

Published by the  
European Audiovisual Observatory

# Media ownership - Market realities and regulatory responses

**IRIS Special 2016-2**

**Media ownership - Market realities and regulatory responses**

European Audiovisual Observatory, Strasbourg 2016

ISBN 978-92-871-8405-4

EUR 55

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**Cover layout** – P O I N T I L L É S, Hoenheim, France

Please quote this publication as:

Cappello M. (ed.), *Media ownership - Market realities and regulatory responses*, IRIS Special 2016-2, European Audiovisual Observatory, Strasbourg, 2016

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# Media ownership

## Market realities and regulatory responses

Amedeo Arena, Konstantina Bania, Elda Brogi, Mark D. Cole, Gilles Fontaine, Silke Hans, Pascal Kamina, Deirdre Kevin, Carles Llorens, Roberto Mastroianni, Michael Petri, Krzysztof Wojciechowski, Lorna Woods







## Foreword

One of the pillars of freedom of expression in the audiovisual sector is media pluralism. This concept covers, on the one hand, the availability of a variety of choice in the programming of the different media players. On the other hand, it concerns the effective presence of a multitude of operators so as to avoid an excessive concentration of the market.

Media pluralism, as such, has been widely explored by legislation and case-law both at the national and European levels. A related issue is the need for ensuring transparency of the financing of the various media providers, and an adequate knowledge of their ownership structure and control or influence.

For these purposes most countries have put in place tools and mechanisms to allow for the collection of the necessary information, which also allows the European Audiovisual Observatory (EAO) to compile a certain proportion of this data. Other sources of information are made available by regulatory bodies throughout Europe, and administrative case-law, which is also related to competition issues, completes the picture.

This IRIS *Special* provides an overview of the current market realities and a selection of regulatory responses that have been put in place across Europe since the Observatory's report on "Converged markets – converged power? Regulation and case law" of 2012. It has been prepared by the Institute of European Media Law (EMR) in Saarbrücken and collects contributions from various authors. It focuses on a selection of European countries (Germany, United Kingdom, Italy, France, Spain, and Poland), which have been chosen with the intention of providing a set of different approaches.

The report begins with an introduction by Gilles Fontaine and Deirdre Kevin (EAO) on the state of the art of European markets. The data is elaborated from the Observatory's MAVISE database, which contains information on the ownership of TV channels and on-demand services available in European countries with their country of establishment (either inside or outside of Europe) and of the line-ups of the main television distributors in Europe.

Mark D. Cole and Silke Hans (EMR) follow this, discussing the guarantees established at European level in order to protect media diversity. In doing so, they detail the different markets of the audiovisual sector – pay-tv, free-to-air, broadcasting rights, internet advertising – and the pertinent case-law of the European Commission. The European picture is completed by Konstantina Bania and Elda Brogi (European University Institute) with an outline of the main findings of the so-called Media Pluralism Monitor during the measurement of the level of pluralism carried out in 19 EU member states in 2015.

The report continues then with national case-studies on Germany by Michael Petri (Medienanstalten/KEK); the United Kingdom by Lorna Woods (University of Essex); Italy by Roberto Mastroianni and Amedeo Arena (University of Naples); France by Pascal Kamina (Université de Franche-Comté); Spain by Carles Llorens (Universitat Autònoma de Barcelona); and Poland by Krzysztof Wojciechowski (Telewizja Polska); before Mark D. Cole and Silke Hans (EMR) conclude.



As to the main findings, what appears is the clear importance of guaranteeing media pluralism through European provisions for the protection of media diversity. The national case-studies also show that convergence is creating challenges for regulatory and monitoring bodies, and that the opportunities offered by the Internet do not imply that media diversity can be protected solely by the new technical possibilities. Since traditional broadcasting remains an important source of information for many European citizens, this also means that rules on media ownership are still relevant.

Strasbourg, November 2016

**Maja Cappello**

IRIS Coordinator

Head of the Department for Legal Information

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# 1. Introduction: media ownership in European markets

*Gilles Fontaine and Deirdre Kevin, European Audiovisual Observatory*

## 1.1. Introduction

As an introduction to this IRIS special on media ownership, this chapter begins with an overview of current trends in European media markets. The data and analysis are sourced from a recent report published by the European Audiovisual Observatory - a first analysis of media ownership on the basis of the MAVISE<sup>1</sup> database using its catalogue of companies and their relationships with the audiovisual media sector.<sup>2</sup>

This report focused on both the broadcasters and distributors of audiovisual services. In the context of research and policy concerns regarding media pluralism, this type of data is useful for mapping the media landscape and allowing for questions to be addressed regarding the pluralism of content and the links between content production, acquisition, packaging and distribution. The focus of the study was on pan-European groups – those companies that operate across a range of countries in Europe, based on a selection of 15 major players, including broadcasting and distribution companies.

This chapter first explores the ways in which the dominance of media companies can be measured at the national level, followed by a brief overview of the state of concentration at the national level. Finally, the focus moves to the pan-European companies active throughout Europe, their geographical footprints, and their strategies.

## 1.2. Examining media ownership, data, and transparency

There are several ways to examine the levels of concentration in the media sector. Audience shares of broadcasters provide a classic measurement of the strength of companies, and this data is available for most countries (although often for payment). The higher the shares, the more valuable

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<sup>1</sup> MAVISE database link: <http://mavise.obs.coe.int/>.

<sup>2</sup> European Audiovisual Observatory (2016): *Media ownership: towards pan-European groups?*, <http://www.obs.coe.int/documents/205595/264629/Media+ownership+towards+pan-European+groups/418385fa-cf0e-4c12-b233-29476177d863>.



the advertising time.<sup>3</sup> However, the data on the shares of the TV advertising revenues at national level are usually aggregated and it is difficult to break this down by broadcasting group, unless the broadcaster provides this information themselves. For this reason it is not possible to establish a clear picture of the concentration in the market for television advertising, although assumptions can be made on the basis of audience shares.<sup>4</sup> For the pay-TV sector, the revenues received from distribution companies for pay and premium channels also tends to be aggregated at the national level, with no clear picture of the relative power of companies in this field.

Distributors of audiovisual services to the home for payment include the pay DTT, cable, satellite and IPTV operators. These distribute linear television and also, for cable, IPTV and hybrid services, audiovisual on-demand services. The strength of these companies can be measured with reference to subscriber figures and most companies publish these figures in annual reports or press releases. Comparing the company figures with national aggregated data for pay-TV homes indicates the market shares of the individual companies.<sup>5</sup> Additional markets that are relevant to the media sector are frequently examined in the analyses of the DG Competition of the European Union when assessing mergers. These include the licensing and acquisition of rights for individual works, where broadcasters and VOD operators are on the demand side of this market. In fact, the Commission has also frequently sub-divided the rights market regarding premium content, where both sports rights and film rights may be considered as specific distinct markets.<sup>6</sup> Any assessment of the power of media companies in these additional markets requires rigorous research, which was not within the scope of this work. Therefore, only the competition between players for the final customer (audience or subscriber) is illustrated.

Finally, a mapping of the ownership of companies and their subsidiaries and any cross ownership relationships between companies is necessary to present a clear picture of the state of media ownership. At the national level, this begins with information on who holds the licences or registration for audiovisual services, catalogued in the MAVISE database using the information from national media regulators. Linking these companies to larger media groups, other national companies, or individuals can be a complex process, and generally requires national expertise to clearly illustrate ownership. For pan-European groups, the Observatory report traced these companies' business interests and market powers across a range of countries in Europe, using company websites and annual reports and the AMADEUS database.<sup>7</sup>

### 1.3. National media systems and concentration

With regard to broadcast markets, the measured levels of concentration of audience shares tend to vary widely between countries. Table 1 summarises some of the data from the report mentioned above on a range of markets which include those particularly concentrated via one or two main groups.

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<sup>3</sup> In most countries, audience shares now also include time-shifted (and catch-up) viewing figures for TV programming. See, European Audiovisual Observatory (2015): Measurement of fragmented audiovisual audiences.

<sup>4</sup> Regarding aggregated data for TV advertising the Yearbook of the European Audiovisual Observatory publishes data provided by WARC.

<sup>5</sup> For aggregated pay-TV revenues, the Yearbook uses data from IHS and from Ampere Analysis.

<sup>6</sup> See for example : EC (2014): EU Merger Procedure: Case M.7000 - LIBERTY GLOBAL / ZIGGO, or EC (2013): EU Merger Procedure: Case No COMP/M.6880 - LIBERTY GLOBAL/ VIRGIN MEDIA.

<sup>7</sup> The database covers European companies and their financial reports:

<https://amadeus.bvdinfo.com/version-2016720/home.serv?product=amadeusneo>.



*Table 1: European media markets: concentration of the broadcast markets (audience shares 2014) in a selection of European countries*

One broadcasting group has a daily audience share of:	The top two groups combined have a daily audience share of:
<b>more than 35%:</b> BE (VLG), BG, DK, FI, GB, IT, MT	<b>60-70%:</b> BE (VLG), BG, CZ, DK, FI, IT, SE
<b>30-35%:</b> AT, CZ, ES, LT, LV, NL, SE, SI, SK	<b>50-60%:</b> AT, DE, ES, FR, GB, HR, LT, MT, NL, SI, SK
<b>25-30%:</b> DE, FR, HR, HU, IE, MK, PL, PT	<b>40-50%:</b> BE (CFB), HU, LV, MK, PL, PT, RO
<b>20-25%:</b> BE (CFB), RO	<b>30-40%:</b> CY, EE, GR, IE
<b>15-20%:</b> CY, EE, GR	<b>20-30%:</b> BA, TR

*Source: European Audiovisual Observatory (2016): Media ownership: towards pan-European groups?*

*Analysis of Mediametrie/Eurodata TV data.*

Considering the changes between 2009 and 2013, over time the fragmentation of audiences has led to a decrease in concentration at the level of individual channels. However, the cumulated market share of the main TV groups has suffered less, indicating they have often managed to compensate for the loss of audiences on their main channels via additional niche and digital channels.

As noted in the recent report from the European Audiovisual Observatory, from a sample of 30 European countries, the two main broadcasting groups in each market have, on average, 51% of the audience share, and the 3 main groups 64%. With regard to distribution, the levels of concentration also vary between countries. Overall these markets are significantly more concentrated than the audience markets for broadcasting, and with regard to evolution there are fewer players in the market than there were four years ago. However, the levels of competition between the national players imply that the markets are more evenly divided (in terms of subscribers) than previously: in seven countries just two distribution companies deliver TV services to more than 80% of subscribers; in 24 countries just two companies serve 50% or more of the national subscriber homes. Table 2 summarises some of the data from the report on a range of distribution markets and their levels of concentration via one or two main groups.

*Table 2. European media markets: concentration of the Pay-TV/distribution markets (subscriber shares 2014) in a selection of countries*

Top distribution group has a market share of:	Top two Groups combined have a market share of:
<b>60-70%:</b> GB, IE, IT	<b>90-100%:</b> PT, MT, IT, IE, GR
<b>50-60%:</b> CZ, GR, HR, MT, RO, TR	<b>80-90%:</b> GB, HR
<b>40-50%:</b> BE, DK, PT, SK	<b>70-80%:</b> BE, CY, CZ, RO, TR
<b>30-40%:</b> BG, CY, DE, EE, ES, NL, PL, SE, SI	<b>60-70%:</b> DK, ES, SI, SK
<b>20-30%:</b> AT, FI, FR, HU, LT	<b>50-60%:</b> BG, DE, EE, FI, HU, NL, PL, SE,

*Source: European Audiovisual Observatory (2016): Media ownership: towards pan-European groups?*

*Analysis of data from Ampere Analysis.*

In this recent research national media systems were not examined in detail with regard to the ownership of broadcasters and distributors. As noted above, country by country expertise is required to link these companies to larger media groups, or other business or political interests.



However, as outlined below in section 1.4., there are three significant broadcasting groups (RTL, Modern Times Group and Central European Media Enterprises) operating in a range of European countries, and together they represent major players in the free-to-air broadcast markets in 17 countries. In addition there are 15 major distribution companies who each have a presence in three or more markets in Europe and serve almost 70% of pay-TV homes in the EU (see below).

## 1.4. Pan-European broadcast media groups

It is difficult to quantify the number of what might be called pan-European broadcasters, due to the complexities of ownership and the existence of “groups within groups”. However, an assessment would suggest there are around 13 significant media groups that operate throughout Europe, in addition to their important subsidiaries which are also pan-European groups. In addition, these groups can be further divided into two categories: multi-country broadcaster groups and pan-European brand groups.

### 1.4.1. Multi-country broadcasting groups

As a type of pan-European broadcaster, a “multi-country broadcaster” tends to own some of the most important free-to-air broadcasters in their range of markets. The emergence of such “multi-country” broadcasting groups is due to several opportunities. These include the development of strong national companies (often in a liberal regulatory environment); the privatisation of European television markets; the opening of new markets in Central and Eastern Europe; and the occasional weakness of the PSB in the markets in which they operate. Examples include RTL, the Modern Times Group, and Central European Media Enterprises. These three companies alone are major players in 17 European countries, and are in the top 4 regarding audience share.

The strategies of such broadcasters include: building audiences and revenues; developing economies of scale in the form of efficiencies in production, content acquisition, rights acquisition, advertising sales etc.; focusing on regions with potential similar taste (cultural consumption) in terms of content; and the overall widening of the distribution of own content. More recently these broadcasters have been consolidating operations (fewer countries of operation, or centralisation of operations in one country); entering the on-demand market (catch-up television and other on-demand services); extending interests in, or buying interests in TV production companies; buying into new digital assets (for example, internet advertising).

### 1.4.2. Pan-European brand broadcasting groups

There are many well known international TV channel brands available throughout Europe, including the Discovery channels, National Geographic channels, Fox Channels, Disney Channels, Eurosport, AXN and HBO. For the pan-European “brand” broadcasters,<sup>8</sup> their development has been in

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<sup>8</sup> These include: 21st Century Fox (Sky Plc, Fox International channels), AMC Networks, Bonnier (C-More entertainment), Discovery Communications (Eurosport), Modern Times Group (Viasat), NBC Universal, Scripps Networks, Sony Corporation (SPTI), Time Warner Inc. (Turner Broadcasting, HBO), Viacom Inc. (MTV Networks), Vivendi (Canal+), and Walt Disney Inc. (AETN, Disney ABC).



response to another set of opportunities, including: the privatisation of European broadcast markets; the development of cable and satellite distribution services removing the capacity scarcity; the ownership of “desirable content” to fill this capacity (e.g. films, music); the development of the European single market (Television Without Frontiers Directive/Audiovisual Media Services Directive); and hence the ability to establish holding companies, and establish broadcasters wherever convenient (for both regulatory and fiscal reasons).

Strategic moves of such broadcasters have included the desire to: increase distribution and revenue; to move closer to the final customer (and therefore capture a higher share of the added-value) by launching channels rather than merely selling programmes; and, by extension, to develop from a US brand channel in Europe to European channels, and often to further decline into national versions of these brands. It can also be noted that in recent years several (Discovery, Viacom and Scripps) have also entered free-to-air TV markets following a "multi-country broadcaster" model. Other recent strategies include: establishing joint ventures with major distribution groups (for example Ziggo cable and HBO in the Netherlands); buying into European TV production companies; and acquiring European sports rights.

## 1.5. Pan-European distribution companies

The development of pan-European distribution groups, which the DG Competition of the EU defines as the “retail suppliers of audio visual content to end users”<sup>9</sup>, has been influenced by a range of circumstances, including: market liberalisation; a potential easing of the regulation of concentration to allow for economies of scale to promote the digitisation of networks, which is a costly business; the slow development of free-to-air DTT systems in several countries opened the way for growth in the pay-satellite sector; the liberalisation and privatisation of national telecommunications markets; the digitisation and convergence, and the development of broadband networks, which facilitated telecommunications services’ delivery of audiovisual content.

The research into pan-European groups showed that there are 15 major companies who have a presence in three or more markets in Europe and serve 68% of pay-TV homes in the EU. This list would include Altice, Deutsche Telekom AG, Liberty Global Group, M7 Group, Orange (France Telecom), RCS/RDS, Sky Plc, Telefonica, Telekom Austria Group, Telenor, Teliasonera, United Media Group, VIASAT, Vivendi and Vodafone Group plc. These include cable and satellite operators, and telecommunications operators involved in the IPTV, and often cable and satellite markets.

The market for distribution of audiovisual services has seen major consolidation in recent years. At the national level significant mergers have included: UPC NL (Liberty Global) and Ziggo in the Netherlands (2014); Unitymedia (Liberty Global) and Kabel BW in Germany (2011); and Orange España and Jazztel in Spain (2015). Most recently the EU DG competition cleared the merger of Ziggo (Liberty Global) and Vodafone in the Netherlands (August 2016).

At the European level, players have expanded their geographical scope and acquired major national players: a prime example is Liberty Global with the takeover of Unitymedia DE (2010) followed by Kabel BW (2011); and the Liberty Global takeover of Virgin Media UK (2013). There has also been cross consolidation between telecommunications and cable companies. The Vodafone takeover of Kabel Deutschland (2013) is a key example, followed by the Vodafone takeover of Spanish cable company ONO (2014). Also significant was the Numericable takeover of SFR in France

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<sup>9</sup> EC (2013): EU Merger Procedure: Case No COMP/M.6880 - LIBERTY GLOBAL/ VIRGIN MEDIA.



(2014). At the same time pay-TV operator Vivendi has increased its interest in Telecom Italia to 24,9%.

Pan-European distributors benefit from specific economies of scale: wider geographical spread implies greater subscriber revenues and the possibility to develop infrastructure. It further presents the opportunity to create synergies in technology development, in particular the development of set-top boxes, and the harmonisation of devices and their functionalities also leads to a certain harmonisation of services.

The majority of distribution companies are also strongly vertically integrated into the value chain of audiovisual services: they are producing and packaging (TV channels and/or on-demand services) as well as distributing content. Where the companies are vertically integrated and have own brand channels (or production), they benefit from guaranteed distribution revenues.

Vertical integration strategic moves have included entering into joint ventures with important content companies; development of “own channels” with premium content (film and sport); acquiring or investing in national broadcasters; extending interests in, or buying interests in TV production companies; and developing regional on-demand brands.

## 1.6. Pan-European groups and content

The scope of this analysis did not include an examination of content or the potential to maximise content revenues via distribution across Europe i.e. the extent to which the same content is provided in a range of markets and the potential influence on media pluralism. This would require the examination of TV schedules of multi-country broadcasters, or examining the line-ups of pan-European distributors in each market. It is possible to assume that such synergies with regard to content are more easily achieved for pan-European brands, and pay-TV channels, when compared to free-to-air channels, due to fewer regulatory obligations regarding programming and a lesser need to address a national market with regard to content and taste. In addition, it is also possible to assume that such internationalisation of content is more easily achieved for VOD services, in particular given the increase in “one brand” VOD services being launched in a range of countries (by broadcasters, pay-TV operators or distributors).

## 1.7. Concluding remarks and potential further research

Generally national broadcast and distribution markets across Europe are moderately or highly concentrated. This is in some way due to the nature of these industries, with there being significant barriers to entry in terms of investment, and also due to the way in which these markets have developed historically. However, the tendency towards continuous consolidation at the national level is also apparent and this further strengthens the voice/weight of individual groups. This extent to which national media systems are pluralistic requires further research of each country regarding the links between national media and business or political interests.

Following the examination of the major European groups, it is clear that some of these represent significant players in the free-to-air broadcast markets in a very wide range of national markets. While they may be within ownership thresholds in individual countries, the multi-country presence certainly provides advantages in terms of economies of scale. The potential for pluralism



with regard to content can only be tested by an examination of content offered by broadcast groups, and delivered by distribution groups, across markets.

As regards the pan-European distribution groups, it is clear that a major process of consolidation within markets, across markets, and across sectors is taking place. It is also evident that the major pan-European media groups are increasing their presence in all markets along the value chain of audiovisual works, from production to licensing, broadcast and distribution i.e. over all platforms.

The mergers are for the most part examined and cleared by the DG Competition of the European Union. EU policy is not concerned with the existence or development of dominant positions in the market, but rather with preventing any abuse of such dominant positions, ensuring that markets are not foreclosed regarding potential entrants, and that efficiencies are passed on to the final consumer. Issues of pluralism in media markets are not addressed at the European level. The extent to which the desire to create strong European companies, and improve the delivery of audiovisual services and IT services such as broadband, impacts upon pluralism of content and diversity of opinion is another potential area of further research.





## 2. Guaranteeing media diversity at European level

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### 2.1. Introduction

At present, the nature and extent of Europe's role in guaranteeing media diversity is far from clear. On the one hand, the European Union may have the power to adopt legislation in this field for its member states or to create a legal framework through decisions relating to competition law, for example. On the other, however, the Council of Europe also has a fundamental part to play, since Article 10 of the European Convention on Human Rights (ECHR) and the protection of fundamental rights offered by the European Court of Human Rights (ECtHR) represent what might be called the core of European "media regulation". The Strasbourg-based institutions are also an important catalyst where media policy is concerned.<sup>11</sup>

On account of the predominantly economic focus of the European Union – especially of its forerunner organisations – and the contrasting cultural and democratic dimension of the media, there is a particular tension between national legislation and "EU media law".<sup>12</sup> When the European Economic Community was founded in 1957, media law was hardly at the forefront of people's minds because the media's cross-border economic and trade-related dimension was not yet evident. It was not until later that the organs of the European Community, prompted in no small measure by the Council of Europe, began to turn their attention to media law within the context of European integration. Since the 1960s, the Council of Europe had been examining the role of the media on account of its importance to a democratic society, in particular with regard to common European values, and had drafted conventions capable of forming part of a media law framework. Despite numerous subsequent efforts, including some at EU level extending as far as proposals for Europe-wide media concentration control, Europe's linguistic diversity – highly relevant to media distribution and consumption – means that national legislation remains decisive. Challenges are also being created by the technological advances resulting from digitisation and increasing convergence, as well as the tendency for state authorities to interfere with the ownership structure of media

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<sup>11</sup> See Fink/Cole/Keber, *Europäisches und Internationales Medienrecht*, C.F. Müller, Heidelberg 2008, pp. 1 et seq., 10 et seq. (para. 1 et seq., 10 et seq.).

<sup>12</sup> See also Dörr, in: Hartstein/Ring/Kreile/Dörr/Stettner/Cole/Wagner, *Kommentar zum Staatsvertrag Rundfunk und Telemedien (RStV) und zum Jugendmedienschutz-Staatsvertrag (JMStV)*, Part B 4, para. 1 et seq.



companies, which has recently been observed in some countries.<sup>13</sup> Nevertheless, as the following analysis shows, including with reference to the aforementioned tension and recent decision-making practices, European law plays a crucial role in guaranteeing media diversity and pluralism in today's convergent media landscape.

## 2.2. Legal framework

Although the European Union and Council of Europe are two distinct international organisations with different priorities and forms of co-operation, they are both founded on the same basic values, such as human rights, democracy and the rule of law. Thanks to this common bond, in particular with regard to the protection of human rights, the legal frameworks developed by each organisation to guarantee media diversity are similar and intertwined.

### 2.2.1. The context of human rights

Article 10 ECHR fundamentally and comprehensively protects freedom of expression, including the right to receive information from other countries. In its interpretation of this provision, the ECtHR has accepted that media freedom in particular may be restricted under regulations designed to guarantee media diversity. Even since before the creation of the EU Charter of Fundamental Rights (CFR), the ECtHR's interpretation of Article 10 ECHR has, in principle, applied in the EU. Initially adopted by the Court of Justice of the European Union (CJEU) in its case law on so-called fundamental Community rights as general legal principles, the EU member states later recognised this approach in Article 6 of the EU Treaty.<sup>14</sup> Article 10 ECHR does not expressly refer to media diversity or pluralism because its primary purpose is to protect individual freedom of expression rather than media freedom as part of an objective value system. However, this does not mean that overarching objectives such as the need for critical journalism for a properly functioning democracy are not covered by the ECHR.<sup>15</sup> The need to protect media diversity has been reaffirmed by the ECtHR, which has recognised not only the particular importance of (audiovisual) media in a democratic society and the related need for pluralism, tolerance and openness, but also member states' right to restrict media freedom in order to protect diversity in accordance with Article 10(2).<sup>16</sup> For example, in its judgment in the case *Lentia Informationsverein v. Austria* concerning the Austrian broadcasting monopoly at the time, it expressly ruled that access to a pluralistic, diverse

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<sup>13</sup> For an overview, see also Oeter/Dienelt, in *Hamburger Kommentar Gesamtes Medienrecht*, Nomos, Baden-Baden, 3rd edition, 2016, p. 34; Woods/Harrison, *European Broadcasting Law and Policy*, Cambridge University Press, Cambridge 2007, pp. 146 et seq.; Harcourt, *The European Union and the regulation of Media Markets*, Manchester University Press, Manchester and New York 2006, pp. 41 et seq.; Cole, "Notwendigkeit und Gestalt eines zukunftsfähigen Medienkonzentrationsrechts" in *Meinungsbildung und Meinungsvielfalt in Zeiten der Konvergenz, Dokumentation des Symposiums der Kommission zur Ermittlung der Konzentration im Medienbereich (KEK)*, VISTAS Verlag, Leipzig 2016, pp. 89 et seq.

<sup>14</sup> Fink/Cole/Keber, *Europäisches und Internationales Medienrecht*, C. F. Müller, Heidelberg 2008, pp. 10 et seq. (para. 10 et seq.).

<sup>15</sup> Dörr, in: Dörr/Kreile/Cole, *Handbuch Medienrecht*, Verlag Recht & Wirtschaft, Frankfurt am Main, 2011, p. 43 (para. B 50 et seq.).

