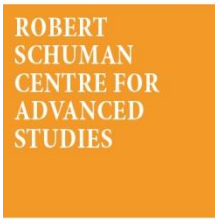




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Robert Schuman Centre for Advanced Studies

The Centre for Media Pluralism and Media Freedom

European Union Competencies in Respect of Media  
Pluralism and Media Freedom

CMPF



European University Institute

**Robert Schuman Centre for Advanced Studies**

THE CENTRE FOR MEDIA PLURALISM AND MEDIA FREEDOM

**European Union Competencies in Respect of Media Pluralism  
and Media Freedom**

CMPF

RSCAS Policy Paper 2013/01

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## **Robert Schuman Centre for Advanced Studies**

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## **Abstract**

This report presents the phenomena of media freedom and pluralism and the major academic and policy debates about their social, political, economic role and implications. It highlights the importance of media freedom and pluralism for the functioning, sustainability and legitimacy of a democratic regime, and therefore the necessity for relevant policy actions. The text also provides a state of the art perspective on the measuring and evaluating of media pluralism. It analyses major aspects of media economics and ownership, including the tendency to media concentration, the potential relationship between pluralism and the increased number of sources of supply, the impact of emerging "Internet native" media players, and globalisation. The legal core of the report examines the development of the debate on legal instruments and jurisprudence, as well as those EU legal instruments that are currently available to tackle the areas of media pluralism and media freedom. Following on from the few EU instruments that are presently in place, and the general legal uncertainty present in this field, the report aims to suggest how the legislation in force could be used or modified in order to foster media freedom and pluralism in a more efficient way.

## **Keywords**

Media pluralism competencies, approximation of media legislation, media authorities independence, Media ownership, Media Pluralism, Relevant markets, New media conglomerates, Media economy globalisation, measuring media freedom and pluralism, comparing media systems, democratic legitimacy, political involvement and representation.





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## Editorial Note

This independent Policy Report has been produced, at the request of the European Union, by the research team of the Centre for Media Pluralism and Media Freedom (CMPF).<sup>1</sup> The CMPF was established at the Robert Schuman Centre for Advances Studies, European University Institute at the beginning of 2012, with the co-funding from the European Union. The Centre is headed by Professor *Pier Luigi Parcu* and the residential research team is composed of experts in the following areas: legal studies, new media policies, media markets and economics, political science and political communications.

Under the general editor Prof. *Pier Luigi Parcu*, the authorship of the chapters is as follows:

Chapter 1. “Framing and measuring media freedom and pluralism across social and political contexts”

*Dr. Andrea Calderaro and Dr. Alina Dobрева*

Chapter 2 “Exploring the economic aspects of media pluralism and media freedom in the European Union”

*Giovanni Gangemi*

Chapter 3 “Media pluralism and freedom: legal instruments for EU intervention”

*Dr. Elda Brogi and Paula Gori*

Chapter 4 “European Commission Soft and Hard Law Instruments for Media Freedom and Media Pluralism”

*Dr. Elda Brogi and Paula Gori*<sup>2</sup>

We are grateful to Prof. *Damian Tambini* (London School of Economics) for acting as editor of Chapter 1, Prof. *Gillian Doyle* (University of Glasgow) and Prof. *Marco Gambaro* (University of Milan) for editing Chapter 2, and Prof. *Roberto Mastroianni* (University Federico II of Naples) and Prof. *Peggy Valcke* (K.U. Leuven) who are the editors of Chapters 3 and 4.

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<sup>2</sup> Chapter 4, Section 3, is attributed to *Konstantina Bania*.

## Executive Summary

The importance of media freedom and media pluralism arises in relation to the pluralistic democratic political system. **Media freedom and pluralism are both a result and a guarantee of efficient and legitimate democratic rule.** Thus, the special role and rights of media are justified only in so far as the media system performs and delivers in a way that is close to the normative standards and expectations of the democratic theory. Media are expected to present a platform for free expression for all societal groups, to foster constructive public debate, to encourage public and political engagement, and to lead to all citizens having a high level of political awareness.

However, all these demands from, the media face numerous limitations, some of them embodied in the nature of the media themselves, others relevant to the general social and political context. **The crucial role of media in the political processes and overall democratic system requires that the market regulation of media enterprises be led beyond the pure principles of business-as-usual.** Nonetheless, media freedom and pluralism regulations are still, and need to be in balance with the demands of all other fundamental human rights, the necessities of the social and political systems, and general market sustainability.

**The measurement of media freedom and media pluralism in the EU Member States is of crucial importance for both the understanding of and the commitment to these high principles at European Union level.** However, their application across the Union calls for an understanding of media systems that goes beyond the cultural, political, historical and social differences among Member States and points to the definition of a common standard.

From an economic point of view, it must be noted that in recent years, despite the technological change, the question on whether the increase in the number of sources and the overcoming of scarcity is really enlarging the market and countering concentration, is still being debated between "optimists", who argue that the increase in the number of media suppliers leads to greater diversity, and "pessimists", who claim that media markets are now even more concentrated than they previously were.

**In any case, it is a fact that while the new technologies lower the entry barriers, thus facilitating the entry of new players, their real impact on media pluralism is still questionable.** The lowering of entry barriers, without a concomitant reduction in economies of scale, soon runs the risk of marginalising new entrants, leaving the level of concentration unchanged. Therefore, **the increased initial abundance on the supply side does not automatically correspond to a greater and permanent variety of sources on the demand side.**

The unclear definition of the relevant markets can determine uncertainty in the measuring of media ownership concentration and consequently in the evaluation of the true status of media diversity and pluralism. **New players emerge with new business models that often play an increasing role in the advertising market, one of the key economic resources of traditional media enterprises.** The extent to which search engines, aggregators, social networks and other types of players, based on the Internet economy, are competitors of the traditional media outlets should be carefully assessed.

The non-European origin of most new players is a concern for media pluralism in Europe. The defence of indigenous and local content in the European media industry remains a priority for Europe. However, the fragmentation of media markets should be countered to avoid a too vulnerable European media industry in a globalised media economy. European media industries should also be helped to improve their ability to compete worldwide. **In this respect, the tools used to protect national and European industries should be reconsidered, taking into account the consequences of these global processes.**

Given the evolving social, political and economic framework, it is important to understand how and to what extent the European Union can intervene in matters of media pluralism and media freedom. **Even if EU competencies sometimes appear to be scattered and residual in respect of the**

**Member States, the European Union has not been, and cannot be, “neutral” on the issue of media pluralism and media freedom.**

**Media pluralism and media freedom are part of the rights, freedoms and principles enshrined in the European Charter of Fundamental Rights and in the European Convention of Human Rights and they are firmly rooted in the national constitutional traditions of the Member States.** As such, they form a normative *corpus* that is a parameter for the creation, application and interpretation of existing and forthcoming laws. The Court of Justice of the European Union plays a central role while exercising its competence in the preliminary ruling procedure, interpreting Article 11 of the Charter that acknowledges the broad case law of the ECtHR on Article 10 ECHR. This role can be significant also for the creation of common EU principles on the regulation of new media that are in line with fundamental rights.

Article 167(4) of the TFEU constitutes another basic instrument for European action. **When appraising the impact of an anticompetitive deal on competition for content, not only economic arguments, but also non-economic and cultural arguments should be taken into account.** Such an appraisal must be placed within the general framework of the achievement of the fundamental objectives laid down in the Treaties, among which are respect for cultural diversity and social cohesion.

**Nevertheless, different national legislation may hamper the functioning of the internal market and thus a harmonisation process could be desirable and necessary.** In particular, the EU should take into consideration the harmonisation of media ownership, ownership transparency and, especially in an online environment, libel and copyright. **In this respect, if the internal market argument cannot be considered to constitute a sufficient legal basis for EU intervention, one might consider EU action on the basis of Article 352 TFEU and could evaluate the possibility of a revision of the Treaties by introducing specific principles on media freedom and pluralism.**

In the era of convergence, it could also be both valuable and reasonable to **consider the establishment of independent National Regulatory Authorities to be responsible for media freedom and media pluralism and for cooperation at a European level.**

**Finally, the EU Institutions could expressly ask the European Union Agency for Fundamental Rights to monitor the media freedom and pluralism situation in the EU, and to report on this. Moreover, or alternatively,** the establishment of a new *ad hoc* Agency for the measurement and safeguarding of media freedom and pluralism and the protection of journalists in the EU could be an efficient soft law instrument.



# **Chapter 1: Framing and Measuring Media Pluralism and Media Freedom across Social and Political Contexts**

Andrea Calderaro and Alina Dobreva

## **1. Introduction**

This chapter defines and frames media freedom and pluralism concepts, and discusses how to measure them across social and political perspectives.

First, it outlines their importance for the functioning of modern liberal democracy and therefore the necessity to create and maintain a framework supporting their sustainability in the European Union. The chapter examines major scientific perspectives and debates on media freedom and media pluralism. Thus, the text presents the social and political context in which policies and legal competencies can and should be constructed (addressed in the chapters to follow). It also outlines the challenges that such policies might face in their construction and application. Second, it focuses on the existing theory and empirical cases, monitoring and measuring media freedom and pluralism across European Union media systems. In particular, it frames the debate on comparative research strategies of media freedom and pluralism within the broader framework of comparative social sciences. The text outlines how to combine research design methodologies, including both qualitative and quantitative methodologies, with the aim of taking into full consideration the national specifics and diversities among Member States.

## **2. Social and Political Aspects of Media Pluralism and Freedom**

### ***2.1. Media Freedom, Media Pluralism and Democratic Principles***

Media freedom emerges as an important notion in relation to the democratisation of societies in general, and of political institutions and rules in particular. A society is free only to the degree to which its citizens are informed and can participate in open discussions, because democracy, as a system, depends on information and communication (Barber 1989). The importance of communication for the functioning of democracy can be traced back to Aristotle's claim that the ideal size of a democratic polity should allow everyone to attend a popular assembly (Barber 1998), i.e., to participate in open political deliberation and communication. The modern foundations of media freedom can be traced to legislative, philosophical works and political acts such as Article 11 of the Declaration of the Rights of Man, the First Amendment to the Constitution of the United States of America, and Chapter 2 of John Stuart Mill's *On Liberty*. Nowadays, however, communities and political entities are significantly larger than those suggested by Aristotle. They are closer to McLuhan's (1964) global village, and therefore, political communication happens predominantly in the realm of mass media. As an unavoidable consequence, the importance of media freedom is greatly increased. The understanding of media freedom has evolved over the years and one clear development is the change of the early concept of "press freedom" or "freedom of the press", to "media freedom", with the development of a variety of platforms for the mass distribution of information. Nowadays, it is widely accepted that liberal democracy requires media freedom as a fundamental prerequisite for its existence and functioning (Mouffe 2009; Karppinen 2007). Media freedom secures the communication upon which political, as well as social and cultural, life depends (O'Neill 2012). Beyond the scientific debates, the *European Charter on Freedom of the Press* also states that "Freedom of the press is essential to a democratic society. To uphold and protect it, and to respect its diversity and its political, social and cultural missions, is the mandate of all governments" (European Charter on Freedom of the Press, 2009). Additionally, the Article 10 of the *European Convention on Human Rights* states that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions

and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises” (European Convention on Human Rights, 1950), and Article 11 of the *Charter of Fundamental Rights of the European Union* states “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” and “The freedom and pluralism of the media shall be respected” (Charter of Fundamental Rights of the European Union, 2000).

During the Twentieth century, many European countries witnessed market changes, such as increases in media concentration, and political changes, such as increased efforts to create society inclusive of everyone and respectful of diversity. Consequently, it became clear that a narrow view of “media freedom” as freedom from government intervention was a necessary, but insufficient, condition for a democratic media system. It was also necessary to develop rules to protect plurality within the media system. Consequently, media freedom and media pluralism were perceived as complementing each other. Therefore, the relevant legislation today needs to address both issues together.

This same historical trend is also observable in the cases of new democracies where there is some claim that the public sphere was *de facto* free only during the euphoric years of transition (Mickiewicz 1999; McConnell & Becker 2002). Those few years occurred after the dismantling of extreme totalitarian censorship, and before a new consolidation and concentration of media ownership with their economic interests. In this situation, the necessity for media pluralism rules became obvious. However, recent studies have demonstrated that there are still problems related to media freedom in certain countries with more recent democratisation or re-democratisation (e.g. Freedom House annual indexes) and, indeed, problems related to media pluralism.

Media freedom is closely related to normative democratic theory, according to which people in a democracy are expected to perform at high level of awareness and engagement, and to be proactive in both forming and expressing their political will. On the other hand, one of the main aims of many non-democratic forms of rule is that of managing and controlling the media and other sources of information. It is rather telling that the democratic transition and liberalisation of the system in the new EU Member States started with freedom of speech and freedom of the press, after which the changes in all other spheres followed (Nikolchev 1996). A free press facilitates the flow of information about public events to citizens; exposes politicians and governments to public scrutiny; elucidates choices during elections; and urges people to participate in the political process (McQuail 2000).

Successful and sustainable democratic systems and institutions depend on such a “rationality-activist model” of citizenship (Almond & Verba 1989; Putnam et al. 1993), that demands involved, active, informed and rational citizens. Democratic social and political systems are associated with a process of constant awareness and the proactive engagement of their citizens. Various studies empirically prove the positive influence of exchanging information with or about people with different views, namely, influencing such as incentive for increased general political knowledge, better understanding (even if not acceptance) of other people’s argumentation, and tolerance (Mutz 2006). Both the use of news media and political conversations have a positive effect on a number of measures of quality of opinion (Kim et al. 1999). The understanding of other groups in society leads to better social orientation, political cognition and, therefore, informed political choice. As an effect, the political system in such a society becomes legitimised if compared to societies with choices based upon limited information and points of view. Consequently, media pluralism and media freedom are especially important in the European Union with its emphasis on strength in diversity.

Media freedom needs to be present in order to fulfil three major functions: (1) to provide a platform for self-expression, (2) to provide citizens with information about their world, and (3) to foster public



debate (Czepek et al. 2009; McConnell & Becker 2002). Evidently, media freedom has different functions and purposes, which are crucial to the functioning of democracy.

(1) The first function, generic free speech, has its irreplaceable role in facilitating self-expression and reflecting the plurality of voices and values (Czepek et al. 2009). In order to enable each social, political, cultural, ethnic and any other group, to enjoy this freedom, a society needs not just free speech but also pluralism. If media freedom provides the possibility to express oneself and to access information, then media pluralism is the degree of outreach of this freedom, i.e., the outcome being that every group in a society can enjoy this freedom. We should note, however, that the media themselves are institutions, and, therefore, the moral philosophy behind the rights of self-expression does not refer to them (O'Neill 2012). The media are the platform for the self-expression of citizens and it is therefore justified for them to enjoy media freedom in as far as they fulfil this fundamental function (how exactly this is done is closely related to the issues of internal and external pluralism, discussed later). Therefore, any policies and regulations relating to media freedom cannot be based on the technical application of liberal principles in the media market. They need to be seen in the context of society as a whole, of the media systems' supply and the audience's demands.

(2) The second function, that of providing citizens with access to information, is fundamental to the facilitation of political awareness and knowledge. A well-functioning democracy "requires access to information as a means to make informed political choices" (O'Neil 1998). Free and pluralistic access to information are expected to lead to the formation of normatively better and clearer views, and enhanced legitimacy of political decisions (Mutz & Martin 2001). Political knowledge and awareness are indispensable in guaranteeing informed choice, which is the basis of the democratic competition of alternatives. Therefore, the nature of democracy itself both suggests and demands free and open communication, and free media are one of the principal, or key, institutions of democracy (McConnell & Becker 2002). The media are the source that helps this social and political orientation as they "provide a compelling description of a public world that people cannot directly experience" (Iyengar et al. 1982, p. 848). In modern society with growing communities and the globalisation of political processes, the mass media have a crucial role to provide both information and a platform for exchanges of opinions and even public debates. The informative role of other information channels, such as political parties, direct observation and participation, is increasingly substituted, or at least facilitated, by the media (Petty & Wegener 1998; Bandura 1994). Therefore, the normative democratic paradigm demands vibrant and easily accessible, free and pluralistic media. Such media freedom and pluralism are based upon fair distribution of power and influence amongst a variety of social and political groups. Pluralism itself contributes to a well-functioning democratic society by informing citizens of a wide range of viewpoints across a variety of platforms and media owners, and by preventing too much influence over the political process (Ofcom 2012).

However, we should be careful not to equate free media information with the discovery of truth. Very often, media information falls into the category of subjective expression with no claim to truthfulness, and media freedom also allows for false claims to appear. Although free media are indeed a necessary condition for the achieving truth awareness among citizens, they offer no guarantee that the discovery of truth will actually take place (O'Neill 2012). This also demands active involvement and effort on the part of audiences, as well as a reasonable level of media literacy. These are additional issues on which EU policies could have a certain influence, aside from those policies that are directly involved with media freedom and pluralism, and which are addressed in this report.

(3) The third function, debate and deliberation, facilitates open discussion between the sub-groups and systems within a society, and the building of a consensus. Free and pluralistic communication is necessary in order to provide sufficient space for public debate or "agonism", i.e., confrontation between adversaries (Mouffe 2009). According to the modern perception of democratic functioning, such communication, in the long run leads to the understanding of the *Other*, achieving a consensual or best alternative decision, and avoiding antagonistic confrontation. Therefore, the role of the free media is to mediate conflict and competition between social groups (Curran 1996). Such deliberation

between various groups is part of the fundamentals of EU institution-building, and it especially takes into account the high level of diversity in the Union and the political orientation towards consensual decision-making. Therefore, such deliberation is also crucially important for the building and maintaining of European Union public space.

Another very important consequence of facilitating friendly and constructive confrontation is the increased level of public involvement in political life (Mouffe 2009; Karppinen 2007). In modern liberal democracy, the media function as the scene of actual political events that unfold, and are very often a catalyst of political events. Thus, such deliberation carries the potential to achieve a higher level of legitimacy for democratic institutions and power. Considering the sizeable detachment of many EU citizens from politics, and from EU politics in particular, including low electoral turn-outs in some Member States in particular, such a catalysing debate becomes of crucial importance to the EU public space.

The existence of a relationship between media freedom and democracy is hardly ever called into question; however, the character of this relationship remains a field of discussion. Different views can be grouped around several major understandings of the relationship: media freedom as producing democracy or vice versa, or even media freedom as an element of democracy (McConnell & Becker 2002). Without entering into the particularities of the debate, we can conclude that it is accepted by all that the relationship between media freedom and democracy is fundamental. It can be seen as a two-way relationship – while the laws and principles of democracy are thought to be essential to enabling the free and diverse voices to emerge in the mass media, this same plurality of voices also safeguards and improves the conditions for democracy. There are many different views on how media freedom can be guaranteed, and undoubtedly they touch upon argument regarding how these could be applied in reality and which safeguarding actions should have priority. However, there are five standards that often appear in these views; and if followed, they should guarantee media freedom: openness about payments from others; about payments to others; about interests; about errors and about sources (O’Neill 2012).

The media play a decisive role in introducing and consolidating new political regimes and cultures, thereby facilitating the very formation and functioning of political entities and structures – a process that was studied intensively in Central and Eastern Europe and beyond (Mickiewicz 1999; Mickiewicz 2005; Voltmer 2000; Sukosd 2000; Nikolchev 1996; G. D. Rawnsley & M.-Y. T. Rawnsley 1998; Dobрева 2008). In fact, a free and pluralistic flow of information is crucially important for establishing individual levels of political awareness, involvement and regime support, as liberal democracy is related not only to economic and political rules and institutions, but also to political attitudes, knowledge and relevant social skills and habits (Gross 2002). As demonstrated above, media pluralism complements media freedom in all its functions. Just as media freedom is not a goal in its own right, so also is media pluralism. Attempts to outline the ideal objectives and outcomes of media pluralism suggest different lists that can be defined in normative terms (Craufurd Smith & Tambini 2012) or in terms of structural elements (Ofcom 2012). The normative goals of media pluralism are maintaining the integrity of the democratic process, preventing media misrepresentation and the suppression of information, enhancing citizens’ access to diverse information and opinions, and the protecting freedom of expression. All these elements demonstrate the relationship between media freedom and pluralism, and affect the legitimacy of the political regime.

Another important aspect relating to political legitimacy is the actual perception of media freedom and pluralism by the public (regardless of the actual levels of freedom and pluralism). Sometimes, this perception is based upon single elements and not on an objective evaluation of the whole system. Unquestionably, this approach is common among the wider public as it is easier, time-, effort- and resource-saving, but it can also be misleading, as not all the elements are coherent, established at the same level, or have equal impact on media freedom and pluralism overall. Such temptations to simplify are also typical of some measurements of media freedom and pluralism (an issue that is addressed later in this chapter). In order to make a proper evaluation of media freedom and pluralism

one needs to consider all major structural elements: sources (the diverse range of independent news media voices across all platforms), distribution (high overall reach and consumption among all consumer demographics and regions), demand and consumption culture, market players (barriers to entry and competition amongst providers), market sustainability, guarantee of high-quality coverage, extensive newsgathering and investigative journalism, and political representation. The quality, independence and transparency of the relevant regulator also influence the overall perception of media freedom and pluralism. All these elements have an impact and thus they should not only be taken into account for measuring media pluralism, but also in policy and legislative acts in this area.

## ***2.2. Definitions of Media Freedom and Media Pluralism***

As demonstrated above, media freedom and pluralism are perceived as being situated at the core of the democratic processes. As such, the terms “media freedom” and “media pluralism”, in particular, have become very popular and widespread. This broad perception and definition are based upon the willingness to charge media freedom and pluralism with expectations of very significant and sometimes even unachievable social and political outcomes. They are also reinforced by the combination of normative and policy approach to media freedom and pluralism (Craufurd Smith & Tambini 2012). Here, we address the normative approach from a political and social perspective. The chapters that follow will address the policy approach from an economic and a legal perspective.

The term “media freedom” is often used alongside or as an alternative to the more generic terms “freedom of speech” or “freedom of expression”. This trend is further reinforced by the ongoing blurring of boundaries between traditional media and user-generated content in media – trends that are provoked and/or supported by the new technologies. However, “media freedom” is still the term that best signifies the independence of media institutions from restrictions and interference from politics and other sources of power, and it therefore enjoys its central position as a concept.

Media freedom relates to the independence of the media from government and from government authorities’ control and intervention. It signifies the lack of governmental monopoly on information (Price 2004). Media pluralism relates to independence of media from private control and the disproportionate influence of one or a few economic, social and/or political sources of power (Czepek et al. 2009). Media freedom is usually framed within the media-government relations, and the concept of media pluralism is usually based upon the tolerance and inclusiveness of both the political system and society in general. Inevitably, media freedom is a necessary pre-condition for the proper functioning of pluralistic media system. Media pluralism could refer to ownership, media outlets, sources of information, and the range of content (Valcke 2011). The European understanding of media freedom has currently been developed as “freedom to”, in contrast to the American liberal-market approach of “freedom from” (Tambini forthcoming), and is more proactively related not only to enabling, but also to ensuring representation (Czepek et al. 2009). The “freedom to” concept is also labelled a “positive right”, i.e., rights and freedoms *to do* things (Tambini forthcoming), and, as such, it is strongly related to media pluralism. This broader perspective is also reflected in the report of the High Level Group (HLG) on Media Freedom and Pluralism. According to them, important aspects of pluralism are cultural and linguistic pluralism, the needs of minorities, and geographical diversity. “A key function of media, therefore, is to protect local cultures (whether national or regional), and, with them, Europe’s cultural diversity” (HLG on Media Freedom and Pluralism 2013). Therefore, the policies and regulations in the European Union are largely expected to protect and guarantee media freedom and pluralism as a positive right. Moreover, the competencies of the European Commission need to reflect this in order to meet this expectation.

Based upon all these distinctions between media freedom and pluralism, we can understand the predominant attention to media freedom in the countries that joined the European Union in 2004 and 2007 (e.g., the current debates about media conditions in Hungary and Bulgaria, and the general debates on post-communist states (Czepek et al. 2009)) and to media pluralism in the Member States

that joined the Union earlier (e.g. Ofcom in the UK). However, this difference should be seen only as a relative focus of attention and not as merely as the relevance of one phenomenon in a country.

More than 100 organisations work on the measuring of media freedom, including NGOs and international governing organisations (Becker et al. 2004). Each employs a different methodology which is based upon a relevant definition, understanding and philosophy of media freedom. Later in this report, we further elaborate on the actual measurement of media freedom and pluralism. Here, we address the definitions and philosophy behind them.

One key contestation of the definitions employed by such organisations relates to the “owner” of the freedom – ordinary citizens, journalists, or editors/media owners (Czepek et al. 2009). The current trend to the deprofessionalisation of journalists (Picard 2009) makes this question even more relevant and makes it even more difficult to determine who the relevant person in the media freedom domain actually is. It is also a contested issue if media freedom is, and should be, primarily “press freedom”, i.e., freedom at the level of the media source, or “journalistic freedom”, i.e., freedom at the level of the individual journalist (Merrill 1993). It is unlikely that this question will find a single uncontested answer in the near future. However, freedom of speech is important on every level and, consequently, each measurement has its own particular value. However, the specificity of each media system could make the different levels more or less indicative of what occurs in a specific country. For example, the prevalence of internal or external pluralism could make the different levels in the measurement of media freedom more or less appropriate.

Another major difference in the philosophy of media-freedom measurement is the emphasis on violations *versus* proactive regulation. The “violations” approach is more in-line with the minimal definitions of democracy, and it focuses on the presence or absence of certain indicative problems, e.g., the number of killings of journalists. The “proactive regulation” approach focuses on the social and political context, and on the legislation that facilitates media freedom and overall performance. This approach goes beyond the minimal standards of democracy and encompasses higher standards of democratic functioning, which are more appropriate in reflecting the standards and ideals of the European Union. The fact that media freedom measurements of this type outline problematical areas in some Member States once again politically justifies the intervention of the EU as the guarantor and facilitator of media freedom and pluralism in the Union. However, such intervention needs to be based on appropriate EU legal competencies, which are addressed later in this report.

Despite the fact that different perspectives and measurements enrich the understanding of the media freedom phenomenon, there is also a need for a more common EU understanding and for common principles of measurement.

Media pluralism is a complex concept that incorporates the different dimensions of media and societal systems, their structure, organisation and functioning. A commonly accepted definition of media pluralism does not exist, despite, or perhaps precisely because of, the wide use of the term (Valcke 2011; Karppinen 2007). A term close to “media pluralism”, namely, “media diversity”, is usually used in the more empirical sense and context, while “media pluralism” is used in a more value- and policy-related context (Karppinen 2007). Definitions of “media pluralism” do vary in the emphasis that they place on particular aspects of the term, but they all include certain key elements. Media pluralism is related to (1) diversity, variety and plurality of media supply; (2) the public sphere, the general public or the audience; it is (3) provided by free, independent and autonomous media sources, and (4) results in both access and a choice of opinions and representations which reflect the citizens of the State in question (Klimkiewicz 2005; Doyle 2002; Ofcom 2012).

(1) The diversity of media supply or content can be approached from a number of perspectives, and McQuail outlines the major ones: diversity as a reflection of society, diversity as access to different points of view, and diversity as provided choice (McQuail 1992). All these perspectives need to be fulfilled in order to guarantee media pluralism and the European Union can have competencies only over some elements of these perspectives. The first one suggests that media pluralism demands

standards (market thresholds and regulations discussed later on in this report) appropriate for the respective society. The second and third ones address media pluralism as supply of pluralistic content and access to it. According to an Ofcom definition, media pluralism includes “ensuring there is a diversity of viewpoints available and consumed across and within media enterprises” (Ofcom 2012, p.1). The diversity *across and within media enterprises* touches on the basic typology of media pluralism. Media pluralism can be external (diversity *across/between* media enterprises) and internal (diversity *within* media enterprises). Depending on the country’s media system, greater emphasis can be placed on either external or internal pluralism, which can predominantly characterise the system. This distinction creates a challenge for the creation of unified EU level policies and criteria related to media pluralism. Normative theories, as well as empirical studies of media pluralism, do not provide conclusive answers as to whether it is internal or external pluralism that better serves the purpose of supplying pluralistic information to the public. The cultural traditions and established media ethics in a country could favour emphasis on internal or external pluralism. Therefore, a fair observation and measurement of media pluralism in any given country can be constructed only as a combination of both internal and external levels of media pluralism. However, the distinct features of internal and external pluralism demand distinct policy frames which take their relevant specificities into account (see Klimkiewicz 2005, for a detailed explanation of the structural, performance and normative aspects related to external and to internal pluralism).