<sup>16</sup> The CJEU followed suit in, for example, its judgment of 18 June 1991, *ERT v. DEP*, Case C-260/89, ECR 1991 I-2925, ECLI:EU:C:1991:254; judgment of 25 July 1991, *Stichting Collectieve Antennenvoorziening Gouda v. Commissariat voor de Media*, Case C-288/89, ECR 1991 I-4009, ECLI:EU:C:1991:323; judgment of 16 December 1992, *Commission v. Belgium*, Case C-211/91, ECR 1992 I-6757, ECLI:EU:C:1992:526.



broadcasting service was an objective that justified the restriction of broadcasters' freedom.<sup>17</sup> It has also recognised a state's obligation to take action to guarantee pluralistic structures.<sup>18</sup>

Meanwhile, at EU level, Article 11 CFR guarantees freedom of expression and media freedom. It replicates Article 10 ECHR almost word for word, but goes on, in Article 11(2), to mention respect for freedom and pluralism of the media. Although, from its wording alone, in conjunction with the CFR's scope of application, it is unclear whether specific obligations can be derived directly from this provision, it nevertheless highlights the fact that media diversity, including pluralistic audiovisual services, is a recognised objective.<sup>19</sup> This is confirmed by CJEU case law which, building on the judgments of the ECtHR, regularly stresses the importance of media pluralism by pointing out that maintaining a pluralistic media landscape is necessary to pursue an overriding aim in the general interest and can therefore justify a restriction of fundamental freedoms.<sup>20</sup> In its judgment in the case *United Pan-Europe Communications Belgium v. Belgium*, the Court emphasised that freedom of expression and media diversity play a central role in the EU and that maintaining a pluralistic broadcasting system is closely linked to freedom of expression.<sup>21</sup> Therefore, freedom of communication must be protected from interference not only by the state, but also by powerful private entities.<sup>22</sup>

## 2.2.2. Media-specific regulation

Although the value of media diversity is recognised in the framework of fundamental rights, the use of the word "respected" in Article 11(2) CFR clearly shows that the EU organs themselves are not obliged to take active steps to guarantee media diversity. On the other hand, it does mean that they must ensure that their actions, e.g. legislative proposals, do not adversely affect media diversity. In any case, this provision does not justify any new powers for the EU, which is also true for the CFR as a whole. Neither the Council of Europe nor the EU has adopted any media-specific regulation governing measures to guarantee diversity in the narrowest sense. Since there are also no specific jurisdictional provisions on the harmonisation or co-ordination of media law as a whole in EU primary legislation, there are also no media-specific rules guaranteeing diversity in secondary legislation.<sup>23</sup> Active protection of media diversity is therefore the sole responsibility of the member states, since under current European law the principle of conferral would stand in the way of a comprehensive system of diversity control, while European media law is based primarily on harmonisation of the internal market, fundamental freedoms and competition policy. The cultural

<sup>17</sup> ECtHR, judgment of 23 September 1993, *Lentia Informationsverein v. Austria*, EuGRZ 1994, 549.

<sup>18</sup> ECtHR, judgment of 17 September 2009, *Manole and others v. Moldova*, case no. 13936/02; judgment of 7 June 2012, *Centro Europa 7 S.R.L and di Stefano v. Italy*, case no. 38422/09. Dörr, in: Hartstein/Ring/Kreile/Dörr/Stettner/Cole/Wagner, *Kommentar zum Staatsvertrag Rundfunk und Telemedien (RStV) und zum Jugendmedienschutz-Staatsvertrag (JMStV)*, part B 4, para. 8 et seq.

<sup>19</sup> Dörr, in: Dörr/Kreile/Cole, *Handbuch Medienrecht*, Verlag Recht & Wirtschaft, Frankfurt am Main, 2011, p. 44.

<sup>20</sup> See, for example, CJEU, judgment of 26 June 1997, *Vereinigte Familiapress Zeitungsverlags- und -vertriebs GmbH/Heinrich Bauer Verlag v. Austria*, case no. C-368/95, ECR 1997 I-3689, ECLI:EU:C:1997:325; Fink/Cole/Keber, *Europäisches und Internationales Medienrecht*, C. F. Müller, Heidelberg 2008, pp. 32 et seq., 49 et seq. (para. 39 et seq., 49 et seq.).

<sup>21</sup> CJEU, judgment of 13 September 2007, *United Pan-Europe Communications v. Belgium*, case no. C-250/06, ECR I-11135, ECLI:EU:C:2007:783.

<sup>22</sup> Schulz, in *Hamburger Kommentar Gesamtes Medienrecht*, Nomos, Baden-Baden, 3rd edition, 2016, p. 109.

<sup>23</sup> For details of previous European Commission initiatives, see Cole, "Europarechtliche Rahmenbedingungen für die Pluralismussicherung" in *BLM-Symposium Medienrecht 2007 – Freiheitssicherung durch Regulierung: Fördert oder gefährdet die Wettbewerbsaufsicht publizistische Vielfalt im Rundfunk?*, Nomos, Baden-Baden 2009, pp. 93, 94 et seq.; Gounalakis/Zagouras, *Ein Plädoyer für ein europäisches Medienkonzentrationsrecht*, ZUM 2006, 716; Gounalakis/Zagouras, *Publizistische Vielfaltsicherung – Eine Aufgabe für Europa?*, JZ 2008, 652; see also Hain, *Sicherung des publizistischen Pluralismus auf europäischer Ebene?*, AfP 2007, 527.



clause in Article 167 of the Treaty on the Functioning of the European Union (TFEU) confirms that active regulation of European media in the sense of harmonisation of cultural aspects of media is not desirable and that the EU's role is therefore limited to the adoption of incentive measures. According to the interpretation of Article 167(4) TFEU, restraint should be exercised where directly cultural activities are concerned and, since the guarantee of pluralism of opinion (including media) is an expression of a particular political, social and therefore cultural situation in the member state concerned, the EU is not permitted to take harmonisation measures.<sup>24</sup>

## 2.3. Measures to prevent media concentration at European Union level

Even though it has no comprehensive powers to regulate media diversity, the EU nonetheless plays an important role in preventing excessive media concentration. The EU can use a standard-setting measure that regulates economic activity in general – and not only sector-specific activity such as that of the media in this case – and helps to protect media pluralism: the guarantee of free competition based on cartel law, including merger control law.<sup>25</sup>

### 2.3.1. Protection of media diversity and pluralism through European competition law

The media sector is unusual insofar as two types of competition are relevant: editorial competition, i.e. competition of opinions, thoughts and information, and economic competition, the aim of which is to create a competitive environment that promotes innovation and progress as well as change in terms of demand preferences.<sup>26</sup> Since EU cartel law is a means of protecting economic competition in the internal market, it does not directly or deliberately regulate editorial competition or attempt to prevent concentration of opinion. Nevertheless, the impact of cartel law provisions on the shape of the media landscape should not be underestimated.<sup>27</sup> Functioning, free competition in the internal market is also an important factor in the protection of media pluralism.<sup>28</sup> For the media industry in particular, which is known for its high level of innovation and fast development cycles, and in which concentration processes have been significant over many years, the protection of economic competition is a vital means of maintaining or creating diversity among media providers and services.<sup>29</sup> There is therefore a duality between control over market power and power of

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<sup>24</sup> See Cole, "Europarechtliche Rahmenbedingungen für die Pluralismussicherung" in BLM-Symposium Medienrecht 2007 – Freiheitssicherung durch Regulierung: Fördert oder gefährdet die Wettbewerbsaufsicht publizistische Vielfalt im Rundfunk?, Nomos, Baden-Baden 2009, pp. 104 et seq., 111 et seq.

<sup>25</sup> In principle, the same applies to EU state aid law, which can also indirectly affect the exact form of the media landscape in a member state through the potential prohibition of incentive measures, see for example Fink/Cole/Keber, *Europäisches und Internationales Medienrecht*, C. F. Müller, Heidelberg 2008, pp. 126 et seq. (para. 172 et seq.).

<sup>26</sup> Hans, *Die Auswirkungen des Medienwandels auf das Werbevertrags- und Werbekartellrecht*, C. H. Beck Verlag, Munich 2015, pp. 135 et seq.

<sup>27</sup> Dörr, in: Dörr/Kreile/Cole, *Handbuch Medienrecht*, Verlag Recht & Wirtschaft, Frankfurt am Main, 2011, p. 221.

<sup>28</sup> Nehl, *Rechtsschutz im Bereich grenzüberschreitender Medienzusammenschlüsse*, p. 3, [http://ec.europa.eu/competition/speeches/text/sp2003\\_041\\_de.pdf](http://ec.europa.eu/competition/speeches/text/sp2003_041_de.pdf).

<sup>29</sup> Dörr, in: Dörr/Kreile/Cole, *Handbuch Medienrecht*, Verlag Recht & Wirtschaft, Frankfurt am Main, 2012, p. 222.



opinion, in which cartel law goes hand in hand with rules designed to protect diversity of opinion and can, almost as a side effect, achieve the objective of guaranteeing diversity of media services. In practical terms, this means that if the European Commission prevents market power being concentrated in the hands of a small number of providers, there might be more choice in the marketplace of public opinion. However, caution is required here: a diverse spectrum of providers, which cartel law seeks to achieve, does not always equate with a broad range of services; for example, in cartel law the size of a company's influence over public opinion is not necessarily measured across neighbouring media-related markets. Cartel law, which is used to control market power, is therefore a necessary, but inadequate, means of guaranteeing diversity of opinion.<sup>30</sup>

The Commission can call upon a number of instruments to control market power (the “three pillars of cartel law”): the ban on cartels in Article 101 TFEU, the ban on abuse of a dominant market position in Article 102 TFEU and the merger controls enshrined in the Merger Regulation (Council Regulation (EC) No 139/2004). The fundamental and decisive feature of cartel law provisions designed to prevent market-distorting behaviour or market concentration is the definition of relevant markets and dominant market positions. Such a position is defined in established case law as the economic market position of an undertaking that enables the latter to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.<sup>31</sup> Since a dominant market position can therefore only be established for a precisely defined relevant market, the definition of the relevant market is the starting point of any examination under competition law.

### 2.3.2. Convergent audiovisual media markets in the EU

The definition of relevant markets serves to delimit the area in which undertakings compete with each other and involves elements of product, geography and time.<sup>32</sup> It is used to investigate which undertakings are actually in a position to constrain the behaviour of other undertakings in the market in order to evade effective competitive pressure. The relevant market concept is the main tool used by the European Commission to define markets. Under this concept, a single relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, prices and intended use. The relevant geographic market comprises the area in which the undertakings concerned supply the relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. The relevant market concept is supplemented by concepts of cross-price elasticity, such as the “small but significant non-transitory increase in price test” (SSNIP-Test)<sup>33</sup>, and the concept of supply-side substitution.<sup>34</sup>

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<sup>30</sup> Cole, “Europarechtliche Rahmenbedingungen für die Pluralismussicherung” in BLM-Symposium Medienrecht 2007: Freiheitssicherung durch Regulierung: Fördert oder gefährdet die Wettbewerbsaufsicht publizistische Vielfalt im Rundfunk?, Nomos, Baden-Baden 2009, p. 105; regarding the link with national law on the protection of diversity, see Chapter 3.3.

<sup>31</sup> CJEU, judgment of 13 February 1979, *Hoffmann-La Roche v. Commission*, case no. 85/76, ECR 1979, 461, ECLI:EU:C:1979:36; Court of First Instance, judgment of 17 September 2007, *Microsoft*, case no. T-201/04, ECR 2007, II-3601, ECLI:EU:T:2007:289.

<sup>32</sup> Time does not play a major role in the definition of relevant media markets, so it is not examined here.

<sup>33</sup> The SSNIP test or hypothetical monopoly test examines customer behaviour if the undertaking concerned were to increase the price of the product concerned. It looks at whether a small increase in a product's price (in the range of 5 to 10%) for a long period of time would provoke consumers to switch to an easily accessible substitute product. If the number of consumers who would switch to other products is sufficient to render the price increase unprofitable, the products are assigned to a single market.



Applying these concepts to the definition of relevant media markets shows that media markets are two-sided, with media companies competing for recipients on the one hand (so-called recipient markets) and for advertising customers on the other (so-called advertising markets).<sup>35</sup> Since there are inseparable economic links and close network effects between these two sides of the market, changes on one side can have a noticeable – positive or negative – impact on competition on the other.<sup>36</sup>

### 2.3.2.1. Traditional definition of relevant media markets in EU competition law

Taking the above definition methods into account, the European Commission, CJEU and Court of First Instance traditionally define relevant media markets in accordance with different media sectors. After the first important merger control decisions in the media sector, the Commission had studies carried out on the definition of relevant media markets.<sup>37</sup> Definitions are also based on numerous Commission decisions, some of which contain principles that still apply, despite changes to media markets. This has resulted in the following relevant media markets being accepted in EU competition law.

#### 2.3.2.1.1. Pay-TV market (viewer market)

There is a relevant product market for the distribution of pay-TV to end users, in which pay-TV providers compete directly for viewers as paying subscribers (viewer market). This market is subdivided according to the type of programmes offered by the broadcaster (special interest, multi-themed, general).<sup>38</sup> The European Commission also believes there is much to be said for dividing the market according to the type of broadcaster (e.g. documentaries, children's programmes, sport). However, it has left open the question of whether a further subdivision according to the broadcaster's distribution method, i.e. cable or satellite, is necessary.<sup>39</sup> These pay-TV markets are geographically defined not only for linguistic reasons, but typically also because of the way in which the relevant rights are licensed for a specific national territory. They must be distinguished from the so-called free TV market, even though there is a degree of interdependence between the two

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<sup>34</sup> See: European Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=DE](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=DE).

<sup>35</sup> For more details, see Hans, *Die Auswirkungen des Medienwandels auf das Werbevertrags- und Werbekartellrecht*, C. H. Beck-Verlag, Munich 2015, p. 148 et seq.

<sup>36</sup> Advertising circulation spiral or advertising reach spiral: the higher the circulation/reach of a media product, the more advertising income it can generate. The higher the advertising revenue, the more money is available to the media provider, which in turn can lead to a higher-quality product. In principle, the increase in quality results in more recipients and, in turn, higher circulation/reach, and the spiral begins again. Conversely, low advertising revenue produces a low level of funds for the media provider, which has a negative effect on quality and circulation/reach, leading to lower advertising income and less available funds. See Trafkowski, *Medienkartellrecht – Die Sicherung des Wettbewerbs auf den Märkten der elektronischen Medien*, C. H. Beck, Munich 2002, p. 11.

<sup>37</sup> Principles for market definition in the media sector can be found, for example, in the detailed study *Media Market Definitions – Comparative Legal Analysis*, prepared by the EMR at the European Commission's request in 2005, [http://ec.europa.eu/competition/sectors/media/documents/2005\\_media\\_market\\_definition\\_study\\_en.pdf](http://ec.europa.eu/competition/sectors/media/documents/2005_media_market_definition_study_en.pdf); see also the study prepared on behalf of the European Parliament: EMR, *The citizens' right to information: law and policy in the EU and its Member States*, 2012, pp. 101 et seq.

<sup>38</sup> European Commission decision of 13 July 2016, COMP/M.4204 – *Cinven/UPC France*; European Commission decision of 30 April 2002, COMP/JV.57 – *TPS*.

<sup>39</sup> European Commission decision of 4 March 2005, COMP/M.3609 – *Cinven/France Telecom Cable – NC Numericable*; European Commission decision of 13 July 2016, COMP/M.4204 – *Cinven/UPC France*; Commission decision of 25 June 2008, COMP/M.5121 – *NewsCorp/Premiere*.



because the success of pay-TV depends largely on the quality of free TV.<sup>40</sup> Whether there is also such a viewer market for free TV is debatable. The Commission initially decided there was a single viewer market,<sup>41</sup> then left the question open<sup>42</sup> and, more recently, talked about a free TV market,<sup>43</sup> which has been viewed in some quarters as acceptance of a separate viewer market for free TV.<sup>44</sup> However, the European Commission has left open the question of the extent to which mobile broadcasting, i.e. the use of media services, especially television, on small portable devices, can form part of the pay-TV market.<sup>45</sup>

### 2.3.2.1.2. Free TV market (TV advertising)

The relevant product market for evaluating market power in free TV is the television advertising market. It comprises all broadcasters which are – at least partly – funded through advertising, so it includes pay-TV broadcasters that (also) generate advertising revenue.<sup>46</sup> Competitors' position in this market is determined primarily by their advertising turnover, although audience share is also taken into account.<sup>47</sup>

### 2.3.2.1.3. Broadcasting rights markets

Programme content that is not produced by the broadcasters themselves is bought on so-called broadcasting rights markets, which are distinct from the free TV and pay-TV markets.<sup>48</sup> Taking into account the substitutability of programmes from the viewer's perspective, these markets can be broken down further into markets for film content, football competitions, other sports, and general and thematic programmes.<sup>49</sup> The European Commission considers that football competitions need to be subdivided even further according to whether they are national team competitions, which are only held every few years, or competitions involving regular matches played in a league format.<sup>50</sup> Cinema and TV film productions also belong to separate markets, while the cinema market can also be divided further, depending on whether films are successful Hollywood blockbusters or other

<sup>40</sup> European Commission decision of 2 April 2003, COMP/M.2876 – *Newscorp/Telepiù*; European Commission decision of 7 November 2000, COMP/M.1943 – *Telefonica/Endemol*; European Commission decision of 13 October 2000, COMP/M.2050 – *Vivendi/Canal+/Seagram*; see also Braun/Paschke, in *Hamburger Kommentar Gesamtes Medienrecht*, Nomos-Verlagsgesellschaft, Baden-Baden, 3rd edition, 2016, p. 603.

<sup>41</sup> European Commission decision of 20 September 1995, IV/M.553 – *RTL/Veronica/Endemol*.

<sup>42</sup> European Commission decision of 3 August 1999, IV/M.1574 – *Kirch Mediaset*.

<sup>43</sup> European Commission decision of 22 February 2007, COMP/M.4547 – *KKR/Permira/ProSiebenSat.1*; European Commission decision of 24 September 2010, COMP/M.5881 – *ProSiebenSat.1/RTL interactive/JV*.

<sup>44</sup> See Braun/Paschke, in *Hamburger Kommentar Gesamtes Medienrecht*, Nomos-Verlagsgesellschaft, Baden-Baden, 3rd edition, 2016, p. 603.

<sup>45</sup> European Commission decision of 25 March 2010, COMP/M.5748 – *Prisa/Telefónica/Telecinco/Digital+*

<sup>46</sup> European Commission decision of 9 November 1994, IV/M.469 – *MSG Media Service*; European Commission decision of 7 October 1996, IV/M.779 – *Bertelsmann/CLT*.

<sup>47</sup> European Commission decision of 7 October 1996, IV/M.779 – *Bertelsmann/CLT*.

<sup>48</sup> European Commission decision of 2 April 2003, COMP/M.2876 – *Newscorp/Telepiù*; European Commission decision of 30 April 2002, COMP/JV.57 – *TPS*.

<sup>49</sup> European Commission decision of 3 October 2014, COMP/M.7217 – *Facebook/Whatsapp*; European Commission decision of 2 April 2003, COMP/M.2876 – *Newscorp/Telepiù*; European Commission decision of 14 August 2002, COMP/M.2845 – *Sogecable/Canalsatellite Digital/Via Digital*; European Commission decision of 10 May 2000, IV/32.150 – *Eurovision*.

<sup>50</sup> European Commission decision of 13 November 2001, COMP/M.2483 – *Group Canal+/RTL/GJCD/JV*; European Commission decision of 19 April 2001, COMP/37.576 – *UEFA Broadcasting Regulations*; European Commission decision of 23 July 2003, COMP/C.2-37.398 – *UEFA Broadcasting Regulations*.



productions.<sup>51</sup> In principle, TV programmes that are produced by the broadcaster itself are not covered by these markets. Such in-house productions only become relevant to TV broadcasting rights markets if they are sold to third parties.<sup>52</sup> From a geographical point of view, broadcasting rights markets are, in principle, national, but they may also cover a particular language area.<sup>53</sup>

#### 2.3.2.1.4. Internet content and advertising markets

The Internet advertising market is separate from advertising markets based on other media. It is divided into markets for the provision of online advertising space, which involve advertisers and website operators, and the market for intermediation in online advertising, in which intermediaries offer bundles of website operators' advertising space to advertisers. The market for intermediation in online advertising can be further subdivided into markets for search advertising intermediation and for non-search advertising intermediation, whereas such a separation in the markets for the provision of online advertising has been considered but not yet confirmed by the Commission.<sup>54</sup> There is also a distinction between online display advertising and online videos on demand.<sup>55</sup> Just as in the television sector, this advertising market is distinguished from the market for paid-for Internet content<sup>56</sup> and, since these different services (content and advertising) are paid for separately, the European Commission treats them as separate markets.<sup>57</sup> Internet content markets are narrowly defined and distinctions can be made depending on the type of products being sold. The definition of Internet advertising markets can also depend on the type of website.<sup>58</sup>

The Commission has also confirmed that Internet advertising and content represent separate product markets, alongside the Internet access services market.<sup>59</sup> The Internet advertising and content markets are also distinct from markets for the provision of Internet portals, which the Commission further subdivides into vertical portals, which focus on providing relatively limited access to a limited type of content, and general search engines/horizontal portals and search functions that can only be used within a particular website.<sup>60</sup>

In geographical terms, the markets for Internet advertising and content tend to be national on account of linguistic differences or limited to a single language area.<sup>61</sup> Internet access services

<sup>51</sup> European Commission decision of 2 April 2003, COMP/M.2876 – *Newscorp/Telepiù*; European Commission decision of 11 March 2010, COMP/M.5776 – *Telecinco/Cuatro*; European Commission decision of 13 July 2010; COMP/M.5779 – *Comcast/NBC Universal*.

<sup>52</sup> European Commission decision of 20 September 1995, IV/M.553 – *RTL/Veronica/Endemol*; European Commission decision of 8 September 2009, COMP/M.5533 – *Bertelsmann/KKR/JV*.

<sup>53</sup> European Commission decision of 13 October 2000, COMP/M.2050 – *Vivendi/Canal+/Seagram*; European Commission decision of 2 April 2003, COMP/M.2876 – *Newscorp/Telepiù*.

<sup>54</sup> European Commission decision of 11 March 2008, COMP/M.4731 – *Google/DoubleClick*.

<sup>55</sup> European Commission decision of 11 March 2008, COMP/M.4731 – *Google/DoubleClick*; European Commission decision of 24 September 2010, COMP/M.5881 – *ProSiebenSat.1/RTL interactive/JV*.

<sup>56</sup> European Commission decision of 20 July 2000, COMP/JV.48 – *Vodafone/Vivendi/Canal+*.

<sup>57</sup> European Commission decision of 15 September 1997, IV/M.973, *Bertelsmann/Burda – HOS Lifeline*; European Commission decision of 11 March 2008, COMP/M.4731, para. 44 et seq. – *Google/DoubleClick*.

<sup>58</sup> European Commission decision of 25 April 2001, COMP/M.2398 – *Linde/Jungheinrich/JV*.

<sup>59</sup> European Commission decision of 15 September 1998, IV/JV.11 – *@ Home Benelux B.V.*; European Commission decision of 20 July 2000, COMP/JV.48 – *Vodafone/Vivendi/Canal+*; however, it should be noted that different methods of Internet access, e.g. via TV cable, traditional telephone line and wireless networks, do not necessarily create separate markets. Furthermore, the access services market has changed significantly since these decisions were published.

<sup>60</sup> European Commission decision of 13 October 2000, COMP/M.2050 – *Vivendi/Canal+/Seagram*; European Commission decision of 18 February 2010, COMP/M.5727 – *Microsoft/Yahoo!Search Business*.

<sup>61</sup> European Commission decision of 27 May 1998, IV/JV.1 – *Telia/Telenor/Schibsted*; European Commission decision of 11 March 2008, COMP/M.4731 – *Google/DoubleClick*.



markets are also, in principle, national, whereas Internet portal markets can be either national or Europe-wide.<sup>62</sup>

### 2.3.2.2. Definition of convergent audiovisual media markets in EU competition law

Increasing digitisation, technical innovations, changing user behaviour and new media services are all part of a growing tendency towards convergence. The term “convergence” or “media convergence” means the amalgamation of previously separate media sectors. Print, broadcast, mobile and Internet services are increasingly merging together.<sup>63</sup> It goes without saying that traditional media are also now accessible to users as online and mobile services, often through the use of a so-called “second screen”, while Internet services can be received via traditional user devices, such as television in the form of Connected TV or Smart TV.

A crucial question therefore arises in relation to competition law: is there a general substitutability between online and offline services or can they, at least in individual cases, be considered part of the same relevant market? A knock-on question concerns the extent to which the European Commission’s previous approach, as demonstrated in its decisions, remains valid. To answer these questions, it is not sufficient simply to point to the migration of viewers/listeners/readers to Internet services, or the similarities between services that are distributed in different ways.<sup>64</sup>

In principle, the European Commission is generally reluctant to recognise convergent, single, multi-genre markets. In 2014, for example, in the *Facebook/Whatsapp* case, it reiterated its view that online and offline advertising markets should remain separate.<sup>65</sup> However, it has shown that it is fully aware of the blurring of the lines between separate media sectors by at least taking account of multi-genre markets in individual cases. European Commission initiatives to update relevant media legislation also demonstrate its recognition of media convergence and its general desire to move towards technology-neutral regulation. Clear examples of this include the current proposal to reform the Audiovisual Media Services Directive in order to include video platforms<sup>66</sup> and the Commission’s statements on the television and online advertising market. It refused to recognise a single, multi-genre advertising market, even though the parties in the cases concerned had argued that newspaper, television, radio and online advertising should form a single market. However, it has entertained the idea of including various forms of online advertising in the TV advertising market. Even if online display and online video advertising cannot be assigned to the same relevant product market, it is therefore feasible that on-demand online video advertising could form part of the same market as on-demand offline video (e.g. video on demand services offered by cable or

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<sup>62</sup> See also Braun/Paschke, in *Hamburger Kommentar Gesamtes Medienrecht*, Nomos-Verlagsgesellschaft, Baden-Baden, 3rd edition, 2016, p. 591.

<sup>63</sup> See Hans, *Die Auswirkungen des Medienwandels auf das Werbevertrags- und –werbekartellrecht*, C. H. Beck Verlag, Munich 2015, pp. 21 et seq.

<sup>64</sup> Beckmann/Müller, Hoeren/Sieber/Holznapel, *Handbuch Multimedia-Recht*, C. H. Beck Verlag, 42nd edition, June 2015, part 10, para. 44.

<sup>65</sup> European Commission decision of 3 October 2014, COMP/M.7217 – *Facebook/Whatsapp*. However, it should be noted that the Commission only briefly considered further subdividing the online advertising market because this was irrelevant to the decision. It did not distinguish between individual online advertising markets, which is why a differentiated comparison in the area in which a convergent market is most likely – online video advertising and offline video advertising – was not part of the merger control procedure.

<sup>66</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities of 25 May 2016, COM(2016) 287 final, pp. 11. et seq., p. 25 (Art. 1), <http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52016PC0287&from=EN>; the proposed reforms are summarised in Hans, *Herzstück des digitalen Binnenmarkts – Rechtsrahmen für Bewegtbildangebote*, NJW 2016, p. 17.



telecommunications companies) and free TV advertising.<sup>67</sup> Furthermore, market boundaries are likely to become blurred in the display advertising sector, since the targeting of advertising at certain groups can reduce the amount of wasted circulation in a similar way to search advertising.<sup>68</sup>

However, with increasing convergence of transmission methods, user behaviour, content and end devices, the European Commission is likely to continue its examination of whether online and offline products should belong to the same market.

### 2.3.3. Relationship between EU competition law and member state concentration control

The relationship between EU competition law and member states' efforts to control concentration under media and competition laws shows that the European Commission's approach, including any adjustment of market definitions to take convergence into account, is not always applicable. This is most clearly demonstrated in the area of merger control. Here, the provisions of EU competition law only apply to concentrations with a Community dimension, i.e. where the aggregate Community-wide turnover of at least two of the undertakings concerned is more than EUR 250 million and the combined worldwide turnover of all the undertakings concerned is more than EUR 5 billion.<sup>69</sup> Even if the relevance threshold is reached, there is an exception to the Commission's exclusive responsibility for merger decisions: in order to achieve other relevant objectives, the member states can, alongside the Commission's decision based on market power, conduct an additional examination that can lead to the Commission's decision being overturned by the member state's own decision, which is based on power of opinion. Indeed, under Article 21(4) sentence 1 of the Merger Regulation, member states may take appropriate measures to protect legitimate interests other than those taken into consideration by the Regulation. Article 21(4) sentence 2 expressly mentions plurality of the media as such a legitimate interest. Therefore, the relevant authorities in the member states are able, in order to protect media diversity, to prohibit concentrations that the Commission has deemed permissible under competition law. However, they cannot approve concentrations previously prohibited by the Commission by arguing that they increase diversity, for example.<sup>70</sup>

### 2.3.4. Overview of important recent European Commission cases

The European Commission has frequently, particularly in recent years, issued important competition law decisions that have had a lasting impact on concentration control in the media sector and will continue to play a significant role. Examples include the *Google/DoubleClick* case, in which the

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<sup>67</sup> European Commission decision of 24 September 2010, COMP/M.5881 – *ProSiebenSat.1/RTL interactive/JV*.

<sup>68</sup> European Commission decision of 11 March 2008, COMP/M.4731 – *Google/DoubleClick*.

<sup>69</sup> A Community dimension – according to the terminology used in the Merger Regulation – can be achieved with lower turnover thresholds if a minimum level of turnover is generated in several EU member states, see Article 1 of the Merger Regulation, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF>.

<sup>70</sup> Westermann, Loewenheim/Meesen/Riesenkampf/Kersting/Meyer-Lindemann, *Deutsches und Europäisches Kartellrecht*, C. H. Beck Verlag, 3rd edition, Munich 2016, Art. 21, para. 11. See also Cole, "Europarechtliche Rahmenbedingungen für die Pluralismussicherung" in *BLM-Symposium Medienrecht 2007: Freiheitssicherung durch Regulierung: Fördert oder gefährdet die Wettbewerbsaufsicht publizistische Vielfalt im Rundfunk?*, Nomos-Verlagsgesellschaft, Baden-Baden 2007, pp. 93, 108 et seq.



Commission commented in detail on competition in online advertising markets, the largest source of finance for online media, and *ProSiebenSat.1/RTL interactive/JV*, in which the Commission suggested that, in a convergent media world, cross-sector markets could be taken into account when examining proposed concentrations.

#### 2.3.4.1. *Google/DoubleClick*

In the *Google/DoubleClick*<sup>71</sup> decision of 11 March 2008, the European Commission investigated *Google's* takeover of American company *DoubleClick*. *DoubleClick* mainly sold ad serving, management and reporting technology worldwide to website publishers, advertisers and advertising agencies, was launching an intermediation platform and owned *Performics*, a search engine marketing agency. In this merger control decision, the Commission laid down some detailed principles which are relevant to the definition of advertising markets in connection with online advertising and targeting.

In its market analysis, the Commission held firstly that there was no single market for online and offline advertising. It therefore rejected *Google's* argument that the relevant product market encompassed the provision of advertising space in all types of media, since the Internet was only one of several media channels that could be chosen by advertisers wanting to promote their goods or services and that would therefore be taken into account in their planning. The Commission stated that online and offline advertising should be separated because online advertising was used for specific purposes and, as opposed to offline advertising, was capable of reaching a more targeted audience in a more effective way. Online advertising also had a unique reporting system that enabled advertisers to evaluate the effectiveness of online advertising much more accurately than that of offline advertising. Finally, the specific online pricing mechanism, calculated on a "cost per click/cost per impression" basis, distinguished the two markets.<sup>72</sup>

The Commission also examined whether, within the online advertising market, narrower market definitions should be used depending on the appearance of the advertising (text or display ads) and, in particular, whether it was search or non-search advertising. It found that there was no reason to make such a distinction as far as online advertising was concerned.<sup>73</sup> The fact that ad serving tools, which helped advertisers to assess their return on investment, were converging across more and more types of advertising led to the conclusion that all kinds of ads could be substitutable. The main reason for the limited availability of metrics in some cases seemed to originate more from self-imposed policies than technical or regulatory reasons.<sup>74</sup> However, things were different in the market for intermediation of online advertising, where the Commission distinguished between search and non-search advertising.<sup>75</sup>

On the basis of this market distinction, the Commission concluded that the merger of *Google* and *DoubleClick* did not threaten competition in the common market. However, this decision concerns an individual case and does not mean that the Commission does not envisage the possibility that *Google* might endanger such competition. On the contrary, the Commission has investigated some of *Google's* business activities on many occasions in recent years. Only recently,

<sup>71</sup> European Commission decision of 11 March 2008, COMP/M.4731 – *Google/DoubleClick*.

<sup>72</sup> European Commission decision of 11 March 2008, COMP/M.4731, para. 44 et seq. – *Google/DoubleClick*.

<sup>73</sup> European Commission decision of 11 March 2008, COMP/M.4731, para. 48 et seq. – *Google/DoubleClick*.

<sup>74</sup> European Commission decision of 11 March 2008, COMP/M.4731, para. 52 – *Google/DoubleClick*.

<sup>75</sup> European Commission decision of 11 March 2008, COMP/M.4731, para. 54 et seq. – *Google/DoubleClick*.



media reports unanimously announced an impending investigation into *Google's* online advertising activities, with a particular focus on *AdWords* and *AdSense*.<sup>76</sup>

#### 2.3.4.2. *ProSiebenSat.1/RTL interactive/JV*

Two years after the *Google/DoubleClick* decision, the Commission announced in its decision in the *ProSiebenSat.1/RTL interactive/JV*<sup>77</sup> case that a strict separation of markets for online and offline advertising would not always be possible in a convergent media world and that it was considering definitions of cross-media markets.

The case concerned the establishment of a joint venture whose purpose was to create an Internet platform on which consumers could watch repeats of television content for seven days after the programme had been broadcast on linear free-to-air television (“7-day catch-up”). The platform was to be funded through advertising.

When defining the relevant product markets, the Commission expressly stated that it could not be excluded, in relation to competition for audience share, that free, online, professional long-format content could form a separate market. At the same time, however, it expressly noted that it should, at least partly, be substitutable with free, online, professional long-format content in the form of on-demand catch-up videos and with free, offline, professional linear long-format content, offline, professional long-format VoD content and paid-for, online, professional long-format VoD content.<sup>78</sup> Finally, similar considerations led the Commission to expressly point out, in connection with the definition of advertising markets, that the convergence of linear television and the Internet could, in future – with regard to video advertising in conjunction with professionally created content – justify a review of the separation between offline and online advertising that had been established in previous cases. Since it was not important for this particular decision, however, the Commission did not set out a definitive market definition.<sup>79</sup>

Finally, the Commission noted that, since the transaction could have significant negative effects on competition in Germany, the case should be thoroughly reviewed. However, since this only or mainly affected a single market in Germany, it referred the matter to the *Bundeskartellamt* (Federal Cartel Office) in accordance with Article 9(2)(a) of the Merger Regulation.<sup>80</sup>

#### 2.3.5. Political initiatives

Away from its decisions under competition law, the Commission recognised the challenges of regulating the media and guaranteeing diversity a long time ago. It first considered media pluralism when it created an EC Television Directive in the 1980s, although this did not provide for any Europe-wide regulation. In December 1992, the Commission published a Green Paper entitled “Pluralism and media concentration in the internal market – An assessment of the need for Community action”,

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<sup>76</sup> European Commission press release of 20 April 2016, [http://europa.eu/rapid/press-release\\_IP-16-1492\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1492_en.htm).

<sup>77</sup> European Commission decision of 24 September 2010, COMP/M.5881, para. 29 et seq. – *ProSiebenSat.1/RTL interactive/JV*.

<sup>78</sup> European Commission decision of 24 September 2010, COMP/M.5881, para. 50 et seq. – *ProSiebenSat.1/RTL interactive/JV*.

<sup>79</sup> European Commission decision of 24 September 2010, COMP/M.5881, para. 65 et seq. – *ProSiebenSat.1/RTL interactive/JV*.

<sup>80</sup> European Commission decision of 24 September 2010, COMP/M.5881 – *ProSiebenSat.1/RTL interactive/JV*; BKartA (German Cartels Office), decision of 17 March 2011 – B 6 – 49/10 – *ProSiebenSat.1/RTL interactive*.



which set out various options for a European regulatory approach.<sup>81</sup> However, the lengthy consultations that followed did not result in any concrete legislative proposals because the Member States did not believe the EU had the power to regulate media pluralism.

It was not until 2007, after the creation of the Audiovisual Media Services Directive, which still did not contain any provisions to guarantee pluralism, that the Commission finally published a background paper entitled “Media pluralism in the Member States of the European Union”, which proposed a definition of media pluralism and described the main features of media concentration, including at cross-border level.<sup>82</sup> The aim was to create transparency and to identify any need for action on the part of the member states.

Later, in 2013, the Commission published a Green Paper on “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”, which laid the ground for various legislative initiatives as part of the strategy to create a digital single market.<sup>83</sup> Although giving the European Commission responsibility for controlling media concentration is not part of the strategy, the basic principles of media diversity and pluralism play a role in the reform of the AVMSD and SatCab Directive in the sense that these objectives are acknowledged. Support is also given to activities designed to monitor pluralism. This is illustrated, for example, by the study on the creation of a Media Pluralism Monitor, which was developed in order to identify potential risks to media pluralism in the member states.<sup>84</sup>

These European Commission activities relating to the protection of media diversity are not only supported, but also demanded by the European Parliament.<sup>85</sup> In numerous resolutions, the Parliament has repeatedly stressed the importance of media pluralism in the European Union as a whole and regularly expresses concern about developments in the media sector if it identifies threats to media diversity in individual member states or the European Union.<sup>86</sup>

The European Parliament constantly urges the Commission to take the necessary measures to protect pluralism. For example, in its resolution of 14 October 2009, it invited the Commission “to issue an urgent communication on the protection of pluralism of the media and media concentration in Member States” and referred to numerous previous resolutions in which it had even called for proposals for a corresponding directive. It concluded that that the EU’s legislative framework on media pluralism and media concentration was still inadequate and that there was therefore an urgent need for the Commission to finally act. The Parliament considered that the EU had sufficient competence to define minimum essential conditions for the protection of pluralism in the member states.<sup>87</sup>

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<sup>81</sup> See [http://aei.pitt.edu/1157/1/pluralism\\_gp\\_annexes\\_COM\\_92\\_480.pdf](http://aei.pitt.edu/1157/1/pluralism_gp_annexes_COM_92_480.pdf) and [http://europa.eu/rapid/press-release\\_P-92-68\\_de.htm](http://europa.eu/rapid/press-release_P-92-68_de.htm).

<sup>82</sup> See [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/media\\_pluralism\\_swp\\_en.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf).

<sup>83</sup> See [https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/convergence\\_green\\_paper\\_de\\_0.pdf](https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/convergence_green_paper_de_0.pdf).

<sup>84</sup> See <https://ec.europa.eu/digital-single-market/en/media-pluralism-monitor-mpm>. Regarding the importance of EU initiatives in the media field, see also: Donders/Pauwels/Loisen, *The Palgrave Handbook of European Media Policy*, Palgrave Macmillan UK, 2014.

<sup>85</sup> Cole, “Europarechtliche Rahmenbedingungen für die Pluralismussicherung” in BLM-Symposium Medienrecht 2007: Freiheitssicherung durch Regulierung: Fördert oder gefährdet die Wettbewerbsaufsicht publizistische Vielfalt im Rundfunk?”, Nomos-Verlagsgesellschaft, Baden-Baden 2007, pp. 93, 114.

<sup>86</sup> See e.g. European Parliament Resolution of 12 March 2014 on Preparing for a Fully Converged Audiovisual World; of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU; of 25 September 2008 on concentration and pluralism in the media in the European Union; of 20 November 2002 on media concentration; of 15 February 1990 on concentration in the media sector.

<sup>87</sup> European Parliament Resolution of 14 October 2009 on freedom of information and media pluralism in Italy and in the European Union.



## 2.4. Measures to prevent media concentration at Council of Europe level

Although, unlike EU competition law, the Council of Europe's activities in connection with the protection of media diversity have no direct legal effect, its work in this area is especially significant. This is partly due to the territorial scope of the Council of Europe, which is much larger than that of the European Union: its 47 member states now include almost all central and east European states, as well as Turkey. The Committee of Ministers and Parliamentary Assembly of the Council of Europe frequently try to influence the member states' policies regarding the protection of media diversity by means of various resolutions and recommendations. Policy recommendations are the main instrument used rather than actual regulatory proposals. Although the recommendations and resolutions are not binding, they stimulate not only co-operation, especially at intergovernmental level, but also, even more importantly, national adherence to their objectives, which may in turn become the subject of international debate.<sup>88</sup> There is a long tradition of Council of Europe recommendations and resolutions on the protection of media diversity. For example, the Appendix to Recommendation No. R (99) 1 of the Committee of Ministers<sup>89</sup> lists numerous principles for the promotion of media pluralism, including in view of new media, and recommends their implementation in national legislation. In Recommendation CM/Rec(2007)2<sup>90</sup> on media pluralism and diversity of media content, the Committee of Ministers calls for national rules to restrict ownership of media companies, which should be reviewed on a regular basis in the light of technological developments. It also calls on Member States to ensure that public service broadcasters play a role in the new media landscape, to encourage the media to provide greater content diversity and to support national scientific research on transnational media concentration. The problem of media concentration has therefore been one of the Media Division's main focuses for 15 years and relevant groups of experts have looked closely at the phenomenon of transnational concentration from an early stage.<sup>91</sup>

The Parliamentary Assembly of the Council of Europe recently published Resolution 2065 (2015)<sup>92</sup> and Recommendation 2074 (2015)<sup>93</sup>, which both deal with the transparency of media ownership. Through Recommendation 2074 (2015), the Council of Europe wishes to draw attention to the member states in which there is a lack of transparency as far as ownership structures are concerned. It refers to alarming tendencies in view of the transparency and pluralism requirements for media under Article 10 ECHR and other Council of Europe standards. The Parliamentary Assembly recommends that the Committee of Ministers review and further develop standards for the promotion of media transparency, media pluralism and diversity of media content. In particular, it calls for more reporting via action in line with the technological convergence of digital media, and

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<sup>88</sup> Dörr, in: Dörr/Kreile/Cole, *Handbuch Medienrecht*, Verlag Recht & Wirtschaft, Frankfurt am Main, 2012, p. 43.

<sup>89</sup> See

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Rec\(99\)1&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Rec(99)1&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true).

<sup>90</sup> See [https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2007\)7E.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)7E.pdf).

<sup>91</sup> Cole, "Europarechtliche Rahmenbedingungen für die Pluralismussicherung" in BLM-Symposium Medienrecht 2007: Freiheitssicherung durch Regulierung: Fördert oder gefährdet die Wettbewerbsaufsicht publizistische Vielfalt im Rundfunk?, Nomos-Verlagsgesellschaft, Baden-Baden 2007, pp. 93 et seq. See also the report of the Advisory Panel on Media Diversity on transnational media concentrations in Europe from November 2004, summarised at <http://merlin.obs.coe.int/iris/2005/1/article2.en.html>. Committee of Experts on Media Pluralism and Transparency of Media Ownership (MSI-MED), see <http://www.coe.int/en/web/freedom-expression/committee-of-experts-on-media-pluralism-and-transparency-of-media-ownership-msi-med>.

<sup>92</sup> See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21958&lang=en>.

<sup>93</sup> See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21959&lang=en>.



for an increase in compliance with transparency standards through co-operation with the European Platform of Regulatory Authorities (EPRA) and between national regulatory authorities. Finally, associations of media outlets are invited to set up ethical standards on transparency of media ownership. This Recommendation is based on Resolution 2065 (2015), which sets out 11 proposals regarding the transparency of media ownership. The Resolution emphasises the fundamental importance of freedom of information through the media in a democracy and the fact that media ownership transparency is necessary to enable members of the public to form an opinion on the value of the information, ideas and opinions disseminated by the media. The Council of Europe notes a lack of transparency due primarily to a lack of transparency obligations under domestic law in member states and non-transparent ownership structures resulting from certain legal constructions of indirect or hidden ownership, which are often linked to political affiliations or economic or religious interests. This represents a particular challenge for media diversity, which is threatened by increased economic pressure and competition through digital media. The Council of Europe therefore considers it important that member states review their legislation to ensure adequate transparency of the ownership of, and influence over, media outlets. However, such regulations should not be used to discriminate against foreign ownership of media. Following these general statements, the Council of Europe lists the information about media outlets that it believes should be disclosed to the public in order to keep media ownership transparent. The information should be submitted by the media outlets concerned to an independent national media authority, which should monitor the respect of reporting obligations and give the public free access to the information, presented in a meaningful way, in electronic format, through the media's websites and/or a centralised database published by the national media authority. The public should be able to lodge complaints of non-compliance with transparency standards.

## 2.5. The impact of media-related relevant markets

Threats to media diversity are not posed solely by media companies themselves and state interference. The aforementioned media markets must not be viewed in isolation because developments in other markets can also have a lasting impact on media pluralism. Media markets are embedded in a system of up- and downstream markets whose existence is very closely linked to that of the media markets themselves and which can influence each other. At present, the role of media agencies and of large international corporations such as *Facebook* and *Google* is under discussion, for example.

### 2.5.1. Media agencies

Media agencies are intermediaries between advertisers and the media that provide or sell advertising.<sup>94</sup> Their expertise means that they play the role of gatekeeper between the two sides of the market.<sup>95</sup> In a context of increasing internationalisation and concentration, the market is dominated by a small number of large international agency holdings (including *GroupM/WPP*,

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<sup>94</sup> See Hans/Ukrow/Knapp/Cole, (Neue) Geschäftsmodelle der Mediaagenturen, 2016, [https://www.blm.de/files/pdf1/emr-gutachten\\_mediaagenturen\\_.pdf](https://www.blm.de/files/pdf1/emr-gutachten_mediaagenturen_.pdf).

<sup>95</sup> Hans, Die Auswirkungen des Medienwandels auf das Werbevertrags- und Werbekartellrecht, C. H. Beck Verlag, Munich 2015, pp. 12 et seq.



*Publicis Media Group, Omnicom Media Group and Dentsu Aegis Media Network*), which is problematic. The impact of the rebate schemes that form the basis of these companies' activities and business models on media financing is therefore the subject of debate, some of it highly controversial.<sup>96</sup> In 2014, following the planned merger between *Publicis* and *Omnicom*, the European Commission took the opportunity to conduct a comprehensive investigation into the European media agency market. It concluded that the merger of the two agencies did not create a dominant position in the market for either the sale or the procurement of media buying services, nor in the marketing and communication services market, and declared the merger compatible with the internal market.<sup>97</sup> Although the merger between the two media agencies never took place for other reasons, the Commission's decision was criticised by smaller media outlets and marketers in particular, who became exposed to increasing pressure on prices from the media agencies.<sup>98</sup>

## 2.5.2. Google, Facebook et al

US IT giants such as *Facebook* and *Google* are increasingly being drawn into the debate over media pluralism. Thanks to their supply structures, they are able to collate and exploit a vast amount of user data and thereby create a totally new type of market power. Through the interaction of data and algorithms, there is a danger that the flow of information to the recipient is manipulated, resulting in an attack on freedom of expression and media diversity. This potential influence became clear in the context of the current US presidential election campaign, when an internal *Facebook* document was made public. The document suggested that the company could use its algorithms to actively support the Democratic Party's campaign through its newsfeed without *Facebook* users noticing.<sup>99</sup> Although *Facebook* denied these rumours, this incident shows how much market power these companies wield on account of the enormous quantities of data that they hold.<sup>100</sup> From a competition law perspective in particular, the extent to which data should be taken into account as a new "currency" alongside financial turnover figures in cartel law assessments of market power is therefore under discussion.<sup>101</sup>

## 2.6. Conclusion

Both the Council of Europe and the European Union, through the decisions of the European Commission, have a crucial influence on the protection of media diversity in Europe. The Council of Europe exercises this influence through a range of political initiatives and is particularly significant on account of its large number of member states. The strongest weapon used by the European Union, with an indirect impact on the protection of media diversity, is competition law, where it holds

<sup>96</sup> Denzel/Holm-Hadulla, Gaedertz/Martinek/Ory, *Handbuch Mediaagenturen – Aufgabenfelder, Geschäftsmodelle, Vertrags- und Wettbewerbsrecht*, Munich 2016, p. 329.

<sup>97</sup> European Commission decision of 9 January 2014, COMP/M.7023 – *Publicis/Omnicom*.

<sup>98</sup> See references in, for example [http://www.spdfraktion.de/system/files/documents/auszug\\_der\\_branchenbefragung\\_kartellrecht.pdf](http://www.spdfraktion.de/system/files/documents/auszug_der_branchenbefragung_kartellrecht.pdf).

<sup>99</sup> See <https://www.washingtonpost.com/news/the-fix/wp/2016/05/09/former-facebook-staff-say-conservative-news-was-buried-raising-questions-about-its-political-influence/>.

<sup>100</sup> See <http://www.wsj.com/articles/facebook-refutes-criticisms-about-a-bias-against-conservatives-1462890206>.

<sup>101</sup> See <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?blob=publicationFile&v=2>; regarding the Facebook investigation, see:

[http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/02\\_03\\_2016\\_Facebook.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/02_03_2016_Facebook.html).



executive powers. The EU strategy on the digital single market in particular shows, in various pieces of legislation and proposals for reform, that the increased convergence resulting from technological advances is playing a major role in the EU's political and legal activities.





## 3. Instruments to measure media and publicise concentration – the example of the Media Pluralism Monitor

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### 3.1. Introduction

In the EU member states media pluralism is perceived as a prerequisite for democracy on the grounds that access to a broad range of information strengthens citizenship and the fabric of society.<sup>103</sup> Yet, despite the broad recognition of the merits it generates, supranational action that is aimed at protecting media pluralism is a highly controversial topic. On the one hand, the European Union does not have explicit Treaty competence to adopt rules in support of this value. Pursuant to the principle of subsidiarity, the member states are believed to be better placed to develop national media policies in accordance with their cultural traditions, societal needs, and the specificities of domestic markets. On the other hand, media pluralism is a foundation stone of the EU in that it forms an integral part of the member states' constitutional traditions and is enshrined in Article 11(2) of the Charter of Fundamental Rights.<sup>104</sup>

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<sup>102</sup> The authors are, respectively, Research Associate and Research Fellow/Scientific Coordinator of the Centre for Media Pluralism and Media Freedom, European University Institute (Florence). The Introduction was co-authored, Sections 3.2., 3.3. and 3.5 were authored by Dr. Bania, whereas Section 3.4. was authored by Dr. Brogi. The Media Pluralism Monitor is conducted with the financial support of the European Union.

<sup>103</sup> It bears noting that the merits of media pluralism are acknowledged both within and beyond the confines of the EU. In Europe, the Council of Europe has been active in analysing best practices in its member states with regard to policies and regulatory measures aimed at protecting media pluralism, as well as in preparing standard-setting proposals on media pluralism and transparency of media ownership. See, for example, Council of Europe, Recommendation No. R (99) 1 of the Committee of Ministers to member states on measures to promote media pluralism; Recommendation No. R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector and its Explanatory Memorandum Pluralism in the multi-channel market: suggestions for regulatory scrutiny (MM-S-PL(1999) 012def); Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting and its Explanatory Memorandum, and Recommendation No. R (94) 13 of the Committee of Ministers to member states on measures to promote media transparency.

<sup>104</sup> Charter of the Fundamental Rights of the European Union [2010] OJ C 83/389. Article 11 reads as follows:

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.



While the question of whether the EU can legislate to safeguard media pluralism is open to debate, there is little doubt that, as a result of numerous harmful (state and corporate) practices<sup>105</sup> which significantly affect access to information and which often transcend national frontiers, a consistent approach across the EU might be necessary in order to address several common threats to diversity in the media. However, the heterogeneity characterising national media landscapes and the limited competence of the EU to regulate non-economic issues related to the operation of media organisations,<sup>106</sup> such as the remit of public service media and the establishment of ownership restrictions, pose significant difficulties for developing a unified approach to the adoption of a regulatory model that enhances media pluralism.

The Media Pluralism Monitor (MPM) is an initiative that must be seen in light of the above reality; rather than a tool that seeks to propose a one-size-fits-all approach to addressing concerns over media pluralism, it is an instrument that aspires to collect a wide range of information about and to raise awareness of matters inherently related to the state of media pluralism across the EU. More specifically, the MPM project, which is carried out by the Centre for Media Pluralism and Media Freedom (CMPF) at the European University Institute, aims to assess risks to media pluralism by reference to relevant legal, economic, and socio-political indicators in four key risk domains; namely, Basic Protection, Market Plurality, Political Independence, and Social Inclusiveness. The methodology of the MPM is based on the holistic approach developed by the *Independent Study on the Indicators for media Pluralism in the Member States: Towards a Risk-Based Approach*.<sup>107</sup> The CMPF has sought to improve the design of the MPM by gradually developing a streamlined formula for calculating risks to media pluralism as well, by restructuring the indicators of the tool with a view to ensuring the relevance of the topics that fall within its scope. A pilot implementation of the MPM took place in 2013-14 (MPM2014), which sought to calculate risks to media pluralism in nine EU member states.<sup>108</sup> A second pilot project was carried out in 2015 (MPM2015) in the remaining nineteen EU member states.

As mentioned above, one of the four domains of which the tool is comprised is Market Plurality. This domain consists of indicators that are assessed through variables<sup>109</sup> that attempt to evaluate concerns over media pluralism that originate from concentration of media ownership; the topic of this report. The Market Plurality domain is concerned with several pressing matters, including: the existence (or lack thereof) of regulatory safeguards to prevent consolidation in the media; the existence (or lack thereof) of regulatory safeguards to promote transparency of media ownership; the role of independent authorities in ensuring that the aforementioned safeguards are effectively implemented; and concentration ratios in the most widely used media.

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<sup>105</sup> These may range from outright political censorship to more subtle forms of interference, such as manipulation of algorithms by social networking platforms and search engines.

<sup>106</sup> See, for example, Article 167(4) and (5) TFEU:

4. 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.

5. In order to contribute to the achievement of the objectives referred to in this Article: — the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, — the Council, on a proposal from the Commission, shall adopt recommendations.

<sup>107</sup> The study and accompanying documents are available at: <https://ec.europa.eu/digital-single-market/en/media-pluralism-monitor-mpm>.

<sup>108</sup> For more information on how these nine States were selected, see: <http://monitor.cmpf.eui.eu/countries/>.