There are also different approaches regarding the kind of media programmes that are relevant to an evaluation of media pluralism. The broad and more culturally-based approach suggests that the relevant media content includes *all* media information. The narrow and more policy-based approach suggests that relevant media content should be limited to news and current affairs programmes. Despite the obvious loss of certain information, focusing only on news and current affairs is justified by two major factors. Firstly, it is the proportionality of the effect – media-effects research consistently proves that news and current affairs have significantly more influence on politically-relevant public opinion, democratic debate and a politically-informed citizenry than other media content. Secondly, it is the practicality of the applicable measurement, policy regulation and monitoring (which are addressed in the following chapters) in terms of resources, complexity and objectivity, which may be realistic only within a limited content frame.

(2) Media pluralism is both created for, and in interaction with, the public. The normative understanding of this relation is based (amongst other political and philosophic studies) on Jürgen Habermas’ notion of the public sphere – a societal space open to everyone, in which public opinion and political will are formed, based upon the free exchange of the relevant information and opinions. In the modern age and in growing communities, this exchange needs media facilitation, and thus the mass media have evolved into institutions which are central to the facilitating of public debates (Klimkiewicz 2005). However, the normative approach is not always fully applied and/or perfectly fulfilled. In practice, the business perspective often becomes dominant, and the public are perceived and treated not so much as a public sphere, but as an audience. It is here that the role of both regulation and the policies to strike a balance between the normative public good and the economic sustainability of the models which aim to achieve these normative goals, and to manage to satisfy both these demands to an optimal degree, comes to the fore. The existing relevant legal frames are discussed in Chapter 3.

(3) As discussed above, media freedom and independence are the bases and prerequisites for media pluralism. Only free media can grant universal access to a plurality of voices and opinions (Czepek et al. 2009). However, the freedom and independence of the media cannot be guaranteed simply by a lack of governmental interference or censorship of the editorial policy. Economic sustainability and a lack of dominant economic players and undue dependencies are another pre-requisite of media pluralism. In line with this reasoning comes a recent Ofcom definition of media pluralism as preventing any one media owner or voice from having too much influence over public opinion and the political agenda (Ofcom 2012). There is also a number of other social, political, religious and even

criminal actors who can play a disruptive part on the level of pluralism and relevant legislation should address this various nature of the pluralism threat.

(4) The expectation that media pluralism should lead both to access and a choice of opinions and representations which reflect a country's citizens is often related to very high normative expectations. Media pluralism is perceived to group issues that turn the media into both a central factor and a contributor to democratic formation and cultural development (Valcke in Centre for Media Pluralism and Media Freedom 2012). Pluralism is perceived as a dimension of democracy (Bobbio 1996), and, based upon this, there is a temptation to see media pluralism as a major guarantee of the flawless functioning of democracy. Researchers are afraid that there is a (policy-related) temptation to perceive media pluralism as a possible answer to any shortcomings in the media system (Centre for Media Pluralism and Media Freedom 2012). However, media pluralism and media freedom are inevitably related to the positive impact that they have on the functioning and sustainability of the democratic system.

The relevance of media freedom and pluralism is perceived in the light of its different roles and uses, as a normative rationale, as an analytical tool and as a regulatory instrument (Klimkiewicz 2005). Each of these roles determines a specific bias of the understanding of this concept, its depth, its level of complexity, and its major purpose.

The foundation of media freedom and pluralism lies in the understanding and appreciation of their normative importance. It is based upon the belief in a close relationship between media freedom and pluralism and the general functioning of democracy. Very often, the relationship between media freedom and pluralism is dominated by purely political discourse. In such cases, it considers neither the complex nature of media pluralism, nor its limitations in guaranteeing optimal democratic functioning. In this approach, media freedom and pluralism are sometimes turned into campaign slogans or political value statements, with their typical emotional charge and simplification. Such use could be motivated by the willingness, or the political will, to demonstrate devotion to, and to preserve, democratic values. It is also "convenient" for moral values such as freedom, due to their unquestioned and even mythological status (Garnham 2000).

The most scientific approach to media pluralism is the one which uses it as a tool for measurement or analysis. This approach takes the complex nature of media pluralism into account, and thereby touches upon the problematic nature of the concept. It usually analyses media pluralism as being normatively pre-conditioned by the general social and political tolerance, subsidiarity, legal and economic equality (or at least the chances of this). This analytical perspective also reflects – to a certain extent – the difficulties in applying the concept. There is an understanding of the complexity of media pluralism which sees it as being simultaneously an area of autonomous actors, demanding de-regulation or self-regulation and economic sustainability, and the scene of a common good and public debate that is related to a well-informed, consensual, inclusive and democratic society. The scientific approach is also the one that is most relevant to the measurement of media pluralism (see the following section), but it rarely provides clear-cut answers. Scientists working from this approach are sometimes tempted to undermine the fact that media freedom and pluralism measurements are a means to an end. Measurements are often utilised in order to establish, run and evaluate policies which lead to the achievement of (or approximation to) the normative goal of ideal media pluralism and freedom, and the resulting positive impact on the democratic system. There is a risk that the interpretation of results and use of data by policy-makers may be inadequate due to a lack of sufficient scientific expertise and/or to vested interests. Thus, before producing and publicising a study, there should be clear decision, instruction and the best possible collaboration with the potential end-users of the research. This links it to the third approach to media freedom and pluralism – namely, the regulatory instruments.

Approaching media freedom and pluralism from policy and legal perspectives, aims to ensure the application of the principles and requirements of the normative theories. The policy and legal

perspectives on media pluralism are based on the rationale and moral principle of aiming for equal opportunity and objectivity. Compared to the analytical perspective, the policy perspective addresses media pluralism in a somewhat inflexible way, and tries to apply a unified formula that will reinforce and guarantee the existence and functioning of media freedom and pluralism. This approach considers the practicalities of the application of media pluralism. Due to this, it is easy to oversimplify both the concept and the setting (sometimes arguable) of quantitative thresholds and benchmarks (discussed further in this report). Another challenge inherent to this approach is the necessity to take both the democratic normative standards and the practical conditions of commercial viability in the media system (public and private alike) into account. Very often, the ideal requirements for media pluralism are not economically viable and/or sustainable, and, consequently, a difficult compromise needs to be reached.

Media pluralism could not be guaranteed without considering the media consumption and demand for it. In case there is no demand for pluralistic media content, policies that aim to increase it could stumble into the problem of not being fully justified. Pluralism in media and policies that aim at it would be pointless without the audiences' demand for pluralism (Valcke 2011). Equalizing supply and demand of pluralistic media content is a logic that can be relatively easily applied to the commercial perception of media systems. However, the democratic normative theory demands that media pluralism be set in the broader context of the needs of democratic functioning - informed choice and accessibility to self-expression for every issue and group, including the ones that are not commercially viable. Moreover, the existence of media pluralism itself could educate audiences into looking for and appreciating media pluralism and respectively to better understand other groups in society, or previously unknown opinions. These are among the moral stands and understandings that are the bases for demands and expectations that the EU supports and guarantees media pluralism.

### ***2.3. The Limitations of Media Freedom and Pluralism related to Audience-Media Interaction***

Media freedom and pluralism are bound to be limited by numerous factors, many of them related to balancing and trade-offs with other social, political and, more generally, human rights. There are obvious legal and market limitations, and the solutions to most of them are discussed in the following chapters. Here, we will briefly discuss the limitations arising from the nature of the media as information-providing platforms and from the viewpoint of the public and media audiences. Attention to the audience is a very important trend since technological evolution is leading media pluralism to become increasingly driven by demand and less affected by objective limits to the access to information.

Many are sceptical of the very potential of the media in general to fulfil their function of informing citizens. Media-provided information is more often than not presented as “infotainment”, a mixture of information and entertainment, which is fragmented and episodically presented information that personalises problems that are structural in nature (McLeod et al. 1994). All these, otherwise, user-friendly techniques of presenting information prevent people from understanding the real principles of the social and political system, and similarly prevent an increase in the level of public awareness. Undoubtedly, there are differences in the way different types of media inform their audiences – the television performs much better on low salience issues and emotions; newspapers often provide contextual richness to issues that are already known and to which people are already motivated to pay attention (Neuman et al. 1992). Unquestionably, the media have a crucial contribution to make to the politically informing and educating citizens, but their structural predispositions prevent them from matching the ideal level that normative democratic theory requires. Policies that aim to promote and support quality-media outlets could be a factor in achieving better-informed citizens.

In contemporary media-saturated societies, there is an abundance of information, including political information, and even people with excellent cognitive skills and considerable interest in politics are not capable of perceiving and paying attention to all the information in its full complexity.

Not only do individuals have their cognitive-processing limitations, but there are also limits to the time and effort that they can spare, or are prepared to spare, for political information. Some researchers even talk about “information overload”, which is created by the sheer amount of information being provided by, or available from, multiple sources (Sotirovic & McLeod 2004). Therefore, people resort to simplified mental models in order to overcome their limited capacities to deal with information (Fiske & Kinder 1981). Although very useful adaptation tools, such models sometimes function as strong filters, and therefore limit the perception of the otherwise accessible pluralistic information. Sometimes, they also function as stereotypical frames of perception, and prevent the proper understanding of information about the *Other*. Sometimes, people withdraw from communication in the face of what they perceive to be contradictions or mere disagreements (Huckfeldt et al. 2004). Consequently, access and/or exposure to pluralist information alone simply cannot guarantee the fulfilment of the normative democratic goals of the average thoroughly-informed citizen. The overall or end result of pluralistically informing citizens also depends on media literacy and, more generally, on the political culture of the society. Thus, additional policies that target media literacy can be extremely helpful.

Notwithstanding these concerns, there is a popular temptation to perceive the new media as the panacea for any problem related to the limitations of the traditional media as well as of media freedom and pluralism in general. These views are mainly based on the face value of the de-centralised character of the new technologies. The new media do, indeed, offer further opportunities for allowing more pluralism – the accessibility to a multiplicity of sources is easier, and extended networks can link people to information that would otherwise be skipped or missed. However, there are also other consequences of the use of the new technologies in the media, and the overall effect and full potential of the new media still remain to be completely understood and explored. In fact, the proliferation of new ICTs and social media raises some renewed concerns about the audience’s ability and willingness to perceive pluralistic information. The amount of information in circulation and its sources becomes even more unmanageable and information is arguably even more fragmented. The observation that the importance of the “share of voice”, which is, perhaps, the major pluralistic advantage of the new media, is overshadowed by the importance of “share of ear” today (Picard 2012) is also important. Thus, the mechanisms of media choice and media perception on the part of audiences become increasingly important. The new media present a novel type of filtering or preselection of information and sources, which limits the pluralistic information on the consumption side, and makes the quality of pluralistic information offered on the demand side less relevant. The social media lead to people surrounding themselves with similar people that they use as information filters. The search engines also filter results according to the previous interests that one has shown. In this way, the new media create the filter bubble effect (Pariser 2011) – the preselection of information leads to one facing only information which confirms one’s own views, and therefore encapsulates the person in his or her own bubble. This, indeed, creates a potential new kind of danger for the pluralism of information. Considering the speedy development of these technologies and the already demonstrated effect that they have on the political processes, scientific analyses as well as regulatory attention are needed.

With regard to media consumption fulfilling the normative democratic expectations, most sceptics base their concerns on the relatively low level of memorised political facts (and thus on a lack of awareness) and inconsistent political attitudes (an inability to make the correct political choices) (a notable example here is the work of Philip Converse). However, research proves that people form opinions upon a basis of factual knowledge, but then tend to remember only their opinions (Neuman et al. 1992). Even if the knowledge which they have is qualified as limited by the normative approach, many studies have proven that this does not incapacitate people in their political choices (Bartels 1996; Cutler 2002; Lau & Redlawsk 1997; Lupia 1994; Popkin 1991). Therefore, despite certain limitations, the media have the potential to inform citizens; and citizens are capable of being made politically aware and of forming a political will, even though they do not precisely follow the strict views of the normative paradigm.



### **3. Measuring media freedom and pluralism across social and political national contexts of the European Union**

Nowadays, we are witnessing an expansion of studies addressing the complex measurement of media freedom and pluralism, as well as their social and political dimensions. Different kinds of institutions and actors contribute to the research on media pluralism and are increasingly interested in mapping it both at national and at European level. International bureaus (Council of Europe 2008; UNESCO 2007), governmental organisations (Ofcom 2012), and academic research (Gálik 2010; Craufurd Smith & Tambini 2012; Valcke et al. 2010) are all playing a key role in developing a better definition of a common theoretical framework, and provide empirical data and research strategies which explore and measure media freedom and pluralism from different perspectives. However, measuring media pluralism is still a major challenge in our field, and there is still no consensus about how to pursue this task.

In this part we present a brief overview of some of the different challenges involved when developing a suitable research strategy for the social and political implications of media freedom and pluralism in Europe. In particular, it discusses the different perspectives, approaches and methodologies which may be applied, and which ought to be considered in order to develop comparable researches and, most of all, to reach comparable outcomes.

#### ***3.1. Theoretical Perspectives Matter***

Measuring media freedom and pluralism calls for research strategies that are able to capture the complexity of media systems both within countries and across national specificities. As is typical in most of the research in social sciences and media studies, one of the biggest challenges in measuring media freedom and pluralism is to develop research strategies that take seriously the fact that the context matters. This means developing theories and selecting measurement techniques that facilitate an adequate exploration of the way in which media freedom and pluralism relate to the national socio-political and economic framework. Since each national media system is embedded in a specific context, it is crucial to take this into account in designing a research project in this field.

In order to facilitate this challenge, a pre-defined theory is key to identifying the perspective of the study, according to Hallin and Mancini (2004). We have already pointed out above that media freedom and pluralism are not single dimensional concepts. A variety of factors influence media freedom and pluralism, and it is possible to develop different kinds of measurements according to the focus and objectives of the endeavour. Similarly, different analytical perspectives exist that address specific aspects of this issue, and capture different aspects of media freedom and pluralism. Within this framework, the academic literature and the policy experiences are rich in analysis measuring media freedom and pluralism from different angles; some, for instance, focus on measuring media-ownership concentrations, others on media-market competition, as well as content diversity or quality, and freedom of journalism (Valcke et al. 2010).

Once the focus of analysis is identified, it is possible to select the proxy indicators most suitable for measuring media freedom and pluralism in diverse socio-economic and political contexts. The narrower the analytical perspective, the better the chance of outlining the single or the few most appropriate national socio-political dimensions of media freedom and pluralism. Measuring media pluralism implies the selection of those indicators which are the more appropriate to the key focus of the study, and better able to explain the socio-political context within which media pluralism is embedded. Within this framework, case-oriented research which explores media pluralism within countries does exist, and reaches results according to national socio-political and economic specificities (see Craufurd Smith & Tambini 2012; Ofcom 2012; Just 2009; Hibberd 2007; Doyle 2002; Czepek et al. 2009).

At the same time, the need to understand the concept of media freedom and pluralism in Europe, as well as the significance of national specificities, calls for cross-national research strategies which are able to compare media freedom and pluralism across diverse socio-political frameworks. In media studies, a comparative approach is welcomed in order to test a theory across different contexts, or to increase knowledge about other countries, or even to improve policy-making in the light of the observance of other national experiences (Livingstone 2003). Within the framework of media freedom and pluralism, comparing different dimensions across European countries facilitates the understanding of the relation between the specific situations of media freedom and pluralism and of national socio-political and economic frameworks. It also provides a picture that has the capacity to trace both the similarities and differences across Europe.

The literature is rich with empirical research which addresses different strategies to compare media systems (Hallin & Mancini 2004), new media frameworks across political contexts (Calderaro 2010), and political communication strategies (Esser & Pfetsch 2004). Livingstone (2003) summarises four models of comparative research identified by Kohn (1989), and applies these to the field of media studies. Each of these can be useful when applied to a research challenge that seeks to compare media freedom and pluralism across European countries: the first is labelled *Nation* as the object of study, and Kohn refers to this cross-national approach in the cases where he seeks to compare countries in order to identify their specific peculiarities. This comparative approach is used somewhat broadly in order to shed light on country specificities, instead of generating comparative outcomes. Second, *Nation as context of study* is a comparative approach used to explore how the hypothesised generality behaves differently across countries. As Livingstone (2003) points out, this approach is not efficient when seeking to explore the national peculiarities in depth, but it is useful in checking the generalisability of a hypothesis or theory. Third, the *Nation as unit of analysis* approach focuses on measuring country specificities, such as socio-economic indicators. This approach compares quantitative data by referring to the specific dimensions of the country, i.e., the unit of comparative research. The goal here is to compare the diversity of countries via a standard method that is able to collect comparable data. As we will discuss in detail below, this approach is less able to catch non-measurable national specificities, but it does prove efficient for research that requires a neutral tool. Fourth, *Nation as component of a larger international or transnational system* is similar to the third model, but takes into account measurable contextual specificities. However, here the observed process is considered in its broader transnational dimension, and less attention is paid to the national socio-political and economic specificities.

In particular, Livingstone (2003) also remarks that, when we refer to a transnational dimension of national culture, which is not determined by borders and flows across countries, many scholars argue that the 'national' is not a suitable unit of analysis, and, therefore, a comparative cross-national approach is not legitimate. However, this is not the case when measuring media freedom and pluralism, since national authorities dictate the political frameworks and national regulations, and transnational cultural frameworks are less applicable. In other words, for the purposes of comparing media freedom and pluralism across European Union national contexts, considering national entities as valuable units of comparative research is appropriate.

Each of these comparative models can, therefore, be applied to the measure of the social and political implications of media freedom and pluralism across the European Union countries, and serve as useful models from which researchers can develop the most suitable approach for the task at hand. Often, a combination of perspectives can produce interesting findings in a larger study or research project. Indeed, for our purpose, using different perspectives should be both encouraged and welcomed in order to map as much of the field of media freedom and pluralism as possible. However, researchers and policy-makers should always clearly spell out both which perspectives they use, as well as the theoretical propositions with which they approach the field. Conflating models and theories may easily lead to confusion and obfuscate the much-needed development of comparative data.

### **3.2. Comparing Approaches: Standardising and Contextualising**

In order to run a cross-national research, standardisation of the approach is considered the right way to proceed by many comparative researchers (Livingstone 2003; Valcke et al. 2010). For this purpose, the supporters of comparative perspectives of analysis design methodologies which can be applied across cases, by focusing on the same national indicators, and using the same research tools for the collection of empirical data. This approach is usually combined with the use of quantitative methodologies. In order to make the research strategy applicable regardless of the context, the standardisation of methodology aims to produce quantitative data which explain how the observed object communicates with contextual factors. In supporting this strategy, Valcke (2010) points out that quantitative methodologies are able to standardise values that can be compared and easily understood by others from different contexts. This certainly makes the measure of media freedom and pluralism across countries more straightforward and easier to compare. Within the framework of a comparative and quantitative research strategy, a key example can be found in the *Independent Study on Indicators for media pluralism in the Member States – Toward a Risk-Based Report*, which was prepared by a consortium of European research centres for the European Commission in 2009 (KU Leuven–ICRI 2009). The KU Leuven–ICRI 2009 Report is a significant example of designing a neutral and standard tool which is applicable across countries and provides measurable outcomes. In particular, the goal of this report was to provide a tool able to measure media pluralism across European countries in a neutral and objective way. The major challenge of this project was to create a standardised tool in order to ensure its applicability to the measurement of media pluralism across countries, depending on their socio-economic and political contexts. The result was designing a tool which summarised several quantitative indicators measuring three key dimensions of national media systems: 1) Legal indicators; 2) Socio-Demographic indicators; and 3) Economic indicators. In order to contextualise these measures according to the diversity of countries across Europe, the indicators are weighted according to national specificities. Finally, by combining all the collected values, the tool provides a numerical value, according to which the level of media pluralism can be identified: as “full pluralism”, “risk to pluralism”, or “no pluralism”.

Beyond the policy debate, and within the broader field of research in comparativism in social sciences, the fact that quantitative approaches aim to provide a standard and comparable dimension of media freedom and pluralism is not immune to criticism. Here, the main obstacle is that context matters and the diversities depend on a combination of several socio-political factors that are difficult to fully standardise within a measurable value. It is therefore argued that data are not helpful in describing this complexity. Instead, as Peschar (1984) points out, by designing a tool in order to pursue neutral data, we run the risk of losing information which is essential to understanding the national context. Moreover, pursuing the design of a comparative research strategy and the selection of proxy indicators, the risk is that the lens used for a national case might not be appropriate in other contexts, and the interpretation that we generate by observing a phenomenon does not imply that it is equally valid cross-nationally (Adcock & Collier 2001). By applying these arguments, that are commonly shared in the domain of social sciences, to our analysis of the complexity of media systems and their diversities across socio-political contexts, the approach of applying standard quantitative methodologies and of focusing the research on the same proxy indicators across country specificities calls for a deep knowledge of national frameworks. In this regard, Mancini and Zielonka (2011) point out that exploring media freedom and pluralism implies the exploration of a complex system that can be understood only through qualitative methodologies. In particular, they claim that, in researching this field, scholars should investigate and understand the process of establishing the media system, rather than focusing on its final outcome. Mancini and Zielonka (2011), therefore, suggest a mainly qualitative approach in order to explore the relationship between media systems and politics. The key technique used in this case is interviews with politicians, professionals and regulators. This is the case of the broad research that Mancini and Zielonka (2011) ran in order to explore “Media and Democracy in Central and Eastern Europe”. Here, qualitative methodology is the key to exploring media ownership in relation to nation political contexts across Western European countries. Then, the

outcome of the interviews are combined with descriptive data coming from multiple datasets, that is finally interpreted within a theoretical framework.

In what follows, we point out that in designing a comparative cross-national research strategy, both qualitative and quantitative approaches are not mutually exclusive. Rather, they are complementary, and indeed useful if efficiently used at different stages of our cross-national measurements and our understanding of media systems across European Union socio-political diversities.

### ***3.3. Debates on Methodology: Qualitative and Quantitative Methods***

By bridging research approaches and empirical cases in this field, we can conclude that the methodologies used to measure media freedom and pluralism in Europe can be summarised along two key lines of research strategies. These typically represent the dichotomous debate within social sciences more broadly: on the one hand, a cross-national and comparative approach clustered around quantitative methodologies, and, on the other hand, a case study oriented qualitative approach, which is considered more appropriate in order to contextualise pluralism within its national socio-political contexts.

In conclusion, many scholars in the field consider quantitative approaches to be a clear, neutral and standard measure that can be applied in different contexts. However, the significance of standard quantitative values may differ between socio-economic and political contexts, and this approach cannot provide a clear picture of the complexity of media systems and the relationship that they have with socio-political and economic national contexts. A qualitative approach is better able to contextualise the exploration of media pluralism, and is a more powerful tool for understanding the socio-economic and political process which explains the status of media pluralism in specific national contexts. However, the weakness of a qualitative approach is the difficulty in finding a standard and neutral approach that is able to facilitate a major comparative exploration of media pluralism across European countries. The debate often comes down to whether there is a need to understand the process in depth, or whether there is a need to describe causal relations in broader terms.

However, it does not necessarily follow that there is an unavoidable friction between quantitative and qualitative methodologies in measuring media freedom and pluralism. The approaches do not conflict with each other; instead, they look at the same issue from different, but potentially complementary, perspectives. A qualitative approach allows an in-depth exploration of the socio-economic and political processes, and helps to develop the theoretical insights that are fundamental to the discovery of the most appropriate indicators, which are useful in operating a quantitative approach. In turn, it is fundamental to measure and to provide an accurate picture of the situation. In synthesis, a combination of the two research strategies and the integration of two methods of analysing and measuring is likely to provide the most holistic and reliable depiction of the situation of media freedom and pluralism across diverse countries and regions.

## **4. Conclusion and Recommendations**

Media freedom and media pluralism are essential elements of the efficient and sustainable democratic societies. As such, they are enshrined in the major value pillars of EU organisational and institutional principles. Therefore, it is an EU policy responsibility to preserve and maintain media freedom and pluralism throughout its territory, as well as to ensure conditions that will reinforce them. Moreover, there are popular public expectations of a proactive role of the EU institutions in this area. Therefore, fulfilling the democratic expectations and the principles and standards of the Union itself is an important element in the further boosting of perception of EU institutions' legitimacy and democratic purposes. Based on this, the proactive use of EU competencies in the area of media freedom and pluralism is recommended.

All measures that need to be implemented to protect and reinforce media freedom and media pluralism need to reflect the complex nature of the phenomena instead of mechanically applying rigid rules and criteria. Policy and legal measures need to maintain a balance between two tendencies: (1) the regulation of the media market towards the fulfilment of the social and political role of media in order to create a forum for self-expression and information access for all social and political groups, and (2) the regulation of the media market towards economically strong media outlets in order to secure their independence and self-sustainability.

In order to ensure the policy adequacy and its proper implementation, as well as to reflect complex phenomena, the EU also needs to strengthen an *early-warning* mechanism to monitor, measure and analyse the conditions of media freedom and pluralism in all Member States. Such monitoring and analysing mechanisms should and will provide an opportunity to reflect the dynamically changing information technologies and the relevant threats and opportunities that occur as a result.

As this introduction to the key debates taking place in research and policy on media freedom and pluralism has shown, there is no unanimity on the most appropriate methods for measuring media pluralism across Europe. Similarly, no agreement exists when it comes to framing a comparative analysis.

The debate about comparativism in social sciences shows that there are a number of different approaches to the study of media freedom and pluralism, and different perspectives of analysis require different tools. Although some scholars argue that quantitative methodologies are not able to describe the complexity of media systems and their relation with socio-political factors, here we point out that in the need to run cross-national analysis, both quantitative and qualitative approaches do not necessarily collide, and they may instead complement each other. Indeed, research in the field should aim to combine the research tools. Quantitative methodologies are useful for capturing the situation at a given point in a time, and are efficient in developing broad, cross-national, comparative analysis. However, qualitative approaches are necessary to reach a deep understanding of socio-political national contexts, which are a fundamental starting point for the design of appropriate indicators, and useful in producing explanations, rather than dry pictures of facts.

In conclusion, this leads us to observe that no single methodology can have the ambition of capturing and comparing the rich complexities of the socio-political dimensions of media pluralism in Europe. Instead, the most effective research and measurement strategy is to combine the diverse approaches, thereby attempting to explore the social and political dimensions of media pluralism in the Europe Union through the piecing together of a plurality of sources of evidence in order to see if the concrete evolution of the different national contexts points in a consistent direction across European Union countries.



## Chapter 2: Exploring the Economic Aspects of Media Pluralism and Media Freedom in the European Union

Giovanni Gangemi

### 1. Introduction

This chapter provides an overview of the most salient economic aspects of media freedom and pluralism. In particular, it focuses on media ownership and ownership concentration, as these have always been regarded as the key issues in relation to concerns around media diversity, freedom and pluralism. The concentration of media resources in the hands of a few owners, as well as the intensification of cross-ownership through the holding of shares and by participation in different companies, all raise questions about the plurality of voices in the media in general, and in the information sector, in particular.