<sup>109</sup> For clarity, 'variables' refers to questions posed to national experts involved in the assessment exercise of each country. For example, one variable in the Market Plurality Domain is: 'Does media legislation contain specific thresholds and/or other limitations that are based on objective criteria (e.g. number of licenses, audience share, circulation, distribution of share capital or voting rights, turnover/revenue, etc.) in order to prevent a high degree of horizontal concentration of ownership in the audiovisual media sector?'



The present contribution first discusses the rational underpinning the ‘Market Plurality Domain’, explaining why concerns arising from media concentration are still relevant and therefore worth studying. Following this, an overview of the methodology underpinning the Monitor is provided, followed by an overview of the results obtained through the implementation of the Monitor. Finally, the contribution ends with some concluding remarks. Given that MPM2015 is an updated version of the pilot implementation, as well as being more representative of the situation on media pluralism across the EU, the analysis will focus on MPM2015.

### 3.2. Why measure concentration of media ownership? The rationales underpinning the ‘Market Plurality Domain’

Prior to explaining the methodology employed to assess risks originating from ownership concentration, it is necessary to make certain key remarks on the rationale underpinning the ‘Market Plurality Domain’.

Developments in the field of Information and Communication Technologies (ICTs), most notably digitization and the increasing use of wireless technologies, have brought about significant changes to media markets in Europe and beyond. New distribution platforms are constantly emerging, whereas spectrum scarcity and large upfront investments are being replaced by almost unlimited space and the ability to establish a media outlet at negligible cost. As a result, there has been a rapid increase in the amount of content and sources that may now reach the public. Amidst these changes, policymakers are increasingly voicing the opinion that the revolution spurred by ICTs is gradually resolving the problems arising from ownership concentration that were pervasive in the traditional media landscape: with the amount of information that citizens now have at their fingertips, they say, rules aimed at addressing concentration of ownership are becoming obsolete. This view is progressively being integrated in media regulation, the most notable example being the trend towards the relaxation or abolition of ownership restrictions that has emerged over the past few years.<sup>110</sup>

The assumption that media pluralism is almost a natural outcome of the digital revolution, and is therefore ‘liberated’ from concentration-related concerns, is arguably *not* well-grounded, for there are at least two realities providing evidence to the contrary:

- First, ‘old gatekeepers’, such as established broadcasters and newspaper publishers, continue to exercise decisive influence over the content that is ultimately consumed by the audience members.
- Second, alongside traditional media organisations, powerful businesses that have emerged with the advent of the Internet, most notably digital intermediaries, may engage in practices that artificially create scarcity.<sup>111</sup>

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<sup>110</sup> See, for example, Open Society Foundations, Mapping Digital Media in the European Union - A Report for the High-Level Group on Media Freedom and Pluralism, p. 2, 2012, [http://www.opensocietyfoundations.org/sites/default/files/Mapping\\_Digital\\_Media\\_EU\\_20121217\\_0.pdf](http://www.opensocietyfoundations.org/sites/default/files/Mapping_Digital_Media_EU_20121217_0.pdf); Ofcom, Report on Media Ownership Rules, pp. 21 *et seq.*, 2009, and Freedom House, *Report on Spain*, 2013, [https://www.freedomhouse.org/report/freedom-press/2013/spain#.VMJr\\_M016eY](https://www.freedomhouse.org/report/freedom-press/2013/spain#.VMJr_M016eY).

<sup>111</sup> For a comprehensive overview of the conflicting arguments regarding media concentration in the digital era see Bania, K., “The Role of Media Pluralism in the Enforcement of EU Competition Law”, pp. 60-93, PhD Thesis, Florence: European University Institute, 2016. <http://biblio.eui.eu/search~S5?/abania/abania/1%2C3%2C6%2CB/frameset&FF=abania+konstantina&2%2C%2C2/indexsort=->, Paris/New York: Concurrences, Forthcoming, 2017. See also Gangemi, G., “Exploring the Economic Aspects of Media Pluralism and Media Freedom in



### 3.2.1. The position of “old gatekeepers” in the current media landscape

As regards the influence of established broadcasters and publishers, it must be borne in mind that traditional media markets have a natural tendency to become concentrated,<sup>112</sup> which is largely attributed to sector-specific economics. Characteristics that contribute to concentration include high entry barriers (e.g. high sunk costs associated with the purchase of broadcast licenses and/or the acquisition of premium content, monetary or psychological switching costs the consumer is reluctant to bear, etc.), economies of scale that a media provider may benefit from by expanding into the same or different levels of the supply chain, and the two-sided nature of advertising-based media, which results in ‘winner-takes-all’ market structures. Legal developments have also facilitated ownership concentration. In addition to relaxation or abolition of ownership restrictions, liberalization and a lenient approach towards mergers & acquisitions in the media sector have enabled large media groups to expand throughout the EU, solidifying their presence in a number of media markets.

The concern that concentration in traditional media markets may lead to a handful of media owners dictating the political agenda has not subsided. This is so for three main reasons:

- First, traditional media sources remain a big part of Europeans’ media diet. For example, television is still the most popular medium in the EU and radio the second most popular.<sup>113</sup>
- Second, technological developments may have lowered barriers to entry, but this does not necessarily enhance media pluralism. For example, while the switch-off of analogue television releases spectrum, instead of creating opportunities for new entrants, it may favour existing media conglomerates that have both the financial resources to invest in acquiring new and multiple channels, and enough content to ‘sustain’ them.<sup>114</sup> The UK market is a good example of how (communicative and market) power is distributed in digital television: in the UK, 621 international, national, and regional channels are currently available.<sup>115</sup> All of these channels are delivered by a handful of well-known groups, such as ITV, CBS, and Viacom.<sup>116</sup>
- Third and finally, recent research shows that online users are inclined to consume content produced by established media organisations instead of actively looking for online content that may complement their traditional media experience. For example, Ofcom found that, in

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the European Union”, in CMPF “European Union Competencies in Respect of Media Pluralism and Media Freedom” RSCAS PP 2013/01, <http://cadmus.eui.eu/handle/1814/26056>

<sup>112</sup> This has been confirmed by empirical studies that have examined the structure of the media industry in Europe and beyond. See, for example, Autorità per le garanzie nelle comunicazioni, Indagine conoscitiva sul settore della raccolta pubblicitaria (Allegato A alla delibera 551/12/CONS), <http://www.agcom.it/documents/10179/1/document/bd184d98-cdcd-41e1-b141-9864dcfba8d6>, and Ward D., Fueg O.C. and D’Armo A., “Mapping Study of Media Concentration and Ownership in Ten European Countries”, 2004, <http://77.87.161.246/wp-content/uploads/2013/08/A-Mapping-Study-of-Media-Concentration-and-Ownership-in-Ten-European-Countries.pdf>.

<sup>113</sup> European Commission, Media Use in the European Union, 2014, pp. 5 and 11,

[http://ec.europa.eu/public\\_opinion/archives/eb/eb82/eb82\\_media\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_media_en.pdf).

See also European Audiovisual Observatory, MAVISE EXTRA, Linear and on-demand audiovisual services in Europe 2015, 2016,

[http://www.obs.coe.int/documents/205595/264629/MAVISE+EXTRA\\_TV+and+ODAS+in+Europe+2015.pdf](http://www.obs.coe.int/documents/205595/264629/MAVISE+EXTRA_TV+and+ODAS+in+Europe+2015.pdf).

<sup>114</sup> European Federation of Journalists, “Media power in Europe: The big picture of ownership”, 2006, pp. 5-6, [http://www.ifj.org/fileadmin/images/EFJ/EFJ\\_documents/Reports/Media\\_Power\\_in\\_Europe.pdf](http://www.ifj.org/fileadmin/images/EFJ/EFJ_documents/Reports/Media_Power_in_Europe.pdf).

<sup>115</sup> See <http://mavise.obs.coe.int/country?id=14>. Note that the UK completed the digital switchover in 2012.

<sup>116</sup> See <http://mavise.obs.coe.int/country?id=14>. For a recent analysis of the topic of media consolidation across Europe see, for example, European Audiovisual Observatory, MAVISE EXTRA, Media Ownership: towards pan-European groups?, 2016, <http://www.obs.coe.int/documents/205595/264629/Media+ownership+towards+pan-European+groups/418385fa-cf0e-4c12-b233-29476177d863>.



2015, the three most popular news websites among laptop and desktop audiences in the UK were the websites of traditional media organisations (The Daily Mail, The Guardian, and BBC News).<sup>117</sup>

### 3.2.2. The influence of “digital intermediaries” over media content consumption

The second reason that concentration-related concerns have not diminished has to do with the structure and practices of emerging markets in which digital intermediaries operate. For the purposes of this investigation, digital intermediaries may be defined as entities that ‘bring news content from third-party providers to consumers, using a variety of digital software, channels, and devices’.<sup>118</sup> Digital intermediaries can be divided into four groups: search engines like Google and Bing, news aggregators like Yahoo!, social media like Facebook, and digital stores like iTunes and Amazon.<sup>119</sup> The markets in which digital intermediaries operate are concentrated for largely the same reasons traditional media markets manifest a tendency to concentration: high sunk costs that need to be incurred to develop an innovative technology; two-sidedness; the possibility to reap large scale economies by expanding into adjacent markets; and switching costs that online users are not willing to bear.<sup>120</sup> These are the main parameters that explain the position of economic strength that the most popular digital intermediaries hold.

Broadly speaking, digital intermediaries do not create content as traditional media organisations do.<sup>121</sup> Nor are they yet generating significant advertising revenues for news providers, which means that we (still) cannot establish a direct and causal relationship between intermediaries and high-quality journalism.<sup>122</sup> Yet, in an environment where content is abundant and attention scarce, the process of discovering content is becoming increasingly challenging and digital intermediaries may engage in practices that artificially narrow the amount of information sources that are available online. Foster identifies four broad areas in which the activities of digital intermediaries may have negative consequences for pluralism:

- a) their control of what may be considered to be distribution bottlenecks through which users, especially younger generations, access content;
- b) the editorial-like judgments they make about the content they link to or carry (e.g. they select and display content ‘relevant’ to the user’s query, decide which sources of news to feature prominently, etc.);

<sup>117</sup> Ofcom, Communications Market Report, 2015, p. 373,

[http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR\\_UK\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR_UK_2015.pdf).

<sup>118</sup> Foster R., “News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism”, p. 25, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).

<sup>119</sup> Foster R., “News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism”, p. 6, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).

<sup>120</sup> In many cases, switching costs can be so high as to produce lock-in effects. For example, if users have bought an iPad (Apple’s e-reader device), they are bound to use Apple’s store whenever they purchase online content such as news apps and e-books.

<sup>121</sup> Foster R., “News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism”, p. 28, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).

<sup>122</sup> Foster R., “News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism”, p. 24, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).



- c) their role in shaping future economic models for news provision (e.g. they enable disaggregation of news content, which makes it increasingly difficult for news providers to generate advertising revenues); and
- d) their inclination and ability to set the political agenda (e.g. when they invest in media in their own right).<sup>123</sup>

This classification identifies the main areas of concern surrounding pluralism thus far. By way of example, consider search engines and news content. Search engines in general, and Google in particular, play a key role in channeling news to Europeans: search is the dominant usage on the Internet, general search engines seem to be the intermediaries that citizens use the most to find news stories, and Google controls over 90% of the general online search market in most Member States.<sup>124</sup>

Starting from its role as a distribution bottleneck, several news providers maintain that Google exercises excessive control over the way in which they attempt to reach online users.<sup>125</sup> More particularly, news providers that operate pay walls claim that, unless they agree to some of their content being made available for free via Google Search, they automatically lose visibility in Google's search results.<sup>126</sup> If this is indeed the case, then Google artificially limits the number of sources that are available in the market. This practice could also be a concern if pay walls became essential for the economic viability of news provision.

Elements of editorial-like judgments made by search engines are present in the presentation of their search results or the design of their algorithms.<sup>127</sup> For example, search engines may decide to downgrade search results of competing services in order to ensure the prominent display of their own services. This issue is currently being examined by the European Commission in the context of an antitrust investigation into how Google displays search results of websites competing with it in neighboring search markets.<sup>128</sup> This case concerns the possible exclusion of competing price comparison websites from general online search; that is to say, websites providing content that is not essential to consume in order to make informed voting decisions. However, if the practice of downgrading was directed at information about matters of common concern, and if it produced exclusionary effects, it could potentially harm media pluralism. An experiment that was conducted by Epstein and Robertson shows that were search engines to promote a certain political agenda, downgrading could prove as harmful as interfering with the editorial policies of a newspaper; the experiment in question shows that downgrading search results influences voters' preferences and may ultimately affect election results.<sup>129</sup>

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<sup>123</sup> Foster R., "News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism", pp. 6-7, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).

<sup>124</sup> See European Commission, "Antitrust: Commission probes allegations of antitrust violations by Google", Press release IP/10/1624, 30 November 2010, [http://europa.eu/rapid/press-release\\_IP-10-1624\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en).

<sup>125</sup> Foster R., "News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism", p. 31, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).

<sup>126</sup> Foster R., "News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism", p. 31, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).

<sup>127</sup> Foster R., "News Plurality in a Digital World, Report prepared for the Reuters Institute for the Study of Journalism", p. 34, 2012, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/News%20Plurality%20in%20a%20Digital%20World_0.pdf).

<sup>128</sup> European Commission, "Antitrust: Commission probes allegations of antitrust violations by Google", Press release IP/10/1624, 30 November 2010, [http://europa.eu/rapid/press-release\\_IP-10-1624\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en).

<sup>129</sup> Epstein R. and Robertson R.E., "Democracy at Risk: Manipulating Search Rankings Can Shift Voting Preferences Substantially Without Voter Awareness", American Institute for Behavioral Research and Technology Working Paper Series/Summary of a paper presented at the



### 3.2.3. Outlook

The preceding analysis establishes that the proliferation of sources and content does not automatically ensure pluralism. It is against the background of both off- and online concentration, which may weaken democracy in many ways (some of which are already known, whereas others are new and therefore still understudied), that arguments on the decreasing importance of powerful media organisations in the public opinion formation process must be carefully considered. Accordingly, policymakers should acknowledge that ‘communicative abundance alone does not render questions about the distribution of communicative power and political voice obsolete, but only reconfigures them in a more complex form’.<sup>130</sup>

## 3.3. How to measure the concentration of media ownership: The methodology underpinning the ‘Market Plurality Domain’

For the reasons set out in the previous section, MPM2015 sought to assess risks to media pluralism that arise from media concentration. To that end, the tool included two indicators<sup>131</sup> that attempted to evaluate whether and to what extent the member states under examination have enacted rules which manage to prevent a handful of media owners from controlling the amount and type of information reaching the public.

More specifically, the first indicator deals with horizontal concentration of ownership, and the second is concerned with cross-media concentration of ownership. Horizontal concentration reflects the level of control that may be exercised by one or a number of media owners in a specific sector (e.g. the position held by a corporation providing retail broadcasting services in the audiovisual market concerned). Cross-media concentration reflects the level of control that may be exercised by one or a few media owners in a number of sectors within the industry (e.g. the position held by a media conglomerate in audiovisual and newspaper publishing markets).

The distinction between horizontal and cross-media concentration is based on two factors:

- First, the fact that media content is very expensive to create but fairly cheap to deliver incentivizes media companies to expand into the same *and/or* other (succeeding and/or preceding) levels of the supply chain,<sup>132</sup> because it provides the opportunity to exploit large economies of scale. Large economies of scale stimulate both horizontal and cross-media concentration, for they enable firms to rationalize resources and reduce transaction costs. Hence, the distinction is intended to mirror media-specific economics

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25th annual meeting of the Association for Psychological Science, Washington, D.C., May 2013, [http://www.fraw.org.uk/files/politics/epstein\\_robertson\\_2013.pdf](http://www.fraw.org.uk/files/politics/epstein_robertson_2013.pdf).

<sup>130</sup> Karppinen K., “Rethinking media pluralism and communicative abundance”, *Observatorio Journal* 3(4), p. 160, 2009, <http://obs.obercom.pt/index.php/obs/article/view/314/302>.

<sup>131</sup> Please note that the Market Plurality Domain comprises three indicators, the third focusing on transparency of media ownership. This indicator assesses the existence and effective implementation of regulatory safeguards that seek to ensure that the public in general and the competent regulator(s) know who owns the media organisations operating in the State concerned. For the purposes of this article, we focus on the indicators assessing horizontal and cross-media concentration. On the issue of transparency see CMPF, *Monitoring Media Pluralism in Europe: Testing and Implementation of the Media Pluralism Monitor 2015*, pp. 16-18, 2016, <http://monitor.cmpf.eui.eu/mpm2015/results/>.

<sup>132</sup> Doyle G., “Media Ownership: The Economics and Politics of Convergence and Concentration in the UK and European Media”, p. 4, 2002, London: Sage Publications, <https://uk.sagepub.com/en-gb/eur/media-ownership/book210343>.



and how the actors of the national market under examination have reacted to the pressure to consolidate.

- Second, certain member states have enacted rules to address both types of concentration (e.g. Austria, Croatia, etc.), other states have adopted regulations that deal exclusively with horizontal concentration (e.g. Poland), and some states have no specific rules to prevent media concentration (e.g. Finland, Lithuania, etc.). Evidently, in the case of states that have enacted rules to address both types of concentration, and to the extent that the rules in question are effectively implemented, the risks to media pluralism are expected to be lower. Therefore, in addition to sector-specific economics, the distinction also takes account of the existence of diverse regulatory models across the EU.

### 3.3.1. The indicator on horizontal concentration

The indicators of horizontal concentration are divided into four broad sets of variables that seek to evaluate concentration of ownership in to four sectors, namely audiovisual services, radio, newspaper publishing, and Internet content provision.

With respect to the choice of the sectors, the following three remarks need to be made:

- First, as regards audiovisual services, MPM2015 adopts the definition laid down in the Audiovisual Media Services Directive. In other words, the variables concerned tackle both linear and non-linear audiovisual services.<sup>133</sup> This approach is intended to reflect the trend of convergence that has been dramatically altering traditional broadcasting markets, and capture national regulation that may seek to address concentration in the sector of on-demand audiovisual services.
- Second, MPM2015 attempts to grasp trends in media content consumption that have emerged with the increasing use of the Internet. In particular, traditional media sources have attempted to reposition themselves in the digital environment by creating websites, which online users often consult. However, alongside traditional media with an online presence, new outlets have emerged that are not distributed in print (i.e. outlets that are online-only). Moreover, an increasing number of online readers use digital intermediaries, which act as gateways to the original source. In view of the above, MPM2015 seeks to assess concentration in markets in which Internet Content Providers (ICPs) operate. The term 'ICPs' includes content originators (providers that produce original content), news aggregators (providers that take information from various news sources and display it in a single space (e.g. Google News),<sup>134</sup> and providers that do not produce original content or aggregate news, but are used as an intermediary between the user and the source (e.g. Facebook and Google

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<sup>133</sup> See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 332/27, Recital (11) and Article 1(1).

<sup>134</sup> Isbell K., "The Rise of the News Aggregator: Legal Implications and Best Practices", 2, 2010, The Berkman Center for Internet and Society at Harvard University Research Publication No. 2010-10,

<http://www.dmlp.org/sites/citmedialaw.org/files/news%20aggregation%20white%20paper.pdf>.



Search). The definition and use of the above three categories of ICPs as the main online news sources was based on Ofcom's proposed framework for measuring media plurality.<sup>135</sup>

- Finally, the sectors that have been selected represent the media that is most widely used in the European Union to access (news) content.<sup>136</sup>

Turning now to a more detailed description of the 'Market Plurality Domain', we consider six questions with a view to assessing horizontal concentration of ownership in each sector.

The first variable is concerned with establishing whether the state under consideration has enacted any rules in order to prevent horizontal concentration in the sector concerned. Where present these rules vary from state to state; for example, certain states limit the number of licenses that a media organisation may hold, whereas other states set market (or audience) share thresholds that an individual media organisation or combination of multiple organisations (e.g. as a result of a merger) may not exceed. Given the diversity of regulatory models across EU member states, this variable is drafted in broad terms in order to include all types of rules addressing horizontal concentration.<sup>137</sup>

The remaining five variables are concerned with evaluating the effectiveness of ownership restrictions, introducing two layers of assessment. The first set of variables comprises three variables the purpose of which is to establish whether there is a supervisory authority that is entrusted with monitoring compliance with the rules, whether the authority in question has the power to impose sanctions in cases of non-compliance, and whether the authority uses the tools at its disposal in an effective manner.

The second set of variables comprises two variables that attempt to establish the actual levels of concentration within the sector under scrutiny; these variables are based on the 'four-firm Concentration Ratio' (CR4), an index which has traditionally been used to measure market concentration and which is an indicator of the size of the four largest firms within a sector, compared to the performance of the entire sector. One variable of the set seeks to establish the market shares held by the four most profitable firms, whereas the other seeks to establish the audience shares held by the four most popular firms in the sector under examination.

Why is the Monitor concerned with both market and audience shares? Market shares are regularly used as an indication that allows competition and regulatory authorities to make some preliminary remarks on the market structure and the relative importance of the various undertakings active in the market.<sup>138</sup> They are calculated on the basis of the supplier's *sales* of the relevant product or service in the affected market.<sup>139</sup> However, in many media markets, content is

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<sup>135</sup> Ofcom, Measurement framework for media plurality. A consultation on Ofcom's proposed advice to the Secretary of State for Culture, Media and Sport, paragraph 4.19, 2015, [http://stakeholders.ofcom.org.uk/binaries/consultations/media-plurality-framework/summary/Media\\_plurality\\_measurement\\_framework.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/media-plurality-framework/summary/Media_plurality_measurement_framework.pdf).

<sup>136</sup> European Commission, Media Use in the European Union, 2014, pp. 5 and 11, [http://ec.europa.eu/public\\_opinion/archives/eb/eb82/eb82\\_media\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_media_en.pdf).

<sup>137</sup> For an overview of the different systems in the EU, see Valcke P. "From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods," *Journal of Media Business Studies*, Vol. 6, no.3, 2009, pp. 19- 42, and the National Reports on the Implementation of MPM2015, available at: <http://monitor.cmpf.eui.eu/mpm2015/results/>.

<sup>138</sup> See, for example, European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 13, and Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 14.

<sup>139</sup> European Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/3, paragraph 53.



offered for free. In other words, in many cases, *no sales transaction* takes place. That a media outlet does not charge for the content it provides does not necessarily mean that it does not have the power to affect the market concerned. For example, Google News does not sell advertising space and does not charge users accessing the stories it aggregates. However, scraping the headline and the first few lines of a story may affect the ability of the news outlets that produced the story to generate traffic and, by extension, advertising revenues. It is clear from the above that the variable regarding audience concentration is intended to provide a useful insight into how audience members are distributed across the various media outlets available in the market, an aspect which is not necessarily captured by market shares.

### 3.3.2. The indicator on cross-media concentration

The exact same logic underpins the indicator on cross-media concentration; after establishing whether there are any rules to prevent cross-media concentration of ownership, the indicator seeks to assess whether the rules in question are effectively implemented, and the actual market situation.

As with the indicator on horizontal concentration, the relevant framework is determined by reference to the existence of a supervisory authority, the role of the authority in ensuring that the rules are indeed respected, and the structure of the markets involved. The only differences between the two indicators are the following:

- First, given that cross-media concentration involves more than one sector, the position held by the most profitable and popular businesses in the national market under consideration is calculated on the basis of the 'eight-firm Concentration Ratio (CR8)', an indicator of the size of the eight largest firms within a sector, compared to the performance of the entire sector.
- Second, the indicator evaluating risks originating from cross-media concentration further includes two variables that seek to assess whether competition enforcement takes account of media pluralism issues and whether there is an authority that monitors compliance with the applicable rules. The *raison d'être* of these two variables of the indicator on cross-media concentration is the following: as explained above, the ability to reap significant scale economies incentivizes media content providers to expand into neighboring markets, including upstream and/or downstream markets. With this in mind, it is clear that cross-media concentration is a common phenomenon. However, as previously mentioned, in many states where rules to prevent horizontal concentration apply, there are no specific safeguards against cross-media concentration. In these regulatory environments, only general competition law applies. Yet, even if a merger, agreement, and/or unilateral conduct does not raise competition concerns, it may raise concerns over media pluralism. In certain states it is acknowledged that this is a possibility, which is why the outcome of competition enforcement is subject to pluralism considerations. For example, an authority/actor that is not linked to the competition authority may intervene in cases where a transaction or behaviour that is not condemned on competition grounds is problematic for media pluralism (e.g. in Ireland, this actor is the Minister of Communications). However, in other cases, even in the absence of sector-specific regulatory safeguards, competition authorities reportedly take account of media pluralism when adopting a decision (e.g. in Latvia, the Netherlands, and Spain).



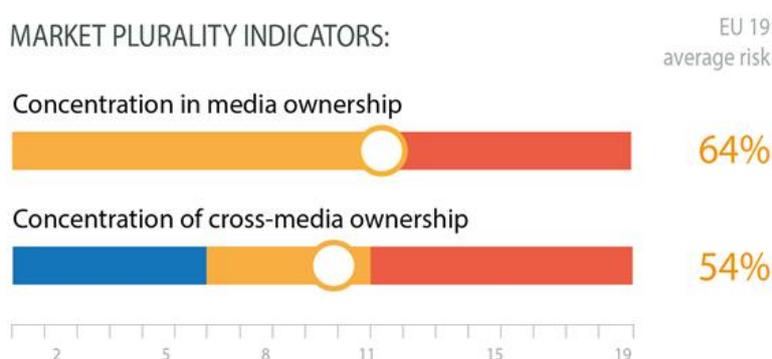
The measurement and score of the indicators on ownership concentration are based on the thresholds set by the *Independent Study on the Indicators for media Pluralism in the Member States: Towards a Risk-Based Approach*, the methodological foundation of MPM2015. Specifically, the study provides that:

- If within one country the major four owners have a market share above 50%, then the risk of high concentration of ownership is considered as high;
- If within one country the major four owners have a market share between 25% and 49%, then the risk of high concentration of ownership is considered as medium; and
- If within one country the major four owners have a market share below 25%, then the risk of high concentration of ownership is considered as low.<sup>140</sup>

### 3.4. Results of the 2015 Implementation of the Media Pluralism Monitor

The results of the indicators on media ownership clearly show that the media markets of most European countries examined for the purposes of the Monitor are highly concentrated (see Figure 1). It is noteworthy that the indicators on horizontal and cross-media concentration of ownership are those that received the highest risk scores.<sup>141</sup>

Figure 1 - EU 19-Average risk per indicator (Market Plurality)



Source: CMPF, *Monitoring Media Pluralism in the Europe: Testing and Implementation of the Media Pluralism Monitor 2015*

<sup>140</sup> KU Leuven - ICRI et al., *Independent Study on the Indicators for media Pluralism in the Member States: Towards a Risk-Based Approach*, Annex 1, 2009. See, for example, pp. 89 and 90, [https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/user\\_guide\\_09.pdf](https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/user_guide_09.pdf).

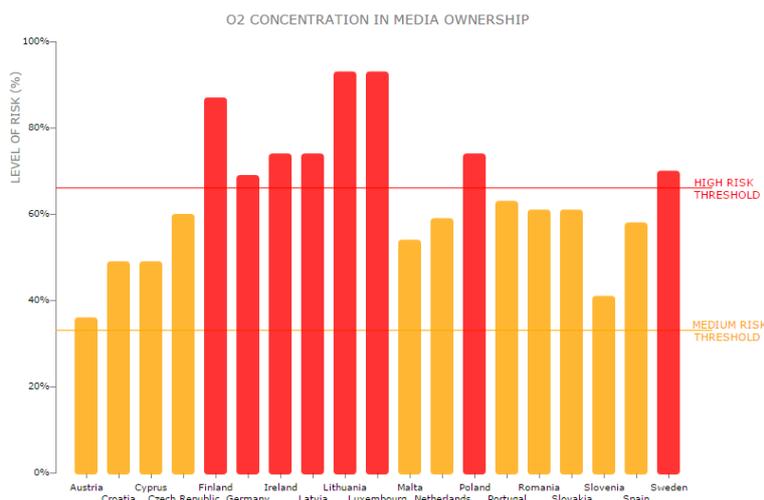
<sup>141</sup> Please note that MPM2015 comprised a total of 19 indicators



The above results align with the outcome of the first implementation of the Monitor, which examined risks to media pluralism in the nine member states that were not evaluated in the 2015 round: Belgium, Bulgaria, Denmark, Estonia, France, Greece, Hungary, Italy and the UK.<sup>142</sup>

It further bears noting that no country scored ‘low risk’. More specifically, eight countries scored ‘high risk’ and 11 scored ‘medium risk’ (see Figure 2).

Figure 2 – MPM2015. Results for the indicator on Concentration in media ownership



Source: CMPF, *Monitoring Media Pluralism in the Europe: Testing and Implementation of the Media Pluralism Monitor 2015*

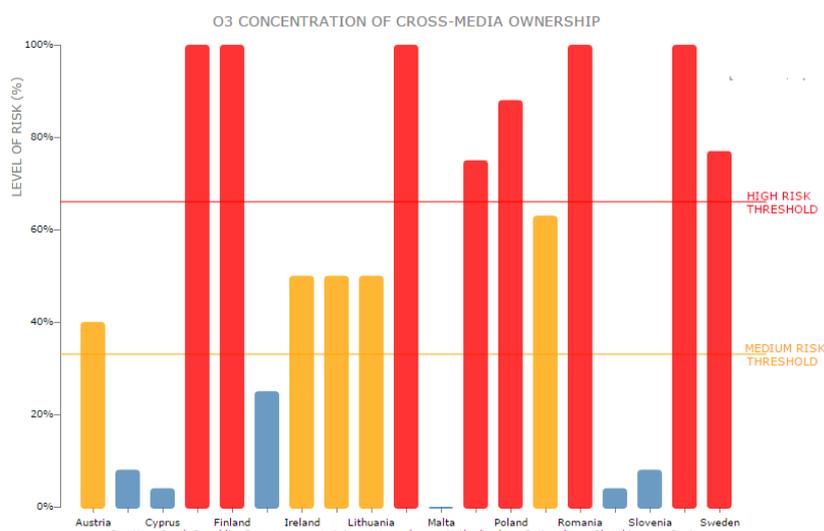
As regards the indicator on horizontal concentration, the risks that were identified following the implementation of MPM2015 are mainly attributed to the absence of regulatory safeguards, which, as set out above, results in competition enforcement being the only tool to address media concentration. That the lack of specific measures to address media concentration has facilitated, if not encouraged, consolidation stems from the variables that depict market structures. For example, the CR4 variables show high concentration in terms of both market and audience shares in almost all countries considered.

The results from the indicator addressing cross-media ownership concentration are similar to those of the indicator assessing risks arising from horizontal concentration. Five countries, Portugal, Lithuania, Ireland, Latvia, and Austria, scored ‘medium risk’, whereas eight countries, Luxembourg, Spain, Czech Republic, Finland, Romania, Poland, Sweden, and Netherlands scored ‘high risk’ (see Figure 3). Again, the lack of sector-specific regulation (or the ineffective implementation thereof) and the inclination towards M&As appear to be the main reasons explaining the above results.

<sup>142</sup> The assessment under MPM2014 (<http://monitor.cmpf.eu/results-2014/>) was carried out using a list of indicators that was then fine-tuned in MPM2015, and which underwent a different aggregation procedure. The assessment in the pilot test of 2014 showed medium/high risk in what MPM2014 called the ‘Ownership Domain’ for the nine examined countries.



Figure 3 – MPM2015. Results for the indicator on Concentration of cross-media ownership



Source: CMPF, *Monitoring Media Pluralism in the Europe: Testing and Implementation of the Media Pluralism Monitor 2015*

Concluding the brief overview of the MPM2015 results, there is a key challenge facing the evaluation of risks to media pluralism from ownership concentration: in many cases it proved difficult, if not impossible, to identify necessary information for the evaluation of the concentration of ownership. Significant difficulties were encountered in attempting to gather data on market and audience shares. In many cases, national regulatory, statistical, and/or competition authorities do not engage in collecting related information. As a result, information about the structure of the market is often not publicly available. The MPM2015 offered the country teams that conducted the data collection the option to select ‘No data’ as a reply to the variable concerned. The country teams that did so were asked to evaluate whether the lack of data could be assessed as a transparency issue. By adopting this approach, we sought to identify a lacuna of the system so as to identify the need for improvements in national media policymaking.

### 3.5. Taking stock of lessons learnt: The 2016 Implementation of the Media Pluralism Monitor

As the above analysis demonstrates, concerns about concentration of media ownership remain pervasive and remarkable, thereby raising strong doubts over whether media pluralism is an almost natural outcome of digital technologies. Instead of gradually adopting a hands-off approach, it is submitted that media policymakers need to carefully reflect on the threats that both old and new gatekeepers pose to pluralism, and to attempt to create a framework within which marginalized viewpoints reach the audiences and audiences become more responsive to diversity.

Taking stock of lessons learnt and having identified a set of other issues that have not been extensively considered in previous implementations of the Monitor, MPM2016 introduces in the Market Plurality Domain two new indicators, which concern a number of sensitive areas linked to



media concentration. More particularly, it is still important to assess the existence of regulatory safeguards to prevent horizontal and cross-media concentration of ownership, concentration must also be interpreted in light of the specific conditions under which the market players operate. For this reason, an indicator on media viability has been integrated into the framework; this indicator seeks to evaluate revenue trends in the media industry, trends in media consumption, and whether media organisations develop alternatives to traditional revenues in order to respond to the challenges posed by the digital environment.

Moreover, while the adoption and effective implementation of ownership restrictions may address certain concerns arising from media concentration, related rules (such as limits to the number of licenses held by a single person or entity, or market share thresholds that media organisations may not exceed) are not designed to capture the *qualitative* facet of media concentration i.e. commercial influence over editorial content. As a result, MPM2016 further introduces an indicator that attempts to evaluate whether and to what extent there are safeguards to prevent commercial forces, including media owners and advertisers, from dictating the content that reaches the public. Put simply, paving the way forward, MPM2016 seeks to capture more subtle, yet significant, risks to media pluralism that originate from ownership concentration.



## 4. Media concentration in Germany

Michael Petri, *die medienanstalten/KEK*<sup>143</sup>

### 4.1. Constitutional basis for the protection of diversity of opinion

In Germany, the constitutional basis for the protection of diversity of opinion is Article 5(1)(2) of the *Grundgesetz* (Basic Law)<sup>144</sup>, which guarantees freedom of the press and freedom of reporting by means of broadcasts and films. The very concise wording of the article has been expanded upon in the case law of the *Bundesverfassungsgericht* (Federal Constitutional Court), which has stressed the importance of broadcasting and the press as modern means of mass communication and factors in the formation of public opinion, highlighting the specific characteristics of broadcasting in particular. Whereas a relatively large, independent and diverse press landscape had developed in Germany, the *Bundesverfassungsgericht* predicted that similar growth in broadcasting would be hindered by technical issues (mainly a shortage of frequency) and the extraordinarily high financial cost of providing broadcast services.<sup>145</sup>

Until 1985, the only television channels available in Germany were public service channels, which provided a diverse range of programming. Public service broadcasters are obliged, as part of their universal service remit, to provide a comprehensive range of programmes reflecting all areas of social life and cultural diversity and technically accessible to everyone. The *Bundesverfassungsgericht* also allowed private broadcasters to operate under the principle of broadcasting freedom (dual broadcasting system). Since public service broadcasters provide a universal service that counterbalances private broadcasting, the requirements for private broadcasters in terms of programming breadth and diversity are less stringent.<sup>146</sup>

The *Bundesverfassungsgericht's* decision to authorise private broadcasting is nevertheless conditional on structures that guarantee the balanced formation of opinion in editorial competition.<sup>147</sup> For example, adverse developments in competition between private broadcasters should be prevented through legal measures designed to tackle controlling influences on public

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<sup>143</sup> \* The author is Deputy Head of the division for media concentration at the German regulator (die Medienanstalten) and legal counsel for the Media Concentration Commission (KEK).

<sup>144</sup> Basic Law of the Federal Republic of Germany, 23 May 1949 (Federal Gazette p. 1), last amended by Article 1 of the Law of 23 December 2014 (Federal Gazette I p. 2438), <https://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg/245216>.

<sup>145</sup> See *Bundesverfassungsgericht* decision 12, 205 (260 et seq.), <http://www.servat.unibe.ch/dfr/bv012205.html>.

<sup>146</sup> See *Bundesverfassungsgericht* decisions 73, 118 (159), <http://www.servat.unibe.ch/dfr/bv073118.html>; 74, 297 (325), <http://www.servat.unibe.ch/dfr/bv074297.html>; 83, 238 (296 et seq.), <http://www.servat.unibe.ch/dfr/bv083238.html>; 90, 60 (90), <http://www.servat.unibe.ch/dfr/bv090060.htm>; 136, 9 (29), <http://www.servat.unibe.ch/dfr/bv136009.html>.

<sup>147</sup> See *Bundesverfassungsgericht* decision 12, 205 (261 et seq.).



opinion.<sup>148</sup> This means that media concentration should be tackled by means of preventive rather than just repressive measures. In this connection, the *Bundesverfassungsgericht* has explained that public opinion is shaped not only by programmes that impart information, such as news bulletins or political commentaries, but also by other public interest broadcasts (e.g. entertainment and sports programmes). Objective criteria for measuring a programme's relevance or irrelevance could not be given. Therefore, information in the sense of the traditional remit of broadcasters included information on all areas of life, without restriction, on the basis of editorial criteria.<sup>149</sup>

The *Bundesverfassungsgericht* has linked the paramount importance of broadcasting and of television in particular to the criteria of widespread impact, topicality and power of suggestion. Widespread impact was demonstrated through a broadcaster's reach and opportunity to influence large sections of the population. The topicality of radio and television was evident in the fact that content and events could be broadcast quickly, even live. Their particular power of suggestion resulted especially from the possibility of combining text and sound, as well as moving images where television was concerned. On account of the resulting appearance of authenticity and reality, as well as its accessibility, television had become the medium through which most people obtained information.<sup>150</sup> As far as advancing digitisation was concerned, the *Bundesverfassungsgericht* stressed that there was no reason to believe the need to protect diversity could be reduced as a result of new (technical) developments.<sup>151</sup> Rather, the potential influence of broadcasting gained even greater importance by the fact that new technologies had resulted in a widening choice and diversity of content, distribution forms and distribution channels, as well as new programme-related services.<sup>152</sup>

Under the competency provisions of the *Grundgesetz*, the *Länder* are responsible for enacting broadcasting laws as part of their independence in cultural and educational matters, while the Federal Government regulates technical matters (telecommunications, frequencies, broadcast technology outside the studio, i.e. from programme transmission to reception).<sup>153</sup>

<sup>148</sup> See *Bundesverfassungsgericht* decisions 73, 118 (155 et seq.); 87, 181 (199), <http://www.servat.unibe.ch/dfr/bv087181.html>.

<sup>149</sup> See *Bundesverfassungsgericht* decisions 12, 205 (260 et seq.); 35, 202 (222 et seq.), <http://www.servat.unibe.ch/dfr/bv035202.html>; 57, 295 (319), <http://www.servat.unibe.ch/dfr/bv057295.html>; 73, 118 (157 et seq.); 74, 297 (325); 97, 228 (257), <http://www.servat.unibe.ch/dfr/bv097228.html>.

<sup>150</sup> See *Bundesverfassungsgericht* decisions 31, 314 (325), <http://www.servat.unibe.ch/dfr/bv031314.html>; 90, 60 (87); 97, 228 (256); 103, 44 (74), <http://www.servat.unibe.ch/dfr/bv103044.html>; 114, 371 (387), <http://www.servat.unibe.ch/dfr/bv114371.html>; see also ECtHR, judgment of 5 November 2002 - application no. 38743/97 - *Demuth v. Switzerland*, EuGRZ 2003, p. 488 (491), para. 43, <http://hudoc.echr.coe.int/eng?i=001-60724>; judgment of 10 July 2003 - application no. 44179/98 - *Murphy v. Ireland*, para. 69, <http://hudoc.echr.coe.int/eng?i=001-61207>; established case law

<sup>151</sup> See *Bundesverfassungsgericht* decision 95, 163 (172 et seq.), <http://www.servat.unibe.ch/dfr/bv095163.html>.

<sup>152</sup> For more information on the relevant principles of constitutional law, see the Media Concentration Reports of the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media – KEK), [www.kek-online.de/information/publikationen/medienkonzentrationsberichte.html](http://www.kek-online.de/information/publikationen/medienkonzentrationsberichte.html).

<sup>153</sup> *Bundesverfassungsgericht* decision 12, 205 (225 et seq.).



## 4.2. Media markets

### 4.2.1. Traditional market definitions

The regulatory framework for broadcasting in Germany is set out in the *Rundfunkstaatsvertrag* (Interstate Broadcasting Treaty - RStV) agreed by the *Länder*.<sup>154</sup> The agreement defines broadcasting as a linear information and communication service in the form of the provision and transmission for the general public of moving images and sound for simultaneous reception in accordance with a programme schedule using electromagnetic oscillations. In relation to concentration controls, the RStV also states that, in certain circumstances, activities in so-called “related, media-relevant markets” must be taken into account. Although this concept is not defined in the RStV, the official explanatory note on the RStV lists examples such as advertising, radio, press, rights and production.

According to the RStV, responsibility for defining these (partial) media markets falls, as part of its obligation to ensure plurality of opinion, to the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK), an independent organ of the *Landesmedienanstalten* (State media authorities) with nationwide jurisdiction<sup>155</sup>. The KEK has further defined the related, media-relevant markets that need to be taken into account in the evaluation of media concentrations with a view to specific influence on the formation of opinion. In the press sector, for example, it has differentiated between daily newspapers, popular magazines and programme guides. In addition to markets that are directly relevant to the formation of opinion (i.e. radio, daily newspapers, popular magazines, programme guides and online media), the KEK has defined markets that can have an indirect impact on opinion formation and that must also be taken into account when examining media concentrations (e.g. markets up- and downstream from television broadcasting, such as programme rights, production, news sources/agencies and programme and marketing platforms).

The KEK generally defines markets according to their relevance to the formation of opinion. Different sales channels for daily newspapers (street/individual sales, subscriptions), for example, are irrelevant. Deviations from the market definitions used by the *Bundeskartellamt* (Federal Cartel Office) under the relevant market concept (functional substitutability) are therefore possible.<sup>156</sup>

### 4.2.2. Convergence

The media sector is characterised by accelerating convergence. Technical advances are facilitating multi-genre services and changing media consumer behaviour. Convergence is also affecting the definition and delimitation of media markets. Linear distribution currently remains part of the definition of broadcasting, for example.<sup>157</sup> However, moving images are no longer transmitted only to traditional television sets, but can also be watched on the Internet on numerous user devices –

<sup>154</sup> *Rundfunkstaatsvertrag vom 31. August 1991 in der Fassung des Neunzehnten Staatsvertrages zur Änderung rundfunkrechtlicher Staatsverträge* (Interstate Broadcasting Treaty of 31 August 1991 as amended by the 19th Agreement Amending the Inter-State Broadcasting Agreement) in force since 1 January 2016, [http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze\\_aktuell/RStV\\_18.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/RStV_18.pdf).

<sup>155</sup> See also Chapter 4.3.4. for information on the *Land* media authorities and Chapter 4.3.1. regarding the KEK.

<sup>156</sup> See explanations of the KEK decision in the *Springer/ProSiebenSat.1* case, case no. KEK 293, [http://www.kek-online.de/fileadmin/Download\\_KEK/Verfahren/kek293prosieben-sat1.pdf](http://www.kek-online.de/fileadmin/Download_KEK/Verfahren/kek293prosieben-sat1.pdf).

<sup>157</sup> See Chapter 4.2.1.



anytime, anywhere. The KEK therefore believes that a future-proof regulatory framework must be based on editorially produced moving images, regardless of how they are distributed (linear/non-linear). Such a change would have to be laid down in legislation.<sup>158</sup>

It is also difficult to know how to classify and deal with intermediaries who, as information brokers, refer users to media content produced by third parties by collecting, choosing, rating and collating information.<sup>159</sup> Since intermediaries do not carry out any genuinely editorial work, they cannot be assigned to audience markets. Neither are they part of markets up- or downstream from television broadcasting. Rather, they play a central role in helping people find online content, and thus have the potential to influence the formation of public opinion. Online services with an editorial structure are relevant to media concentration controls.<sup>160</sup> Insofar as intermediaries act as brokers between the providers of such media content and users, they have a direct influence on the formation of opinion. Operators of search engines, social networks, news aggregators, blogging sites and app platforms that distribute or help users find media content as described above could therefore be considered part of a related, media-relevant market.

Not all the effects of convergence require market definitions to be amended. For example, electronic editions of newspapers are included in published audience figures.

## 4.3. Legislative provisions to prevent media concentration

### 4.3.1. Sector-specific media regulation

Media concentration control is a task that the *Bundesverfassungsgericht* derives directly from Article 5 of the Basic Law and links primarily with broadcasting. Although the court does not believe the state should never take action to avert threats to the freedom of the press resulting from monopolies over public opinion,<sup>161</sup> the legislator is obliged to create a “positive order” for broadcasting. Material, procedural and organisational measures should be taken to prevent the creation of dominant power over public opinion. The diversity of existing opinions in society should be represented in broadcasting as broadly and comprehensively as possible.<sup>162</sup> Media-specific concentration control should be used to preventively counter the creation of dominant power over public opinion because, once adverse developments have begun, they can only be reversed – if at all – to a certain degree and only with great difficulty.<sup>163</sup>

In order to implement the *Bundesverfassungsgericht*'s requirements, the *Länder* signed the *Staatsvertrag zur Neuordnung des Rundfunkwesens* (Inter-State Agreement on the Reorganisation of

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<sup>158</sup> See KEK position paper on future-oriented protection of diversity, 17th KEK annual report, pp. 136 et seq.,

[http://www.kek-online.de/fileadmin/Download\\_KEK/Informationen\\_Publikationen/150819\\_KEKJahresbericht\\_web.pdf](http://www.kek-online.de/fileadmin/Download_KEK/Informationen_Publikationen/150819_KEKJahresbericht_web.pdf).

<sup>159</sup> These include providers of search engines, social networks and news aggregators, but not intermediaries in the e-commerce sector, such as price search engines, comparison sites or e-commerce platforms.

<sup>160</sup> See KEK Media Concentration Report, 2015, pp. 503 et seq.,

<http://www.kek-online.de/information/publikationen/medienkonzentrationsberichte/fuenfter-konzentrationsbericht-2015.html>.

<sup>161</sup> *Bundesverfassungsgericht* decision 20, 162 (176), <http://www.servat.unibe.ch/dfr/bv020162.html>.

<sup>162</sup> *Bundesverfassungsgericht* decision 57, 295 (320); *Bundesverfassungsgericht* decision 136, 9 (29 et seq.) with further references.

<sup>163</sup> See *Bundesverfassungsgericht* decisions 57, 295 (323); 73, 118 (160), see Fn. 3; 95, 163 (173); for more detail, see also KEK Media Concentration Report, 2015, p. 12.



Broadcasting) in 1987<sup>164</sup>. Initially, they tried to counter concentration by limiting corporate shareholdings and the number and type of channels that could be operated by a single broadcaster. However, this approach could not effectively prevent a concentration in private broadcasting, but led to the creation of joint ventures and families of channels. As a result, the “shareholding model” was replaced with an “audience share model” (from 1997). Under current legislation, any television broadcaster<sup>165</sup> may operate an unlimited number of channels and types of channel nationwide, as long as it does not hold a dominant influence over public opinion (Art. 26(1) RStV).

A broadcaster is considered to have dominant influence if the programmes attributable to it achieve an average annual viewer rating of 30% or over (Art. 26(2) sentence 1 RStV). The same applies if a company has a viewer rating of at least 25% as well as a dominant position in a related, media-relevant market or if an overall assessment of its activities in television and in related, media-relevant markets concludes that the influence obtained as a result of those activities is equivalent to that of a company with a television viewer rating of 30% (Art. 26(2) sentence 2 RStV).

Viewer ratings take into account all German television channels, i.e. public service channels as well as private channels that can be received nationwide. Under a bonus rule, the viewer ratings of individual companies are reduced by 2% if they transmit regional window programmes and a further 3% if they simultaneously allocate transmission time to independent third parties. The obligation to allocate transmission time to independent third parties (Art. 26(5) RStV) applies to broadcasters which achieve an annual average viewer rating of 10% with a full programme or an information-oriented specialist programme or if all programmes attributable to it achieve a combined viewer rating of 20%. The broadcasters of the two full programmes with the widest nationwide reach are obliged to include regional window programmes (Art. 25(4) RStV).

The KEK is responsible for examining questions on the protection of plurality of opinion in connection with nationwide private television (Art. 36(4) sentence 1 RStV). It consists of six broadcasting and business law experts and six statutory representatives of the *Land* media authorities, who are appointed under *Land* law. The KEK assesses issues relating to media concentration law as part of licensing procedures and changes in ownership structure. It acts on behalf of the *Land* media authority to which the licence application was submitted or with which the broadcaster concerned is licensed. The KEK may represent more than one *Land* media authority if it is asked to approve changes in ownership structure. Its decisions are binding on the other organs of the relevant *Land* media authority. The KEK is also involved in the selection and licensing of broadcasters of regional window programmes and independent third-party broadcasters.

The RStV does not contain any provisions for ensuring plurality of opinion on private radio, most of which is broadcast on a local or regional basis. The task of ensuring diversity in this sector tends to be assumed by the individual *Land* media authorities, which do so by means of different regulatory approaches. Some *Land* legislators use a model based on external pluralism, in which the broadcasting industry as a whole must ensure diversity. Others seek to guarantee diversity of opinion through internal measures, requiring broadcasters to ensure diversity within their own programmes. Some *Länder* use a combination of these two approaches.

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<sup>164</sup> *Staatsvertrag zur Neuordnung des Rundfunkwesens* (Interstate Treaty on the Reorganisation of Broadcasting - *Rundfunkstaatsvertrag*), 1 to 3 April 1987, [http://www.urheberrecht.org/law/normen/rstv/RStV-00a-1987/text/1987\\_00.php3](http://www.urheberrecht.org/law/normen/rstv/RStV-00a-1987/text/1987_00.php3).

<sup>165</sup> Private broadcasters require a licence. Licences to broadcast nationwide may only be granted to natural or legal persons whose residence or headquarters is in the Federal Republic of Germany, another member state of the European Union or another state of the European Economic Area, and which can be pursued through the courts (Art. 20a(1)(5) RStV).



### 4.3.2. Competition law

The *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints on Competition - GWB) is designed to protect economic competition and prevent agreements restricting competition,<sup>166</sup> the abuse of dominant market positions<sup>167</sup> and concentrations that hinder competition.<sup>168</sup> For jurisdictional reasons, cartel authorities can only take measures based on federal laws<sup>169</sup> if they are by their very nature designed to prevent the abuse of a position of economic strength. Competition between private broadcasters is also economic competition. Overlaps between sector-specific media regulation and competition law are therefore feasible, in particular in relation to merger and concentration control.

The provisions on the control of concentrations (Articles 35 et seq. GWB) apply if the undertakings involved exceed a particular economic size. The participating undertakings must have a combined worldwide turnover of more than EUR 500 million. The domestic turnover of at least one participating undertaking must be more than EUR 25 million and that of another must be at least EUR 5 million. For the publication, production and distribution of newspapers, magazines and parts thereof, eight times the amount of the turnover is taken into account. For the production, distribution and broadcasting of radio and television programmes, and the sale of radio and television advertising time, twenty times the amount of the turnover is taken into account (Article 38(3) GWB).

### 4.3.3. Relationship between cartel law and media concentration law

Although cartel law provisions designed to control competition sometimes have the side effect of protecting diversity of opinion, they cannot replace media-specific concentration control. Their purpose is to maintain economic competition, not to guarantee diversity of opinion. They therefore have no effect on the legislator's obligation, in accordance with broadcasting freedom, to ensure diversity of opinion and prevent a dominant influence over public opinion in cases where a merger is not subject to concentration control or to the law on restraints of competition. This is the case, for example, when individual undertakings that already hold a dominant position in other media sectors found a broadcasting company. Organic growth, which has led to dominant market positions in the press sector in particular, also does not fall under the scope of cartel legislation. However, if such growth results in a dominant influence over public opinion, media concentration regulations apply (Article 26 RStV).<sup>170</sup>

The *Bundesverfassungsgericht* therefore considers concentration control measures under competition law to be an admissible, but inadequate, means of ensuring diversity of opinion in

<sup>166</sup> Prohibition of cartels, Article 1 of the *Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013* (Act against Restraints on Competition in the version promulgated on 26 June 2013 - Federal Gazette I pp. 1750, 3245), last amended through Article 1 of the Act of 17 February 2016 (Federal Gazette I p. 203), <https://www.gesetze-im-internet.de/gwb/BJNR252110998.html> and Article 101 TFEU, <http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A12012E%2FTXT>.

<sup>167</sup> Abuse of a dominant position, Article 19 GWB / Art. 102 TFEU, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

<sup>168</sup> Control of concentrations, Articles 35 et seq. GWB / EC Merger Regulation, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A126096>.

<sup>169</sup> Article 74(1)(16) of the Basic Law, [https://www.gesetze-im-internet.de/gg/art\\_74.html](https://www.gesetze-im-internet.de/gg/art_74.html).