This chapter, first, reviews the basic elements of media industry economics, as well as the reasons why media markets have traditionally been described as having a tendency to concentration. Second, it considers whether this conventional understanding still pertains in an era of fast technological change, by exploring the impact that new technologies have on media ownership, and particularly on whether they are contributing to the opening up of the market to new entrants, or if, they are increasing market concentration. In other words, the chapter will deal with the question as to whether the increase in the number of suppliers and sources of information that has been brought about by technological change can be considered sufficient to achieve the goal of a more pluralistic media landscape, and consequently of a more democratic society. The text will therefore review the role that traditional outlets play on the Internet and the impact of new "Internet native" players on the market, in order to understand if the latter are facilitating the opening up of markets or, rather, are leading to even more concentration. Finally, this chapter considers the question of competition in online media in the context of an increasingly globalised media market, and will try to understand some of the implications of technological change for the competitive position of European companies and, through this, for media freedom and pluralism in Europe.

In this chapter, the question of media freedom and pluralism and market concentration is addressed by considering news and information in particular, but also by taking into account the content and entertainment sectors and the media industry as a whole, including new types of players, such as search engines and social networks. The chapter will therefore follow the indication that comes from the *Independent Study on Indicators for media pluralism in the Member States – Toward a Risk-Based Report* (KU Leuven–ICRI 2009),<sup>1</sup> in considering “Emerging and future risks” for media freedom and pluralism and the final report of the EU Media Futures Forum.<sup>2</sup> In so doing, this chapter, to some extent, adopts a broader perspective than has traditionally been the case. The conventional focus of analyses of the relationships between market concentration and pluralism has, indeed, been the traditional media industry and, particularly, the news, as they are the main tools media outlets use to communicate ideas, and for citizens to become informed and to form their own opinions on the facts. By also considering new media, we provide a broader perspective on these issues.

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<sup>1</sup> For more information see: Chapter 1, Section 3.2.

<sup>2</sup> In particular, the report remarks that “Issues related to social networks, advertising and networks/connectivity are also covered because of their importance for the media content sector” (EU Media Futures Forum, Final Report, 2012, p. 3).

## 2. The specificity of media and the tendency towards concentration

The debate about media ownership concentration has a long tradition and represents one of the crucial aspects of the wider debate on media pluralism. The debate originated in the United States, where the media have always been controlled by private companies and where concerns about the concentration of media ownership in the hands of a few powerful firms was already a pertinent issue in the 1970s. In 1979, Compaine wrote the book entitled *Who owns the media?*. By the time Bagdikian published his *The Media Monopoly* in 1983, the discussion about media concentration in the US had reached a mature phase. In Europe, the debate around media concentration is more recent, both because the state-monopoly rupture in the broadcasting sector started in the late 1970s, and because the media economy in the European market saw a dramatic growth in the same period, increasing concerns about the accumulation of considerable amounts of wealth around a few private companies.

Historical distinctions between Europe and the US partly explain the different status of the debate around the topic of media concentration. The bulk of the scientific literature devoted to this issue comes from the US, while contributions from European authors are less numerous.<sup>3</sup> In spite of their outputs' different quantitative relevancies, authors on both sides of the Atlantic share some commonalities: they have highlighted the existence of a natural tendency towards concentration that is attributable to the economic features of media markets and, as a consequence, they have traditionally focused on aspects relating to supply – and particularly on media-ownership concentration.

The natural tendency towards media ownership concentration has been confirmed by a number of empirical studies. In Europe, among the several existing studies on concentration levels, the 2004 one, led by Ward, on behalf of the Netherlands Media Authority, is worthy of mention. The study compared concentration levels in three different types of media (the press, both national and regional, TV and radio), in 13 media markets, using the C3 index. The study is interesting both for its choice of countries and for its choice of media markets. The main outcome was that, in each of the 13 markets, in every country, the first three operators held a market share of more than 56%. This means that in every single market the C3 index showed a “high concentration”.

Anecdotal evidence of the tendency towards concentration is particularly marked in the television market. In mature European markets, such as Spain and Italy, new operators tried to compete with historical players in the 2000s. In Spain, the TV channel La Sexta, which is mainly owned by the Mexican giant Televisa, despite considerable investment (which included the TV rights to the FIFA World Cup 2006), was purchased in 2010 by one of its main competitors, Antena 3. In Italy, the TV channel La7, launched in 2001 by the telecommunications company Telecom Italia, didn't break even in more than a decade, thus failing to compete with the big players, Rai and Mediaset, in the advertising and audience markets. The channel has now been put up for sale.

This is confirmed by more recent empirical assessments, which were also led by NRAs. The newly published analysis on the advertising market, undertaken by the Italian regulator (AgCom 2012), provides a good comparative picture of the situation of the TV market in the main Western European countries and in the US. The CR4 index exceeds the threshold of 89% in all of the countries, except for France, where it is in any case close to 70%. The HHI index exceeds 2.000 points in all the countries, with a peak of 3.772 in Italy (and all the European countries present a higher HHI index than the US).

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<sup>3</sup> A major contribution that provides insights for Europe is the study led by Noam, entitled *International Media Concentration*, which continues from his *Media Ownership and Concentration in America* (2009), and is forthcoming. The new study will address the ownership question on an international basis, but part of the study will focus on Europe. The part that focuses on Europe is being co-ordinated by Patrick Badillo Dominique Bourgeois, Jean-Baptiste Lesourd and Helmut Müller.



### **Concentration indexes: an international comparison**

| Country | Concentration index |       |       |       |
|---------|---------------------|-------|-------|-------|
|         | CR1                 | CR2   | CR4   | HHI   |
| Italy   | 56.7%               | 79.3% | 88.2% | 3.772 |
| Germany | 40.2%               | 81.9% | 86.6% | 3.392 |
| France  | 43.0%               | 62.4% | 69.2% | 2.286 |
| UK      | 43.1%               | 65.8% | 85.9% | 2.623 |
| Spain   | 30.4%               | 59.4% | 84.7% | 2.118 |
| USA     | 25.6%               | 50.8% | 87.4% | 2.011 |

Note: figures include both national and local advertising.

Source: AgCom, on different sources. AgCom, Indagine conoscitiva sul settore della raccolta pubblicitaria, all.A delibera 551&12CONS, p.98.

Levels of concentration vary, however, according to the different media being considered (television, newspapers, radio, etc.). The mentioned study led on the behalf of the Dutch Media Authority, for instance, showed that the concentration of the radio sector was, in most countries, notably lower than in the television sector (Ward 2004). According to a recent analysis carried out by AgCom (2010), the radio and newspapers advertising markets in Italy are “moderately” concentrated (with an HHI index of 1.419 for the radio market and 1.438 for newspapers), while the Internet market is “highly” concentrated (HHI 2.643).

Both the tendency towards concentration and the differences in media-ownership concentration that have been highlighted among different media have been attributed to a number of the features of media markets. Competition in media markets typically requires high initial investment, which creates barriers to market entry. The investment that is needed to set up a radio or TV station, or a newspaper, or even to make a film, has historically been an important obstacle to accessing the media market. This is the first element that may explain the differences in concentration across different types of media, as different levels of initial investment translate into different concentration levels in the market. To launch a radio station is indeed less expensive than to start up a national TV channel, or to make a film, and this is one of the reasons why radio markets are usually less concentrated than film or television markets.

As a consequence of the high initial investment, media outlets largely exploit economies of scale and of scope. For broadcasting and audiovisual businesses especially, the marginal costs can be very low (the cost of an additional reader of a newspaper is just the material cost of the paper, while an additional viewer of a TV or radio show has no additional costs). The low marginal costs and the high initial costs are closely related. Moreover, the low marginal cost is a powerful incentive for firms to attempt to expand into every possible distribution channel in order to maximize their profits.

The need for firms to expand is the main cause of the increase in vertical and horizontal integration (Gambaro & Silva 1992). According to Doyle (2002), media companies tend to expand horizontally (monomedia), by consolidating their activity into one single medium diagonally, by extending their activities in order to use the same product, or to provide the same product through different means of distribution or on different platforms (multimedia); or vertically, by owning interests in the various parts of a product’s value chain. This may help incumbent media organisations to keep their prices low and to make it difficult for new players to access the market. The final effect is, again, an increase in concentration and a potential threat to content diversity.

Vertical integration has traditionally been a crucial issue. By controlling both the production and the distribution levels, media firms may act as market gatekeepers and create technological bottlenecks. When, thanks to vertical integration, a firm manages, in some way, to control access to a

certain type of technology, this facilitates oligopolisation or monopolisation. This could happen, for example, in the satellite pay-tv market, as well as in the provision of audiovisual services by ISPs.

More recently, economic scholars' attention to the interpretation of the media markets has been directed towards the so-called two-sided market paradigm (see, among others, Armstrong 2006; Rysman 2009; Rochet & Tirole 2003), which has been extensively applied to the different types of advertising-funded media: TV (e.g. Kind et al. 2010), newspapers (e.g., Argentesi & Filistrucchi 2007), Internet (e.g. Evans 2009). According to this perspective, the most salient feature of different media is that they are platforms involving two markets. On the one hand, media sell their product to the audience, and, on the other, they sell their audience to the advertisers.

This approach contributes to the highlighting of the additional forces that lead towards increased concentration in media markets. The fact that media are platforms means that, in order to remain profitable in the market, players must be able to engage both sides of it. Competition for the audience and for advertisers are therefore intertwined and market dynamics are characterised by strong feedback effects or, as it is often called, by a 'chicken-and-egg' dynamic (Caillaud & Jullien 2003): to attract advertisers it is necessary to be able to attract an audience, but only by being able to attract advertisers it is possible to raise the amount of revenue needed to invest in quality content that is desirable to viewers/readers. This is due to the existence of indirect externalities among the consumers in the two sides of the market or, in other words, to the fact that the utility of consumers on one side of the market (advertisers), increases with the number of consumers on the other side of the market (readers/viewers).

The two-sided nature of media markets reinforces their natural tendency towards concentration due to the above-described phenomena (high initial costs of investment and economies of scale). This is because, in these markets, the ability to control key resources, such as attractive content (especially 'premium' content), confers on market players an advantage in attracting advertising resources, through a process that has mutually reinforcing (i.e. feedback) effects.

This discussion has thus highlighted that there are many economic forces that can result in a tendency to a reduction in the number of players who can successfully operate in media markets. The distinct issues are whether the low number of contestants and the associated high level of market concentration should be regarded as having only negative implications, and whether the degree of concentration *per se* is always a meaningful indicator.

According to some media economists, media markets' concentration can even have positive effects from an economic perspective, to the extent that the large scale of firms could facilitate market stability, boost investments and promote innovation. Instead, limits to the expansion of firms could lead to an excessive market fragmentation, without benefits in terms of prices or quality. As Doyle (2002) observed, "where there is room in the market with only one supplier, or just a few suppliers (a 'natural oligopoly'), this implies that increased competition would result in higher costs and less efficiency". Noam (2009) observes that the size of a firm has little or no influence on a company's behaviour, as its profit orientation remains the key factor, regardless of whether the firm is large or small. In this respect, in well-defined circumstances, it has also been suggested that some degree of media concentration could be tolerated in as much as a reduced number of players could better allow defence of plurality in content (Gambaro & Silva 1992; Doyle 2002).

Moreover, according to other critics, the concentration level in one market should always be put in relationship with the size of that market. One of the most cited examples is the case of the local press. Both in the US and in Europe, it has been noted that, on a local basis, it is quite common to see monopolies, even though, at a national level, the market is not highly concentrated (Noam 2009; Polo 2010). For instance, in Italy, according to a survey led by Polo in 2006, the average HHI index for newspapers is not high (575 points), but in each region it was above 1000, and in 10 out of the 20 Italian regions, it was above 1,800 points, which is considered to be a high concentration ratio (and in more than 75% of the provinces, the smaller administrative units, it was even more than 2,000 points).

It is widely accepted that, in these cases, less competition could be tolerated as the only possible condition for profitability.

Although economic theory has recently provided a more nuanced assessment of the negative implications of a high degree of concentration in media markets, this concentration in media markets has generally been considered an issue that should be addressed through regulation. Most countries have indeed adopted a range of rules that are aimed at setting limits on concentration or on mitigating its negative effects.

For instance, the use of ownership-thresholds in the media economy is still regarded as an effective and necessary tool, although many critics agree that the main reason to promote and maintain ownership limitations is not just to preserve competition, but to foster media diversity and pluralism (Just 2009; Dimmick 2004; Doyle 2002). The effectiveness of these thresholds should be assessed by the consideration of several factors, mainly related to the context in which they are applied and to specific market features. This is because, although limits to ownership concentration in the media industry, as well as in other industries, can prevent dominant positions and improve competition, exceptions are possible, depending on the size of the market or the type of media industry. In other words, the increase in different voices, sources of information, and, more generally, of content diversity and media plurality, may not be a straightforward consequence of ownership thresholds.

While ownership thresholds have traditionally played a crucial role as an antidote to excessive concentration, many other public policy tools have additionally been adopted. These include limits set to the amount of advertising resources that a single market player may gather, rules on content exclusivities, ‘must carry’ and ‘must offer’ rules, behavioural or structural remedies that may be applied in the context of antitrust proceedings and a number of other tools (see OECD 2007).

A complete review of these tools is outside the scope of this chapter. However, the discussion in the next section will analyse the impact that new technologies have on the issue of media concentration and, as a consequence, will provide some insights on the issue as to whether recourse to these tools, and particularly to ownership thresholds, should still play a role in light of technological change and of economic globalisation.

### **3. Numerical diversity and media plurality: the impact of new media on ownership concentration**

Technological development is dramatically changing media markets. Digitisation, the diffusion of broadband and the resulting increase in transmission capacity, the emergence of new platforms, as well as the convergence of the different platforms, have all deeply affected media markets.

Among the different aspects of this revolution, two technologies in particular are having a deep influence on the media value chain and on the media economy in general, and are, at the same time, raising fundamental questions about diversity and pluralism. One is digital broadcasting, especially terrestrial digital broadcasting, and the other is the Internet. These two technologies have a different nature and impact, the first is changing the most important traditional media, and the second, being ubiquitous and global, represents a revolution in the way the media are distributed and conceived.

The main common effect is a multiplication of channels and sources of information, which has undoubtedly changed the pre-existing concept of “resource scarcity”. For many years, the latter represented one of the pillars upon which media legislation relied, and was one of the justifications for concerns about media-ownership concentration, from when it was adopted for the first time in 1943 by the US Supreme Court.<sup>4</sup> According to some commentators, the overcoming of scarcity, allowed both

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<sup>4</sup> *NBC vs United States*, 319 U.S. 192.

by digital television and by the Internet, is sufficient reason to consider the threat of excessive concentration less intense than it was in the past.

Digital television has boosted the number of TV and radio channels that are available in every country. According to the European Audiovisual Observatory's figures (OEA Yearbook 2011, T6-01), the number of linear TV channels available in the European Union jumped from 1,678 in 2005 to 7,613 in 2011. In particular, terrestrial digital television made this benefit available also for that part of the audience - the majority in many countries - which used to receive linear audiovisual services only (or mainly) through terrestrial television.<sup>5</sup>

The Internet's contribution to the increase in the sheer number of information sources is difficult, and probably impossible, to quantify, but it is clearly evident. In addition, of course, the Internet brings about many more changes. For instance, as the Internet becomes the main means of distribution, the boundaries between the different platforms will progressively tend to blur and it could become meaningless to distinguish among platforms, since it would be possible to consume content, regardless of whether it is provided by, e.g., a newspaper or a broadcaster. This evolution will emphasise the role of devices, rather than platforms, raising additional issues as regards the existence of bottleneck restrictions (such as, for instance, those related to the choice of standards and interoperability (Doyle 2002).

More generally, the increasing pace of technological development is enhancing the role that innovation plays in media markets. On the one hand, innovation is potentially a key tool for the expansion of the distribution of content and audience access. On the other hand, innovation requires high investment, which only well prepared and solid firms can afford. In this regard, the need for high levels of investment moves in the opposite direction from market fragmentation. There is a trade-off between the need to guarantee a diversified range of players in the market, as to avoid dominant positions, and the general interest in maintaining high levels of investment in new technologies. This concern is likely to become even greater in a globalised economy.

The previous discussion gives only a partial hint at the range of issues that relate to the effects that technological change has on media concentration in media markets. In the interests of consolidation, the rest of this section will focus on one of these issues, namely the question of whether the multiplication of sources of information has, in fact, or will prospectively, lead to the overcoming of the issues that have traditionally been raised on concentration in media markets.

Some theoretical contributions on the relationship between technological progress in the media and ownership concentration had appeared as early as the beginning of the 1980s. In 1982, Murdock argued that the increase in the number of channels did not automatically mean an increase in diversity: "more does not necessarily mean different" (Murdock 1982, p. 120). Many years later, the question about whether the increase in the number of sources and the overcoming of scarcity that are associated to technological change is really enlarging the market and countering concentration, is far from being resolved.

The analysis of the effects of technological change has nonetheless enlarged scholarly perspectives. While most of the attention has traditionally been devoted to concentration aspects relating to the supply of media – ownership concentration and the problem of economic resources in the hands of a few operators – recognition of the importance of technological evolution has directed attention towards concentration on the demand-side as well, i.e., concentration of demand around a few successful products.

The technological revolution that permanently and increasingly involves the media sector indeed affects concentration on both the supply and the demand side. On the supply side, the increase in both

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<sup>5</sup> The number of terrestrial channels in the EU climbed from around 60 in the analogue era to more than 500 in the new digital terrestrial environment.

the number of platforms and the means of distribution has generated a debate about whether technological development will lead to an increase in the number of sources of information (Murdock 1982; Compaine 2005; Bagdikian 2004; Baker 2007). On the demand side, the debate is mainly about whether the appearance of too much “content”, even if it is consumed only by a few, should be considered positively, or rather as being an excessive level of fragmentation which tends to disperse the audience, thus favouring well-known products and strongly recognisable brands (Owen 2004; Ofcom 2012).

In this enlarged framework of analysis, scholars’ contributions have tended to become polarised. Noam (2009) refers to the “media optimists” vs. “media pessimists” debate when talking about the distinction between those who believe that new technologies – digital media and the Internet – are increasing competition, and those who are convinced that all these technological changes are neither improving the state of media diversity nor of media pluralism. This has also been seen as a dispute between those who focus on “numerical diversity” and those who primarily evaluate “source diversity” (Winseck 2008).

The optimists view the impact of new technologies positively, as they allow new players to enter the market at either a lower initial cost, or at no cost at all. The pessimists argue that the new media have had a negative effect on concentration in the media markets and are sceptical about whether new technologies are changing the landscape, facilitating access to the media and countering ownership concentration. They believe that the process of digitisation is not leading to a golden era of pluralism, as the increase of content availability is not only ineffective in extending market competition to new entrants, but is also rapidly causing more concentration. In other words, the numerical growth of sources, the opportunity for many new operators to enter the market at a low initial cost, as the entry barriers are lower, also, the availability of new means of distribution and new platforms, would not lead to a truly less concentrated media landscape.

Thierer’s (2005) statement that the “sky has never been brighter and is getting brighter with each passing year” (p. 14) is probably the most famous synthesis of an optimistic view of the media market. However, the author who has provided the most compelling defence of the role that the new media are playing in enhancing competition is Compaine. Analysing the single media market by using the HHI index, Compaine and Gomery (2000) also conclude that the top 5 media companies hold slightly more than 25% of the entire world’s media market, while the top 14 do not even account for the top 50%. “There can be little disagreement, he sustains, that there is more competition than ever among media players”, stating that this process can even be summarised by one word: “Internet” (Compaine & Gomery 2000, p. 574). Compaine and Gomery (2000) also state that there is no risk of excessive concentration, because the media are controlled by “thousands of large and small firms and organizations [...] controlled, directly and indirectly, by hundreds of thousands of stockholders, as well as by public opinion” (p. 578).<sup>6</sup>

Despite these theories, a higher, and probably increasing, number of media economists is raising concerns about the intensification of media-ownership concentration. Bagdikian (2004) emphasises the negative effect that technological change is having on competition in the media field. In his updated version of the classic *Media Monopoly, The New Media Monopoly* (Bagdikian 2004), he observes that the media industry is now more concentrated than ever before. While, in 1984, half of the broadcasting, newspaper and film industry was controlled by nearly 50 corporations, 20 years later this number has fallen to just 5, and 4 of them are American: *Time-Warner*, *Viacom*, *Disney*, *News Corp* (the latter originally being an Australian company, whose headquarters are located in New York, and which is listed on the NASDAQ). The only exception is the German conglomerate *Bertelsmann*. It is worth noting that Noam (2009) remarks that some of the conclusions Bagdikian (2004) draws are

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<sup>6</sup> More recently, Compaine & Hoag (2006) describe how, according to 14 media entrepreneurs interviewed during the research, the Internet was facilitating access to the market, essentially by lowering barriers to entry.

not confirmed by hard figures, as, in 1984, the first 50 companies held a 37.5% stake, and almost none of them *held a share greater than 2%*. Noam also remarks that a media giant like *Comcast* was eventually excluded from Bagdikian's analysis, as it did not appear among the top companies until 2004.

McChesney and Schiller (2003) agree with Bagdikian about the high level of media concentration when they note that 9 transnational companies dominated the media market: *General Electric, Liberty Media, AOL Time Warner, Sony, News Corp. Viacom, Vivendi Universal* and *Bertelsmann*. These companies are mainly based in the United States.

Arsenault and Castells (2008) consider that the market is dominated by 7 large media firms, with 6 American giants, the same ones mentioned by Bagdikian (2004), plus *CBS* and *NBC Universal*, as well as *Bertelsmann*. Interestingly, Arsenault and Castells note that, beyond the traditionally dominant media conglomerates, it is worth mentioning the four new media players that come from the ICT or Internet world, and who base their business on the new economy: *Google, Microsoft, Yahoo!* and *Apple*. They also are all American companies.

Having shown the rankings of the 10 richest media conglomerates in the world, Dwayne Winseck (2008) concludes that evidence suggests that the markets are becoming more consolidated: "audiences have now more media channels than ever, but source diversity is shrinking" (p. 45).

However, to counter a somewhat too American perspective, provided by American authors, it is worth mentioning the European Audiovisual Observatory figures, which provide a clear statistical picture, even if this picture is limited to the audiovisual sector in Europe. The 10 top-ranked companies in terms of audiovisual turnover were *Sony, Disney, Direct TV, Time Warner, News Corp., NBC Universal, Vivendi Universal, Viacom, Dish DBS Corporation* and *Nintendo* (OEA Yearbook 2011). All of these companies managed to increase their revenues between 2006 and 2011, sometimes with a double digit compound annual growth rate (CAGR). Seven of them are US based, the exceptions being the Japanese companies *Sony* and *Nintendo*, and the French based *Vivendi*. The latter, however, has a considerable amount of its audiovisual business that comes from Universal Music's activities.

Several theories have been advanced to justify the "media pessimists" paradigm. An interesting explanation is provided by Baker (2007). The author notes that the Internet is producing a significant reduction in distribution and delivery costs, which will have two different, and possibly opposite, effects. On the one hand, there is an 'abundance effect', as the price of distributing media products decreases, and content can be more easily accessed. On the other hand, the reduced distribution costs could lead content producers to allocate more resources to the first, initial copy of their product. The final result of this paradox, if we follow Baker's (2007) analysis, is that, if consumer prices do not increase, the reduction in distribution costs may increase production costs, thereby not only improving the quality of content, but also concentrating the audience around a few, high level products. In other words, the Internet could not only reduce consumer prices, but could also reduce the number of new products available, with a negative effect on diversity. This is what Baker (2007) calls a "Hollywood effect", referring to the high amount of money that is spent to produce the first copy of a film, which represents a very high entry barrier. Baker (2007) concludes that "concentration of audiences in the Internet world will be great and likely to be even greater than in the older offline world" (p. 102).

More generally, it has been pointed out that media pluralism should also always be examined in relation to the quality and novelty of content. Two distinct and partially opposite phenomena are occurring: on the one hand, there is an abundance of platforms, as a consequence of technological change which provides new opportunities for reaching the audience. On the other hand, it is a fact that pre-existing "traditional" operators play a relevant role on these new platforms.

This asymmetry could not only affect competition negatively, but could also reduce the quality and diversity of content. One of the immediate effects of this process is the strengthening of the bigger and

leading brands. Given that media firms rely on well-known, popular brands and themes, exploiting them on different platforms, they are somewhat discouraged from investing in new content. Undoubtedly, the advertising-supported media have been particularly affected by the financial crisis, a fact exacerbated by the difficulties in earning revenues from online activities.

Several authors have highlighted this type of trend. In considering the results of the digitisation of content, Murray (2005) underlines that the emerging business models linked with streaming content seem to be profitable only for a few content providers, thus strengthening the position of global corporations and their successful brands in the multi-platform environment. The multiplication of sources that technical evolution makes available is thus not encouraging the production of new content. Doyle (2010) observes that one approach employed by media organisations employ to fit the content needs of the new platforms is the systematic re-use of existing content. For example, linear television content can be re-used online or through mobile platforms. This continuous recycling of content could threaten diversity, as powerful media-operators can benefit from further reduction of their marginal costs, thus making it more difficult for new entrants to compete. The final result of this process is that content diversity may be reduced because new operators are not attracted, or are unable to compete in the multi-platform market.

Baker (2007) also mentions two other strong reasons that are not directly related to economic factors and which could explain why Internet fragmentation is creating more concentration. Firstly, the reputation of media products is a fundamental value, and this is even more important in the social media era. With a wide choice of content and sources, consumer choices tend to concentrate on those products that other people have already consumed, and about which they have expressed positive comments. Secondly, people searching for news on the Internet will prefer to choose the sources of information which they already know they can trust: e.g. newspapers websites will be considered more reliable than single individuals' blogs. However, it should also be considered that individuals' blogs are often used as relevant sources of information by journalists, thus creating an interesting looping process.

A still different explanation is provided by Noam (2009), who relates entry barriers to economies of scale, and points out that, even though entry barriers are lowered, as a consequence of the technological change and the advent of the Internet, in the case of the media industry, if economies of scale remain high, the positive effect of having more contestants in the market will be only temporary. This happens because while, in the short term, many new entrants could be attracted by the opportunity to access a market with lower initial investment; in the long term, only the biggest operators, i.e., those who can exploit sizeable economies of scale in order to keep prices low, will survive. This is what Noam (2009) calls the "U-shaped" effect, and, in his view, this is precisely the trend that has characterised the communication industry in the last decades: "it is therefore not surprising to observe the U-shaped concentration pattern through many industries of the information sector" (p. 37). According to Noam's model, the lowering of entry barriers is a necessary, but insufficient, condition for an increase in competition, if it is not accompanied by a similar decrease in economies of scale.

The problem could also be seen from a different perspective: the increased abundance on the supply side does not correspond to greater variety on the demand side. As Owen (2004) puts it succinctly, "access" should not be confused with "success", or, in other words, with equality of access, that is, the equal possibility for everyone to access the media, which should be distinguished from equality in results, that is, the need to consider the real output to also measure market concentration. This is a crucial debate. New technologies are undoubtedly facilitating access to content, with much more information available at low, or even no, cost for users. However, it is worth noting that not only do many of the new digital TV channels have a very small audience, but also that the entry barriers are far from being removed, especially in the broadcasting markets, where radio and TV licences still have relevant costs. Owen underlines that the lack of concentration on the supply side, which results from equality of access, would not automatically avoid concentration on the demand side: even if the

number of products available is potentially infinite, the audience would concentrate on only a few of them and people would probably focus their choices on quality products. In other words, concentration on the demand side is not related to the number of suppliers, and “we would experience a degree of media "concentration" even in the absence of anything that might be called a market imperfection or entry barrier” (Owen 2004, p. 6).

In its recent study entitled, Ofcom (2012) comes to a similar conclusion, taking a clear position with regard to media availability. Although the number of news providers can be considered to have significantly increased, merely counting this number does not measure diversity. According to Ofcom (2012), an approach which considers all news providers as contributing to plurality is not credible, unless it also takes into account the level of consumption.

Ofcom’s comment reminds us that the assessment of the level of plurality in the media market should always take into account the degree of consumption and the ways in which audience tends to concentrate around certain products, or sources of information. This again means that the fact that many new TV channels have been launched, or that information can be provided on the Internet through thousands or even millions of sites, blogs or social networks, should not be considered a sufficient condition to guarantee pluralism if those providers are not able to reach a minimum level of audience.

To sum up, the opinions of media economists appear rather polarised. While some believe that there are no longer any reasons to worry about media-ownership concentration, because the increase in the number of media suppliers allows “something for everyone” (Compaine 2005), others object that, notwithstanding the quantitative increase in the number of sources of information, media ownership remains very concentrated. While new technologies lower entry barriers, thus facilitating the creation of new players, their real impact on the media economy is questionable for at least two reasons. The first is that, given that the main effect of new technologies is lower distribution costs (i.e. it becomes cheaper to distribute the same product), there may be an increase in initial investments by those operators who can benefit more from low marginal costs, namely, the more vertically- and horizontally-integrated media organisations. The second is that the lowering of entry barriers creates an enabling situation for new players only at the first stage: without a concomitant reduction of economies of scale, these new entrants will soon be marginalised, leaving the concentration level essentially unchanged or even worsened.

Finally, we have noted that, whatever the circumstances, the number of operators in the market should not be taken as a sufficient condition for media pluralism, as media pluralism should not be measured only by the number of services available, but also by the level of consumption. Many channels, or many websites, providing information to niche audiences, that achieve small market shares, can contribute only marginally to the fostering of pluralism.

#### **4. The role of traditional media outlets and the rise of new media conglomerates**

Irrespective of whether media pessimists or media optimists are right, it is, however, self-evident that the Internet is radically changing the media economy. The question of whether concerns about media diversity and media pluralism should increase or lower in the new online and converging media environment should also take into account the role that the old and new media outlets have in the new online environment.

In this regard, it should firstly be noted that many analysts (see for more Arsenault & Castells 2008) believe that there is no conflict between old and new media, and that, on the contrary, the barriers between them are disappearing. As soon as traditional media outlets – print, broadcasting, audiovisual – simply transfer online, occupying a relevant market space, many questions that were posed about whether the Internet should be considered as part of “new media” or as a new, revolutionary, means of distribution are immediately clarified. Compaine and Gomery (2000),

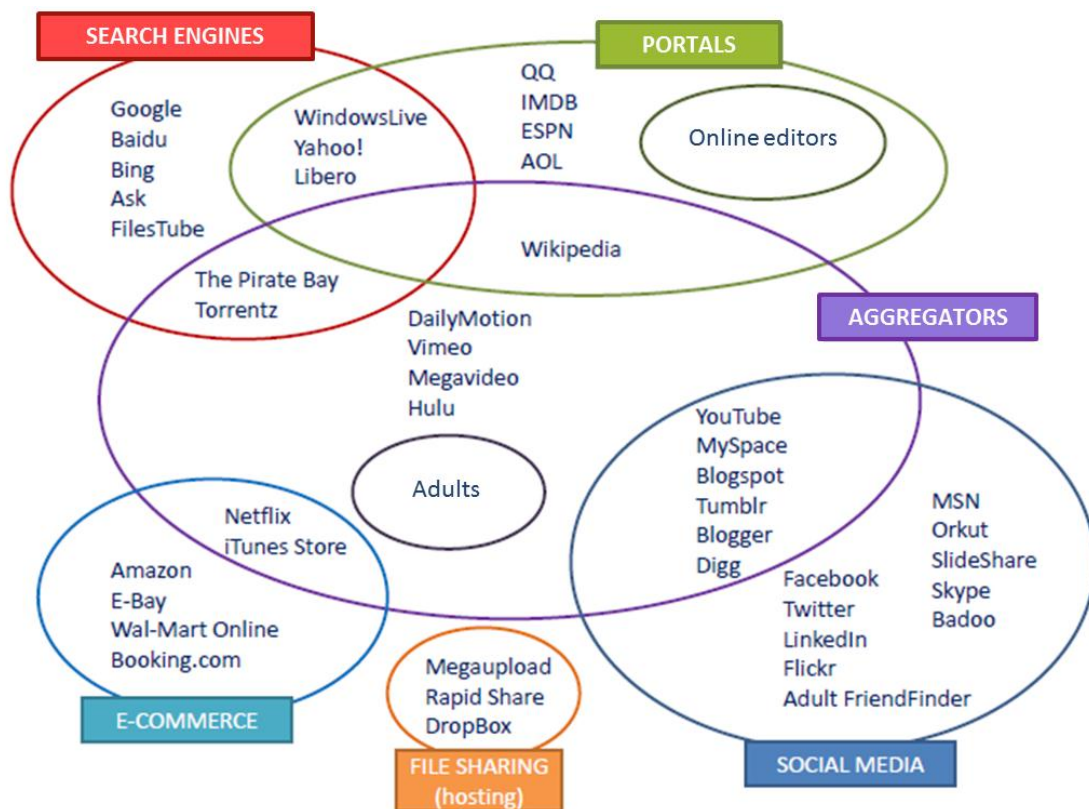


dwelling on this aspect, underlined that “the difference between the Internet and newspapers, books, records or television is that (the Internet) can be all those things together” (p. 575).

This appears to be the foreseeable development of the media in the next decades. There is little doubt that the convergence process is going to dominate the scene. Henten and Tadayoni (2008), for example, point out that “broadband networks are competing technologies to other broadcast distribution networks”, even though they also maintain that “the extent to which broadband replaces the traditional distribution system” and “the degree [to which] it will be more efficient to have specialised broadcast networks” has still to be verified (p. 48).

The Internet has been described as the “medium of the media” (Levinson 1999), which emphasises its capacity to deliver written and audiovisual content. More recently, Henten and Tadayoni (2008) have affirmed that the Internet proves “to be a technological platform for all kinds of point-to-point, point-to-multipoint and multipoint-to-multipoint communications, including blogs and peer-to-peer communications” (p. 48). This also implies that Internet content engages in different kinds of competition with all different kinds of information and entertainment: it can easily substitute printed content or audiovisual ones. Nonetheless, the Internet has also brought a new kind of communication space, gaining its own specificity through display, search, blogs, social media, etc. (Levinson 2009). The graph below draws a map of the different business lines of the Internet players and of their overlapping activities (IEM 2012).

### The Internet players: a possible segmentation



Source: Istituto di Economia dei Media (IEM), 2012

Nonetheless, the broad spectrum of Internet businesses should be carefully addressed, especially with regard to the question of the relevant market, which involves the degree of substitutability of different products/services. The rise of the Internet has stimulated a significant debate about the substitutability

of off- and on-line media. Many scholars have highlighted that advertising in newspapers and on the Internet is highly substitutable (Bergemann & Bonatti 2010; Ratliff & Rubinfeld 2010). However, others have underlined how substitution between old and the new media is still imperfect (Ahlers 2006; Berte & De Bens 2008). Substitutability on the demand side is also becoming increasingly important. In this respect, it is important to assess the ways citizens become informed, through what means and how one of these means can be a substitute for another. Ofcom, for example, follows this approach in its Public Interest Test, and other National Regulatory Authorities (NRAs) are paying more and more attention to this aspect (see AgCom 2010).

The issue of the appropriate definition of relevant markets is becoming increasingly important also in light of the fact that new Internet native players are beginning to have an increasingly relevant share in the advertising markets. Up to now, no clear distinction has been made between the different types of online advertising, in order to understand to what extent search engines, aggregators, social networks and other types of players, who are based on the Internet, should be considered as competitors to traditional media outlets.<sup>7</sup> *Google*, for example, claims that the advertising revenues that come from the news aggregation service are only a very small and non-relevant share of total advertising revenues. However, on the other hand, online video advertising (e.g. YouTube) directly competes with the online services provided by broadcasters and also with other content and information providers.

The transition to a fully online media system will realistically take several years, and, in the meantime, large media organisations, as previously noted, tend to use as many platforms as they can to distribute their content, and, of course, the Internet is one of them. As Doyle (2010) notes, "...the transition towards digital platforms - the Internet being the principal example - means that content of all kinds can circulate and be delivered to audiences across numerous avenues (e.g. television over mobile, or radio via DTT, or the Internet)" (p. 436). The increase in the number of platforms generates relevant effects that foster the availability of content, as the same products can be distributed through different means and can be consumed on different devices, in different ways and in different contexts. In any case, this process is led by the strongest media companies and operators, and as Arsenault and Castells (2008) stress, "despite the proliferation of blogs and other news and information sites, the mainstream media continue to dominate the online news market" (p. 719).

The data on Internet consumption provides evidence of this transition phenomenon. In every country, the main news websites are usually the online versions of the traditional media outlets: newspapers, television and radio. Baker (2007) reports an interesting comparison between blogs and newspaper online-readership, showing that 21 online versions of traditional printed newspapers have more unique viewers than every blog in the US. According to two of the main Internet user ratings, Nielsen and Comscore, eleven out of the top fifteen news-websites in terms of unique viewers in 2010 belong to newspaper publishers or broadcasting media outlets (such as *CNN*, *USA Today*, *CBS*, *The Washington Post*, etc.), while others are essentially news aggregators, such as *Google* or *Yahoo!*, even though the latter is moving towards an original content production model. The only native Internet news provider that can be considered is, to some extent, the *Huffington Post*, which is ranked 8<sup>th</sup> according to Nielsen, and 7<sup>th</sup> according to Comscore, and which employs a particular hybrid model, combining different sources of information (internal bloggers, blogs from public personalities, etc.).

Ofcom's recently published *Communications Market Report 2012* confirms this type of trend. Eight out of the twelve most popular news sites on desktop and laptop computers in the UK belong to

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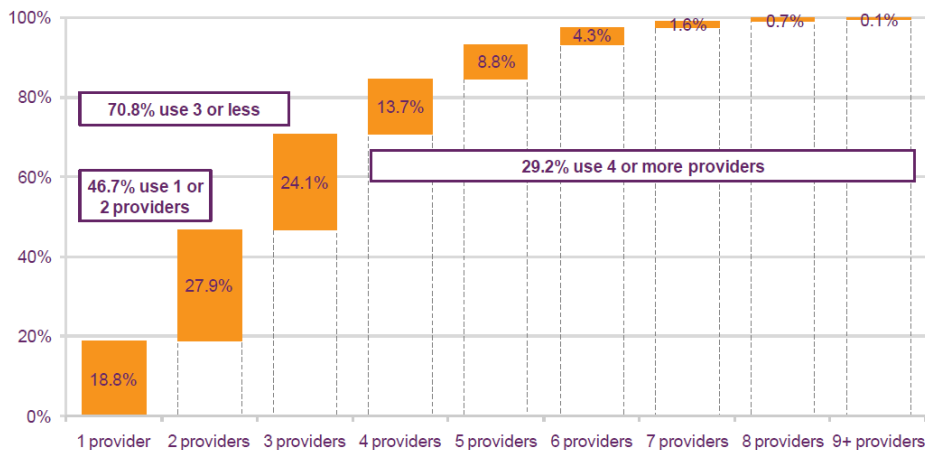
<sup>7</sup> With 103/12 law, in July 2012, the Italian Parliament has approved a government decree has introduced the "online advertising" into the "Sistema Integrato delle Comunicazioni" (SIC), the wide basket that is used as a base to assess market dominance and dominant position in the media industry in Italy, including also revenues coming from search engines and social networks.

traditional media outlets and the remaining four to Internet companies that are essentially aggregators (Ofcom 2012).

Other major examples include on demand audiovisual services, where the most successful experiences can be considered to be the BBC’s iPlayer, and Hulu, the co-competition video platform owned by *Disney*, *NBC Universal* and *News Corp*. The iPlayer attracts almost one third of unique users of online catch-up TV services and it is the third most visited entertainment website, after YouTube and iTunes, with 7.4 million of unique users, according to Ofcom figures.<sup>8</sup>

As Ofcom comments, the different media platforms “should not be seen as direct substitutes; rather, they complement each other in many ways” (Ofcom 2012). In its "Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation" (December 2010), Ofcom underlines that 58% of news consumers in the UK “use two or more platforms on a weekly basis [...] This suggests that the average number of platforms used to access news in a typical week is 1.9” (Ofcom 2010, 47-48). According to Ofcom findings, multi-sourcing can occur both within each platform and across platforms. On the one hand, users can consume different sources within the same platform, for example more than one TV channel, or more than one newspapers or website. Ofcom also estimates an average usage of 1.7 channels for television per week and 1.3 titles for newspapers per week. On the other hand, audiences can also consume news using different platforms.

### Distribution of multi-sourcing by wholesale provider among all regular news consumers

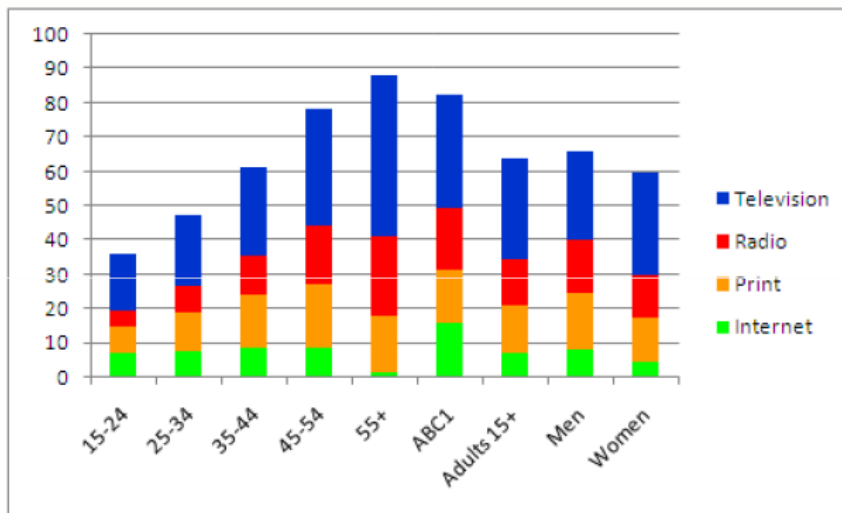


Source: Ofcom cross-media audience research (2010)

Note: Figures refer to at least weekly use for TV channels, radio stations, websites and daily newspapers, and at least monthly for weekly/Sunday newspapers of wholesale providers of news and current affairs across all platforms. Figures count News Corp and Sky as separate providers. Figures may underestimate the amount of multi-sourcing because “other” sources are grouped as one.

Considering the mix of different media used for news consumption, we might note that, despite television still accounting for most of the time spent consuming news, Internet is growing fast in viewers’ usage time. As the NewsNext report provided by Headway International (2011) clearly illustrates, especially among young consumers between 15 and 24 years and young adults between 25 and 34 years, the role of the Internet as an information source is now comparable with their usage of radio and of newspapers.

<sup>8</sup> Figures are based on UKON/Nielsen research and refer to March 2012.

**Time spent with media news per day in minutes (by demo, 2009)**

Source: Headway International, NewsNext 2011.

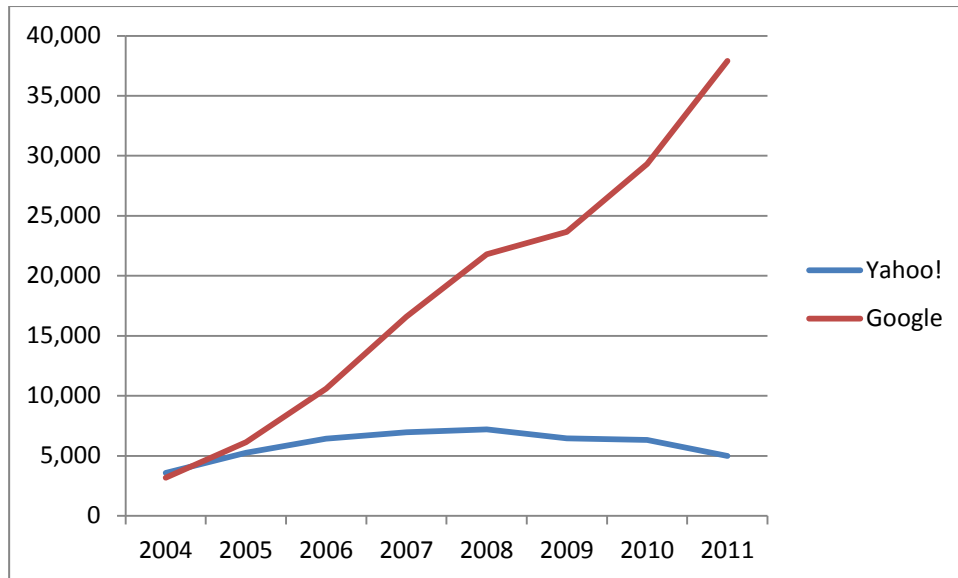
What has been discussed above suggests that the big traditional media organisations are becoming powerful in the new online media environment. Nonetheless, the Internet economy is not dominated by these types of subjects, as it is producing powerful new players. As mentioned above, new operators such as *Google*, *Microsoft*, *Yahoo!* and *Apple*, as well as the new, rising social media firms, such as *Facebook* or *Twitter*, should by now be included in the list of the most powerful media organisations worldwide. Many of these players are now even larger than some of the largest media firms, when measured by revenue (for example, *Google* had a bigger turnover than *News Corp.* in 2011), moreover they are growing much faster.

The dramatic rise of these new players raises three main concerns. The first relates to their type of business: native Internet players are rarely involved in content production, they are mainly “intermediaries” or “gatekeepers” (Foster 2012; Laidlaw 2011). Foster distinguishes between four kinds of Internet intermediaries: news aggregators, search engines, social media and digital app stores (a digital application distribution platform). He rightly observes that there is a difference between those players who exert some form of editorial control, as well as an accurate packaging, of content, such as *Yahoo! News*, and those, like *Google*, who have a more neutral approach. Although, for now, both aggregators and search engines seem not to be interested in producing their own content, nonetheless it is worth noting that some aggregators, like *Yahoo! News*, are trying to go beyond the mere activity of bringing together content that is provided by other operators, by investing in some original journalistic and licensed content. Moreover, even without directly investing in new content, Internet intermediaries are playing an increasingly important role in delivering information to the audience (HLG on Media Freedom and Pluralism 2013, p.27), as they can exercise “control over the way in which users access news, and news suppliers reach their users” (Foster 2012, p. 29).

The second concern is about the tendency towards the concentration of these online media organisations. Even companies with thriving businesses, based upon a strong and consolidated revenue model, such as *YouTube* or *Skype*, have been easily taken over by stronger operators such as *Google* or *Microsoft*. Furthermore, it is becoming increasingly difficult to compete in any one market that is related to the business of online media. *Yahoo!* is a good example. In 2004, the company was at the same level as *Google* in terms of revenue: \$3.6 billion for *Yahoo!* and \$3.2 billion for *Google*. Seven years later, *Google* has become almost 8 times larger than *Yahoo!* – with \$37.9 billion revenues versus \$5.0 billion – with the latter suffering a drop in 2011 for the third consecutive year. Although the two companies’ business models and their assets are not exactly the same, in both cases their revenues come mainly from advertising sales generated by searches, where *Yahoo!* and *Google* are the two most

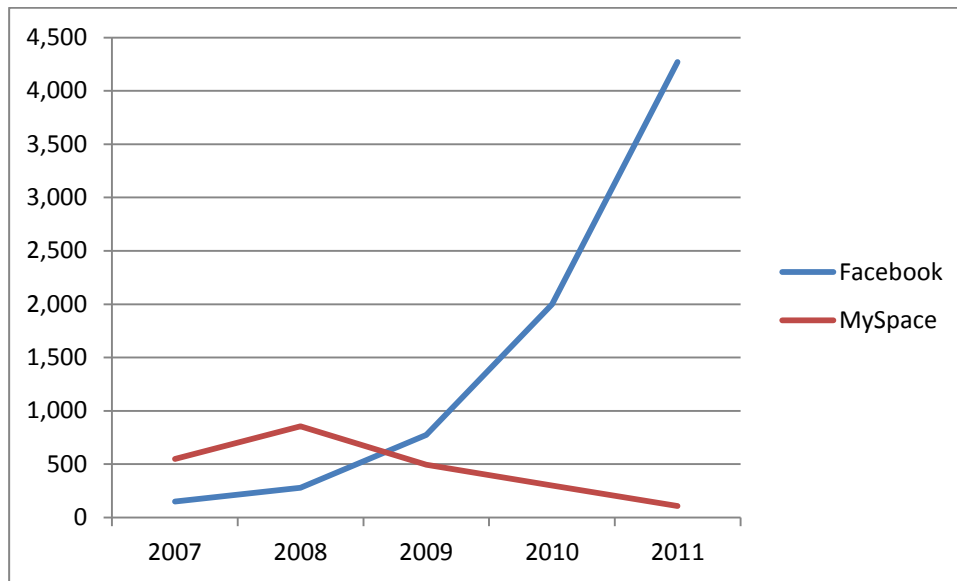
popular search engines worldwide. According to the NetMarketshare figures, *Google* dominated the search engine market in 2011, with an 84% market share (up from 79% in 2007), against *Yahoo!*'s 6% share (down from 11% in 2007). This shows that, notwithstanding the global scale of online display search advertising, there is a clearly dominant position, with strong market concentration and a consequent narrowing of competition.

**Google and Yahoo! - Total revenues 2004-2011, USD million**



Source: NetMarketshare, available at: <http://www.netmarketshare.com>

The search engine market is not the only highly concentrated one in online media, as the social networks market is going in exactly the same direction. *MySpace*, which was the most used social network at that time, was overtaken, in terms of users, by *Facebook* in April 2009, and since then, it has not been able to compete with what has become the most widespread social network in the world. The ratio in terms of revenues between *Facebook* and *MySpace* was almost 40 in 2011, steeply rising from 1.5 only two years before. And even though, following *MySpace*'s decline, new players, such as *Google+* or *Twitter*, have since emerged, *Facebook*'s dominance nonetheless remains evident. According to eMarketer figures, in the US, *Facebook* is expected to record a 71% market share, while *Twitter* will have a 6% market share, *LinkedIn* 4%, and all the other social networks, taken together, the remaining 15%. An interesting consideration is that *Facebook*'s leadership in terms of users is less prominent, with *Facebook* having 900 million users, *Twitter* 500 million and *Google+* 250 million.

**Facebook and MySpace - Total revenues 2007-2011, USD million**

Source: eMarketer data provided by operators

All this suggests that equal competition in online markets is not easy to achieve. Even when a viable business model is established, such as for advertising on search engines, or for social networks, the markets seem to solidify around a few, or even one sole player. This phenomenon has often been described as the “winner-takes-all” dynamic.

Finally, the third concern is about the geographical origin of the new Internet players, as there is an evident imbalance between the US and the rest of the world, notably Europe. Section 5 of this chapter will focus mainly on this topic.

It is possible to conclude that the convergence process is putting together “traditional” players, coming from the “old media” environment, and the new players, coming from the Internet sector. Although they come from different markets, with different business models, they are all competing for the same need: namely, online advertising. As convergence progresses, the same content will be made available on different platforms, and the competition will be carried out mainly through content quality. However, to date, this abundance of platforms has not led to an increase in either content production or quality: “traditional” media players tend to maximise their profits by exploiting the same content on different platforms, while, new media players tend to be simple aggregators, not investing in content production. The final result of this process in terms of diversity of sources and quality of information and content should be carefully assessed, in order to gauge the risk that market resources will become even more concentrated only on very few products or items, to the exclusion of other, less profitable, ones.

## **5. Plurality and market presence for indigenously-produced contents**

Economic theory has been invoked to lend support to the idea that measures should be taken to promote the production and diffusion of indigenous content, i.e., of content produced in a given local territory – a region, country or set of countries (e.g. the European Union). Indigenous content has, indeed, been looked at via various economic concepts: as a form of public good, whose provision requires some form of incentive; as a merit good, whose provision should be ensured for ‘paternalistic’ reasons; as goods displaying both demand-side and supply-side externalities; finally, as goods produced by an ‘infant industry’, or goods that would not be accessed equally by all parts of the population in the absence of public involvement.

The defence of pluralism through measures meant to support the production and distribution of indigenous content, to give a voice to minorities, and to represent the identities of small communities therefore also finds a rationale from an economic standpoint, although the measures adopted are sometimes seen as distorting trade.

The technological revolution brought about by the changes described in the previous two sections raises new questions as regards to the choice to promote indigenous content. Three of them stand out as being most relevant. First, is technological change reinforcing the longstanding dominance of content produced outside the EU, and particularly in the US? Second, does the protection of indigenously produced content still make sense in this globalized environment? Third, are traditional tools adopted to support indigenous content still effective?

Answering the first question seems to be much easier than answering the two latter questions. The rich literature addressing the issue of the supremacy of the American audiovisual industry over the European one, in terms of both economic and cultural factors, dates back to the pre-Internet era. Early analyses, mainly influenced by ideological patterns, were led in the 1970s (Nordenstreng & Varis 1974, Boyd Barrett 1977).

The US has a unique combination of a large internal market, a single linguistic system and general economic wealth. No other country enjoys such a combination. Europe, despite similar economic well-being, still has markets that are too parcelled and separated, often based on a different language. China has, on the contrary, an even larger internal market than the US, although, to date, its economic conditions, its lack of an open market in the media sector, as well as the presence of tight media censorship, have impeded it from taking full advantage of it.

The opportunity to sustain higher initial costs and to exploit economies of scale better, due to a larger audience, allow American media firms to gain higher profits than firms in any other country. This has, in turn, stimulated higher investment in new technologies, thus contributing to an increase in the gap between American and European industries. The general economic wealth of the American media industry gained a further advantage when, between the late 1970s and the early 1980s, broadcasting monopolies were broken up in Western Europe. The rise of private TV operators, seeking low cost and successful commercial products in order to overcome their initial unprofitability, created a huge new demand for entertainment goods (De Bens et al. 1992, Silj 1988). The expansionist strategy of the Hollywood industries welcomed this new market space, which provided them with the opportunity to sell their products to new markets, with very low marginal costs. All this worked to the advantage of the US, and helps to explain why the balance of trade between the United States and Europe has mainly gone in one direction.

The most recent figures provided by the European Audiovisual Observatory confirm this historical trend (OEA Yearbook 2011). According to the OEA, the 20 EU media companies listed in the European top 50 have a total of \$88 billion in revenues, while the 21 US companies account for \$213 billion. The American audiovisual industry is three times larger than the European one, although Europe has a higher GDP than the US.<sup>9</sup> The gap between American and European audiovisual industries is even growing. In the 5 years from 2006 to 2011, the European audiovisual economy grew just by 4.6%, almost four times less than that of America, which grew by 18.1%.

The discussion in sections 3 and 4 of this chapter suggests that, although the advent of the globalised online media is changing standard paradigms in many respects, it has not helped to re-balance the situation between the US and Europe in terms of trade flows for audiovisual products and ideas. Rather, it seems that it intensifies American predominance and further weakens the European industry.

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<sup>9</sup> According to IMF statistics, EU GDP was \$17,558 billion in 2011, while US GDP was 15,094 billion in 2010.

The previous section has, indeed, provided evidence that the new operators emerging from the Internet economy are almost exclusively US-based, while Europe struggles to establish new players that are able to compete with them. Competition in every single segment of the online media is becoming increasingly difficult, and this makes it even harder for European players to emerge as players on a global scale. Local players in the search-engine market, or in the social networks domain, can exist only in particular contexts, either where there is a big internal market, or where political power can exert tight control (or where both situations occurs, e.g., in China). In all other situations, they cannot easily afford to compete with worldwide players.

Moreover, in Europe, technological change has led traditional media outlets to move to the Internet but has not stimulated the emergence of local native Internet players. The challenge in European countries can thus be more or less described as one between locally-based, well-established media firms (broadcasters, newspaper publishers, etc.) that both produce and own content, and international globalised organisations, mainly based in the US, that operate as content aggregators.

The answer to the first question – whether technological change is reinforcing the longstanding dominance of contents produced outside of the EU – is a clear yes.