<sup>170</sup> See also the KEK Media Concentration Report, 2015, pp. 14 et seq.



broadcasting and preventing a dominant influence over public opinion in this field.<sup>171</sup> Separate legislation, i.e. media-specific concentration control, is therefore urgently required to guarantee diversity in broadcasting.

#### 4.3.4. Regulatory and competition authorities

Broadcasting – both public and private – is regulated by the *Länder* as stipulated in the *Grundgesetz*. The organisation and control of private broadcasting are regulated under *Land* media laws, and media regulation, i.e. licensing, programme supervision and concentration control for private broadcasters, is a core task of the 14 *Land* media authorities. Many broadcasting-related matters require regulation at national level, including the issue of broadcasting licences to nationwide broadcasting providers, monitoring of such providers and concentration control. Fundamental tasks incumbent on all the *Länder* are co-ordinated by means of joint bodies and committees of the *Land* media authorities. As previously mentioned, where nationwide television is concerned, the KEK, a specialist joint organ of the *Land* media authorities, is ultimately responsible for concentration control at national level.<sup>172</sup> Regulation of regional and local television and of radio is the responsibility of the relevant *Land* media authority.

The competition authorities are responsible for controlling business activities that affect competition. Where the effect of such conduct does not extend beyond the territory of the *Land* concerned, the *Land* cartel authorities are responsible; the *Bundeskartellamt* is responsible for matters affecting more than one *Land* and for merger control.<sup>173</sup>

The regulatory and competition authorities are independent. They are not bound by any instructions or overarching supervisory body. Their decisions can be appealed.

### 4.4. KEK decision in the *Springer/ProSiebenSat.1* case

#### 4.4.1. Subject-matter of the decision

In 2006, the KEK blocked the planned takeover of private broadcasting group *ProSiebenSat.1 Media AG* (*ProSiebenSat.1*) by the publishing company *Axel Springer AG* (*Springer*) because of fears that it would create a dominant influence over public opinion.<sup>174</sup> The KEK justified its decision with reference to the fact that the merger would combine the *ProSiebenSat.1* group's strong position in national private television with *Springer's* formidable status in the daily press and other media sectors; it estimated that the resulting influence on public opinion would be comparable to a national television viewer rating of over 42%. The applicants had refused to take other measures to neutralise the resulting influence over public opinion.

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<sup>171</sup> See Bundesverfassungsgericht decision 73, 118 (174), .

<sup>172</sup> See Chapter 4.3.1.

<sup>173</sup> Art. 48(2) GWB, see Fn. 24. The Federal Cartels Office and the *Land* cartel authorities can agree to deviate from this arrangement under Article 49(3) and (4) GWB.

<sup>174</sup> KEK decision of 10 January 2006, case no. KEK 293.



#### 4.4.2. Judicial review

This decision was the subject of several court procedures, culminating in the 2014 ruling of the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG).<sup>175</sup> The key points of the dispute concerned the interpretation of the concept of dominant power of opinion (Art. 26(1) RStV), the meaning of the rules designed to give concrete form to this concept (Art. 26(2) RStV), the bonus rules and the KEK's margin of discretion in media concentration control procedures. The *Bundesverwaltungsgericht* found the KEK's decision incompatible with the relevant legal provisions and its resulting refusal to approve the planned takeover unlawful.

The programmes attributable to *ProSiebenSat.1* achieved a viewer rating of 22.06% during the reference period. The 25% threshold above which, according to Article 26(2) sentences 1 and 2 RStV, activities in a related, media-relevant market – in this case, this would primarily concern *Springer's* daily newspapers – are taken into account was therefore not reached. The KEK's view that dominant power of opinion would result was therefore based on the "general clause" referred to in Article 26(1) RStV and an overall assessment. The KEK considered Article 26(2) sentences 1 and 2 RStV to be refutable presumption rules (rules on the burden of proof) or open facts that served as a model with regard to the application of the "general clause".<sup>176</sup>

On the contrary, the *Bundesverwaltungsgericht* stressed that Article 26(2) sentences 1 and 2 RStV set out examples for the assumption of dominant power of opinion. It was true that they should not be interpreted as conclusive, so dominant power of opinion could also be assumed on the basis of the general clause alone. However, although the court also recognised the model function of the examples as a means of interpreting the general clause, this function had a limiting nature. The KEK was therefore only required to carry out an overall assessment under the terms of the general clause if there were particular circumstances in the individual case that could not be suitably measured using codified examples. If the thresholds in Article 26(2) RStV were not reached, dominant power of opinion could only be assumed if there were significant grounds and on the basis of an overall assessment. The individual case would have to differ so greatly from the norm on account of its specific characteristics that adherence to the standard legal consequence seemed inappropriate.

The court also noted that, with regard to thresholds, bonus points should be deducted in advance. A figure below the threshold mentioned in Article 26(2) RStV was significant in the context of the examination of the general clause of Article 26(1). The court was well aware that, where applicable – if and because the 25% threshold was no longer reached after the bonus had been deducted – a company's position in relevant, media-related markets did not need to be taken into account, no matter how great its influence on public opinion in those markets.

In the court's view, the KEK had exceeded its discretionary powers in its application of the general clause. Before any further examination had taken place, bonus points of 5% should have been deducted from the 22.06% viewer rating of *ProSiebenSat.1* programmes. The actual viewer rating would then have been so far below the 25% threshold mentioned in Article 26(2) RStV that no dominant power of opinion could have been established. The legislator had, in conformity with constitutional law, limited itself to taking steps only to prevent a television broadcaster's already substantial power of opinion being strengthened through activities in related markets. The further the rating dropped below the threshold mentioned in Article 26(2) RStV, the more the examination

<sup>175</sup> *Bundesverwaltungsgericht* decision of 29 January 2014, case no. 6 C 2.13, <http://www.bverwg.de/entscheidungen/entscheidung.php?lang=de&ent=290114U6C2.13.0>.

<sup>176</sup> See KEK decision in the *ProSiebenSat.1/Springer* case, case no. KEK 293, III 5.



of risks linked to such a merger fell under general media concentration control rather than specifically television-related control. With a viewer rating of 20%, the company's position in the television market would, as a rule, be so weak that, even taking into account its activities in other media-relevant markets, there would be no possibility of it holding dominant power of opinion.

### 4.4.3. Consequences of the decision

The *Bundesverwaltungsgericht's* decision has far-reaching consequences for the KEK's practical activities. Limiting the applicability of the "general clause" to atypical cases not covered by the examples given renders the former as good as useless. The broadly defined examples take into account all activities in related, media-relevant markets, as well as dominant positions in those markets. The court was correct to point out that the legislator, with its television-centred approach to concentration control, had failed to create general concentration control in media markets. Nevertheless, concentration control is not limited to the television sector, but also applies to cross-media situations. The court itself has also recognised that there may be circumstances in which dominant power of opinion may be held even if the threshold in Article 26(2) sentence 2 RStV is not reached.

In this context, even the definition of an absolute lower limit, below which dominant power of opinion cannot be achieved in any circumstances, is problematic. Moreover, the prior deduction of bonus points renders Article 26(2) sentence 2 meaningless. In order to exceed the 25% threshold after the bonus points are deducted, an undertaking would need a viewer rating of at least 30%. However, under Article 26(2) sentence 1 RStV, a company with such a viewer rating is already assumed to hold dominant power of opinion.<sup>177</sup> The wording does not refer to the deduction of any bonus points. Neither are additional activities in relevant, media-related markets mentioned. At the same time, companies with a viewer rating of just under 30% and any level of power in a related media market are exempt from examination under media concentration law once the bonus points have been deducted.

In the German television market, only the *RTL* and *ProSiebenSat.1* groups currently hold viewer ratings of 20% or above. The broadcasters in both groups are legally obliged to incorporate regional window programmes and to allocate broadcasting time to independent third parties, which means they receive bonus points. As a result, any cross-media mergers in which they are currently involved are exempt from media concentration control.<sup>178</sup>

## 4.5. Proposed reforms

In view of the uncertain future development of media usage, the rising importance of Internet-based media services and the relationship between the use of linear and non-linear moving images, the legislator and the KEK are currently discussing whether and how media concentration law should be amended. There are essentially two possible ways of reforming media concentration law:

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<sup>177</sup> See Chapter 4.3.1.

<sup>178</sup> Concerning this decision and its consequences, see the 17th KEK annual report, pp. 137 et seq. (KEK position paper) and 143 et seq. (judgment review).



- Firstly, the existing television-centred approach could be opened up to create a whole market model. This would result in comprehensive media concentration control in which a provider's position in the "whole public opinion market" would be measured. This option would create difficulties around the question of which cases should fall under such broader regulations and which would be exempt. Problems would also arise in connection with the definition of relevant media in the framework of a whole public opinion market. A universal measurement and evaluation system would be required.
- A less radical option is to retain the television-based approach, in which the nationwide provision of television programmes remains the reference point for media concentration analysis, with activities in other markets relevant to the formation of public opinion also taken into account. Under this system, a company's power to shape public opinion can be deemed excessive either on the basis of its national television programmes alone or, where cross-media concentrations are concerned, on the basis of an overall view of its activities in the television and other (horizontal) media markets. Activities in up -or downstream (vertical) markets should be taken into account to either strengthen or weaken the assumption of a dominant position. This approach assumes that television will remain the dominant medium. At the same time, established concentration control provisions in other media sectors, such as the press, can be retained.

The KEK believes that, in future, linear television and non-linear professional moving image services that are relevant to the formation of public opinion should be treated equally. According to the relevant criteria of topicality, suggestive power and widespread impact, as defined in the *Grundgesetz*, the effect of non-linear services on the formation of opinion is similar to that of linear television.<sup>179</sup>

## 4.6. Other media-relevant factors

### 4.6.1. Intermediaries

Intermediaries<sup>180</sup> do not, as a rule, carry out editorial work themselves, but act as brokers between individual media services and users. They include providers of search engines, social networks and news aggregators. Although the actual influence of intermediaries on the formation of opinion is difficult to measure, the KEK believes that they play a central role in helping users find media content. They therefore have the potential to influence the formation of public opinion and are relevant to media concentration law.

### 4.6.2. Media agencies

Advertisers use the services of media agencies when allocating their advertising budgets and placing advertisements in the media. In a context in which only a small number of media agencies share enormous purchasing power, the risk of editorial influence is increasing. Agencies with a growing

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<sup>179</sup> See KEK position paper on future-oriented protection of diversity, 17th KEK annual report, pp. 136 et seq.

<sup>180</sup> See also Chapter 4.2.2.



influence on how advertising funds are distributed are able to exert greater pressure on broadcasters, whose programming may subsequently be influenced by the objectives of the advertising industry and who, for example, may refrain from reporting critically on advertisers or covering subjects against their wishes. Media agencies' position of power can create a dependent relationship with individual broadcasters. Media agencies must therefore, in principle, be monitored by the media concentration authorities.<sup>181</sup> In its final report, the *Bund-Länder-Kommission zur Medienkonvergenz* (Federal Government and *Länder* Commission on Media Convergence) also noted that regulations on media agencies' transparency obligations should certainly be explored and that cartel law control of media agencies remains necessary.<sup>182</sup>

## 4.7. Shareholding restrictions in the media sector

In principle, there are no restrictions on shareholdings in broadcasting companies, with two exceptions: a shareholding may not result in dominant power of opinion and the requirement of separation between the state and the media<sup>183</sup> must be respected. The latter principle is designed to prevent the state interfering with broadcasting and using it as a political tool. The state is therefore not allowed to provide broadcasting services itself or to influence programming, even indirectly.<sup>184</sup> What this means for direct or indirect state ownership of broadcasting companies has not yet been determined by the *Bundesverfassungsgericht*. However, in view of their role and function in the country's constitutional structures, the *Bundesverfassungsgericht* believes it is necessary to also apply the principle of separation to political parties.<sup>185</sup>

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<sup>181</sup> KEK concentration report, 2015, p. 475 et seq.

<sup>182</sup> Report of the *Bund-Länder-Kommission zur Medienkonvergenz* (Federal Government and *Länder* Commission on Media Convergence), June 2016,

<https://www.bundesregierung.de/Content/DE/Anlagen/BKM/2016/2016-06-14-medienkonvergenz-bericht-blk.pdf?blob=publicationFile&v=3>.

<sup>183</sup> See KEK Media Concentration Report, 2010, pp. 24 et seq.,

<http://www.kek-online.de/information/publikationen/medienkonzentrationsberichte/vierter-konzentrationsbericht-2010.html>.

<sup>184</sup> See *Bundesverfassungsgericht* decisions 12, 205 (263); 83, 238 (322 et seq.), see Fn. 3; 90, 60 (88); regarding limits on the influence of state and state-related members of the governing bodies of the public service broadcasters, see *Bundesverfassungsgericht* decision 136, 9 (37 et seq.).

<sup>185</sup> See *Bundesverfassungsgericht* decision 121, 30 (53 et seq.), <http://www.servat.unibe.ch/dfr/bv121030.html>.





## 5. Media concentration in the United Kingdom

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### 5.1. Constitutional Background

The United Kingdom does not have a formal written constitution containing guarantees as to freedom of expression or media freedom. The Human Rights Act (HRA)<sup>187</sup> incorporates the European Convention on Human Rights (ECHR) into the domestic system, including the case law on Article 10 ECHR. Section 12 HRA makes special provision in relation to the granting of remedies in the context of freedom of expression. There is no specific rule relating to the media, though there are references to 'any relevant privacy code', which includes the codes of self-regulatory bodies such as the Independent Press Standard Organisation (IPSO). Thus, there are no specific constraints on the regulatory framework derived from human rights. The European Communities Act 1972<sup>188</sup> gives EU law effect in the UK.

### 5.2. Convergent Audiovisual Media Markets

The legislation providing the regulatory framework (including limitations on ownership), for the purposes of the act, refers to broadcasting, press, and telecommunications as distinct activities. The act distinguishes between different types of broadcasting for the purposes of the licensing regime obligations imposed on operators. Effectively there is a distinction between terrestrial broadcasting<sup>189</sup> and satellite and cable systems, so a 'television licensable content service' is defined separately.<sup>190</sup> All these types of broadcasting fall within the definition of 'television programme service'. Provisions were also introduced to create local television licences: local digital television programme services (L-DTPS). A 'television multiplex service' is defined separately;<sup>191</sup> this definition excludes satellite broadcasting. A final distinction arises from the introduction of video-on-demand (VOD) services, known as "on-demand programme service" (ODPS),<sup>192</sup> which followed the extensions

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<sup>187</sup> Human Rights Act 1998, <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

<sup>188</sup> European Communities Act 1997, <http://www.legislation.gov.uk/ukpga/1972/68/contents>.

<sup>189</sup> Section 362 Communications Act 2003; <http://www.legislation.gov.uk/ukpga/2003/21/contents>.

<sup>190</sup> Section 232 Communications Act 2003.

<sup>191</sup> S. 241 Communications Act.

<sup>192</sup> S. 368A Communications Act 2003 (inserted by *SI 2009/2979*).



of EU level regulation. Note that the licensing regime may include ownership restrictions. While the Communications Act also covers electronic communications networks, the act is structured so that there is separation between content provisions and provision pertaining to communications; ownership restrictions (beyond competition law) do not apply here.

Decisional practice in the competition field indicates that there are sub-markets within the different segments of the media. For example, recently the Competition and Markets Authority (CMA) considered the acquisition of the Financial Times Group as taking place on the market for quality daily newspapers.<sup>193</sup> In terms of broadcasting, the majority of merger decisions relate to radio. There, a distinction has been made between commercial broadcasters and non-commercial broadcasters even within the free-to-air category. As regards commercial broadcasters, this is a two-sided market involving advertisers on the one hand and the audience on the other. In the latter context, the CMA has noted the constraints imposed by the regulatory regime and the existence of the BBC in the local radio market.<sup>194</sup> In *Global/GMG*, the Competition Commission (CC) defined a separate market for radio advertising which was distinct from advertising on other media, such as newspapers, television and the Internet, although the impact of the Internet is increasing. As regards cable and satellite providers, there have been some competition decisions in which the regulatory authorities recognise the impact of the triple play bundle. While triple play considerations were argued in the *BSkyB/Easynet* and *ntl/Telewest* mergers, at that point the strategy was at too nascent a stage to be factored in.<sup>195</sup> Similarly, quadruple play, though in the minds of the parties to the deal, did not weight heavily with the regulator in *BT/EE* (see below).

While there have been fewer cases of media mergers or even joint ventures, and on-going complaints primarily relate to the abuse of a dominant position in relation to certain premium content,<sup>196</sup> the media regulator Ofcom, in the context of market investigations as well as cases of anti-competitive practices, has distinguished between different sorts of audiovisual content at both wholesale and retail levels. So, in its Pay TV Investigation, Ofcom found there were premium movie channels and premium sports channels, as distinct from other content markets.<sup>197</sup> While Ofcom chose to use its sectoral powers in relation to concerns about the sports rights issue, it found that the movie sector – implicating as it did VOD services – insufficiently covered by its sectoral powers. So, in respect of that premium content, Ofcom used its competition powers and referred the question to the CC.<sup>198</sup> Of note in this context is the fact that the CC had initially concluded, in its first Provisional Findings of August 2011, that competition was ineffective in the supply of "premium movies content" via pay TV to UK consumers, and remedies were required to address these concerns. However, it subsequently revised its view given increasing broadband penetration and the

<sup>193</sup> Acquisition by Nikkei of the Financial Times Group (ME6565/15), Competition and Markets Authority, 15 October 2015, available: [https://assets.publishing.service.gov.uk/media/5649bd8b40f0b674d3000030/Full\\_text\\_decision.pdf](https://assets.publishing.service.gov.uk/media/5649bd8b40f0b674d3000030/Full_text_decision.pdf).

<sup>194</sup> A report on the completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited, Competition Commission, 21 May 2013; ME/6158/13: Anticipated acquisition by Bauer Radio Limited of TIML Golden Square Limited (Absolute Radio), OFT Decision, 20 December 2013; CMA ME/6546/15: Anticipated acquisition by Global Radio Holdings Limited of Juice Holdco Limited, 22 October 2015 available at: <http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/>.

<sup>195</sup> OFT, Anticipated Merger of NTL Incorporated and Telewest Global Inc, decision 30<sup>th</sup> December 2005 (published 10 January 2006), para. 17; OFT, Anticipated acquisition by BSkyB Broadband Services Limited of Easynet group plc, decision 30 December 2005 (published on 13 January 2006).

<sup>196</sup> FA premier League Rights – Virgin Media Complaint (pending); Wholesale Supply of Sky Sports – BT Complaint, case closed 16 Feb 2016 (remedy sought by complainant agreed to by Sky).

<sup>197</sup> Ofcom, Statement on Pay TV Investigation, 31 March 2010, [http://stakeholders.ofcom.org.uk/binaries/consultations/third\\_paytv/statement/paytv\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf).

<sup>198</sup> Reference 4 August 2010, [http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies\\_on\\_pay\\_tv/pdf/terms\\_of\\_ref.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies_on_pay_tv/pdf/terms_of_ref.pdf).



increasing presence of *Netflix/Love Film* as a supplier of films. Ofcom, relying on s. 316 Communications Act, imposed a wholesale must-offer (WMO) remedy in respect of sports rights, which *Sky* successfully challenged. Ofcom carried out a further consultation in 2014 and removed the WMO due to changes in the market, both in terms of the development of means of delivery of news content and also because sport is more readily available than at the time of the first investigation.<sup>199</sup> BT has now challenged this decision, arguing inter alia that Ofcom should not have focussed on premium sports but rather on sports channels.<sup>200</sup>

### 5.3. Prevention of media concentration by law

The Communications Act 2003 obliges Ofcom 'to further the interests of consumers in relevant markets, where appropriate by promoting competition'.<sup>201</sup> In carrying out its functions, Ofcom is required to secure a range of objectives including the availability of a wide range of television calculated to appeal to a variety of tastes and interests as well as to ensure a 'sufficient plurality' of providers.<sup>202</sup> As a result of these obligations Ofcom has reviewed media ownership periodically, and has advised the minister as to the need for change.<sup>203</sup>

#### 5.3.1. Recent Ofcom investigations

Following Ofcom's consideration of media plurality in relation to the proposed *NewsCorp/BSkyB* acquisition, Ofcom was asked to produce advice on a measurement framework for media plurality. Ofcom first produced a measurement framework for media plurality in 2012. In the preamble to its report, Ofcom defines plurality as '(i) ensuring there is a diversity of viewpoints available across and within media enterprises; and (ii) preventing any one media owner or voice having too much influence over public opinion and the political agenda'. It also took the view that news and current affairs are the genres to consider in assessing plurality.<sup>204</sup>

Following a series of consultations and reviews, including the Leveson Report, Ofcom published new advice to the government on a measurement framework for media plurality.<sup>205</sup> Ofcom's underlying approach remains the same as in 2012: using a 'basket of metrics' to measure media plurality, a conception which includes all forms of media, i.e. print, radio, TV and online (both retail and wholesale). The basket includes quantitative measures, cross-media metrics, and contextual factors. Consumption metrics are the 'starting point' for any plurality assessment,

<sup>199</sup> Ofcom Statement on Review of the WMO, 15 November 2015, [http://stakeholders.ofcom.org.uk/binaries/consultations/wholesale-must-offer/statement/review\\_of\\_wmo\\_sStatement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wholesale-must-offer/statement/review_of_wmo_sStatement.pdf).

<sup>200</sup> *Bt v Ofcom*, summary of appeal, [http://www.catribunal.org.uk/files/1246\\_BT\\_WMO\\_Summary\\_210116.pdf](http://www.catribunal.org.uk/files/1246_BT_WMO_Summary_210116.pdf).

<sup>201</sup> S. 3(1)(b) Communications Act 2003.

<sup>202</sup> S. 3(2) (c) and (d) Communications Act 2003.

<sup>203</sup> S. 391 Communications Act 2003.

<sup>204</sup> Ofcom, Statement on Measuring Media Plurality, 19 June 2012, <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>.

<sup>205</sup> Ofcom, Statement on Measuring Media Plurality, 5 November 2015, [http://stakeholders.ofcom.org.uk/binaries/consultations/media-plurality-framework/statement/Measurement\\_framework\\_for\\_media\\_plurality\\_Statement.pdf?utm\\_source=updates&utm\\_medium=email&utm\\_campaign=Measurement-framework-for-media-plurality&utm\\_term=media%2C%20plurality%2C%20broadcasting%2C%20UK%2C%20DCMS](http://stakeholders.ofcom.org.uk/binaries/consultations/media-plurality-framework/statement/Measurement_framework_for_media_plurality_Statement.pdf?utm_source=updates&utm_medium=email&utm_campaign=Measurement-framework-for-media-plurality&utm_term=media%2C%20plurality%2C%20broadcasting%2C%20UK%2C%20DCMS).



although reach and availability are also included.<sup>206</sup> The new framework contains more information on how Ofcom views the 'personal importance' metric. Perceived impartiality, reliability, trust, and the extent to which news sources help consumers make up their mind about the news will be important in measuring impact. Ofcom also removed the Herfindahl-Hirschman Index, which was previously used to measure market concentration relating to consumption. A significant feature of Ofcom's framework is a distinction between wholesale and retail news providers, created in an attempt to understand who is behind third party content. Ofcom also highlights the role of digital intermediaries, although it is less clear how this will be measured.

In 2015 Ofcom also conducted a review into the production sector given the changes in that sector, including the acquisition of some of the largest UK producers by global media companies. Seven of the ten largest UK producers are owned by large foreign media corporations. There are no restrictions on overseas ownership of media companies. Ofcom concluded that despite this consolidation, a diverse range of companies remain with high levels of new entrants to the market, helped by the requirement that public service broadcasters commission at least 25% of non-news programmes from 'independent producers'.

As regards communications networks, while Ofcom has the power to set conditions in relation to access, there are no specific provisions relating to concentration of ownership. As regards the broadcasting provisions, s. 316 of the Communications Act permits Ofcom to include in broadcasting licences condition for ensuring fair and effective competition. Further, Ofcom may exercise its powers under the Broadcasting Acts 1990 and 1996 respectively, which can include the exercise of those powers for the purpose of competition. In such an instance Ofcom must consider whether it would be better to exercise its Competition Act powers.<sup>207</sup> These mainly relate to the behaviour of undertakings rather than the consolidation of undertakings and link to Ofcom's roles and duties relating to identifying and responding to conduct which is unlawful, anti-competitive, or otherwise harms consumer interests.

### 5.3.2. Mergers and acquisitions

Historically, there were extensive rules on the accumulation of media interests. Although these have been reduced significantly (specifically local media limitations given the competition from the Internet), some cross-media ownership rules remain. No person may acquire a *Channel 3* (ITV etc.) licence if he or she runs one or more national newspapers with an aggregate market share of 20% or more; and a *Channel 3* licensee<sup>208</sup> may not acquire an interest of 20% or more in a body corporate running one or more national newspapers with an aggregate market share of 20% or more.<sup>209</sup> The media ownership rules in the Communications Act do not limit ownership of television platforms so these matters fall to competition law. The Communications Act also contains the *Channel 3* news provider rule. The Secretary of State has the power to create a similar regime for *Channel 5* if he or she is satisfied that the audience share of *Channel 5* is broadly equivalent to that of *Channel 3* services, but this has not been exercised as *Channel 5* remains significantly smaller than *Channel 3*. According to s. 391 of the Communications Act, Ofcom is to review these rules at least every three

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<sup>206</sup> 2015 Statement, para. 1.18.

<sup>207</sup> S. 317 Competition Act 1998, <http://www.legislation.gov.uk/ukpga/1998/41/contents>.

<sup>208</sup> Channel 3 is one of the (digital) terrestrial frequencies; coverage is split into regions. Channel 3 licences were originally granted under the Broadcasting Act 1990, Part 1, but are now dealt with in ss. 214 et seq Communications Act 2003.

<sup>209</sup> Communications Act 2003, Schedule 14, part 1.



years. In 2012 it recommended no change. It published the most recent review in November 2015. Despite changes in consumption, Ofcom concluded that the rules still serve their purpose and should be retained.

The Communications Act amended the Enterprise Act 2002<sup>210</sup> (which was more recently amended by the Enterprise and Regulatory Reform Act 2013 (ERRA)<sup>211</sup>) to introduce specific provisions relating to media mergers concerning the press and broadcasting. It envisages a role for Ofcom as well as for what is now the Competition and Markets Authority (CMA). The CMA replaces the Office of Fair Trading (OFT) and the Competition Commission (CC). The OFT and the CC were abolished at the same time.