This leads to the second question. The emergence of new media, in spite of the multiplication of sources of information, does not appear to undermine the economic rationale for the protection of indigenously-produced content. The jury is still out on the issue, which is considered at length in the two previous sections, is technological change positively or negatively affecting concentration of media markets and, therefore, pluralism? However, it is clear that there is no endogenous force providing new sources of incentives for the production of European content. All the reasons traditionally invoked to back policies in support of indigenous productions therefore appear to still be valid.

The third question, i.e., are whether the traditional tools adopted to support indigenous content are still effective is definitely the most complex to address. In this regard, changes are more profound. Europe has historically protected its media industry through a range of public policy tools. The presence in each country of a public service broadcaster and of public subsidies for the audiovisual and media industries act as support mechanisms that preserve national content production (Doyle 2012). More recently, starting from the end of the 1980s, the introduction of quotas, both for programming and investment in European-originated audiovisual works, has also been used to safeguard the local media industries.

The application of these public policy measures has traditionally been made easier by the fact that media firms were mostly Europe-based. For instance, in the traditional audiovisual industry, broadcasters are vertically integrated and fully control distribution channels that, in turn, are subject to various forms of regulation by public authorities (e.g., permissions and licences).

The diffusion of online media may make standard tools for the promotion of indigenous content ineffective. In the online media world, traditional media firms are no longer the only gatekeepers, since the same information can be accessed and provided by many operators. As noted in the second section of this chapter (Baker 2007; Noam 2009), the diffusion of online media lowers distribution costs which, in turn, allows new players, notably content aggregators, to access the market to provide users with content collected from others. This may create a sort of ‘regulatory asymmetry’ between traditional media firms and new players, who may be subject to different regulatory requirements in terms of measures to protect indigenous content, but also to privacy, advertising and fiscal rules.

Another aspect of the issue is linked to the fact that the abundance of content generated outside the EU and made available to EU citizens through digital media platforms, may prevent users from consuming indigenous content whose production has been supported through public policies (Burri Nenova 2009). If the ultimate objective of this type of public policy were to promote the diffusion of local content, it could be concluded that the diffusion of online media may make the final effect of



these policies relatively negligible. This could be the case for some of the different measures foreseen by Article 13 of the consolidated version of the AVMS Directive (2010/13EU) for non-linear services. The promotion of production and access to European works prescribed by this article has been implemented differently in different European Member States. Thirteen Member States opted for a “share of prominence”, while three others have also included the possibility of a financial contribution (Attentional et al. 2011). However, whatever implementation mechanism has been adopted, it risks not working as well as has been the case with linear services.

The lack of a single market in the digital economy is also seen as an obstacle to the development of the conditions for a competitive European digital industry. In a fragmented European market, defensive policies could safeguard single market operators who are structurally unfit to compete in a worldwide market. The unintended effect might be to weaken the European media industry as a whole, with potentially negative long term consequences for media diversity and pluralism. As the EU Media Futures Forum has pointed out in its Final Report, “a lack of co-ordination and decisiveness in countering the fragmentation of the markets and conservatism of the industry would not produce the expected benefits for the European players” and “the only players benefitting from such changes would be the big media and technology companies established outside the EU” (EU Future Media Forum, Final Report 2012, p. 16).

In conclusion, the economic rationale for supporting indigenous and local content and their providers also remains valid in the online world. However, how this should be achieved should be carefully assessed in order to avoid making European media outlets too vulnerable in a globalised economy.

## **6. Conclusion and Recommendations**

This chapter has addressed the issues of media pluralism and freedom from an economic perspective, focusing mostly on the issue of the natural tendency towards media market concentration. The issue has been considered both from the traditional supply-side angle and from the more recently explored demand-side perspective.

The review of the relevant literature suggests that straightforward conclusions are difficult to draw, but that important steps have been made to isolate the various forces at play. Media markets tend to be concentrated and oligopolistic, although concentration varies according to the size of the market and the type of media industry. The tendency is even higher within online media organisations that seem largely to operate according to a “winner-take-all” paradigm. Market thresholds and limits to ownership concentration may thus still serve to prevent dominant positions. However, a certain level of concentration may have some positive effects by creating conditions for higher investment in new technologies and could be tolerated if the effect on pluralism and diversity is carefully assessed and contained.

Several elements suggest that there is not a straightforward relationship between the number of contestants and the level of concentration in media markets. An increase in the number of media suppliers does not automatically imply an increase in the number of voices, sources of information and content, which is due also to a “re-cycle” phenomenon, that is, the use of the same content across different platforms. This is related also to the rise of a new type of players, namely “aggregators”, who increasingly attract advertising investment, but are essentially not involved in content production.

The number of operators in the market should not be taken as a condition that is also sufficient for media pluralism for demand-side reasons, as media pluralism should not be measured only by the number of services available, but also by the level of consumption. The increased abundance on the supply-side does not necessarily correspond with a greater variety in consumption on the demand side.

Finally, the chapter has also considered the impact of technological change on indigenous content production in Europe. The analysis has shown that recent technological changes have not undermined the traditional economic reasons supporting the choice to promote indigenous content. Indeed, no local native Internet player is emerging in Europe, while the non-European international globalised, mainly US based online media companies are successfully growing by exploiting relevant economies of scale and scope. The present lack of a single market in the digital economy is also clearly an obstacle to the development of conditions leading to a competitive European digital industry. This poses new problems for the definition of the appropriate tools that are needed to promote indigenous content.

Traditional protectionist policies in digital media could have negative effects both from a commercial and a cultural diversity point of view. European media firms would benefit more from a wider and more comprehensive approach. New interventions may be required to counter increasing concentration among gatekeepers and to remove consequent bottlenecks. In addition, new policies may be launched to stimulate local creative industries, providing incentives for the production of original content and also reconsidering the role of public service media, albeit in the existing framework of state aid rules (see in particular, Communication 2009/C 257/01), but with a view to the new global competition context.

## Chapter 3: Legal Analysis of the EU Instruments to Foster Media Pluralism and Media Freedom

Elda Brogi and Paula Gori

### 1. Introduction

During the Pan-European Forum on Media Pluralism and New Media, held in Brussels in June 2012, Vice-President Neelie Kroes affirmed that “currently the EU does not have the legal competence to act in this area [media pluralism] as part of its normal business. In practice, [...] [the role of the Commission] involves naming and shaming countries ad hoc, as issues arise.” This impossibility clashes with the activist position of the European Parliament, which has always been in favour of European common action in this crucial field.

The latter voted several resolutions in the 1990s requesting direct EU intervention, and the European Commission, during the course of the Green Paper on Services of General Interest (2003), also asked whether EU action on media pluralism should be put on the table. The different regulations in the Member States led to a negative answer, and, in 2005, the outcome of the Liverpool Audiovisual Conference was again a non-intervention policy on the part of the EU.

The right to information and, thus, the media play a crucial role in the decision making process of the citizens, be it for political, social or economic reasons. In its resolution of April 2004, the European Parliament stated that “a free and pluralist media is an essential requirement for the full respect of the right of freedom of expression and information [...] and that a free and pluralist media reinforces the principle of democracy on which the Union is founded (Article 6 of the EU Treaty) and is essential in the European Union, where citizens have the right to stand and vote in municipal and European elections in a Member State of which they are not a national.” The aim of this report is to assess whether, and, if so, upon which basis, the EU does have legal competence to legislate in the field of media pluralism and media freedom. This 3<sup>rd</sup> Chapter will introduce an overview of the state of the art in the media pluralism and freedom field from a legal point of view, while the following chapter will try to highlight some possible space for intervention.

The European Community approached the issue of media pluralism and freedom starting from the broadcasting sector. The overview will start from the famous *Sacchi* Case and the developments that led to the Television Without Frontiers (TWF) Directive (see section 2.1). It will then go through the deep discussion on media pluralism and freedom held in the 1990s (see section 2.2) and analyse the use of competition law to guarantee such important rights (see section 2.3). The rapid technological developments and thus the important changes in the media sphere, are at the basis of a revision of the TWF Directive, which in 2007 became the Audiovisual Media Services Directive (see section 2.4). Because of their public service remit, public service broadcasters play a crucial role in guaranteeing media pluralism and media freedom (see section 2.5). Article 11 of the Charter of Fundamental Rights of the European Union, Article 10 of the European Convention of Human Rights and Fundamental Freedoms, the activity of the European Court of Justice, of the Council of Europe and of the European Court of Human Rights represent a solid legal reference for guaranteeing and fostering media pluralism and media freedom in Europe (see sections 2.6). Especially in the era of convergence, one cannot disregard the electronic communications sector and thus the networks through which the content is delivered, the regulation of which could represent a valid example for the media content sector (2.7). However, the rise of new media introduced new platforms in the media landscape which are not evident to position in the media legislation (2.8). Finally, although there have been several actions in the last years, the media pluralism and freedom issue still represents an open and hot debate in Europe (see section 2.9).

## 2. The state of the art: the European media policy from the Sacchi case to the present day

The aim of the following sections is to introduce a state of the art analysis on the legal competences of the EU in the media field, starting from the very beginning of the debate.

### 2.1. From the Sacchi Case to the 1984 “Green Paper on the Establishment of a Common Market in Broadcasting, especially by Satellite and Cable” and the Directive 89/552 “Television without Frontiers”

The first media-relevant jurisprudence of the ECJ dates back to 1974 and is the so-called *Sacchi* case.<sup>1</sup> Giuseppe Sacchi was a cable operator claiming that the *RAI* (the Italian public service broadcaster) should abandon its monopoly of advertising revenue because it was (*inter alia*) in breach of the principle of the free movement of goods in the EC. The ECJ was asked to establish whether the principle of the free movement of goods could be applied to television signals. The latter stated that the monopoly of the *RAI* was not limiting the free movements of goods within the EC, that the case only related to the Italian market, and that the monopoly was justified under national cultural policy. However, the ECJ defined broadcasting signals as an economic activity (a “service”, according to Treaty definitions), falling under the scope of the Treaty of Rome: “In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. [...] It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.” The Court also specified that “[o]n the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods.”<sup>2</sup>

The principle of the transmission of television signals as services was confirmed six years later when the ECJ was called to pronounce on a case of cross-border broadcasting in the *Debauve* case. The jurisprudence of the ECJ (repeatedly confirmed during the 1980s) and the rapid technological development are at the base of the 1984 Green Paper on the Establishment of a Common Market in Broadcasting, especially by Satellite and Cable which led up to the Television without Frontiers Directive (TWFD) of 1989. The latter, revised in 1997 (and in 2007 with the adoption of the Audiovisual Media Service Directive (AVMSD)), aimed at creating a common market in broadcasting and referred to traditional linear broadcasting services, excluding information society services or other messages on individual demand which were covered by the less restrictive regulatory approach of the Electronic Commerce Directive.

The main principle introduced in the TWF Directive is the country of origin principle, namely, that broadcasters can only be regulated in the country of transmission and not in the country or countries of reception. Member States could not prohibit the reception or re-transmission of broadcasts in their territories by providers that were under the jurisdiction of another Member State (Keller 2011).<sup>3</sup> However, the criteria to determine the jurisdiction were lacking, and the ECJ had to deal with it in several cases in which it stated that broadcasters come under the jurisdiction of the Member State in which they are established (the principle affirmed in Case *Commission v United Kingdom*,<sup>4</sup> 1996, and subsequently confirmed). In the event that a broadcaster is established in more than one Member State,

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<sup>1</sup> Case 155-73, *Giuseppe Sacchi*, 30 April 1974.

<sup>2</sup> Paragraph 7.

<sup>3</sup> For an analysis of the deregulation cases as a possible consequence, see Harcourt, 2004.

<sup>4</sup> C-222/94, *Commission v United Kingdom*, 1996.

the ECJ affirmed that it falls under the jurisdiction of the Member State in which it has its centre of activities (i.e. where scheduling decisions are taken).<sup>5</sup>

Aiming at achieving the free movement of television services within the Community, the TWF Directive introduced a minimum standard of harmonisation by imposing some obligations to broadcasters, such as the promotion of the production and distribution of European works, the transmission advertising and sponsoring, the protection of minors and public order, and the establishment of a right of reply. However, anti-concentration measures were lacking with the result that the European Parliament continued to call for a regulation on ownership by adopting a series of resolutions and motions in the early 1990s.<sup>6</sup>

In its Communication on the Future of European Regulatory Audiovisual Policy of 1999, the Commission affirmed that “regulatory policy in the sector is aimed at safeguarding certain public interests, such as cultural and linguistic diversity, the protection of minors and consumer protection. These are not called into question by technological development. However, following a wide-ranging consultation in recent years, new regulatory approaches and techniques would appear necessary for the future”.<sup>7</sup> Thus, even though the base remains market integration, the Commission stresses the role played by public interest and diversity when it comes to the regulation of media services.

This opening to a cultural policy gave rise to a debate on the competences of the EU, which was positively solved when cultural objectives were included in the Treaty of Maastricht (Keller 2011, p.121). In particular, Article 128 (now Art. 167 TFEU) states that “The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore [...] The Community shall take cultural aspects into account in its action under other provisions of this Treaty.”

However, in order to contribute to the achievement of such objectives, the European Parliament and the Council, after consulting the Committee of Regions, only have incentive powers, and cannot take actions for the harmonisation of the laws and regulations of the Member States (Article 167(4)) (Further developments in Chapter 4.3).

Despite its efforts to keep pace with the digital evolution, the TWF Directive became very soon obsolete because the media sector was undergoing rapid and important technological developments. As we will see below, the Commission, realising that convergence was becoming a crucial issue and “anxious that Europe should not be left behind the United States” (Keller 2011, p. 122), started working on a re-styling of the EU communications legislation.<sup>8</sup> This led to two revisions of the TWF Directive (1997 and 2007, when it became the Audiovisual Media Services Directive, see Section. 2.4.), to the Electronic Commerce Directive of 2000 and to the 2002 EU Regulatory Electronic Communications Framework, the so-called Telecommunications Package (see Section 2.7).

## ***2.2. The Debate on Media Pluralism in the 1990s. The Monti Draft Directive***

The legislative instruments provided by the Treaties, the secondary legislation and the case law, did not assess any specific European competence on media pluralism. The European Parliament asked the

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<sup>5</sup> Case C-56/96, *VT4 Ltd v Vlaamse Gemeenschap*, 5 July 1997.

<sup>6</sup> Resolution on Media Concentration and Diversity of Opinions (1992) Resolution on the Commission Green Paper “Pluralism and Media Concentration in the Internal Market” (1993); Resolution on concentration of the media and pluralism (1994); Resolution on Pluralism and Media Concentration (1995).

<sup>7</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age, COM(1999) 657, 14 December 1999.

<sup>8</sup> See the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, COM(97)623, 3 December 1997.

European Commission on many occasions to act in order “to put forward proposals for establishing a special legislative framework on media mergers and takeovers” (Resolution of 15 February 1990 on media takeovers and mergers) and “to submit, after consultation with the parties concerned, a proposal for effective measures to combat or restrict concentration in the media, if necessary in the form of an anti-concentration directive” (Resolution on media concentration and diversity of opinions, 16 September 1992)<sup>9</sup>. In 1992, DG III (Industry) of the European Commission drafted a Green Paper on “Pluralism and Media Concentration in the Internal Market” which introduced three different possible options for the EC: no specific action at Community level, action related to transparency, and action to harmonise national laws.

The paper reflected the spirit of the DG it came from, by mainly focusing on the need for the harmonisation of the national-ownership regulations and by looking at a liberalisation of the market in order to compete on the global scene (Harcourt 1998). DG III was particularly concerned that a regulation disparity could have negative effects on the internal market and feared extreme national regulations.

This internal-market and industrial-policy approach on the part of the Commission was in sharp contrast with the position of the Parliament, which looked at the issue upon the basis of the pluralism argument and did not give its support to the EC. Moreover, there was no agreement internally at the Commission on how to legislate on media ownership. According to DG X (Information, Communications, Culture, Audiovisual), a harmonisation of national ownership regulation aiming at promoting a common internal market (the legal base being the media as a good or a service) was in contrast with the aim of the individual national legislation. In particular, it claimed that, with regard to the latter, the objective of the legislator was the protection of pluralism as a fundamental democratic principle (cultural concerns being the legal basis) and not as an economic one.

In 1993, after the unit responsible for ownership was split into data protection, on the one hand, and information technology, on the other, media ownership was covered by the latter and moved to DG XV (Internal Market) by Commissioner d’Archirafi. In June 1994, the Bangemann Report, based upon internal-market concerns, called for legislation on media ownership.

In October 1994, DG XV released a Communication on Pluralism and Media Concentration in the Internal Market – an Assessment of the Need for Community Action, which introduced three main changes: it focused more on harmonisation than on liberalisation; it angled also towards information society matters; and it adopted the audience share (and not market share) as a criteria for measuring concentration. The European Parliament was not satisfied with the paper and voted in favour of strong regulation on European media ownership, urgently calling for legislation (Resolution on the Commission Green Paper Pluralism and Media Concentration in the Internal Market).<sup>10</sup>

In 1995, the new Commission was established and Commissioner d’Archirafi of DG XV was replaced by Mario Monti. A third consultation was launched.

In the meantime, in stimulating the debate on convergence between media and telecommunication industries, DG XIII (Telecommunications, Information Market and Exploitation of Research) brought the media and the related question of ownership under its umbrella (in considering them part of the information society frame).

The main difference between the approaches of DG XIII (Bangemann) and DG XV (Monti) was that the former did not introduce any distinction between telecommunications and media markets, and

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<sup>9</sup> Further EP resolutions following the debate on media pluralism are the Resolution on the Commission Green Paper “Pluralism and Media Concentration in the Internal Market” (1993), Resolution on concentration of the media and pluralism (1994) and Resolution on Pluralism and Media Concentration (1995).

<sup>10</sup> OJC 44/177, 20 January 1994.

pushed for more liberalisation. In contrast, DG XV not only made this separation, but also distinguished between the different kinds of media.

In 1995, Commissioner Monti started drafting a directive mainly based upon the internal market argument which had been strongly criticised by the European Parliament in the Tongue Report. The draft was submitted in July 1996, but Commissioners Bangemann, Oreja (DG X) and Brittan (DG I) and the College of Commissioners in general, all raised objections. Finally, during a special meeting, Monti managed to come to an agreement with Bangemann and Oreja, and a second draft, supported by DG X and DG XIII, was re-submitted in March 1997. In particular, this draft introduced a policy framework covering all the Internet, telecommunications and television sectors (new services markets included) and introducing the limit of 30% of market share (and not audience share) with regard to ownership. However Brittan, Papoutsis and Santer (the President of the Commission) raised some objections and eventually, even though Monti managed to obtain the necessary majority, he decided to withdraw the draft.

### ***2.3. Pluralism and Competition Law***

The 1990s debate on media pluralism did not lead to the adoption of a new legal instrument (a directive), and the main instrument which the European Commission deploys to date is still competition law.

Competition law, which is a field in which the EC has “practical omnipotence” (Herold 2008), is applicable when the behaviour of a company or an agreement between companies enters into conflict with the Single Market principles.<sup>11</sup> In other words, the intervention of the EU is based upon economic evaluations with regard to the functioning of the internal market. A dominant position in the media market could not only disadvantage consumers but could also constitute a threat to the variety of independent sources (Keller 2011).

EU competition law has been used in a few cases where the main objective was not directly the protection of a competitive market and/or the functioning of the single market (Ariño 2004), and thus the argument was not based upon mere economic evaluations.

It has been argued that competition law could be the instrument used to tackle the lack of concrete competence of the EC with regard to media pluralism and to cover the “European Regulatory Gap” (Ariño 2004). As affirmed by Ariño (2004), the aim of competition law in the communications market is not only to safeguard a competitive market process, but also to ensure a democratic communications system.

In 1990, the EC introduced a specific paragraph on Pluralism and Mergers (2.2.3) in its Communication to the Council and European Parliament on Audiovisual Policy. In particular, it stated that it had to be ensured that the audiovisual sector did not develop at the expense of pluralism, and recognised that “whereas the activities of media operators have increasingly assumed a European dimension, the response to the effects these may have, in certain cases, on pluralism has, for the time being, not gone beyond national limits. National legislation, existing or planned, could be circumvented and would not therefore be sufficient to guarantee pluralism in all cases. Moreover, this situation, characterized by a multiplicity and disparity of national laws, may produce the opposite effect of limiting the activity of operators who could contribute to a growth of pluralism in the Member States. Nor is the application of Community Competition law, in particular Articles 85 and 86 of the Treaty, able to cover all situations in which a threat to pluralism is posed, notably in the case of multimedia ownership.”

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<sup>11</sup> Articles 101, 102, 106 and 107 TFEU.

When it comes to the application of competition law in the media market, the main concerns emerge in relation to the scope of competition law which is linked to the internal market argument and which thus does not necessarily have a cultural/democratic aim.

The positions of the Commission and of the CJEU with regard to the application of competition law as an instrument to assure media pluralism are not straightforward. If, in some cases, they seem to be inclined to accept non-economic considerations (in particular, the Commission), in other cases, they prefer to rely more traditionally on the mere internal market and economic efficiency arguments.<sup>12</sup> With regard to the first position, there are a few cases in which the Commission explicitly refers to non-economic considerations. In the *EBU/Eurovision System* case, for example, in taking into consideration the fact that EBU members were transmitting “minority sports and sports programmes with educational, cultural or humanitarian content, that they cannot show on their national generalist channels”, the Commission accorded a certain importance to a non-economic evaluation. However, the Court of First Instance annulled this decision.<sup>13</sup> In the following *UIP* case, cultural concerns were considered not to be strong enough under competition law to be used as a ground to deny an exemption or its renewal.

In the *Screensport/EBU* case of 1991, the Commission, while recognising that the joint-venture between the *EBU* and *News International* represented a dominant position case in sport broadcasting (infringing Art. 85 EEC), stated (in 1993) that PSBs had a role in guaranteeing public interest and could, consequently, be exempted from EU competition law.

One may also consider the simple common application of competition law upon the basis of economic considerations. The current proliferation of TV channels, and, in general, of media sources, does not *per se* mean that the variety of programmes and news is a direct consequence. Indeed, it may be that we have more channels and platforms still offering the *same* programmes and information. This will be the case especially when the new entrants try to locate themselves at the centre of the market with (or because of) consistent entry barriers which favour a restricted number of companies. In this perspective, by preventing the creation of other barriers and the strengthening of the existing ones, competition law might play an important role in the safeguarding of media pluralism and freedom. Indeed, the less barriers there are, the less incentive there is for companies to position themselves at the centre of the relevant market and thus the more possibility there is to have a plurality of content as well (Iosifides 1997).

Thus, the protection of pluralism is, in the majority of cases, the *consequence* of competition, rather its aim (Ariño 2004), the latter task being the removal of abusive forms of behaviour and preventing concentrations that could distort the market, and not the protection of a cultural and democratic principle.

#### **2.4. The Revision of TWF Directive and the New AVMS Directive**

The Liverpool Conference in 2005 was another chance for a debate on media pluralism while assessing the framework of the new regulation of media convergence. After having defined a general regulatory framework for electronic communications in 2002 (see Section 2.7), the next step was to upgrade the audiovisual regulation according to the principle of technology neutrality, which is one of the core elements of the electronic communications regulation itself. The debate on media pluralism was not so fruitful, as no European competence was acknowledged: as already mentioned the

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<sup>12</sup> For a more in depth discussion of the policy objectives underpinning EU competition law, see Van Rompuy B., Economic efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency considerations under Article 101 TFEU, Kluwer Law International, 2012.

<sup>13</sup> Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, Judgment of the Court of First Instance (First Chamber, extended composition) of 11 July 1996. *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities*.



Commission and the Member States agreed that media pluralism was not seen “as a value to be generated through European Union media policy instruments, but rather as an added value to be addressed by other European (Council of Europe) or national institutions” (Klimkiewicz 2009, p.52; see, also, European Commission, Issues Paper for the Liverpool Audiovisual Conference. Media Pluralism - What should be the European Union’s role?, (sic) July 2005).<sup>14</sup>

In 2007, the European Community approved the second revision of the Television without Frontiers Directive (Directive 2007/67/EC), which, as already mentioned, was re-named the “Audiovisual Media Services Directive”, because of its changed scope of application (AVMS Directive, 2007/65/EC, and subsequently consolidated in version 2010/13/EU). After a long debate on both the need and the rationale of the reform in order to face the rapid and future changes caused by technological developments, the directive embraces a technologically-neutral approach, creating a level playing-field for all the so-called audiovisual media services. The legal basis for the directive is, of course, the same of the TWF Directive (free movement of services): however, the scope of application has been broadened since it covers traditional broadcasting services (those of the TWF Directive, defined as *linear services*) and new television-like services (such as on-demand services, defined as *non-linear services*). According to the proportionality principle, the regulation of linear and non-linear audiovisual services is graduated: the rules for non-linear services are reasonably less intrusive as they have less impact on the public.

As it defines a common set of rules for all the audiovisual services, the AVMS directive also extends the European quota rule and the right to short reporting, promoting media freedom and media pluralism, “despite the fact that the promotion of media pluralism as such is neither mentioned in the operative part of the AVMSD, nor in the TWFD; yet, media pluralism is an influential and underlying object that the above-mentioned measures aim at achieving” (Barzanti 2012, p.18) as it is mentioned in the preamble of the directive itself as a principle underlying audiovisual media service regulation both at European and Member State levels (Recitals 5, 8, 12, 34, 48, 94).

Acknowledging that audiovisual media services are as much cultural services as they are economic services, the directive aims at creating a level playing-field and a true European market for audiovisual media services, stimulating economic growth and investment, and guaranteeing conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services (AVMS Directive 2010, Recitals 2, 5, 10 and 14). The Directive therefore enshrines basic principles of the internal market, such as free competition and equal treatment, to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry (AVMS Directive Recital 10). At the same time, it lays down harmonised rules to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, the protection of minors, and consumer protection, and to enhance public awareness and media literacy (which are considered to be core principles of European regulatory audiovisual policy; AVMS Directive, Recital 12). The latter rules are considered to be justified in the light of the growing importance of audiovisual media services for society, democracy - in particular, by ensuring freedom of information, diversity of opinion and media pluralism - education and culture (AVMS Directive, Recital 5).

## **2.5. The Public Service Broadcasting – Public Media**

Another important element that concurs with the definition of the European audiovisual framework and which is related to pluralism is the “regulation” of public service broadcasting and, nowadays, public service media.

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<sup>14</sup> This Issues Paper, however, clearly underlined the important role that the EC could play in monitoring media pluralism (instead of regulating it).

Public service broadcasting has been a particular feature of Member States broadcasting systems: at least in the Western States of the European Union, the PSB model has functioned as a safeguard to pluralism both during the monopoly period, and as a consequence of the liberalisation of the broadcasting market. In fact, as already mentioned in the communication of the Commission on Services of General Interest in Europe (COM(2000) 580 final, p. 35). “The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the broadcasting sector has, since its inception, been subject to specific regulation in the general interest. This regulation has been based on common values such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection.” At the beginning of the television industry, this meant a reserved regulation for the broadcasting activities and public broadcasting monopolies, justified by the so-called spectrum scarcity and the high barriers to entry; then, after the liberalisation of the market in the 1990s and the technological developments, the market substantially reached an acceptable level of “external pluralism” in many countries. Member States considered that public service broadcasting ought to be maintained, “as a way to ensure the coverage of a number of areas and the satisfaction of needs that private operators would not necessarily fulfil to the optimal extent” COM (2001/C 320/04).<sup>15</sup>

In the last years, public service broadcasting regulation in various EU countries has faced important developments and changes. Some essential and common features of the regulation models can be generally assessed among some different national experiences. First of all, the national regulatory models define the role of a body (a public body or a public company maybe partially or wholly state-owned), which has a mission to fulfil (a set of special obligations, which differs from the common obligations of the other broadcasters) and is wholly or partially financed by a public system of support. Nonetheless “[t]here is an on-going debate in several European Union countries about the level of government support that public service broadcasters should be allowed to receive, as well as about the funding mechanisms (for instance direct grants versus obligatory subscription fees) to be used.”<sup>16</sup>

Even if it is a national regulatory choice, the role of public service broadcasting has been stressed on many occasions in Europe.<sup>17</sup> As a service of economic general interest, it is covered by Article 106 (2) of the TFEU as interpreted according to the 1997 Amsterdam Protocol on Public Service Broadcasting. The Protocol, having defined the system of public broadcasting in the Member States as “directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism,<sup>18</sup> states that the provisions of the Treaty establishing the European

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<sup>15</sup> As mentioned by the 1988 Oreja Report, “The digital age European audiovisual policy. Report from the high-level group on audiovisual policy”, 1998, public service broadcasting “has an important role to play in promoting cultural diversity in each country, in providing educational programming, in objectively informing public opinion, in guaranteeing pluralism and in supplying, democratically and free-of-charge, quality entertainment”.

<sup>16</sup> One country (Portugal) has even started proceedings to privatise public service broadcasting, by “contracting out” the services it is meant to provide. This is interpreted by some as an innovative way out of situations where government budgets have become severely restricted, but by others as a contradiction in terms, for how can “public” remain public, if you decide to privatise it?” Report of the High level group on Media Freedom and Media Pluralism “a free and pluralistic media to sustain European democracy”, January 2013, p. 38.

<sup>17</sup> See, i.e., Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, Council of Europe (1996) Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting and its Explanatory Memorandum, 11 September 1996, Council of Europe Parliamentary Assembly (2004) Recommendation 1641 (2004) on public service broadcasting, 27 January 2004, Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, adopted 27 September 2006, Council of Europe, Recommendation of the Committee of Ministers to Member States on public service media governance (Adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers' Deputies). See, also, at international level, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions Paris, 20 October 2005.

<sup>18</sup> It is in the context of this Protocol that for the first time “media pluralism” is mentioned in EU primary legislation.

Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and 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.” So, while recognising the pro-pluralistic role of the national systems of public-service broadcasting and while stressing the national competence in regulating its organisation and funding, the Protocol sets some limits to the national-funding system, according to European rules.

The European Commission has played a very important role in “interpreting the interpretative provisions” of the Protocol. With two principal Communications (2001 and 2009), the Commission has defined a set of guidelines and rules which it follows, while deciding state-aid cases in the public-service broadcasting domain. As the guidelines of the two principal Communications (and the “case law” developed over more than 10 years<sup>19</sup>) are the way in which the Commission transparently expresses its reasoning while assessing the previous criteria of judgement, it is a matter of fact that the Commission has provided useful guidance for the Member States while planning their public-service broadcasting systems.

According to the Communications and the decisions on the single cases, the Member States have to set a precise definition of the public service remit, must clearly entrust the body carrying out the PSB mission with the provision of that service, and the compensation should not exceed the net costs of the public service.

PSBs are highly important with regard to media pluralism. As a matter of fact, a PSB expansion and abuse of public funding could represent an obstacle for commercial operators to enter the market and thus threaten media pluralism. On the opposite, public service broadcasting and public service media, in a dual system, represent a chance to maintain or create quality spaces to guarantee “internal pluralism” and access to all those positions that are excluded from the main media outlets<sup>20</sup>. In its 2008 Resolution, the European Parliament<sup>21</sup> “recommends that regulations governing state aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment, while ensuring that public service media carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expedience.”

As many public-service operators have developed new media services and platforms, the Commission stated that public service broadcasters should be able to take advantage of the opportunities offered by digitisation and Internet-based services to benefit society by offering services on all platforms, although it must not distort competition or disproportionately affect the market. The Member States must consider whether significant new audiovisual services provided by public service broadcasters fulfil the conditions of the Amsterdam Protocol in serving the democratic, social and cultural needs of society, without having disproportionate effects on trading conditions and competition (Communication 2009, par. 6.7; see, also, Donders & Pauwels 2008).

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<sup>19</sup> For a review of the decisions adopted by the Commission, see Donders-Pauwels 2008, p.300-301.

<sup>20</sup> In this last meaning, see the MEDIADEM Policy recommendations for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries and the potential links for PSM to user generated contents promotion: “In particular, the EU institutions should adopt a clear regulatory strategy regarding the need to safeguard user-generated content from forms of proprietisation. Consideration could be given to the following measures: promoting user-generated content in the key elements of public service across media; granting civil society access to public service media in terms of time, space, and visibility; providing funding schemes to support user-generated content, based on a clear and transparent awarding procedure.” <http://www.mediadem.eliamep.gr/>

<sup>21</sup> European Parliament Resolution on Concentration and Pluralism in the Media in the European Union, 2007/2253(INI), 25 September 2008.

Some authors have already observed that the Amsterdam Protocol is not a mere *a priori* exemption for the Member States from applying European Treaty laws (Mastroianni 1998) and, from the perspective of European public law, it will be interesting to see how a “Europeanisation” of governance regimes will develop for public broadcasters (Feintuck & Varney 2010). More recently, it has been underlined that the imposition of the obligations upon the Member States to introduce the “Amsterdam test” before launching new PSB media services (and, as requested by the Commission, to establish monitoring bodies external to, and independent of, the public broadcasters, in order to ensure delivery of the public-service mission, established mechanisms to avoid cross-subsidisation and over-compensation) are indicative of the impact that the Commission state-aid controls may have on the formulation of national public broadcasting policies.<sup>22</sup> It remains to be seen whether the Commission is willing to initiate infringement proceedings in case the commitments the Member States made are not respected (Bania 2012).

## 2.6. Fundamental Rights in the EU

When it comes to fundamental rights in the EU, there are three main instruments which have to be taken into consideration: the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; and the common constitutional traditions of the Member States.

Although the European Community was founded with the principal aim of creating a common internal market, fundamental rights were considered as important principles to be respected across the Community. In particular, they were considered as a fundamental part of the EC legal framework (“the *acquis communautaire*”) by the ECJ from the start,<sup>23</sup> and Article F.2 of the Treaty on European Union of February 1992 (“The Treaty of Maastricht”) explicitly stated that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Article 2 of the Treaty of the European Union introduces the fundamental values upon which the EU is based. In particular it affirms that “the Union is founded on the values of respect of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common on Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

According to Article 7 TUE the Council “may determine that there is a breach by a Member State of the values referred to in Article 2 and, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.” Such Article introduces a general competence of the EU, which is however related to a specific case that is one Member State violating the principles of Article 2 and a specific focused reaction to that violation. Although the threat of such an action could be considered as having general deterrent effect on Member States, Article 7 TUE is to be accounted just as a specific *ultima ratio* instrument and not as legal basis to introduce a general proposal.

During the Cologne Council of 1999, the Member States agreed on the necessity of applying fundamental rights at a common level and triggered the drafting of the first EU text introducing civil,

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<sup>22</sup> See, also, Donders-Pauwels 2010.

<sup>23</sup> “Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.” Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970.

political, economic and social rights of the European citizens and people resident in the EU. The Charter was signed in the year 2000 on the occasion of the Nice Council. However, since the Cologne Council, the issue of its legal status, namely, whether to make it legally-binding by including it in the Treaty of the European Union, was raised. This legal uncertainty was solved on the 1 December 2009 with the entering into force of the Treaty of Lisbon, which introduced the Charter into European primary law<sup>24</sup> and consequently made it enforceable by the EU and by the national courts. With regard to its application, the Charter is “addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law [...] The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties (Art.51).”

With specific regard to freedom and pluralism of the media and to freedom of expression, these principles are affirmed in Article 11 of the Charter, which states that:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected.”

Article 11 has been drafted on the basis of Article 10 of the European Convention on Human Rights, and this clearly emerges also from Article 52(3) of the Charter, which states that “[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

Article 11 explicitly refers to the need for media pluralism and freedom to be respected, however, because of the subsidiarity principle, the sphere of activity of the EU is limited and the CJEU cannot use this Article as a legal basis for its decisions. It can be argued that the 2nd paragraph has an approach which is too shy because of its short and weak syntax (“Member States shall ensure media pluralism and freedom” or, “media pluralism and freedom shall always be granted” would have had a stronger impact). Despite the possible interpretation of a non-interference approach on the part of the legislator, this provision is of great importance because it introduces the media pluralism and freedom principles into a source of primary law (although it is not a legal basis for EU competence).

As it has been illustrated in the Commentary of the Charter by the EU Network of Independent Experts of Fundamental Rights, “[i]n Paragraph 2 the freedom and pluralism of the media was made independent from other parts of freedom of expression. Media as an overall category includes here both printed and electronic press (radio and television), as well as Internet, as a new medium. This emancipation of the freedom of the media is reflected in the fact that in the Praesidium’s explanation reference was not made to the jurisprudence of the European Court of Human Rights, but to the ECJ’s practice.”

Article 11 has also to be combined with Article 53, according to which “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by

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<sup>24</sup> Treaty on the European Union, Article 6.1. “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.

international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.” Thus there is a strong cooperation between the EU institutions and the Council of Europe, which is at the basis of the media pluralism and freedom issue in Europe. As it has been noted, the EU “has joined the Council of Europe in setting and interpreting human rights standards for an expanding European regional sphere “(Keller 2011, p. 131).

The CJEU repeatedly refers to the constitutional traditions of the different Member States, to the ECHR and to the case-law of the ECtHR and a general strong cooperation between the two Courts emerges particularly in the media pluralism and freedom field. As is has been affirmed in the *ERT* case, “fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. [...] The European Convention on Human Rights has special significance in that respect. [...] It follows that, as the Court held in its judgment in Case C-5/88 Wachauf v Federal Republic of Germany [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed”<sup>25</sup>.

In the *Gouda* case,<sup>26</sup> the Administrative Appeal Section of the Netherlands State Council referred three questions to the ECJ on the interpretation of the provisions of the EEC Treaty with regard to the freedom to provide services, to assess the compatibility with Community law of a national legislation laying down conditions for the transmission of radio and television programmes by cable, broadcast from other Member States, which contain advertising specifically intended for the Dutch public.<sup>27</sup> On this occasion, the ECJ stated that “[t]he Netherlands Government maintains that those restrictions are justified by imperatives relating to the cultural policy which it has implemented in the audio-visual sector. [...] A cultural policy understood in that sense may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that Dutch policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order (Case 4/73 Nold v Commission [1974] ECR 491, paragraph 13).<sup>28</sup> Conditions affecting the structure of foreign broadcasting bodies cannot ... be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.”<sup>29</sup> The ECJ confirmed this position in a few other cases also related to the Dutch legislation.

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<sup>25</sup> Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 18 June 1991.

<sup>26</sup> Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, 25 July 1991.

<sup>27</sup> The 3 questions being: 1. Must Article 59 of the Treaty be interpreted as meaning that there can be said to be an unlawful restriction on freedom to provide services, such as the distribution, by means of cable networks, by operators of cable broadcasting organizations of programmes (with or without advertisements) supplied to the managers from abroad via cable, over the air or by satellite, where such distribution of programmes is subjected under national rules to restrictions such as those contained in the second sentence of Article 66(1)(b) of the Mediawet which apply in the same manner to similar programmes broadcast within the Member State concerned? 2. If the Treaty provisions on freedom to provide services apply to the national rules referred to above, must such rules not only comply with the prohibition of discrimination but also be justified on grounds relating to the public interest and proportional to the objective to be achieved? 3. If Question 2 is answered in the affirmative, can objectives relating to cultural policy, designed to maintain a pluralistic and non-commercial broadcasting system and/or to safeguard diversity of opinion in broadcasting and the press constitute such justification?

<sup>28</sup> Paragraphs 22 and 23.

<sup>29</sup> Paragraph 25.

The Court slightly changed its course in the *Veronika* case,<sup>30</sup> in which it affirmed that “the Mediawet is designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands. It also follows from those two judgments (see respectively paragraphs 41 and 42 and 23 and 24) that those cultural-policy objectives are objectives relating to the public interest which a Member State may legitimately pursue by formulating the statutes of its own broadcasting organizations in an appropriate manner.”<sup>31</sup>

One year later, in the *TV10* case,<sup>32</sup> the ECJ, after recalling its jurisprudence (starting from the *Sacchi* case) stated that “cultural policy objectives are objectives of general interest which a Member State may lawfully pursue by formulating the statutes of its own broadcasting bodies in an appropriate manner. As can be observed, the general shy approach to pluralism emerges again.” Indeed, the Court deliberately chose a “possibility structure” and not a “must structure” of the sentence (“may”). However, in paragraph 25, the ECJ confirmed the role played by pluralism: In *Commission v Netherlands*, cited above, paragraph (30), the Court held that the maintenance of the pluralism which the Netherlands broadcasting policy seeks to safeguard is intended to preserve the diversity of opinions, and hence freedom of expression, which is precisely what the European Convention on Human Rights is designed to protect.

The Court re-affirmed the diversity exception in the *Vereinigste Familiapress* case, but outlined the proportionality test by clarifying that a national provision limiting the free movement of goods because of a diversity aim is possible “provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means.”<sup>33</sup>

Media pluralism and media freedom are concepts which are commonly employed at an international level. Article 19 of the International Covenant on Civil and Political Rights of 1966 enshrines freedom of expression. It does not mention pluralism, but media pluralism and ownership concentration have been considered on various occasions by the Committee on Human Rights, the body that monitors the implementation of the Covenant (such as in the Russian Federation, Guyana, Moldavia, Vietnam and Italy). In July 2011, during the 102<sup>nd</sup> session, the committee adopted the Comment General n. 34 on Article 19 of the Covenant, in which it is emphasised that “[t]he State should not have monopoly control over the media and should promote plurality of the media. Consequently, State parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”

At the European level, the task of defining legal standards for media pluralism and freedom is carried out mainly by the European Convention on Human Rights (ECHR), through the activity of the Council of Europe and through the case law of the European Court for Human Rights (ECtHR) which involves the interpretation of Article 10 of the ECHR. This set of acts which the Committee of Ministers, the Parliamentary Assembly and the Committees of Experts have produced on this topic, plus the important case law of the Court of Human rights and the European Convention for Transfrontier Television<sup>34</sup> form a sort of *corpus* that covers most of the issues relating to media

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<sup>30</sup> Case C-148/91, *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media*, 3 February 1993.

<sup>31</sup> Paragraphs 9 and 10.

<sup>32</sup> Case C-23/93, *TV10 SA v Commissariaat voor de Media*, 5 October 1994.

<sup>33</sup> Case C-368/95, *Vereinigste Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, 26 June 1997. See, also, Case T-266/97, *VTM v Commission*, 8 July 1999.

<sup>34</sup> Other CoE legal instruments: the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML).

freedom and pluralism, and is a point of reference for any national, supranational or international order that deals with this topic.

According to the ECtHR, freedom of expression is inextricably linked to the development of a democratic society and for the development of each individual: subject to limitations described in Article 10(2), freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such as the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society (*Handyside v UK*, 5493/72).

The rulings of the ECtHR are also quite clear with regard to the role of governments in media pluralism. Governments not only have negative obligations to not interfere in the exercise of freedom of expression, but also positive obligations to take action by adopting policies designed to foster a variety of media and a plurality of information sources as much as possible, thereby allowing a plurality of ideas and opinions (*Informationsverein Lentia and others v Austria* 1993<sup>35</sup>). The ECtHR upheld the legitimacy of public authority interference, such as the introduction of structural limits to the media through a system of licensing, and through restrictions on media ownership, providing that they are necessary to protect external pluralism. As it has been affirmed, “a situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (*Manole v Moldova*)”<sup>36</sup> (Mastroianni 2011b).

According to the Committee of Ministers, Member states should consider the adoption of rules which aim to limit the influence which a single person, company or group may have in one or more media sectors as well as to ensure a sufficient number of diverse media outlets.<sup>37</sup> These rules may include the introduction of thresholds based upon objective and realistic criteria, such as audience share, circulation, turnover, share capital and voting rights. The authorities responsible for the application of these rules should be vested with the power required to accomplish their mission and, in particular, with the power to refuse an authorisation or a licence request, to act against concentration operations of all forms and notably to divest themselves of existing media properties in which unacceptable levels of concentration have been reached and/or where media pluralism is threatened. Their competences could therefore include the power to require commitments of a structural nature or, in relation to the conduct of the participants in such operations, the capacity to impose sanctions. Member states may consider the possibility of creating specific media authorities with the power to act against mergers or other concentration operations that threaten media pluralism, or the possibility of investing existing regulatory bodies for the broadcasting sector with such powers. The general competition authorities should pay particular attention to media pluralism when reviewing mergers or other concentration operations in the media sector. The rules governing regulatory authorities for the broadcasting sector, particularly those concerning membership, are key to guaranteeing their independence. The authorities should ensure that there is no interference, in particular from political forces or economic interests. The Council of Europe “order” pays special attention also to public service broadcasting, political broadcasting, financing of media outlets and ownership transparency

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<sup>35</sup> See, recently (June 2012), Case 38433/09, *Centro Europa 7 and Di Stefano v Italy*, in which Italy was condemned for having failed to put in place the appropriate legislative and administrative framework to guarantee effective media pluralism.

<sup>36</sup> Application no. 13936/02, *Manole and others v Moldova*, 17 September 2009.

<sup>37</sup> Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content.



which, especially in Eastern European countries, is perceived as a being essential for a real democratic and pluralistic media environment.

The majority of this *corpus* on media pluralism and media freedom is not legally binding as it is composed of resolutions, declarations and recommendations. However, it is worth underlining that “also in the light of Council of Europe’s Statutory rules concerning the adoption of Recommendations (in particular, Articles 15 e 20), they can be relevant to the interpretation of ECHR rules since they are a direct manifestation of the subsequent practice of Member States.” (Mastroianni 2011b).

The European Convention on Transfrontier Television (1989) is a binding instrument which represents a basis for the following intervention of the European directive on Television Without Frontiers. The aim of the convention is to create an even playing field among member states in order to encourage the free circulation of television programmes, information and ideas. The application of the convention is linked to the fundamental values of the Council of Europe as regards media freedom and pluralism (i.e. art. art. 10a “Media pluralism”)<sup>38</sup>.

### ***2.7. Two main new Factors: Technological Evolution and the Internationalisation of Networks***

In the debate on pluralism in the media, and, in particular, with regard to broadcasting, one cannot fail to take electronic communications networks, the resource through which content is delivered, into consideration.

By the mid-1990s, the Commission, realising that telecommunications and media sectors were converging, acknowledged a shift from vertical regulation (in which platforms were regulated according to the content service that they were providing) to horizontal regulation (distinction between infrastructure and content)(Keller 2011)and, aiming at harmonising regulation at European level, launched a review of the legislation which resulted in the Electronic Communications Regulatory Framework in 2002. The so-called Telecommunications Package consists of a general Framework Directive, which introduces a European framework for Electronic Communications Networks and Services, and four more specific directives, namely, the so-called Authorisation, Access, Universal Service and Privacy, and Electronic Communications Directives.<sup>39</sup>

The aim of this regulatory package, according to the Commission, is to provide a coherent, reliable and flexible approach to the regulation of electronic communication networks and services in fast moving markets. The directives provide a lighter regulatory touch where markets have become more competitive, however ensuring that a minimum of services are available to all users at an affordable price and that the basic rights of consumers continue to be protected.

According to Article 1 of the Framework Directive, its objective is to establish a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.

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<sup>38</sup> The Explanatory Report attached to the Convention, at para. 204, underlines the importance of pluralism for the effective exercise of freedom of information, thus making explicit the connection between the Convention and Article 10 ECHR (Mastroianni, 2011b).

<sup>39</sup> This package is completed by the Radio Spectrum Decision (Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community), and by the amendments introduced by the Better Law-Making Directive (Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009) and the Citizens Right Directive (Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009) as well as by the establishment of BEREC (Body of European Regulators for Electronic Communications).

According to this Article, electronic communications networks are the subject of this directive and consequently broadband, cable and satellite television are also covered.<sup>40</sup>

The Framework Directive also refers to associated facilities, defined as those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so, and include, *inter alia*, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets.<sup>41</sup>

Even though electronic communications networks include radio- and TV-broadcasting networks and electronic-communications services include transmission services in networks used for broadcasting, services providing or exercising editorial control over content transmitted using electronic-communications services and networks are not included. Indeed, according to the Access Directive, “[s]ervices providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services.”<sup>42</sup>

Even though the primary policy objectives underpinning the electronic communications directives are the promotion of competition, the development of the internal market, and protection of the consumer (see Article 8 Framework Directive), the directives regularly refer to cultural considerations, and media pluralism in particular, as general interest objectives which are also relevant in the context of electronic-communications networks and services. Article 8(1) Framework Directive, for instance, confirms that national regulatory authorities may contribute within their competences to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

Certain provisions in the directives aim to tackle bottlenecks at infrastructural or technical levels, which would not only hinder effective competition, but also pose threats for the free flow of information and media pluralism. Article 18 of the Framework Directive, for instance, requires Member States to encourage the inter-operability of digital interactive television services “in order to promote the free flow of information, media pluralism and cultural diversity”, whereas Article 6 of the Access Directive maintains the obligation initially imposed by Directive 95/47/EC for operators of conditional access services to provide access on fair, reasonable and non-discriminatory terms, “in order to make sure that a wide variety of programming and services is available”(Recital 10, also explicitly stating that “Competition rules alone may not be sufficient to ensure cultural diversity and

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<sup>40</sup> “Electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;” (Article 2(a) of the Framework Directive as amended by the Better Law-Making Directive); “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks (Article 2(c) of the Framework Directive – Paragraph repealed by the Better Law-Making Directive).

<sup>41</sup> Article 2(e) as amended in 2009.

<sup>42</sup> Recital 2 of the Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

media pluralism in the area of digital television”).<sup>43</sup> The liberalisation of the electronic communications and the development of new network technologies have deeply impacted on the “national” dimension of the distribution of contents. This means that the more content services are developed on the Internet, the more they potentially fall outside the remit of the application of National or European law. In the near future, probably, media pluralism itself will be assessed according to different indicators and standards that will be shaped by the development of new technologies.

## **2.8. New Technologies Challenges**

Due to rapid technological developments, the media sector is currently facing a significant and revolutionary change. In particular, the internet is significantly modifying the way information and entertainment are created with the main change being that users play an active role both in the way information is created and is requested. The spread of internet access and the consequent possibility for users/citizens to play an active role in the creation of information can be considered both positively and negatively in respect of media pluralism and freedom.

It is evident that the greater access people have to different sources and to personally spread information, the more they can get (or let other get) in contact with different opinions and voices. However, this also implies a major danger of encountering in false information and in getting the tendency to always look for opinion confirmation rather than for diversification (thus with the larger risk to enter in, i.e. create, the so-called “filter-bubble”).

In the previous sections (2.4 and 2.8) we have seen that the common legislative framework makes distinctions between broadcasting services (regulated by the AVMS Directive) and the services for their transmission (regulated by the Telecommunications Package (Valcke & Lefever 2012)). A sensitive issue related to new media is the role played by intermediaries, aggregators and other platforms that do not have any editorial responsibility and fall neither under the scope of the AVMS Directive nor of the Electronic Communications Framework.

With regard to these platforms there is still some legal uncertainty. The AVMS Directive does not define a general set of rules for all the convergent services and excludes all those that are not broadcasting-like services and so do not fall under the broad definition of *industrially run* mass media. In fact, for the application of the directive, “an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude [...] all services the principal purpose of which is not the provision of programmes, i.e., where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in ancillary manner, such as animated graphical elements, short advertisements or information related to a product or a non-audiovisual service” (whereas 22).<sup>44</sup> As it was noted a great number of services

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<sup>43</sup> Following an overview of articles/recitals in the Electronic Communications directives referring to media pluralism: Articles 8(1) and 18(1) and Recitals 5, 6 and 31 Framework Directive (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), O.J. [2002] L 108/33); Article 5 (2) Authorisation Directive (indirectly, via the notion of “general interest objectives”) (Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [2002] O.J. L108/21); Recital 10 Access Directive (Directive 2002/19 of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [2002] O.J. L108/7); Article 31 (1) and 33 Universal Service Directive (again indirectly, via the notion of “general interest objectives”) (Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services [2002] O.J. L108/51).

<sup>44</sup> Clearly, the definition also excludes any form of private correspondence, such as e-mails sent to a limited number of recipients, as it cannot be compared to a mass media communication.

“fall outside of the scope of the AVMS Directive: personal websites or non-commercial blogs are excluded, as the concept is confined to economic activities.” It potentially creates different treatments between similar services, such as, “online editions of newspapers or magazines, radio services [which are] are not targeted” (Valcke et al. 2008, p.116).

The directive stresses the exclusion of some intermediate operators from its scope of application, such as *YouTube* and all other platforms that work as aggregators of audiovisual content without exercising editorial responsibility. These services seem to fall within the scope of application of the Electronic Commerce Directive.<sup>45</sup> According to the legislation in force, content providers are those who have editorial responsibility for their programmes and are subject to the AVMS Directive while network operators are those that provide technical transmission services, including conditional access services, and are regulated by the Electronic Communications Directive of 2002 and its subsequent revisions. Technological and business developments show how this tripartition could be difficult to apply when an intermediary operator is a hybrid between a “common carrier” and an editor. This could be the case with search engines, EPGs, internet portals or other navigational tools which open the gate to content edited by others.<sup>46</sup> The service that they are offering is neither an electronic communications service, nor a service the purpose of which is the delivery of moving images - with or without sound - to the general public by electronic communications networks (Article 1 of the 2007 directive). “Nevertheless, they determine to the growing extent to which information will reach the end-user [...] (we can, for instance, think about the growing concern for the hidden manipulation exercised by certain search engines)” (Valcke et al. 2008, p.106). Thus, the development of these new platforms, applications and technologies opens new perspectives in assessing the threats to media pluralism: from the responsibility of the intermediaries to the regulation of “content blocking” procedures.

## **2.9. Recent EU Discussions and Initiatives on Media Pluralism and Freedom**

The protection of media pluralism and freedom, even in recent years, has also been a highly and constantly debated issue at political level and has also been the recurrent concern of the European Parliament, of interest groups, professional institutions and civil society. The main issues addressed to the European Commission were, and still are, related to the need to combat processes of media concentration and to foster the right of citizens to receive information from diverse and independent sources, to re-affirm the role of PSBs, to stress the need to avoid the unequal representation of minorities in the media and the pressure from advertisers, and also to foster journalistic autonomy against political influence (Klimkiewicz 2009).

Because it does not have the power to initiate legislation and thus cannot act directly, the European Parliament has been - and still is - the most active forum in debating the issue of media pluralism at European institutional level. As Klimkiewicz notes (2009), the European Parliament has gradually

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<sup>45</sup> For the liability of hosting services, see Articles 12, 13 and 14 of the 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>46</sup> A certain awareness emerges from the Access Directive and in particular from its whereas 10 when it is stated that Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television. Directive 95/47/EC provided an initial regulatory framework for the nascent digital television industry which should be maintained, including in particular the obligation to provide conditional access on fair, reasonable and non-discriminatory terms, in order to make sure that a wide variety of programming and services is available. Technological and market developments make it necessary to review these obligations on a regular basis, either by a Member State for its national market or the Commission for the Community, in particular to determine whether there is justification for extending obligations to new gateways, such as electronic programme guides (EPGs) and application program interfaces (APIs), to the extent that is necessary to ensure accessibility for end-users to specified digital broadcasting services. Member States may specify the digital broadcasting services to which access by end-users must be ensured by any legislative, regulatory or administrative means that they deem necessary.

developed a “conception of media pluralism” that has taken on form in the course of subsequent documents and discussions. [...] the causal and direct relation between media concentration and diversity of opinion was perceived as an eventual hindrance to democratic performance. This interpretation of the emerging notion of media pluralism is embedded in the Resolution on Media Takeovers and Mergers (European Parliament 1990), which refers to many worrying examples of concentration which could readily be observed in national and transnational European media landscapes.