Media mergers can generally qualify for review under the Enterprise Act 2002 (the Enterprise Act) when two or more enterprises "cease to be distinct" and satisfy a market share or a turnover test. This can include joint ventures. Under the Enterprise Act, as amended by the Communications Act, the OFT would undertake an initial review to decide whether to refer the issue to the CC for in-depth investigation. Since ERRA came into force, the CMA conducts both the initial Phase 1 examination of mergers, the more detailed Phase 2 investigation, and final determination. Ofcom can refer completed or anticipated mergers to the Competition Markets Authority to consider whether a merger may be expected to result in a substantial lessening of competition within the appropriate market.<sup>212</sup> Media mergers do not have to be referred.<sup>213</sup>

As well as a competition review of media mergers, the Enterprise Act recognises the public interest element related to such mergers. An enterprise is a "media enterprise" if it "consists in or involves broadcasting".<sup>214</sup> These rules seem to apply to a limited group of media companies: press and traditional broadcasting. It does not seem to include ODPS, nor does it include transmission or other gateway companies. Nonetheless, the Enterprise Act provides for possible intervention by the Secretary of State for Business, Innovation and Skills in relation to stated public interest considerations: the need for accurate reporting, free expression, and a plurality of opinion in newspapers in each market. According to Department of Trade and Industry (DTI) guidance, intervention would normally only occur in cases where media ownership rules were removed by the Communications Act 2003.<sup>215</sup> The Secretary of State can ask Ofcom to report on the public interest concerns. The media public interest considerations are comprised of the following: a newspaper test for mergers involving newspaper enterprises, and a broadcasting and cross-media test for mergers involving broadcasting enterprises or mergers between broadcasting enterprises and newspaper enterprises. The *BSkyB/ITV* merger was the first time these powers were used. The Secretary of State has issued another two media public interest intervention notices: *News Corporation/BSkyB* and *Global/GMG Radio*.

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<sup>210</sup> The Enterprise Act 2002, <http://www.legislation.gov.uk/ukpga/2002/40/contents>.

<sup>211</sup> Enterprise and Regulatory Reform Act 2013, <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>.

<sup>212</sup> Sections 22 and 33 Enterprise Act 2002.

<sup>213</sup> See e.g. CMA Anticipated Acquisition by Nikkei Inc. of Financial Times Group, ME/6565/15.

<sup>214</sup> Section 58A(1) of the Enterprise Act 2002 (as amended); section 44(9) provides the applicable definition of "broadcasting".

<sup>215</sup> DTI, Enterprise Act 2002: Public Interest Intervention in Media Mergers- Guidance on the Operation of the Public Interest Merger Provisions relating to Newspaper and Other Media Mergers, May 2004, p. 37.



### 5.3.3. Approach to concurrent powers

Ofcom has concurrent powers with the CMA to exercise Competition Act powers, as well as Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).<sup>216</sup> It also has market investigation powers insofar as they relate to communications matters.<sup>217</sup> Prior to the enactment of ERRA, the National Audit Office and the OFT had criticised the sector regulators for defaulting to the use of sectoral ex ante powers, although Ofcom is a possible exception. The concerns were that reliance on ex ante control led to a dearth of decent competition law precedent in the regulated sectors, and additional and unnecessary regulation, as well as contributing to a delay in the development of “normal” competitive markets in the regulated sectors. ERRA was aimed at tackling this issue and may result in a shift in balance between use of ex ante regulatory powers and use of competition powers.<sup>218</sup>

Under ERRA, sector regulators will have a duty to apply competition law in preference to their regulatory/licence enforcement powers where it is more appropriate for them to do so. Further, the CMA may run a competition law investigation itself. Following the enactment of ERRA, Regulation 4(2) of the Competition Act 1998 (Concurrency) Regulations 2014<sup>219</sup> sets out the steps that must be taken before a competent person exercises its competition functions (as defined in regulation 2) in relation to a case, and in particular specifies that all competent persons are to agree which of them shall exercise prescribed functions in relation to that case. The CMA has issued guidance on concurrent powers.<sup>220</sup> Both the CMA and Ofcom are members of the UK Competition Network, established in light of ERRA, which is aimed at ensuring that the various sector regulators and the CMA work together effectively.<sup>221</sup> Ofcom and the CMA have further entered into a memorandum of understanding with regard to the exercise of concurrent powers and allocation of cases.<sup>222</sup>

### 5.3.4. Regulatory/monitoring bodies

The main bodies are Ofcom and CMA. Ofcom is the communications regulator, though it has responsibilities for the post as well as electronic communications. It was established as a body corporate by the Office of Communications Act 2002. Ofcom operates under a number of Acts of Parliament but the main relevant act is the Communications Act 2003. It is an independent body, but is still accountable to Parliament in respect of the carrying out of its duties. In addition to its sector-specific regulatory powers, Ofcom has competition powers which it exercises alongside the CMA.

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<sup>216</sup> Section 371 Communications Act 2003.

<sup>217</sup> Section 370 Communications Act 2003.

<sup>218</sup> See ss. 51-53 ERRA.

<sup>219</sup> SI 2014/536.

<sup>220</sup> CMA (2014), Regulated industries: Guidance on concurrent application of competition law to regulated Industries (CMA10).

<sup>221</sup> UK Competition Network, statement of intent,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/382445/UKCN\\_Statement\\_of\\_Intent.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382445/UKCN_Statement_of_Intent.pdf).

<sup>222</sup> Memorandum of understanding between the Competition and Markets Authority and the Office of Communications – concurrent competition powers, 2 February 2016,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502645/Ofcom\\_MoU.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502645/Ofcom_MoU.pdf).



Ofcom's structures reflect those of a corporate body. Its main decision-making body is the Board, which provides strategic direction for the organisation. It has a Non-Executive Chairman, Executive Directors (including the Chief Executive), and Non-Executive Directors. The Executive runs the organisation and answers to the Board. Ofcom also has a number of advisory boards and committees as well as a full time staff

The CMA is the successor body to the Competition Commission and the Office of Fair Trading. Established under the Enterprise and Regulatory Reform Act 2013, it is an independent non-ministerial department. The CMA has an executive team as well as a board to which it reports. It employs a full time staff of around 700.

There is a possibility of challenge before the Competition Appeal Tribunal (CAT). The CAT is a non-departmental public body. It was created by Section 12 and Schedule 2 of the Enterprise Act 2002. It is a specialized judicial body, the members of which include experts in a range of subjects – notably law and economics. It hears cases involving competition or economic regulatory issues; its jurisdiction is not limited to competition law, nor just to the communications sector.<sup>223</sup>

It is then possible to appeal to the normal appellate courts. In England, appeals go to the Court of Appeal, in Scotland to the Court of Session, and in Northern Ireland to the Court of Appeal in Northern Ireland. Any such appeal may only be made with the permission of the Tribunal or the relevant appellate court. A further appeal on a point of law may be made to the Supreme Court where permission is granted. Notably, Ofcom's decision to impose licence conditions on British Sky Broadcasting with regard to the right to broadcast the content of major sporting events, including Premier League football, ended with a Court of Appeal decision.<sup>224</sup>

## 5.4. Key Decisions

### 5.4.1. Project Kangaroo/Project Canvas

This case concerned a joint venture between *BBC Worldwide*, *ITV* and *Channel 4*, aiming to make current and archive material available via a common website. It would consist of free-to-air and pay TV services. *Kangaroo* would make content available direct to viewers but also was the vehicle for wholesale supply of content. The OFT referred the matter to the CC because it had concerns that this would result in a merger that would lessen competition in the VOD market. The CC confirmed that the project would result in a 'substantial lessening of competition' in both retail and wholesale VOD markets.<sup>225</sup> Not only did the parties have high market shares, but they were each other's closest competitors. The resulting loss might have led to higher prices for consumers but also foreclosure in relation to other market participants.

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<sup>223</sup> Relevant legislation includes: Competition Act 1998, Enterprise Act 2002, Communications Act 2003, Electricity Act 1989, Energy Acts 2004 and 2010, Postal Services Act 2011, Civil Aviation Act 2012, Financial Services (Banking Reform) Act 2013, the Wireless Telegraphy Act 2006.

<sup>224</sup> *British Sky Broadcasting v. Office of Communications* [2014] EWCA Civ 133.

<sup>225</sup> Competition Commission, A report on the anticipated joint venture between BBC, Worldwide Limited, Channel Four Television Corporation and ITV plc relating to the video on demand sector, 4 February 2009, [http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep\\_pub/reports/2009/fulltext/543.pdf](http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/543.pdf).



The parties to *Project Kangaroo* returned with *Project Canvas* (now *YouView*), which was a version of *Kangaroo* but with the problematic elements removed. Seven partners (*BBC Worldwide*, *ITV*, *Channel 4*, *Channel 5*, *Talk Talk*, *BT* and *Arquiva*) aimed to produce a common technical standard for interconnected television, to be published as an open standard. It also envisaged an ‘app store’. Content could be made available either through the main site or through personalised sites; any payment system would have to be introduced by the party using the standard – it was not incorporated into *Project Canvas*. None of the partners were to transfer any content or business to the joint venture, and *Project Canvas* would not have a role in aggregating, marketing, or directly retailing any television content. The project gave rise to criticism from other interested parties. The OFT determined that even though the project might be of significance for the development of interconnected television, this project did not give rise to a relevant merger situation and therefore it did not have jurisdiction to investigate. Complaints were then made to Ofcom claiming an infringement of the Competition Act. Ofcom dismissed the complaints and did not open an investigation.<sup>226</sup> Given the nascent nature of the market at that stage, Ofcom felt it would be premature to investigate. It also considered that there may be consumer benefits to the project. Ofcom said it would keep the situation under review.

#### 5.4.2. BSkyB/ITV

BSkyB, a satellite television service provider- but part of a group with wider media interests, acquired 17.9% of *ITV*'s shares. *ITV* is an independent broadcaster in the UK. It is the owner of eleven of the fifteen regional Channel 3 licences. The proposal was considered by the OFT and Ofcom. The OFT determined that the acquisition raised ‘significant competition concerns’, while Ofcom considered there were serious public interest issues with regard to media plurality and that the agreement should be referred to the CC for further investigation. The CC came to the conclusion that, contrary to Ofcom’s opinion, there were no plurality issues but that there was a significant lessening of competition. This difference in assessment, and the fact that Ofcom’s view could be overridden, was subsequently highlighted with concern by the House of Lords Select Committee on Communications.<sup>227</sup> Following the CC’s report, the Secretary of State came to the conclusion that there was insufficient evidence to suggest that *BSkyB*'s 17.9% shareholding in *ITV* would give *BSkyB* or its parent companies (e.g. *News Corporation*) the ability or incentive to exert editorial influence over *ITV*'s news output and that there were therefore no plurality issues. Nonetheless, he made an adverse finding in relation to the competition law aspects; that there would be a substantial lessening of competition within the UK market for all television and that this would operate against the public interest.<sup>228</sup> *BSkyB* was ordered to divest its shares. The outcome was challenged before the Competition Appeal Tribunal (CAT). *BSkyB* argued that the level of intensity for such review should be higher than that an administrative court would normally use in judicial review cases as the CAT is a specialist tribunal, with specialist expertise. This argument was rejected both by CAT and the Court of Appeal.<sup>229</sup>

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<sup>226</sup> <http://media.ofcom.org.uk/news/2010/no-investigation-into-project-canvas/>.

<sup>227</sup> HL Paper 122 2007-08 para. 268, paras 270-01.

<sup>228</sup> Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group’s acquisition of a 17.9% shareholding in *ITV* plc dated 29 January 2008,

[https://assets.digital.cabinet-office.gov.uk/media/55194c63ed915d1424000382/sky\\_berr\\_decision.pdf](https://assets.digital.cabinet-office.gov.uk/media/55194c63ed915d1424000382/sky_berr_decision.pdf).

<sup>229</sup> *BSkyB/ITV*, paras 32 and 41.



### 5.4.3. NewsCorp/BSkyB

In 2010 *News Corporation* sought to increase its share in BSkyB to 100%. It already had a 'material influence' over *Sky* given its existing ownership of 39.1%, more than double that which *Sky* was blocked from owning in *ITV* in 2007. Although the European Commission cleared the acquisition from an EU perspective, the then relevant Secretary of State in the Coalition Government, Vince Cable (of the Liberal Democrat Party), requested Ofcom to investigate under the public interest provisions. The matter was then transferred to a different MP, Jeremy Hunt (of the Conservative Party), following reports that Vince Cable was 'at war' with Mr Murdoch (main shareholder of *News Corporation*).<sup>230</sup> Ofcom's report suggested that there might be plurality issues. In coming to this conclusion it took the approach of the CC in the *BSkyB/ITV* case, assessing the change in the level of plurality rather than seeking to determine an absolute number of providers.<sup>231</sup>

Before referring the matter to the CC, the Secretary of State took time to consider undertakings proposed by *News Corporation* to address the potential threats to the public interest in media plurality identified by Ofcom.<sup>232</sup> He subsequently announced, on revised advice from Ofcom and the OFT, that its proposal to spin *Sky News* as a separate company would be acceptable in this regard.<sup>233</sup> Indeed the changes might increase *Sky News's* editorial independence as it was opposed to its position at that time. He also announced that further consultations would be carried out to ensure a robust set of undertakings.<sup>234</sup> Before a decision was made, the phone hacking scandal broke. This was the revelation that journalists working for certain newspapers (including titles in which Mr Murdoch had an interest) had broken the law to obtain material for stories. The Secretary of State wrote to Ofcom and the OFT to ask for their opinion as to whether these events affected their assessment of the threat to plurality and the credibility of the undertakings offered.<sup>235</sup> *News Corporation* withdrew its offer of undertakings in lieu and Jeremy Hunt referred the matter to the CC. Shortly after *News Corporation* withdrew its bid.

### 5.4.4. BT/EE

This 2016 clearance concerned the acquisition of the UK's largest mobile telecoms business (a result of the merger between *Orange* and *T-Mobile* networks) by the UK's largest telecoms business.<sup>236</sup> *BT* is also the main supplier on the wholesale market through its *Openreach* infrastructure network. The deal was motivated by the selling of the full range of *BT* services to the *EE* customer base, that is fixed/mobile convergence (quadplay). It specifically identified broadband, fixed telephony and pay-TV services. The deal proceeded to phase II/in-depth investigation through the 'fast track' procedure introduced by ERRA.

A range of concerns were raised during the investigation by other operators and customers in the UK telecoms industry. In its submission *Carphone Warehouse* raised a concern that the deal

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<sup>230</sup> HC Deb, 18 Jan 2011, cc 35-6WS.

<sup>231</sup> Referring to the Competition Commission Report in *ITV*, para. 5.15.

<sup>232</sup> HC Deb, 25 January 2011, cc 3-4WS.

<sup>233</sup> HC Deb, 3 March 2011, cc 518-9.

<sup>234</sup> HC Deb, 30 June 2011, c 1107.

<sup>235</sup> DCMS, Statement: *News Corp's* Acquisition of BSkyB, 8 July 2011.

<sup>236</sup> BT Group PLC acquisition of EE Limited, January 2016. All documents available at: <https://www.gov.uk/cma-cases/bt-ee-merger-inquiry>.



could result in long quadplay contracts, limiting consumers' ability to switch supplier. Another issue was access to the *Openreach* network, but *BT* is not only the UK's biggest home broadband service provider, but an increasingly significant challenger to *Sky*'s dominance in the pay TV market. The CMA, following a favourable report by Ofcom also, cleared the deal without remedies on the basis that *BT* and *EE* operate largely in separate areas, with only limited overlap. Consequently the merger would not substantially lessen competition in any market or markets in the UK, including in relation to the supply of retail mobile, wholesale mobile, mobile back-haul, wholesale broadband, and retail broadband services. This assessment was predicated on the basis that mobile and fixed communications are not substitutes for each other and so are in separate relevant markets. In this the CMA and Ofcom are following standard practice; it is arguable that it does not, however, take into account the full repercussions of the 'quad play' approach.

Note *Hutchison*, the owner of mobile operator 3, announced its intention to bid to acquire *Telefonica*'s mobile operator *O2*. The CMA asked the Commission to refer the investigation to it, but the Commission declined. The CMA outlined its concerns with the deal, specifically relating to the need for a fourth mobile network operator in the UK. The deal was subsequently blocked by the European Commission.

## 5.5. Current Discussion

While there have been ongoing concerns about media plurality and concentration of media ownership in the UK, the main debate at the moment is about the *BBC Charter* renewal and *BBC* governance structures. The *BBC* plays a key role in ensuring that a diverse range of content is available. A specific issue arising from consideration of the *BBC* is the need to close the 'iPlayer loophole' in the licence fee. Secondary legislation which will extend the current TV licensing regime not only to cover those watching the *BBC* live, but also those watching the *BBC* on catch-up through the *iPlayer* has been proposed.

Ofcom last year delivered its third review of Public Service Broadcasting,<sup>237</sup> which formed part of the backdrop to discussions about the *BBC*, and about the balance of payments between broadcasters and platforms. The review addressed opportunities and threats arising from the growth in internet use and the resulting changes we are seeing in technology innovation, media provision and audience behaviour, specifically identifying services such as *Netflix* and *Amazon Prime*. It also raised questions about the effectiveness of the regulatory regime in supporting the production sector, which led to the review noted above. It remains to be seen what the government's response to the review is. The response to the plurality review as well as the review of the ownership rules (see below) is outstanding.

The Government is also consulting on changes to the CMA, but this seems mainly aimed at procedures and enforcement.<sup>238</sup> In his speech at this year's Oxford Media Convention, the minister highlighted the issue of advertising revenue and ad-blockers; and while confirming that there is no intention to ban ad-blockers he stated that he plans industry talks. The extent to which there is recognition of the individuals' data protection rights and perhaps freedom from being profiled in this debate has not been expressly recognised.

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<sup>237</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/statement/PSB\\_Review\\_3\\_Statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/statement/PSB_Review_3_Statement.pdf).

<sup>238</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/525462/bis-16-253-options-to-refine-competition-regime.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/525462/bis-16-253-options-to-refine-competition-regime.pdf).



## 5.6. Specific Restrictions on Ownership

Under Section 3(3) Broadcasting Acts 1990 and 1996, Ofcom has a duty to be satisfied that a person holding a television or radio broadcasting licence is, and remains, a fit and proper person to hold a licence.<sup>239</sup> The precise meaning of this phrase is uncertain and during the *News International/BskyB* merger, Ofcom seemed unable to elaborate general rules though it eventually applied them.<sup>240</sup> It has also made an assessment of 'not fit and proper' in the context of a licensee's repeated failure to abide by the content code.<sup>241</sup> Nonetheless in its recent review on ownership rules, Ofcom argued that the impact of removing these rules on consumers would be uncertain and that they should be retained.

When there is a change of ownership, Ofcom will review the new position. If there is a change of control of a *Channel 3* or *Channel 5* television licence Ofcom must carry out a review of the likely effect of the change of specific matters set out in the Communications Act.<sup>242</sup> This could lead to new licence conditions to preserve aspects of the service that might be prejudiced by the change of control.<sup>243</sup> For example, on 4 May 2016, Ofcom published its "change of control review" under s. 351 of the *Channel 3* licence for Northern Ireland, following the transfer of ownership of *UTV Limited*, a subsidiary of *UTV Media plc* (now *Wireless Group plc*) to *ITV Broadcasting Limited*, a subsidiary of *ITV plc*. As part of discussions *ITV* proposed increasing the current affairs element of *UTV's* non-news quota, from 26 minutes to 33 minutes per week, following which Ofcom concluded that the change of control was not likely to be prejudicial.

Certain persons are restricted from holding a broadcasting licence: advertising agencies;<sup>244</sup> political parties/issues groups and religious bodies. The Nominated News Provider for *Chanel 3* cannot be under the control of political or religious bodies or bodies which would be barred from holding a *Channel 3* licence.<sup>245</sup> The *BBC*, *Channel 4 Corporation*, and *S4C* are prohibited from holding *Channel 3* and *Channel 5* licences. The 1990 and 1996 Broadcasting Acts contained restrictions on non-EEA nationals controlling the terrestrial broadcasters Channel 3, Channel 4, and Channel 5. With the introduction of the Communications Bill, the Government argued that:

*These rules are inconsistent and difficult to apply. The Government wants to encourage inward investment from non-EEA sources, to allow the UK to benefit rapidly from new ideas and technological developments, aiding efficiency and productivity. Content regulation will maintain requirements for high quality, original programming.*<sup>246</sup>

Despite opposition in its passage through Parliament, the Communications Act 2003 omitted the disqualifications on ownership with regard to Broadcasting Acts licences – subject always to the other limitations on ownership and compliance with the regulatory regime.

<sup>239</sup> See sections 3(3) and 86(3) of the Broadcasting Act 1990 and sections 3(3) and 42(3) of the Broadcasting Act 1996.

<sup>240</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/fit-proper/bskyb-final.pdf>.

<sup>241</sup> Ofcom Notice of Revocation: Bang Media, 25 November 2010, <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/fit-proper/bangmedia-revocation.pdf>.

<sup>242</sup> Sections 351 and 353 Communications Act.

<sup>243</sup> Sections 352 and 354 Communications Act.

<sup>244</sup> As defined in Section 202(7) Broadcasting Act 1990.

<sup>245</sup> S. 281 Communications Act.

<sup>246</sup> Consultation on the Draft Communications Bill (May 2002), para. 9.3.1.



## 5.7. Other Considerations

Although there have been concerns about declining advertising revenue as a consequence of recent economic depression, as well as new content delivery models, Ofcom's 2015 market report shows that broadcasters obtained 29% of their revenue for 2014 from advertising (c.f. revenue from subscriptions which is at 45%). This constituted an increase of 3.9% over the previous year's revenue. Despite increased competition from online advertising, broadcaster advertising accounted for 43.5% of all advertising (press, online, TV). This increase is not evenly spread amongst the channels: *ITV's* was the largest increase, with *Channel 4* and *Channel 5* showing small declines. Online, some free-to-air (FTA) is funded by advertising (as opposed to subscription): both continue to increase though constitute a small portion of overall revenues.

Ofcom investigated competition issues in the UK TV advertising trading mechanism<sup>247</sup> with a view to making a reference to the CC. Particular concerns related to the potentially anti-competitive characteristics of the trading model, including Share of Broadcast (SoB) deals, media agency umbrella deals, and Station Average Pricing (SAP). Having carried out a consultation, however, Ofcom decided not to make the reference.<sup>248</sup> There is no indication that it intends to return to this topic.

In addition to the changes in the market and convergence/vertical integration, there is a concern about findability, particularly in relation to the public services broadcasters' ability to fulfil their remits. While EPGs are required to comply with prominence rules, these obligations do not apply to all providers (e.g. OTT suppliers).

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<sup>247</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV\\_advertising\\_MIR.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV_advertising_MIR.pdf).

<sup>248</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/statement/statement.pdf>.



## 6. Media concentration in Italy

Roberto Mastroianni and Amedeo Arena<sup>249</sup>

### 6.1. Constitutional background

Media pluralism is directly connected to the right to inform and be informed, enshrined in Article 21 of the Italian Constitution.<sup>250</sup> Pluralism as a constitutional value first developed in the context of television broadcasting and was later extended to other means of information so as to become one of the pillars of the freedom of information.

Pluralism has an internal, external, and substantial dimension.<sup>251</sup> Internal pluralism concerns the ability of a given means of information to convey a multitude of different cultural, political, and social views. External pluralism entails the availability of as many information sources as possible, having regard to the current state of technical development. Substantive pluralism is necessary to create a level playing field in the context of political communication.<sup>252</sup>

The Italian Constitutional Court played a pivotal role in the safeguard of pluralism, notably by calling on the Parliament to lay down rules to prevent the creation of dominant positions in the media sector,<sup>253</sup> and by striking down several pieces of legislation that were unable to prevent excessive concentration in the broadcasting sector.<sup>254</sup> In spite of the constitutional status of the principle of media pluralism, concentration in the media sector has been an issue in Italy for over

<sup>249</sup> Roberto Mastroianni is professor of European Union Law at the University of Naples and wrote the first two sections of this chapter (“Constitutional background” and Convergent audiovisual / media markets”); Amedeo Arena is associate professor of European Union Law at the University of Naples and wrote the remaining sections.

<sup>250</sup> Constitutional Court, Judgment no. 155 of 2002, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=155>.

<sup>251</sup> See, generally, Roberto Mastroianni and Amedeo Arena, *Media Law in Italy*, Wolters Kluwer, 2014, 36 et seq.

<sup>252</sup> Constitutional Court, Judgment no. 112 of 1993;

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1993&numero=112>

no. 466 of 2002 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=466> ; See also G. Gardini, *Le Regole dell'Informazione. Principi giuridici, strumenti, casi* (Milan: Bruno Mondadori, 2009), 37 et seq.

<sup>253</sup> Constitutional Court, Judgment no. 826 of 1988,

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1988&numero=826> .

<sup>254</sup> See, for example, Constitutional Court, Judgment no. 420 of 1994,

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1994&numero=420> (holding that Article 15, para. 4, of Law 6 August 1990, no. 223 was unconstitutional in that it allowed the same broadcaster to hold up to 25% of the available broadcasting frequencies and up to three broadcasting networks);

Judgment no. 466 of 2002 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=466> (holding that Article 3, para. 7, of Law 31 July 1997, no. 249 was unconstitutional in that it did not set out a clear deadline for the transitional period during which broadcasters exceeding the concentration limits could carry on broadcasting their programmes).



two decades, as summarised by the Council of Europe Parliamentary Assembly in Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy:

*Through Mediaset, Italy's main commercial communications and broadcasting group, and one of the largest in the world, Mr Berlusconi owns approximately half of the nationwide broadcasting in the country. His role as head of government also puts him in a position to influence indirectly the public broadcasting organisation, RAI, which is Mediaset's main competitor. As Mediaset and RAI command together about 90% of the television audience and over three quarters of the resources in this sector, Mr Berlusconi exercises unprecedented control over the most powerful media in Italy.*

*This duopoly in the television market is in itself an anomaly from an antitrust perspective. The status quo has been preserved even though legal provisions affecting media pluralism have twice been declared anti-constitutional and the competent authorities have established the dominant positions of RAI and the three television channels of Mediaset. An illustration of this situation was a recent decree of the Prime Minister, approved by parliament, which allowed the third channel of RAI and Mediaset's Retequattro to continue their operations in violation of the existing antitrust limits until the adoption of new legislation. Competition in the media sector is further distorted by the fact that the advertising company of Mediaset, Publitalia '80, has a dominant position in television advertising.*<sup>255</sup>

## 6.2. Convergent audiovisual/media markets

### 6.2.1. Traditional market definition

The Italian legislators and regulators have for a long time defined media markets according to the technology employed. The Postal Code of 1973, for instance, distinguished between telegraphy, telephony, and radio broadcasting. Likewise, legislation enacted in the 1980s and the 1990s to limit concentration in the television broadcasting sector set “technical” thresholds based on the number of analogue broadcasting frequencies held by each operator.<sup>256</sup>

Both institutional actors and academic commentators expressed concerns about the ability of the “technical” limit to ensure media pluralism.<sup>257</sup> The Council of Europe's Venice Commission, in particular, considered that the number of channels broadcast by a given operator is “not a clear

<sup>255</sup> Parliamentary Assembly of the Council of Europe, Resolution 1387 (2004), Monopolisation of the electronic media and possible abuse of power in Italy, <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10587&lang=en>.