The interest of the European Parliament in a common approach to media pluralism and freedom regulation was often stimulated in reaction to particular cases in Member States in which the political framework was heavily characterised by media concentration and political influence over the media (Italy and Hungary, for instance). In the last decade, and on many occasions, the European Parliament has invited the Commission to take action and promote clear measures to foster media pluralism, legislative initiatives on media freedom, media ownership, pluralism and independent governance of the sector both at national and European level in order to stress the democratic nature both of the European Union and of the European media landscape, and to intervene in the individual Member State cases.

One of the main examples of these initiatives is the 2004 European Parliament Resolution on the risks of violation, both in the EU, and in Italy in particular, of freedom of expression and information (22 April 2004). The resolution stresses the strict link between pluralism and democracy, and reminds the European Union of its political, moral and legal obligation to ensure, within its field of competences, that the right of EU citizens to free and pluralist media is respected. Moreover, the Parliament stresses the role of an evolving public service broadcasting in the digital era. The resolution calls upon the Commission to submit a proposal for a directive to safeguard media pluralism. The Parliament also calls for the protection of media diversity to become a priority of EU competition law and for legislation on conflict of interest in the media sector.<sup>47</sup>

In the 2004 Resolution, the European Parliament affirmed that the European Community, already at that time, had competence in a number of policy areas and used policy tools with direct relevance for media pluralism<sup>48</sup> and suggested the use of these tools as “core elements of the Community’s policy to safeguard media pluralism and thus need to be applied, interpreted and further developed by the Commission with a view to strengthening these measures in order to combat horizontal and vertical media concentration in traditional as well as in new media markets” (par. 73). On other occasions, the European Parliament has suggested that the Commission acts to defend and foster pluralism according to EU competences. In the Resolution on Concentration and Pluralism in the Media in the European Union of 25 September 2008 (2008-2007/2253INI), the Parliament affirmed that “whereas the EU has no intrinsic competence to regulate media concentration, nevertheless its competence in various policy fields enables it to play an active role in safeguarding and promoting media pluralism: [...] competition and state aid law, audiovisual and telecommunication regulation as well as external (trade) relations are areas in which the EU can and should actively pursue a policy to strengthen and foster media pluralism.” In the recent resolution on Media Law in Hungary (10 March 2011) the Assembly calls on the Commission “to act on the basis of Article 265 of the TFEU by proposing a legislative initiative pursuant to Article 225 TFEU on media freedom, pluralism and independent governance [...] making use of its competences in the fields of the internal market, audiovisual policy, competition, telecommunications, state subsidies, the public-service obligation and

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<sup>47</sup> For a more detailed list of the requests to the Commission, see the resolution, par. 79 from letter a) to t).

<sup>48</sup> Beside the rules on free access for undertakings to important events in Directive 89/552/EEC, the other rules mentioned by the EP are related to the “package” on electronic communications of 2002 (rules on fair, reasonable and non-discriminatory access to APIs and EPGs in Directive 2002/19/EC, on “must-carry” in the Directive 2002/22/EC, on the use of an open API for digital interactive television services and platforms and on the harmonisation of standards in order to achieve full inter-operability of digital television at the level of consumers in Directive 2002/21/EC).

the fundamental rights of every person resident on EU territory, with a view to defining at least the minimum essential standards that all Member States must meet and respect in national legislation in order to ensure, guarantee and promote freedom of information and an adequate level of media pluralism and independent media governance.”

In 2007, the European Commission tried to respond to the requests posed by the European Parliament with what was called “a three step approach” on media pluralism, proposed by Commissioner Viviane Reding and Vice-President Margot Wallström.<sup>49</sup>

As a first step, the European Commission published a Staff Working Document (SEC(2007)32, 16 January) on “Media Pluralism in the Member States of the European Union”, indicating further stages in a policy process regarding this matter. The document provides an overview of the meaning of media pluralism, and underlines the different levels of commitment (EU and CoE) to preserve and foster it, but argues against a European legislative initiative on pluralism, as the various consultations taken led to the conclusion that it would not be appropriate (Reding 2009). In the same document, the Commission stresses the need to monitor media pluralism closely, as already suggested during the 2005 Liverpool Conference. The second step of the approach, is a study launched by DG INFSO “with the aim of clarifying and advancing the debate on pluralism”(Valcke et al. 2009, p.1): this study, carried out in 2009 by the University of Leuven, Central European University, Jönköping International Business School, Ernst & Young Consultancy Belgium and subcontractors in all Member States aimed at defining a set of indicators and a monitoring tool that could be useful to “measure” the threats to pluralism in the Member States.

The third step which was initially envisaged, but never actually materialised, was a Communication of the Commission based upon the outcome of the Media Monitor indicators study.

The strategy of the Commission has changed with the new Commissioner and Vice-President Neelie Kroes: in October 2011, she appointed a high-level expert group on Media Pluralism and Freedom (President Professor Vaira Vīķe-Freiberga) with the mission of analysing and providing recommendations on the main issues related to the topic;<sup>50</sup> in December 2011, she established the EU Media Futures Forum, chaired by Christian van Thillo, CEO of the De Persgroep, to reflect on the impact of the digital revolution on European media industries and on how to improve the policy framework for European media industries<sup>51</sup>; in the meantime, she has initiated the Centre for Media Pluralism and Media Freedom at the Robert Schuman Centre for Advanced Studies at the European University Institute with the long-term mission of accompanying the process of European integration on media pluralism and freedom and with the short-term mission of developing (this) policy report on European Union competences on media freedom and media pluralism.

Recently (2012), the debate on media pluralism, which, to date, has been mainly developed at European institution level, has been enhanced by a so-called “European Citizens’ Initiative” ((ECI) “European Initiative for Media Pluralism” proposed the Commission to endorse a new directive or the adoption of an amendment to the AVMS Directive) which aims at partial harmonisation of national rules on media ownership for a better functioning of the internal market and for the fostering of media pluralism.

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<sup>49</sup> Approach criticised as a way to defer any initiative (Mastroianni 2011b). See also Komorek 2009.

<sup>50</sup> “A free and pluralistic media to sustain European democracy”, January 2013. Available at: [http://ec.europa.eu/information\\_society/media\\_taskforce/pluralism/hlg/index\\_en.htm](http://ec.europa.eu/information_society/media_taskforce/pluralism/hlg/index_en.htm) .

<sup>51</sup> “Fast forward Europe – 8 solutions to thrive in the digital word”, September 2012. Available at: [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/forum/report.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/forum/report.pdf) .

### **3. Conclusion**

The debate on the space for intervention by the European Union in the media pluralism and freedom field is still open. The European Parliament has been, and still is, a very active actor in this debate and this is also confirmed by the recent agenda of the LIBE commission and in particular by the Weber report. This third Chapter aimed at introducing the main steps of this discussion and the consequent existent legal instruments that regulate the issue. What we have concluded is that, although there already are immanent competences of the European Union in respect of media pluralism and media freedom, they should definitely be enhanced and improved and, especially because of the democratic aspect of the issue, it is of high importance to have a more consistent and active intervention from the EU. At this regard, the following Chapter tries to introduce some possible legal basis for a more proactive role of the European Union, always keeping in mind the sensitiveness and importance of such principles and the importance of an harmonized and common approach.





## **Chapter 4: European Commission Soft and Hard Law Instruments for Media Pluralism and Media Freedom**

Elda Brogi and Paula Gori

### **1. Introduction**

What emerges from the overview in the previous Chapter, is that although there are some EU competences in respect of media pluralism and media freedom, such competences are rather hidden and not explicit. The European Union has not been “neutral” on the issue of media pluralism and media freedom. As mentioned above, even if there is no evidence of explicit EU competences, media pluralism is a principle that can operate and be implemented at various levels in the EU order. The following sections introduce some suggestions on how the legislation in force can be used - or slightly reformed - to foster media pluralism.

As it has been underlined in the 3<sup>rd</sup> Chapter, the three main instruments to foster and guarantee fundamental rights in the EU are the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the constitutional traditions of the Member States. One path to follow to promote and spread common standards on media pluralism can be the application and the implementation of a common jurisprudence based on European principles on human rights through the co-operation of both European and national courts (see Section 2).

The recent rapid technological developments are shaping a new media market and consequently some competition concerns are arising. More in general, as it has been seen in the previous Chapter, competition law is one of the main instruments that are used to tackle media issues. However, especially with regard to the democratic role played by media pluralism and freedom, the economic argument does not constitute a sufficient approach. The interpretation of Article 167 (4), which stresses the obligation on the part of the Commission to cater for pluralism, is a useful legal instrument in force to direct the European Commission implementation of competition rules (see Section 3).

The four free movement principles (the so-called “four freedoms”) and the right to establishment constitute one of the milestones of the EU internal market. Within the EU we have different national legislations that regulate the media and endeavour to guarantee media pluralism and freedom, but a European level is missing. This situation is far from being efficient in the light of the free movement of services and goods and of the right to establishment. The lack of harmonisation of the different national regulations (in particular with regard to media ownership, ownership transparency, libel and copyright) can harm the functioning of the internal market. Indeed, investors can decide to establish companies in Member States where the regulation is more lenient in order to avoid providing services in countries where their action would be limited by stricter conditions. Moreover, also with regard to the transnational nature of the media, the freedom to receive a service is strictly related to the right to receive information irrespective of frontiers. This, eventually, also has consequences on the non-discrimination principle, which has to be granted to European citizens (see section 4).

In case the internal market argument does not constitute a sufficient legal basis for EU legislative intervention, one might also consider to take into consideration the possibility of having recourse to Article 352 of the Treaty on the Functioning of European Union (which allows the Council to adopt relevant measures in case action of the EU should prove necessary to attain one of the objectives of the Treaties and the Treaties have not provided the necessary powers). In a very extreme case a revision of the Treaties (in particular the Treaty on the Functioning of the European Union) could also be taken into consideration. However, the limit of both actions is the need of a unanimous approval by the Member States (see section 5).

Proposals of reforms of the legislation in force mainly deal with “regulatory” and “soft law” intervention into the regulation of media services. One possibility could be a reform of the AVMS

Directive in order to create a network of independent national regulatory agencies, on the model of the electronic communications regulatory framework. Although there are best practices cases in relation to some national authorities, it is of high importance to guarantee by law the existence of a European network of independent and transparent agencies. In that case there would be a certain similarity between the regulation of content and the regulation of the networks for its transmission (see Section 6). Another possible soft law intervention could be the involvement of the Fundamental Rights Agency (FRA) in the promotion of media pluralism and media freedom or the establishment of an *ad hoc* agency (see Section 7).

## 2. Article 11 of the Charter and Article 10 of the ECHR: Media Freedom and Pluralism as General Principles of the EU Order

As demonstrated by the recent findings of the MEDIADEM project (Policy recommendations) “both the CJEU and the ECtHR have contributed extensively to the shaping of media policy in Europe”, at least in the 14 countries analysed<sup>1</sup>, both on media pluralism and media freedom (see Chapter 3) and, of course, according to their different roles and in different ways<sup>2</sup>. The two European Courts, with the national Courts, could probably play an important “joint” role in the definition and in the application of common European principles on media freedom and pluralism starting at “case level” and in creating a sort of “constitutional basis” for a direct or indirect validity multilevel scrutiny. As already mentioned (see Chapter 3, Section 2.6), the principles enshrined in ECtHR case law has already influenced the reasoning of the CJEU in its decisions related to media freedom and media pluralism<sup>3</sup>: this was and is an important tool that helped shaping the EU legal order in according to the fundamental rights protection. So, the fact that the Charter must be interpreted according to both the Convention and the existence of the rules at national level, which bind national courts to adhere to the interpretation of the European Courts, could create a positive environment for the general application of common principles on human rights and *in specie* media pluralism and media freedom as interpreted by the ECtHR).

For media freedom and media pluralism, this approach is now acknowledged and codified in Article 11 of the Charter of Fundamental Rights, which is debtor of the two Court’s jurisprudence (Mastroianni 2011a) when it states, in paragraph (2), that “freedom and pluralism of the media shall be respected.” Although it has been argued that Article 11 reflects a general non-interference approach (Casarosa 2010; Klimkiewicz 2005), it represents a key fundamental legal instrument that. It introduces “constitutional” principles in a source of primary law and can and must be used in the multilevel European environment to interpret existing legislation and shape, even *de iure condendo*, the EU and national legislative orders. According to them and, so, according to the interpretation of

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<sup>1</sup> “The two courts seem to have pursued slightly divergent goals over time, with the ECtHR being more focused on media freedom as a driver for democracy, and the CJEU more oriented towards an economic approach, and thus towards the liberalization of media industries and the avoidance of concentration of ownership”. MEDIADEM Policy recommendations for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries, September 2012. Available at [http://www.mediadem.eliamep.gr/wp-content/uploads/2012/11/EU\\_CoE\\_matrix.pdf](http://www.mediadem.eliamep.gr/wp-content/uploads/2012/11/EU_CoE_matrix.pdf).

<sup>2</sup> While in principle the scope of the right does not differ in the two systems, in practice the perspective of the Luxembourg Court is different from that of the ECHR. This is the consequence of the peculiarities of the jurisdiction of the CJEU according to the basic Treaties (Mastroianni 2011a).

<sup>3</sup> *Kabel Deutschland*, at para. 37, the Court affirms that: “... it should be noted that the maintenance of the pluralism which the legislation in question seeks to guarantee is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which freedom is one of the fundamental rights guaranteed by the Community legal order (see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I 4007, paragraph 23; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I 487, paragraph 10; Case C-23/93 *TV10* [1994] ECR I 4795, paragraph 19; and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I 11135, paragraph 41) (Mastroianni 2011a).

the ECHR, Article 52 (3) of the Charter affirms that “[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

Even if article 6 TEU, while recognizing the rights, freedoms and principles set out in the Charter of Fundamental Rights which are to have the same legal value as the Treaties, stresses how the provisions of the Charter are not to extend the competences of the Union as defined in the Treaties in any way, Article 51 of the Charter states that “[t]he institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law” have, therefore, “[to] respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on in the Treaties.” So, Article 11 can be interpreted also as “a parameter for the adoption of national acts when they fall under the “umbrella” of EU law, for instance in case of national measures implementing EU directives, as well as in case of measures which hinder or restrict the fundamental economic freedoms guaranteed by the Treaty. In such cases, it is for the national courts to rule on the compatibility of national laws with the principle of freedom of information. Thus the CJEU could play a pivotal role in this respect due to the exercise of its competence under Article 267 TFUE (preliminary rulings procedure).” (Mastroianni 2011a, p.6)

The other bill of rights acknowledged by Article 6 TEU is the European Convention of Human Rights, that affirms that “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. As well as the rights enshrined by the Charter for Fundamental Rights, such accession is not to affect the Union’s competences as defined in the Treaties. This notwithstanding, fundamental rights, should constitute the general principles of EU law, as already guaranteed by the ECHR, and as these rights arise from the constitutional traditions common to Member States. In other words, media freedom and pluralism are part of the rights, freedoms and principles which are enshrined both in the Charter and in the ECHR. They are also firmly rooted in the national constitutional traditions of the member states and therefore form a normative *corpus* that has already had, and will potentially have, a role in the interpretation and application of European law.

It is clear from Article 51(1) of the Charter that its provisions mainly address the institutions, bodies, offices and agencies of the Union, which are bound to respect the right to freedom of information in any activities carried out in applying the Treaties. Hence, an act of the institutions may be subject to scrutiny as to its validity or interpretation before the ECJ in a direct action under Article 263 TFUE or indirectly via a reference made by the national Court (Article 267 TFUE). As it has been seen in the previous Chapter, there is still some uncertainty on the issue of intermediaries, aggregators and in general services provided through new web platforms. This is a field where the Courts could also play an important role. For instance, one of the elements of the uncertainty of the regulation of such media actors, is related to their role and responsibility, namely if they should be considered responsible for the content diffused through their platforms and, if yes, when and in which form.

Through a case by case process, and according to the interpretation of the ECHR, the CJEU could pave a common path in order to try to approach similar cases in a similar manner and consequently to interpret the existent legislation through common fundamental principles.<sup>4</sup>

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<sup>4</sup> The recent case-law proves this possible trend. In particular see Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011. Moreover, as it has been mentioned, the Recommendations of the Council of Europe “can be relevant to the interpretation of ECHR rules since they are a direct manifestation of the subsequent practice of Member States.” With this regard, the Recommendation CM/Rec(2011)7 of the Committee of Ministers on a New Notion of Media, introduces an interesting and broad definition of new media that could be of interest for the Court when it has to decide on such cases. According to such definition new media encompass

### 3. Competition and cultural aspects: Article 167.4 TFEU

Over the past decades, rapid technological developments have led to the proliferation of new types of contractual arrangements between market players active in the media business and an increase in media merger activity. These changes have given rise to serious competition concerns, for instance, the creation of obstacles to access to content and infrastructure and high concentration ratios.

These trends, emerging in markets that have traditionally been perceived as national in scope, have become a matter of increasing concern for the realization of the European project. Anti-competitive agreements, abuses of dominance by gatekeepers and concentration on a pan-European scale may distort intra-Union competition as they may raise significant entry barriers for potential competitors or prevent existing suppliers from developing innovative products.

Yet, given the particularities of the media products, which are distinct from other marketable commodities due to their ability to shape public opinion and therefore direct citizen behaviour, the aforementioned trends, insofar as they reduce content output and the number of independent providers of media services, have also had a negative impact on the protection of media pluralism within Europe. However, a systematic overview of the practice that the Commission has developed in the media sector demonstrates that competition law has not contributed significantly to the advancement of pluralism. Three conclusions can be drawn from the analysis of the Commission decisions in the media domain.

First, while both primary and secondary Union law lay down the Commission's obligation to have regard to non-economic considerations when action is taken in the framework of the Union's competition policy, the latter has been reluctant to openly address pluralism-specific concerns. A good example of this approach is the *Newscorp/BSkyB* merger decision.<sup>5</sup> In addition to the possible anticompetitive effects that it was likely to create (para.28), the proposed concentration also gave rise to serious pluralism concerns on the grounds that, if it were to be permitted, it would give one entrepreneur a dangerous level of control of the UK media.<sup>6</sup> In its decision, the Commission assessed the competitive impact of the notified operation on the relevant markets, but it did not approach pluralism-related issues. More particularly, in respect of the effects of the proposed transaction on media pluralism, the Commission referred to Article 2(3) of the Merger Regulation<sup>7</sup> in order to stress that the latter entrusts it with appraising mergers of EU dimension solely on competition grounds.<sup>8</sup> The Commission considered that its duty was mainly to check "the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger" and that competition and pluralism assessments are very different.<sup>9</sup>

Second, trends that have emerged in European competition policy, in particular a more economics-based approach in competition analyses have made increased efficiencies and welfare considerations the main factors that determine the Commission's decision to either permit or prohibit an agreement or

(Contd.) \_\_\_\_\_

"all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents."

<sup>5</sup> Commission decision *Newscorp/BSkyB*, Case COMP/5932 [2011] OJ C 37/02.

<sup>6</sup> See, for instance, <http://www.bectu.org.uk/news/1076>.

<sup>7</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1

<sup>8</sup> Commission Decision *News Corp/BSkyB*, Case COMP/5932 [2011] OJ C 37/02, para. 306.

<sup>9</sup> *Ibid.*, para. 307.

a merger.<sup>10</sup> Yet, it should be borne in mind that options that have been followed to advance the U.S. antitrust policy do not necessarily make them adequate options for the EU competition policy. Townley correctly argues respectively that “unlike the competition provisions of the U.S.A., the Union’s competition provisions are not in stand-alone competition legislation aimed at isolated goals, but are part of a web of inter-related Treaty articles.”<sup>11</sup> There are several Treaty provisions that directly connect the Union’s competition policy with other policies in such a way that the first must be implemented with reference to the second.<sup>12</sup> Thus, a pure economics-based approach may have its benefits, but it is not supported by the Treaties.

Third, an analysis of the relevant decision-making sufficiently proves that, while the Commission has focused on securing a diversity of suppliers in the markets affected by the operations under scrutiny,<sup>13</sup> it has abstained from considering the effects of the concentration on content and exposure diversity. However, taking into consideration the particularities of the media markets, ensuring a diversity of suppliers does not necessarily guarantee a variety in the range of contents available or that the consumers will choose to be exposed to different sources. Therefore, pluralism at Union level seems to have been protected only coincidentally.

The Commission’s role in safeguarding pluralism in the media under its competition practice has been extensively discussed and more often than not it is argued that the latter, due to the Union’s competence limitations in the cultural domain, lacks the power to effectively protect this value.<sup>14</sup> The derogation laid down in Article 21(4) of the Merger Regulation, on the basis of which national law may take precedence over EU competition law in cases where a concentration endangers media plurality in a Member State, is said to strengthen the view that the Commission’s role in assessing a media merger is restricted to securing that the operation will not result in undue distortions of intra-Union competition.<sup>15</sup> Yet, these arguments should not guide the Commission’s competition practice in the media domain for the following reasons: Article 167(4) TFEU lays down that the Commission must take cultural aspects into account in the framework of the Union’s competition policy. Articles 11(2) and 51(1) of the Charter of Fundamental Rights establish the Commission’s responsibility to respect and promote pluralism. On the basis of these provisions, European competition law needs to be applied in the spirit of the overall objectives pursued by the Treaties. This stance is also corroborated by secondary legislation, for instance, the Merger Regulation which, in its Recital 23, stipulates that, while under its provisions the Commission is primarily entrusted with appraising whether a concentration significantly impedes effective competition in intra-Union trade, such an appraisal must

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<sup>10</sup> In the past, non-economic considerations seem to have influenced significantly the Commission’s reasoning. The Treaty itself establishes the legal basis for such an approach as several provisions lay down the Commission’s obligation to consider other Treaty objectives when implementing the Union’s competition policy (See Articles 11, 9, 12 168 174 and 175 208(1) and, of relevance for this study, 167(4) TFEU). The Commission’s practice provides several examples that demonstrate that competition analyses have been conducted with reference to other Treaty goals. See, for instance, Decision of the Commission of the European Communities of 15 December 1975 relating to a procedure under Article 85 of the EEC Treaty (IV/847 – SABA) [1976] OJ L 28/19; Commission Decision of 12 December 1983, relating to a proceeding under Article 85 of the EEC Treaty [1983] OJ L 376/22; Commission Decision Philips/Osram [1994] OJ L 378/37, para. 27; Commission decision CECED [2000], OJ L 187/47, paras. 47-51 and 55-57; Commission decision EBU/Eurovision system [1993] OJ L 179/23, para. 62, subsequently annulled by the General Court, Joined Cases T-185/00, T-299/00 and T-300/00; Commission Decision VBBB/VBVB [1982] OJ L 54/36, para. 59.

<sup>11</sup> Townley 2009, 48.

<sup>12</sup> See Articles 12, 168, 174 and 175, 208(1) and 167(4) TFEU.

<sup>13</sup> See, for instance, *Deutsche Telekom/Beta Research*, Case IV/M.1027 [1998] OJ C 37/4; *Nordic Satellite Distribution*, Case IV/M.490 [1995] OJ L 053/20; *RTL/Veronica/Endemol*; Commission Decision *Vivendi/Canal+/Seagram* Case COMP/M. 2050 [2000] C 311/03; Commission Decision *Kirch/Richemont/Telepiù*, Case IV/M.584 [1994] OJ C 225/3; Commission Decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1.

<sup>14</sup> See, for instance, Klimkiewicz 2009, 68; European Publishers Council 2011, 2.

<sup>15</sup> See, for instance, Commission Staff Working Paper on Media Pluralism in the Member States of the European Union, SEC (2007) 32, 7.

be placed within the general framework of the achievement of the fundamental objectives laid down in the Treaties, among which are respect for cultural diversity and social cohesion. Media pluralism is clearly a facet of these objectives. Media foster cultural diversity through the provision of services that cater for the needs of linguistic and cultural minorities and promote national cultural identities whilst bringing closer the Union's peoples.<sup>16</sup> Furthermore, ensuring plurality in the media means in essence "providing a space for dialogue, while responding to the specific needs or requests of certain groups in civil society and serving as a factor of social cohesion and integration."<sup>17</sup> Besides Recital 23, Article 2(1) of the Merger Regulation, which binds the Commission to consider the interests of the intermediate and ultimate consumers, allows it to take into account the particularities of the media markets, and in particular the viewers' multifaceted interests, these not being limited to low prices but also encompassing a variety of sources of information and entertainment and a wide range of differentiated products to choose from.

Besides the fact that it does not fully endorse media pluralism, the Commission's approach to the media industry also gives rise to competition issues. As previously said, looking at the relevant decision-making it can be noticed that the Commission has mostly focused on securing a diversity of suppliers in the relevant markets with the effects of the concentration on content and exposure diversity having hardly been discussed in these cases. However, it is well accepted that undertakings also compete on quality, service and innovation. The Commission itself acknowledges in its Guidelines on the assessment of horizontal and non-horizontal mergers the non-price dimensions of effective competition such as high quality, a wide selection of goods and services, and innovation, and takes the stance that its mission is to prevent mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An increase in market power in that regard refers to "the ability of one or more undertakings to profitably increase prices, "reduce output, choice or quality of goods and services or diminish innovation."<sup>18</sup> It has convincingly been argued that these dimensions of competition are "of particular importance in the Internet, broadcast television, and radio industries, where the competition extends beyond advertising prices."<sup>19</sup> In that respect, examining the impact of an anticompetitive deal on non-price competition is a legitimate subject for competition law inquiries. However, the integration of such elements in relevant assessments does not solely encompass aspects of competition that need to be considered in the appraisal of relevant deals but may also address pluralism concerns. As the Commission stated in its Staff Working Paper on Media Pluralism in the Member States of the European Union "[m]edia pluralism is a concept that embraces a number of aspects, such as diversity of ownership, variety in the sources of information and in the range of contents available in the different Member States. [...] Although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism. The incorporation of pluralism-specific considerations in a competition analysis is not an easy task. But, it is not impossible either.

The following example exemplifies how the Commission can modify its approach so as to integrate pluralism-specific concerns in its assessments. Consider that two broadcasters active in the provision of international news in distinct national markets notified their intention to merge. The cases in the

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<sup>16</sup> See, for instance, Council of Europe Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions, 'Report on Media Diversity in Europe' 2003, 7. See also Raboy's 'Background Paper for UNESCO on media pluralism and the promotion of cultural diversity' 2007.

<sup>17</sup> Council of Europe, Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue adopted by the Committee of Ministers on 11 February 2009 at the 1048th meeting of the Ministers.

<sup>18</sup> Commission (EU) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, para. 8 and Commission (EU) Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, para. 10.

<sup>19</sup> Stucke and Grunes 2001, 279.

broadcasting sector have tended to see the geographic scope of the viewers' market as national because of the "different regulatory regimes, existing language barriers, cultural factors and other different conditions of competition prevailing in the various markets."<sup>20</sup> Indeed, such factors need to be taken into account when defining the relevant geographic market for the provision of broadcasting services. For instance, TV programs are more often than not broadcast only in the relevant national language whereas in several Member States foreign language films are almost never broadcast in the original language. In our example, under the approach it has been following to date, the Commission would find the concentration to be compatible with the Treaty on the grounds that the undertakings involved in the transaction develop their activities in different territories.<sup>21</sup> Yet, before approving the merger on the basis that the undertakings operate in distinct national markets, the Commission should secure that the undertakings in question would not use the same news agency post-merger. This direction would enable it to avoid a reduction in editorial diversity at Union level.

To sum up, the appraisal of the effects of an anticompetitive agreement or a merger deal on content diversity should take due account of dimensions of competition which more often than not drive the firms' behaviour to differentiate their products from the ones offered by the competitors and attends to pluralism issues that may arise in a competition case. In that regard, the incorporation of pluralism-specific considerations makes a competition analysis sounder and endorses a Union value which the Commission is bound to respect.<sup>22</sup>

#### **4. MEDIA Pluralism and freedom and the internal market harmonisation: libel, ownership, transparency, copyright**

The media play a crucial role in the democratic process as they are the tool through which citizens obtain information and consequently take their economic, politic and social decisions. Another possibility of intervention for the European Union is the re-construction of the competence on media pluralism and freedom starting from the need to harmonise different legislation at national level, that deal with media pluralism regulating media ownership and media ownership transparency.<sup>23</sup>

As the legislative framework described in Chapter 3 of this report shows, European Institutions have developed a specific policy on the audiovisual sector. This policy has been, and continues to be, closely related to media freedom and media pluralism. Member States have already agreed in some cases to relinquish their "sovereignty" on specific topics in order to embrace a European regulation as they have faced the internationalisation of markets, privatisation of broadcasting and the need to safeguard the citizens-users of television services. The application of the rules of the EC Treaty on free circulation of services and goods and the principle of mutual recognition have first opened the broadcasting systems to competition; then harmonization of the legislations have brought to a European legislation that involves in many cases the regulation of topics that were jealously kept in the national legal realm: beside the television services, commercial advertising, protection of minors, right of reply, copyright and the electronic communications (Mastroianni 2011b).

In fields that are strictly related to the audiovisual sector, as well to media freedom and pluralism, as the one of the electronic communications, the harmonisation based on internal market arguments

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<sup>20</sup> See, for instance, Commission Decisions Bertelsmann/CLT, Case IV/M.779 [1996] OJ C 364/3, para. 20. and UGC/Noos, Case COMP/M. 3411 [2004] OJ C177/5, para. 11.

<sup>21</sup> See, for instance, Commission Decision Bertelsmann/News International/Vox, Case IV/M.189 [1994] OJ C 274/9, paras. 1, 3 and 20 and Commission Decision Kirch/Richemont/Telepiù, Case IV/M.584 [1994] OJ C 225/3, paras. 3,5,7.

<sup>22</sup> For more details on this section Bania, K. 2013. "European merger control in the broadcasting sector: Does media pluralism fit?" in *Competition Law Review*, Vol. 8 (3).

<sup>23</sup> Such action was recently requested by the European Citizens' Initiative and proposed by the coalition "European Initiative for Media Pluralism".

involves almost all aspects of the considered market (see the Electronic Communications package) and Member States are constrained to respect the common rules in this market through the establishment of *ad hoc* agencies duly shaped by the European directives, forming a multi-level European administration. The European Union could act incisively on the regulation of fields where media freedom and media pluralism are involved by setting a common level playing field for market operators and common standards for the circulation of good and services in in the single market.

The internal market argument can only be used when applied in sectors where different state legislations negatively affect the single market itself. The issue of the legal basis also has to be evaluated in relation to the application of the subsidiarity principle. In fields where there is a concurrent competence with the states, the European Union can act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5 TUE).<sup>24</sup>

According to Article 114 TFEU, paragraph (1), which states that “[s]ave where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”, the European Union can exercise its competences whenever the proper functioning of the internal market is negatively influenced by the existence and application of diverging national provisions in any sector which is not expressly excluded from the founding Treaties.

Some authors (for example Mastroianni) affirm that the cases where they were applied, gives evidence that Articles 53(1) and 114 TFEU (former Article 47(1) and 95) were used to intervene on sensitive sectors. As it has been mentioned before, the audiovisual sector has been already partially harmonised through the argument of the internal market by directive 89/552/EEC and its revisions. Mastroianni (2011b) also notes that in some cases the need of harmonization was almost assumed *a priori*; for instance in the regulation of the right of reply. Nonetheless, the harmonization approach operated in a very positive way, as it widened the possibility of access to different contents and sources of information for the citizens/users and strengthened the citizens’ rights vis-à-vis media operators. Recently, the High Level Group on Media Freedom and Pluralism acknowledged that, “ever since the creation of the Single Market, the EU has been legislating on all aspects of cross-border trade in services and goods, including media products” and proposes “common and uniformly-enforced rules” for instance on libel, as a harmonized framework could prevent phenomena like “libel tourism”<sup>25</sup>. It is clear how the single market approach can be used in all cases where differences between Member States can be demonstrated in a field that is not explicitly excluded by the Treaties can hamper the proper functioning of the internal market.<sup>26</sup>

According to this reasoning, a possibility of intervention for the European Union could be the reconstruction of an indirect competence on media pluralism and freedom starting from the need to harmonise different legislation at national level which deal with media pluralism, for instance, regulating media ownership or media ownership transparency in the broadcasting sector.<sup>27</sup>

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<sup>24</sup> And then apply the principle of proportionality in order to define the extent of the intervention.

<sup>25</sup> HLG on media freedom and pluralism, 2013.

<sup>26</sup> See HLG on media freedom and pluralism, 2013 par. 2.3: beside libel law, taxation, financial subsidies, data protection.

<sup>27</sup> Such action was recently requested by the European Citizens’ Initiative and proposed by the coalition “European Initiative for Media Pluralism”.



One of the regulatory instruments used by Member States to protect media pluralism in the broadcasting market is legislation on media ownership concentration that usually prevents and sanctions the creation of a dominant position in the media market. The formulae that the Member States choose are different and mainly based upon national market characteristics.<sup>28</sup> The analysis of these provisions shows that there are different parameters to define positions prejudicial to pluralism and freedom (the number of channels controlled, resources, audience share, *etc.*) (Valcke 2009). Moreover, even though some countries impose obligations to ensure transparency of media ownership as well as financial transparency, other countries still do not. All these differences can hamper the functioning of the internal market, as “their existence may be detrimental to the free movement of services or the right of establishment, since operators may find it difficult to establish or to provide services in another Member State where dominant positions are in place”.<sup>29</sup>

The possibility of establishing a legal framework on media-ownership is mostly tailored on broadcasting and print media as this is the sector where national legislation provide different limits:<sup>30</sup> a directive on media ownership concentration could face many exceptions, for instance, depending on the size of the market.

As mentioned in Chapter 2 section 3 of this report, the issue of concentration in the media should be seen in the light of the technological developments and the debate on how the abundance of content sources of the new environment is effectively countering media concentration is still at stake. Concentration is a tendency that can be observed also in the new media markets and thus it could be worth introducing ownership thresholds.<sup>31</sup> These thresholds should take into consideration the substitutability of the markets and consequently a clear definition of the markets seems to be necessary.<sup>32</sup>

Concerning media ownership, the issues of concentration and transparency should be considered. As previously mentioned, the media play an active role in the democratic process, namely by providing citizens with content which they may use to make decisions in their personal life and which may influence their voting behaviour. As a result of this, and in order to allow individuals to have an informed opinion, citizens also need to have adequate information about the structure of the company selling and providing information.<sup>33</sup>

In its 2008 resolution, the European Parliament affirmed that as the Commission stressed in its above-mentioned staff working document, “the concept of media pluralism cannot be limited to the issue of concentration of ownership of companies, but also includes issues related to [...] transparency

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<sup>28</sup> See also Converged Markets- Converges Power? Regulation and Case Law, European Audiovisual Observatory, January 2013.

<sup>29</sup> This is the position of the European Citizens’ Initiative on Media Pluralism.

<sup>30</sup> “To date, non-linear audiovisual media services have clearly not been a prime target for media-specific anti-concentration rules. None of the country reports mentions thresholds for audiences or capital shares that might directly limit ownership in on-demand audiovisual media services. These services are also not directly targeted by media-specific anti-concentration measures linked to licencing, simply because none of the countries included in this study has introduced a licencing system for non-linear services. For EU member states the Aduiovisual Media Services Directive could also stand in the way of introducing a licencing requirement (and in addition licencing non-linear audiovisual media services would raise constitutional issues related to the freedom of information). In particular, rules which prohibit the accumulation of licenses above a certain number, or rules that condition the award of a licence on remaining below certain concentration thresholds within a given market have normally no relevance for on-demand media”, Susanne Nikoltchev, Common Grounds and Uncommon Choices. An Analysis of National Regulation of Market Power in the Audiovisual Sector, Converged Markets- Converged Power? Regulation and Case Law, European Audiovisual Observatory, January 2013.

<sup>31</sup> However, such thresholds should not jeopardize the investments and should not limit competition in a globalised market.

<sup>32</sup> A network of independent NRAs (see section 6) closely working with the EC could define and monitor such markets.

<sup>33</sup> See also the Report by Open Society Media Program of the High-Level Group on Media Freedom and Pluralism on Transparency of Media Ownership in Europe, October 2012.

and [e]ncourages the disclosure of ownership of all media outlets to help achieve greater transparency regarding the aims and background of the broadcaster and publisher.” Article 3(a) of the AVMS Directive and Article 6 of the E-Commerce Directive introduce some transparency requirements, but these might not be sufficient to guarantee ownership transparency in the democratic interest of the European citizens (Stolte & Craufurd Smith 2010). Legislation on media ownership transparency is thus mainly enforced by Member States which reflects an un-harmonised European approach on such an issue. The two main legislative bases for a possible action could be the Internal Market and Citizenship arguments (Stolte & Craufurd Smith 2010).

The first argument is related to article 114 TFEU. Legislation on media ownership transparency is stricter in some member states than in others. Such legislation imposes more administrative and economic costs on companies and could discourage companies established in Member States with weak legislation to offer their services in states with stricter legislation. Consequently one could argue that the lack of harmonisation between national legislation and its resulting disparities have a direct impact on the functioning of the internal market and thus the relevant measures should be adopted.

Another legal basis for intervention could be linked to Article 50 TFEU, which introduces the possibility of the adoption of directives in order to “attain the freedom of establishment as regards a particular activity”. In particular, in paragraph (g) it states that the European Parliament, the Council and the Commission shall coordinate “to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies of firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union.”<sup>34</sup>

As regards citizenship, according to Article 25 of the TFEU, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). The latter introduces some of the rights that EU citizens have in relation to their European citizenship. In particular, they have “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 the State.” As already stated, the media represent a fundamental tool for citizens to gain access to information and, on that basis, to inform their vote. Therefore, transparency on the ownership of media outlets constitutes an important element for transparent and fair elections.<sup>35</sup>

The provisions adopted on the basis of Article 25 will come into force following approval by the Member States in accordance with their respective constitutional requirements. However, it would seem that the foreseen condition of unanimity will be a difficult obstacle to overcome and that the internal market argument is a more realistic possibility. As mentioned in the Commission Staff Working Paper of 2007, “although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism. Media ownership rules need to be complemented by other provisions (par. 2).

The harmonization of the legislation could play a role also in the new debate of freedom of expression, the right to inform and to be informed on one side and copyright on the other. Some web operators have developed online applications that allow an automatic aggregation of contents, especially news, produced by other professionals or operators<sup>36</sup>. Some recent studies show how the conflict is resolved differently in different countries and “has frequently gone to national courts, where

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<sup>34</sup> Article 54(2)TFEU ‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies and other legal persons governed by public or private law, save for those which are non-profit-making.

<sup>35</sup> This information is also precious with regard to the delicate issue of the conflict of interests.

<sup>36</sup> The best known of this services is Google News, that allows users to have a broad selection of articles of online publications.

freedom of expression has been used in litigation either by content producers or by service providers. The former have referred to it in order to promote some forms of propertisation and protect their incentives by allocating part of the revenues to those who produce innovative content. On the opposite side, large Internet Service Providers (ISPs) have sought to reduce copyright protection and grant open access to information on the web.”<sup>37</sup>

## 5. The Treaties of the European Union

As it has been said, the co-existence of different national legislation could constitute an obstacle for the functioning of the internal market. There are different cases in the media of EU intervention addressing limits to the internal market due to the lack of harmonisation of national legislation relating to cultural and constitutional issues rather than economic ones (for example, in the AVMS Directive, with regard to the protection of minors, the right of reply and the promotion of EU productions) (Mastroianni 2011b).

However, if the internal market does not constitute a sufficient legal basis for EU intervention, one might consider EU action on the basis of Article 352 TFEU. According to the latter, “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers” the Council acting unanimously might adopt the appropriate measures. At this regard, the objectives set out in the Treaties could be the protection of human rights *ex* Article 6 TUE and the active and informed participation of EU citizens in the European elections (Article 22 TFUE). However, it seems to be very hard to tackle the hurdle of the need of a unanimous vote of the Council (thus of the Member States).

Another solution, although it would be difficult to implement, is the amendment of the Treaties in order to deal with the lack of direct and explicit competences. Article 48 of the Treaty on the European Union introduces different revision procedures of the Treaties. As we are dealing here with competences of the European Union, the ordinary procedure would apply (paragraphs from 2 to 5 of the Article). Although it is well known that, due to the strict conditions foreseen, a revision of the Treaties would be difficult to implement however it cannot for this reason be excluded *a priori*.

The major threats to media pluralism and freedom can arise from two different sources: the political power and the private economic power. Therefore, a proposal could be to add two new general principles in the Treaties (in particular in the Treaty on the Functioning of the European Union) that would introduce the need to protect media pluralism and freedom as common principles to be respected in the EU.

A first principle could be that “it is forbidden to create or maintain a dominant position in media markets”. Such an article would express a more restrictive approach to dominant positions. Indeed, the general principle is that the EU allows dominant positions but forbids abuses (Art. 102 TFEU). In relation to the specific case of the media, the position should be more restrictive and thus should prohibit any dominant position. In the case of dominant positions which already exist, these should be dismantled.

The second principle could be that “governments and economic forces cannot exercise any undue influence on media undertakings”. This general principle would be defined over time by the case law of the CJEU which would indicate which behaviour could be considered acceptable and which not. Such an interpretation would be done on the basis of the general principles governing the European Union, on the basis of the general principles of the Treaties, of the Charter of Fundamental Rights, of

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<sup>37</sup> MEDIADEM, Policy recommendations for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries and the potential links for PSM to user generated contents promotion, 2012.

the European Convention on Human Rights, on the activity of the Council of Europe and of the case law of the European Court of Human Rights.

## 6. THE Implementation of the AVMS directive and the role of NRAS

Another possibility of legislative and structural intervention that could help fostering media freedom and media pluralism relates to the governance of the audiovisual media services and, so, to the role of the national regulatory authorities in the audiovisual sector. The AVMS Directive does not foresee the establishment of relevant independent National Regulatory Authorities (NRAs) for the audiovisual environment. It only acknowledges the existence and the role of national independent regulatory bodies and asks them to cooperate among themselves and with the Commission.<sup>38</sup>

The comparative analysis developed by the MEDIADEM project<sup>39</sup> “highlighted a significant degree of fragmentation in the formulation and implementation of media policies, including where common rules are available through EU legislation or the case law of the CJEU and ECtHR.” The project calls for a better “Pan-European coordination of regulatory approaches, use of soft law and exchange of best practices as a key to a more integrated Single Market for media services”. One of the best organizational models of such integration can be found in the multilevel governance of the national independent authorities, linked with the Commission or to another *ad hoc* body. This could mean the opportunity of a harmonized framework on NRAs in the audiovisual sector<sup>40</sup>.

The lack of harmonization of regulatory bodies is particularly blatant compared to Electronic Communications Directives, that regulate issues which are closely related and complementary to those in the AVMS Directive, as mentioned above (see Chapter 3, section 2.7). In fact, according to the provisions of the Framework Directive, all relevant national regulatory authorities must comply with a number of institutional requirements. The most important ones relate to independence vis-à-vis market players and the obligation for NRAs to take all reasonable measures to achieve a limited number of policy objectives and regulatory principles (INDIREG 2011, p.334).<sup>41</sup> These institutional requirements include that Member States protect NRAs against external intervention or political pressure liable to

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<sup>38</sup> Article 30 “Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.” See also MEDIADEM policy recommendations cit.: “The full potential of the existing public regulatory authorities is not yet exploited as coordination among them and also between the supranational and national level is limited, or in few cases completely lacking. One of the Comparative Reports analyses this issue in depth and suggests that this goal could and should be achieved through a stronger role of the European Platform of Regulatory Authorities (EPRA), which could play a pivotal role in coordinating horizontally with the Contact Committee established under the Audiovisual Media Services (AVMS) Directive and the Body of European Regulators on Electronic Communications (BEREC). [http://www.mediadem.eliampep.gr/wp-content/uploads/2012/11/EU\\_CoE\\_matrix.pdf](http://www.mediadem.eliampep.gr/wp-content/uploads/2012/11/EU_CoE_matrix.pdf) .

<sup>39</sup> Policy recommendations for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries, September 2012

<sup>40</sup> This possibility is provided also in the report of the HLG on media freedom and pluralism, 2013, (sect. 2.3): “Another area where there is a need for some degree of harmonisation is in defining the composition and role of regulators. At the moment, Art. 30 of the AVMSD only requires the cooperation of the 'competent independent regulatory bodies'.” The HLG underlines also that “It should be noted that regulators exist only for audiovisual media, but not for the press sector, which is subject to self-regulation. If a regulator were to cover all media, it should be specified that its role has to be different according to each kind of media.

<sup>41</sup> The NRAs must also comply with a number of other requirements, such as the transparency of their competences, the ability to resolve disputes, the availability of a sufficient level of enforcement for their decisions and a right of appeal against them. A number of these requirements were reinforced by the directives of 2009, which inter alia aim at eliminating political interference in NRA's day to day duties as well as the protection against arbitrary dismissal for the head of the NRA. (INDIREG 2011, p.334)

jeopardise their independent assessment of matters coming before them<sup>42</sup>, that they adopt rules regarding the grounds for the dismissal of the head of the NRA (in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors), and that they guarantee that NRAs have their own budget (published annually) which is sufficient to allow them to recruit a sufficient number of qualified staff (Article 3 Framework Directive).

The AVMS Directive does not introduce any specific obligation for member states nor does it provide any guidelines on the structure, functioning or role of those national bodies or about the relationship between them. This *lacuna* appears particularly evident when we consider that the AVMS Directive regulates issues which are very sensitive, as they deal with audiovisual services and thus with media freedom and pluralism. It must be noted that the importance of independent bodies regulating the media sector is also growing in line with the legal issues raised by new technologies. For instance, one of the hot topics related to internet regulation is currently finding due alternative dispute resolution procedures to solve copyright infringements in the online environment. It is clear that only independent authorities could be entrusted to decide cases where fundamental rights are at stake.<sup>43</sup> Particularly in an era of convergence, it could be both valuable and reasonable to consider the establishment in the Audiovisual regulation of the same institutional requirements and networks foreseen in the Electronic Communications Package.<sup>44</sup> Such rules, without requiring a direct competence of the EU on media pluralism, could help to develop common guidelines and soft regulation on this issue.

## **7. THE European union Agency of Human Rights (or another qualified body) – soft law standard-setting and monitoring**

As the European Union can rely on common constitutional principles regarding human rights, as mentioned above, so another potential European level of intervention on media freedom and pluralism could be through the European Union Agency for Fundamental Rights (FRA). The latter “provides the EU institutions and Member States with independent, evidence-based advice on fundamental rights. The main areas that the FRA covers include discrimination, access to justice, racism and xenophobia, data protection, the rights of victims of crime and the rights of the child. As the FRA was established to provide advice to the EU and the Member States when they are implementing EU law and policy, the agency may only work on issues that fall within areas where the EU has competence”.<sup>45</sup>

The Agency cooperates with EU Institutions and Member States to provide them with independent expert advice and fundamental rights analysis, and it also has close relations with the Council of Europe. The thematic areas of activity of the FRA are determined through a five-years multiannual framework, adopted by the Justice and Home Affairs Council of the European Union, on proposal of the European Commission and after consulting the European Parliament. According to the 2013-2017

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<sup>42</sup> Whereas 13 Directive 140/2009 “The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework. For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors.”

<sup>43</sup> See also that the reform of article 1 of the Framework directive provides that “Measures taken by Member States regarding end-users access' to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.”

<sup>44</sup> See INDIREG 2011, p.331.

<sup>45</sup> Booklet of the FRA available on its website, pp.7-10.

Multi-Annual Framework, which will be adopted in June 2013<sup>46</sup>, the FRA will *inter alia* have to deal with information society issues. With regard to its general competences on human rights, and to the more specific ones on the information society aspects and having in mind Article 11 of the Charter, the FRA could be mandated to monitor the protection of media pluralism and freedom in the different Member States. It could monitor and propose common standards, basing its work on the ample case law of the European Court of Human Rights and of the CJEU and work in close relation with the Council of Europe. This could allow the EU to play its part in ensuring that its own laws and actions, as well as those of Member States, are in line with the Convention.<sup>47</sup> In particular, EU institutions can specifically request the FRA to deliver an expert opinion on a specific topic (as with the case on PNR) and therefore the FRA could be mandated to deliver a report on media freedom and pluralism in the different Member States.

Another possibility could be the establishment of a new agency for the safeguard of media pluralism and freedom and the protection of journalists in the EU. The agency could have a monitoring and naming and shaming role.

It could publish periodic reports on the situation in the different Member States and could provide guidelines, benchmarks and general principles to be respected across the EU. The agency would also have a stimulating, awareness, and assistance role, both in relation to the delicate role played by journalists (and thus the importance of their protection) and to the importance of the respect of democratic principles such as media pluralism and freedom. Although it would not use hard law instruments, it could become a reference point for journalists and for citizens when it comes to the safeguarding of media pluralism and freedom in EU countries.

The agency would work in close co-operation with the EU institutions, with the FRA, with the Council of Europe, with the United Nations, and with other international organisations dealing with media pluralism and freedom, protection of journalists and their sources, right to information, democracy and human rights.

The activities would be conducted by a group composed of experts of the legal, economic, political and social sciences, media, statistics and Internet sectors, as well as by media stakeholders. Such a group would be supervised by a board composed of 28 independent experts: one from each Member State plus a representative from the European Commission (29 from July 2013). Taking into consideration the political and democratic role played by the media, independence is a crucial element to guarantee the credibility of the agency and the effectiveness of its activities.

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<sup>46</sup> Council conclusions of 20 and 21 December 2012 on a request to the European Union Agency for Fundamental Rights in accordance with Article 4(1)(c) and (d) of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, (2012/C 400/05).

<sup>47</sup> Media freedom in the EU Member States: Seminar in the European Parliament in cooperation with the Association of European Journalists as part of the AEJ's 50th anniversary celebration, May 8 2012, Remarks by William Horsley, AEJ Media Freedom Representative, [www.aej.org](http://www.aej.org)

## **Conclusion**

This Policy Report appears in the context of the heightened interest in the field of media freedom and pluralism in Europe. This interest comes from experts, institutions, academia, media, and, above all, from the citizens of the EU. By launching three different research and/or policy consulting groups: the High Level Group, the Media Futures Forum, and the Centre for Media Pluralism and Media Freedom, the EU Commission has stressed its active effort to address these issues across European Member States. Within this framework, this study looks at media freedom and pluralism in the context of their social, political and economic aspects, with the aim of proposing a fresh look at EU legal competencies in the field.

As pointed out in this Report, exploring media freedom and media pluralism implies a full understanding of media systems in relation to both their international and national contexts. Within this framework, the Report outlines media freedom and media pluralism by exploring their dimensions in the light of national political systems and social realities, national and international market conditions and players, technological developments, and legal frameworks and competencies. In order to address these challenges, the Report takes into consideration the complex nature of the phenomena and implications related to their policy applications. In particular, this study has explored media freedom and media pluralism through three main lines of research.

The Report defines the concept of media freedom and media pluralism and their importance for the functioning and legitimacy of democratic systems, as well as for the guaranteeing of modern democratic political values and rights for all citizens. Furthermore, it discusses how to effectively measure and compare media freedom and media pluralism. Particular attention has been paid to discussing the instruments able to measure the phenomena in a neutral fashion and to take into consideration national, social and political specificities. It concludes that the optimal way to face this challenge is by a combination of both qualitative and quantitative methods.

Moreover, the Report discusses the economic implications of media pluralism. After reviewing the current debate on this topic, it frames the concept of media ownership and concentration in the online media environment, to understand whether major technological changes, such as Internet or digital TV, are contributing to the fostering of media freedom and pluralism, or whether they are raising new and unprecedented concerns. It observes that new online-media firms, operating worldwide and using relevant economies of scale, making marginal investments in original content, though investing heavily in innovation, are rapidly growing in the advertising market and are strongly challenging the pre-existing economic equilibrium of traditional media outlets. The Report also highlights that this competition is influenced by an imprecise definition of the relevant markets, as well as by the lack of a level playing field. It discusses whether the non-European origin of most of the online-media suppliers could represent another element of concern, not only with regard to the EU's media economy, but also with regard to media diversity and pluralism in the Member States. It concludes that too much fragmentation in the media markets risks making the European media industry excessively vulnerable in the globalised economy and incapable of responding adequately to the profound transformations occurring in the media and information systems with a concomitant danger to our pluralistic assets.

The Report then addresses the debate on the legal instruments that could be used to guarantee and foster media freedom and pluralism, legal instruments which need to evolve into concrete benchmarks that are valid for all Member States. As already stated, the European Union has a few hard and soft law instruments to promote and assure media freedom and pluralism in Europe. Even though the EU's competencies with regard to media pluralism appear to be scattered in the European legal landscape, it is certainly not correct to affirm that the EU has no competencies in this field.

In evaluating the status of media freedom and media pluralism in the EU, special concerns emerge with regard to at least two key situations: a) when rapid changes in the market may alter the previous equilibria that assured adequate levels of pluralism – a possible new occurrence being the monopolistic risks derived from the unforeseen strengthening of non-European native Internet

companies; and b) when extreme national developments create situations in which media freedom and media pluralism, which are European common principles, are clearly violated in a Member State. In such cases, there is the concrete risk of a threat to media freedom and media pluralism with common European effects. It is thus of the utmost importance that the EU can identify sufficiently adequate instruments to intervene, be it on the basis of an economic argument, or on the basis of a cultural-democratic one.

Following Article 11 of the Charter of Fundamental Rights, both the EU Institutions and the Member States, when implementing the EU law, have to respect the principles of freedom and pluralism of the media. According to Article 52(3) of the latter, the meanings and the scope of the Charter have to be interpreted in line with the principles affirmed in the ECHR. The Treaty of the European Union, in its Article 6(2) affirms that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and, as they result from the constitutional traditions common to the Member States, as general principles of Community law”, and in Paragraph (4) of the same Article, it is stated that, “the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.” These legal rules could be the basis for immediate action if a serious threat to pluralism and freedom of the media is identified in Europe or in a Member State.

Furthermore, by affirming that, “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”, Article 167(4) of the Treaty on the Functioning of the European Union constitutes another basic instrument for action. In particular, when the Commission has to face competition distortion in the internal market, not only should its evaluation take economic arguments into account, but, if relevant to the case, it should also take non-economic arguments into account, such as the protection of media pluralism and freedom. Given the importance of the media in a democratic society, and thus the peculiarity of the media market, the Commission should also regularly consider the pluralism argument.

The co-existence of many different national provisions on media ownership and ownership transparency in Europe may represent a threat to the free circulation of goods and services (Articles 34 and 56 TFEU) and to the freedom of establishment (Article 49 TFEU). The uncertainty caused by the lack of a common European standard has direct consequences for structural configurations and investments in the media sector, and action, for example, through a Directive, can be envisaged upon the basis of Article 114 TFEU, which allows intervention when the objective is the establishment and functioning of the internal market.

If the internal market instrument is not enough, the EU also other tools in the Treaties, be it through a revision that introduces specific principles directly defending media pluralism and media freedom, or through the use of Article 352 TFEU, which allows the Council to take appropriate measures in case the Treaties have not provided the necessary powers to attain one of the objectives set out in them. In both cases, a unanimous consensus of the Member States is needed. Another step forward, could be the introduction of a network of independent regulatory authorities. Such authorities should be independent and transparent and should sit on a European Board empowered to act as an instrument for common discussion and peer review of the national situations.

Finally, it might be interesting to take into consideration the possibility to commission the Fundamental Rights Agency to monitor the media situation in Europe, or to establish an *ad hoc* agency with this task. Such a soft law tool would have an important awareness influence.

In conclusion, this policy report sheds light on the current debate on, and status of, media pluralism and media freedom, and it provides both a basis and the instruments for a better understanding of the phenomena and of the present difficulties. By doing this, it provides grounds for proposing further policy decisions and applications.



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