<sup>256</sup> See, for example, Article 15, para. 4, of Law 6 August 1990, no. 223

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1990-08-09&atto.codiceRedazionale=090G0270&currentPage=1> (limiting to 25% the number of broadcasting concessions that a single broadcaster could hold); Article 3, para. 6, of Law 31 July 1997, no. 249

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1997-07-31&atto.codiceRedazionale=097G0287&currentPage=1>.

(lowering the above limit to 20%); Article 3, para. 8 of Law 31 July 1997, no. 249 (limiting to 30% the revenues that a single broadcaster could gather in the television broadcasting sector).

<sup>257</sup> See, for example, B. Valensise, Il conflitto di interessi nella legge n. 215 del 2004 tra luci (poche) ed ombre (molte) (Studium iuris, 2005), 834 et seq. and 1034 et seq.; F. Scintola, La disciplina del conflitto di interessi dei membri del Governo (Nuova rassegna di legislazione, dottrina e giurisprudenza, 2005), 2131 et seq.; R. Zaccaria & A. Valastro, Diritto dell'informazione e della comunicazione (Padua: Cedam, 2010), 72–77.



indicator of market share” and argued that it should be combined “with an audience share indicator”.<sup>258</sup>

## 6.2.2. Convergent media market definition

The approach to market definition in the media sector changed significantly in the early 2000s. The Postal Code was replaced by the Electronic Communications Code (Legislative decree 1 August 2003, no. 259),<sup>259</sup> which mirrors the convergent approach espoused in the 2002 EU directives. In 2004, the Gasparri Law<sup>260</sup> introduced the so-called *Sistema integrato delle comunicazioni - SIC* (Integrated Communications System), a statutory relevant market encompassing revenue from the following activities: newspapers and magazines; yearly and electronic publishing; radio and audiovisual media services; cinema; outdoor advertising; communication initiatives for products and services; and sponsorships.<sup>261</sup>

According to data provided by *Autorità per le Garanzie nelle Comunicazioni* (AGCOM), the Italian Media Regulator, three major players are currently active in the SIC: *21<sup>st</sup> Century Fox* (comprising the pay-TV company *Sky Italia* and *Fox International Channels Italy*), with a revenue share of 15.7 (in 2014); *Fininvest* (comprising the free-to-air commercial broadcaster *Mediaset* and the *Arnoldo Mondadori* publishing company), with a share of 14.7% (in 2014); and *RAI Radiotelevisione Italiana* (Italy’s public service media company) with a share of 13.5% (in 2014).<sup>262</sup> The other half of the SIC revenues are scattered among smaller players, with individual shares of 3% or less.

Scholarly commentators have criticised the SIC as being too broad and comprising heterogeneous, unrelated, and non-substitutable services, thus undermining the effectiveness of the concentration limits based on SIC market shares.<sup>263</sup> In addition, the Venice Commission averred that;

*[the SIC] certainly reflects a modern trend but should not, at least in this very broad definition, be used already at this stage instead of the ‘relevant market’ criterion, as its effect is to dilute the effectiveness of the instruments aimed at protecting pluralism. Indeed, it may allow an individual company to enjoy extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20% threshold for the whole sector.*<sup>264</sup>

<sup>258</sup> European Commission for Democracy Through Law (Venice Commission), Opinion adopted at its 63rd Plenary Session (10-11 June 2005), on the compatibility of the “Gasparri” and “Frattini” laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PV\(2005\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PV(2005)002-e).

<sup>259</sup> <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2003-09-15&atto.codiceRedazionale=003G0280&currentPage=1>.

<sup>260</sup> Law 3 May 2004, no. 112,

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2004-05-05&atto.codiceRedazionale=004G0153&currentPage=1>.

<sup>261</sup> Article 2 para. 1, lett. l) of Legislative Decree no. 177 of 31 July 2005,

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2005-09-07&atto.codiceRedazionale=005G0206&currentPage=1>.

<sup>262</sup> AGCOM, 2016 Annual Report 2016, 19, <https://www.agcom.it/relazioni-annuali>.

<sup>263</sup> See R. Zaccaria and A. Valastro, *Diritto dell’informazione e della comunicazione* (Padua: Cedam, 2010) 560; R. Mastroianni, *Riforma del sistema radiotelevisivo italiano e diritto europeo* (Turin: Giappichelli 2004) 63.

<sup>264</sup> Opinion of the Venice Commission, adopted at its 63rd Plenary Session (10-11 June 2005), cit.



Moreover, although Italy's three major audiovisual media operators have similar revenues, their audience shares are remarkably different: *RAI* and *Mediaset* have overall audience shares of, respectively, 37.2 and 32.4% (in 2015); *Sky* – part of Italy's largest media corporate group in terms of revenues – is mainly a pay-TV broadcaster, and has an audience share of only 5.4% (in 2015).<sup>265</sup> Similarly, *RAI* and *Mediaset*'s flagship news programmes, *TG1* and *TG5*, have audience shares of, respectively, 22.8 and 19% (in 2015); *Sky TG24*, a free-to-air DTT channel of the *Sky* network devoted exclusively to the news, has an audience share well below 1%.<sup>266</sup>

## 6.3. Prevention of media concentration by law

### 6.3.1. Laws applicable: sector-specific media regulation

#### 6.3.1.1. The so-called “technical” anti-concentration limits

The Italian AVMS Code (Consolidated Law on Audiovisual and Radio Media Services)<sup>267</sup> sets out both “technical” and “economic” anti-concentration limits for the media sector. The former seeks to limit the number of channels broadcasted by the same audiovisual media services provider. In particular, the Code provides that no AVMS provider is allowed to broadcast more than 20 % of the total television channels and more than 20 % of the total radio channels.<sup>268</sup>

The enforcement of the “technical” limit is entrusted to AGCOM. In its Deliberation no. 353/11/CONS, AGCOM undertook to carry out an *ex officio* monitoring of compliance with the technical limit by 30<sup>th</sup> October each year. So far, AGCOM has not established any violation of the “technical” limit.

#### 6.3.1.2. The “economic” anti-concentration limits

Turning to “economic” anti-concentration limits applicable to the media sector, the AVMS Code prohibits the creation of dominant positions in the SIC and in its constituent submarkets.<sup>269</sup>

Moreover, the Code stipulates that, without prejudice to the prohibition on dominant positions, no communication operator may, either directly or through controlled or connected companies, achieve revenues in excess of 20% of the total SIC revenues.<sup>270</sup> Such revenues include *inter alia* those derived from the sale of daily newspapers and periodicals, from online publishing, from advertising, teleshopping, sponsorships etc.<sup>271</sup> The 20% limit is reduced to 10% for companies achieving more than 40% of the overall revenues of the electronic communications sector.<sup>272</sup>

<sup>265</sup> AGCOM, 2016 Annual report, 93.

<sup>266</sup> AGCOM, 2016 Annual report, 94.

<sup>267</sup> Legislative Decree no. 177/2005, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2005-09-07&atto.codiceRedazionale=005G0206&currentPage=1>.

<sup>268</sup> Article 43, para. 7, AVMS Code.

<sup>269</sup> Article 43, paras. 2 and 9 AVMS Code.

<sup>270</sup> Article 43, para. 9, AVMS Code.

<sup>271</sup> Article 43, para. 11 of Legislative Decree no. 177 of 31 July 2005 ,



The enforcement of the “economic” anti-concentration limits is entrusted to AGCOM,<sup>273</sup> which must adopt appropriate measures in case of non-compliance.<sup>274</sup> To that end, every year AGCOM adopts a decision establishing the overall values of the SIC (17 billion Euros in 2014).<sup>275</sup> In 2010, AGCOM opened a procedure for the definition of the individual markets that make up the SIC.<sup>276</sup> In this connection, in May 2015, AGCOM launched an inquiry into the audiovisual media services sector to establish the existence of dominant positions or other positions liable to undermine media pluralism.<sup>277</sup>

### 6.3.1.3. Rules governing the press sector and cross-ownership (diagonal) anti-concentration limits

In addition to specific concentration limits for the audiovisual media sector, the AVMS Code also precludes companies that engage in nationwide broadcasting or electronic communications exceeding certain revenue thresholds from acquiring stakes or participating in the establishment of publishers of daily newspapers (with the exception of daily newspapers issued only in electronic form) before 31 December 2016.<sup>278</sup> The relevant revenue thresholds are 8% of the overall SIC for broadcasting companies, and 40% of the revenues in the electronic communications sector for electronic communications companies.<sup>279</sup>

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<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2005-09-07&atto.codiceRedazionale=005G0206&currentPage=1>.

<sup>272</sup> Article 43, para. 11, AVMS Code.

<sup>273</sup> Article 43, para. 5 of Legislative Decree no. 177 of 2005,

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2005-09-07&atto.codiceRedazionale=005G0206&currentPage=1>.

<sup>274</sup> Article 43, para. 5, AVMS Code.

<sup>275</sup> AGCOM Decision no. 658/15/CONS,

[https://www.agcom.it/documentazione/documento?p\\_p\\_auth=fLw7zRht&p\\_p\\_id=101\\_INSTANCE\\_kidx9GUnlodu&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_struts\\_action=%2Fasset\\_publisher%2Fview\\_content&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_assetEntryId=3484284&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_type=document](https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=3484284&_101_INSTANCE_kidx9GUnlodu_type=document).

<sup>276</sup> AGCOM Decision no. 555/10/CONS,

[https://www.agcom.it/documentazione/documento?p\\_p\\_auth=fLw7zRht&p\\_p\\_id=101\\_INSTANCE\\_kidx9GUnlodu&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_struts\\_action=%2Fasset\\_publisher%2Fview\\_content&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_assetEntryId=659588&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_type=document](https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=659588&_101_INSTANCE_kidx9GUnlodu_type=document).

<sup>277</sup> AGCOM Decision no. 286/15/CONS,

[https://www.agcom.it/documentazione/documento?p\\_p\\_auth=fLw7zRht&p\\_p\\_id=101\\_INSTANCE\\_kidx9GUnlodu&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_struts\\_action=%2Fasset\\_publisher%2Fview\\_content&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_assetEntryId=2067993&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_type=document](https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=2067993&_101_INSTANCE_kidx9GUnlodu_type=document).

<sup>278</sup> Article 43, para.12, AVMS Code,

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2005-09-07&atto.codiceRedazionale=005G0206&currentPage=1>.

<sup>279</sup> Ibid.





two authorities' tasks and powers are uncertain.<sup>285</sup> In order to promote consistency between the actions of those two authorities, Law no. 249/1997 requires AGCM to seek an opinion from AGCOM before exercising its powers *vis-à-vis* undertakings operating in the communications sector.<sup>286</sup>

The Council of State has clarified that, while AGCM is required to request such an opinion, the latter is not binding on AGCM, which may depart from AGCOM's findings but must give clear and sufficient reasons for doing so.<sup>287</sup> The Council of State has also stated that an AGCOM decision establishing that certain contract clauses are in line with sectoral regulation is no bar to a subsequent decision by AGCM that those clauses are incompatible with antitrust law, but does prevent AGCM from imposing a sanction.<sup>288</sup> Moreover, AGCOM and AGCM have entered into a cooperation agreement for the exchange of information and the coordination of their respective tasks in the field of electronic communications.<sup>289</sup>

The twofold review mechanism applicable to concentrations in the media sector<sup>290</sup> entails the risk of conflicting outcomes: in the *SEAT/Cecchi Gori* case, for instance, AGCOM opposed the deal<sup>291</sup> while AGCM subsequently authorised it, subject to commitments.<sup>292</sup> In other cases, such as the establishment, by Italy's main free-to-air television operators, of a joint venture (named *TIVÚ S.r.l.*) entrusted with the retransmission of its parent companies' broadcasts on DTT and satellite networks, AGCOM took the view that the deal did not constitute a concentration between independent undertakings, and resolved not to open an investigation.<sup>293</sup>

### 6.3.4. Regulatory/monitoring bodies and competition authorities

The enforcement of sector regulation seeking to safeguard media pluralism rests with AGCOM, a five-member independent authority, the President of which is appointed by the President of the Italian Republic on the basis of a proposal by the Prime Minister, in agreement with the Minister of Economic development, subject to a favourable opinion issued by the relevant Parliamentary committees by a two-thirds majority. The remaining four AGCOM Members are elected by the

<sup>285</sup> See F. Donati, 'Funzioni di regolazione e impegni nel settore delle comunicazioni elettroniche', in F. Cintioli and F. Donati (eds.) *Recenti innovazioni in materia di sanzioni antitrust*, pp. 103-113 (Turin: Giappichelli, 2008).

<sup>286</sup> Law no. 249/97, Article 1, para. 6, letter c), no. 11,

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1997-07-31&atto.codiceRedazionale=097G0287&currentPage=1>.

<sup>287</sup> Council of State, Judgment of 10 March 2006, no. 1271, <http://www.federalismi.it/nv14/articolo-documento.cfm?artid=25745>.

<sup>288</sup> Ibid.

<sup>289</sup> Cooperation Agreement between AGCOM and AGCM in the field of electronic communications (2004), <http://www.agcm.it/protocolli-di-intesa/8179-accordo-di-collaborazione-agcm-agcom-in-materia-di-comunicazioni-elettroniche-23-febbraio-2004.html>.

<sup>290</sup> See AGCOM, Regulation governing the procedures for authorizing the transfer of ownership of broadcasting companies, the procedures concerning dominant positions and the review of concentrations and agreements in the context of the Integrated Communications System, Annex I to AGCOM Decision of 9 November 2006, no. 646/06/CONS,

[https://www.agcom.it/documentazione/documento?p\\_p\\_auth=fLw7zRht&p\\_p\\_id=101\\_INSTANCE\\_kidx9GUnlodu&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_struts.action=%2Fasset\\_publisher%2Fview.content&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_assetEntryId=684400&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_type=document](https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts.action=%2Fasset_publisher%2Fview.content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=684400&_101_INSTANCE_kidx9GUnlodu_type=document).

<sup>291</sup> AGCOM, Trasferimento di proprietà della Cecchi Gori Communications S.p.A. a Seat Pagine Gialle S.p.A., Decision of 17 January 2001, no. 51/01/CONS, [http://www.aistel.it/Authority/d51\\_01\\_CONS.htm](http://www.aistel.it/Authority/d51_01_CONS.htm).

<sup>292</sup> AGCM, Case C4158 - SEAT Pagine Gialle/Cecchi Gori Communications, Decision of 23 January 2001, no. 9142,

<http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/1C6C784AA9FEA66BC12569DF00535549.html>.

<sup>293</sup> See AGCOM Decision of 14 September 2009, no. 519/09/CONS.

<https://www.agcom.it/documents/10179/15967/4+PARTE+3+RELAZIONE.pdf/06c9ce2f-d157-4c82-9eb8-f9e93c8adf76>.



Parliament; two by the Chamber of Deputies and two by the Senate, and are appointed by the President of the Republic.<sup>294</sup>

Competition provisions applicable also to other economic activities, instead, are enforced by AGCM, an independent competition authority, the president and two commissioners of which are appointed by the Presidents of the Chamber of Deputies and of the Senate, respectively.<sup>295</sup>

Decisions by both AGCOM and AGCM can be challenged before the Latium Regional Administrative Court in Rome, the rulings of which can be appealed before the Council of State.

### 6.3.5. Key rulings

The effective protection of the fundamental value of media pluralism, enshrined in Article 21 of the Constitution, has been the subject of a number of key rulings by the Italian Constitutional Court.

Before turning to an analysis of those judgments, it must be noted that, from the procedural perspective, they were all rendered on the basis of the so-called “preliminary question of constitutional legitimacy” (*questione incidentale di legittimità costituzionale*). According to the Italian Constitution, individuals cannot challenge the constitutionality of parliamentary legislation or government decrees having the same legal force (decrees-law and legislative decrees) directly before the Constitutional Court. However, if a legal dispute involves the application of a law the compliance of which with the Constitution is in question, the court entrusted with the resolution of that dispute is entitled to suspend the proceedings and request the Constitutional Court to render a binding decision on the constitutionality of the relevant item of legislation.<sup>296</sup>

The landmark case on the principles of media pluralism applied to television broadcasting is judgment no. 826 of 1988 of the Italian Constitutional Court.<sup>297</sup> In that judgment, the Court, emphasising the pivotal role played by media pluralism in a democratic system, took the view that pluralism entails, above all, the involvement in the broadcasting sector of “as many voices as technically possible”, without the danger of certain opinions being marginalized because of the concentration of technical and economic resources in the hands of a few. On that occasion, the Court also averred that pluralism entails that citizens must be granted the freedom to choose from a variety of information sources, and that both public and private broadcasting must ensure the expression of different opinions.

Of paramount importance is also judgment no. 420 of 1994,<sup>298</sup> in which the Constitutional Court underlined the constraint imposed by the Constitution on the legislature, in order to protect media pluralism and to ensure the fundamental right of the citizens to information. On that occasion, the Court held that the existence of public broadcasting cannot offset the harmful effects on media pluralism caused by undue concentration of market power in the context of private

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<sup>294</sup> Article 1(3) of Law 31 July 1997, no. 249, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1997-07-31&atto.codiceRedazionale=097G0287&currentPage=1>.

<sup>295</sup> Article 10 of Law 10 October 1990, no. 287.

<sup>296</sup> See Constitutional Court, *The Italian Constitutional Court*, p. 30 et seq.  
[http://www.cortecostituzionale.it/documenti/download/pdf/Cc\\_Checosa\\_2013\\_UK.pdf](http://www.cortecostituzionale.it/documenti/download/pdf/Cc_Checosa_2013_UK.pdf).

<sup>297</sup> Constitutional Court, Judgment no. 826 of 1988,  
<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1988&numero=826>.

<sup>298</sup> Constitutional Court, Judgment no. 420 of 1994,  
<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1994&numero=420>.



broadcasting. Hence, the Court declared the unconstitutionality of Article 15, paragraph 4, of Law 223/1990 (cd. Mammi law),<sup>299</sup> insofar as it provided that the nationwide broadcasting concessions granted to the same subject could not exceed 25% of the number of national networks provided by the spectrum allocation plan and, in any case, should be no higher than three. The Court reached that decision for the additional reason that that limit was less stringent than the 20% cap applicable to the publishing industry as per Section 3, paragraph 1 of Law 67/1987,<sup>300</sup> even though television broadcasting could influence public opinion more effectively than the press.

The principles set out in the judgment n. 420 of 1994 were reaffirmed in judgment no. 155 of 2002,<sup>301</sup> in which the Constitutional Court underlined that the constitutional imperative set out in Article 21 of the Constitution must be characterized by the plurality of information sources and the completeness, accuracy, and objectivity of the information provided. Finally, in judgment no. 466 of 2002,<sup>302</sup> the Court established that Articles 3 and 21 of the Constitution precluded provisions such as Section 3, paragraph 7, of Law 249/1997;<sup>303</sup> the Court did not set a clear deadline – in any case not later than 31 December 2003 – within which the programs transmitted by broadcasters exceeding the limits, referred to in paragraph 6 of section 3 of the said law, must be broadcast exclusively via satellite or cable.

## 6.4. The importance of media related factors and markets

Advertising constitutes a significant source of revenue for two of the three major corporate groups operating in the context of audiovisual media services (*RAI* and *Mediaset*). In 2012, AGCOM carried out a comprehensive inquiry that revealed that the television advertising market was highly concentrated, with one dominant player (*Mediaset/Fininvest*) having a share of 62% (in 2010), another player (*RAI*) with a market share of 24%, and other fringe competitors.<sup>304</sup>

AGCOM noted that *Fininvest's* dominant position was particularly strong thanks to that company's vertical integration with companies active in the television broadcasting and infrastructure market (i.e. *Mediaset*). AGCOM added that while *RAI* and *Mediaset* had similar audience shares, *Mediaset/Fininvest* enjoyed a dominant position in the advertising side of the market also because *RAI* was subject to stricter quantitative limits on advertising, by reason of its PSM status. Similarly, AGCOM noted that the lower hourly advertising limits imposed on pay-TV operators, such as *Sky*, relative to those applicable to free-to-air tv operators, notably *Mediaset*, could contribute to the strengthening of the latter's dominant position in the television advertising market.

<sup>299</sup> <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1990-08-09&atto.codiceRedazionale=090G0270&currentPage=1>.

<sup>300</sup> <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1987-03-09&atto.codiceRedazionale=087U0067&currentPage=1>.

<sup>301</sup> Constitutional Court, Judgment no. 155 of 2002, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=155>.

<sup>302</sup> Constitutional Court, Judgment no. 466 of 2002, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=466>.

<sup>303</sup> <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1997-07-31&atto.codiceRedazionale=097G0287&currentPage=1>.

<sup>304</sup> See attachment A to AGCOM Decision no. 551/12/CONS.



Sky challenged the stricter advertising limits applicable to pay-TV operators at the Latium Regional Administrative Tribunal and, in that context, it raised the issue of the impact of those asymmetric rules on media pluralism. However, the European Court of Justice<sup>305</sup> and the Constitutional Court,<sup>306</sup> both of which were involved in the lawsuit, did not address that issue.

## 6.5. Specific Ownership Restrictions/Barriers to Ownership

As regards specific ownership restrictions in the field of media, it must be noted that as per Section 3(2) of Law no. 249/97, broadcasting concessions for the nationwide broadcasting of terrestrial television channels can only be issued to companies established in Italy or in a member state of the European Union. Citizens or nationals of a State that is not a member of the European Union may control the above companies provided those States ensure conditions of real reciprocity towards Italy, without prejudice to the provisions deriving from international agreements.

Regard must be also had to restrictions on media ownership by individuals holding governmental offices. As noted above, for several decades the Italian media sector was characterised by ‘a unique combination of economic, political and media power in the hands of one man – the former President of the Italian Council of Ministers’, Mr. Silvio Berlusconi,<sup>307</sup> who has been the largest shareholder of the *Mediaset* network group since its establishment in 1978, and served as Prime Minister of Italy from 1994 to 1995, from 2001 to 2006, and from 2008 to 2011. According to the European Parliament<sup>308</sup> and the Parliamentary Assembly of the Council of Europe,<sup>309</sup> that situation of conflict of interest could impinge upon the principle of freedom of expression and upset the balance of electoral competition, contrary to the constitutional principles of internal and external pluralism.<sup>310</sup>

The debate on placing restrictions on media ownership for politicians began in 1994, following Mr. Berlusconi’s first election and appointment as Prime Minister. Some Members of the Parliament claimed that Mr Berlusconi’s election to the Chamber of Deputies was at variance with Article 10 of the Decree of the President of the Republic no. 361 of 1957, according to which holders of public concessions of a significant value cannot be elected to the Chamber of Deputies.<sup>311</sup> The

<sup>305</sup> European Court of Justice, judgment 18 July 2013, Case C-234/12,

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1470925781473&uri=CELEX:62012CA0234>.

<sup>306</sup> Constitutional Court, judgment no. 210/2015,

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=210#>

<sup>307</sup> European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights), 2003/2237(INI), para. 60, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2004-0230+0+DOC+XML+V0//EN>.

<sup>308</sup> Ibid., resolution on the situation as regards fundamental rights in the European Union (2002), 2002/2013(INI), OJEC C 076 E, 25/03/2004 P. 0412 – 0429, para. 37 (deploring ‘the fact that in Italy in particular a situation is continuing in which media power is concentrated in the hands of the Prime Minister, without any rules on conflict of interest having been adopted’), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2003-0376+0+DOC+XML+V0//EN&language=ET>.

<sup>309</sup> See Parliamentary Assembly of the Council of Europe, Resolution 1387 (2004), Monopolisation of the electronic media and possible abuse of power in Italy, para. 1 (expressing concern about ‘concerned by the concentration of political, commercial and media power in the hands of one person, Prime Minister Silvio Berlusconi’), <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10587&lang=en>.

<sup>310</sup> See R. Zaccaria and A. Valastro, *Diritto dell’informazione e della comunicazione* (Padua: Cedam, 2010) 72.

<sup>311</sup> Decree of the President of the Republic 30 Mar. 1957, no. 361, OJIR 3 giugno 1957, no. 139, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1957-06-03&atto.codiceRedazionale=057U0361&currentPage=1>.



Chamber's Committee of Elections, however, took the view that that provision only concerned persons holding broadcasting concessions 'in their own name', as opposed to indirectly through shareholdings, as in the case of Mr. Berlusconi.<sup>312</sup>

In 2004 the Parliament passed a bill aimed at regulating the conflict of interest between public officials and professional and entrepreneurial activities; the so-called Frattini Law.<sup>313</sup> The Frattini Law provides that holding a government office (e.g. Prime Minister, minister, etc.) is incompatible with certain activities, such as those involving the management of business undertakings.<sup>314</sup> Individual entrepreneurs wishing to take up public service tasks are thus required to entrust their businesses to one or more trustees (which may include family members).<sup>315</sup>

The Frattini Law requires persons holding a government office to devote themselves exclusively to the public interest and to abstain from taking measures and participating in joint decisions in situations where there is a possible conflict of interest.<sup>316</sup> Conflicts of interests are defined as an act or omission by persons holding a government office: i) when they are also holding an incompatible post as defined above; or ii) when that act has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest.<sup>317</sup>

The Council of Europe's Venice Commission,<sup>318</sup> as well as a number of academic commentators,<sup>319</sup> have expressed concerns as to the ability of the Frattini Law to effectively address the situation of conflict of interest characterizing the Italian media sector.

## 6.6. Current discussion

The debate on media concentration has somewhat faded in the recent years, also because the situation of conflict of interest that has characterised the Italian media landscape for several years resolved itself in 2013, when Mr. Berlusconi was expelled from Parliament following a four-year conviction for tax fraud.<sup>320</sup> Although a new bill on conflict of interest was introduced in 2013,<sup>321</sup> it

<sup>312</sup> Chamber of Deputies, Committee for Elections, decisions of 20 Jul. 1994 and of 17 Oct. 1996,

[http://legislature.camera.it/dati/leg12/lavori/Bollet/39690\\_01.pdf](http://legislature.camera.it/dati/leg12/lavori/Bollet/39690_01.pdf), and

<http://leg13.camera.it/dati/leg13/lavori/bollet/199610/1017/pdf/16.pdf>.

<sup>313</sup> Law 20 July 2004, no. 215, 'Norme in materia di risoluzione dei conflitti di interessi',

<http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2004-08-18&atto.codiceRedazionale=004G0212&currentPage=1>, OJIR 18 August 2004, no. 193. The 'Frattini Law' was named after its sponsor

Minister Franco Frattini, at that time in charge of the Public Functions Department of the Berlusconi II Cabinet.

<sup>314</sup> Article 2, paragraph 1, of the Frattini Law.

<sup>315</sup> Article 2, paragraph 2, of the Frattini Law.

<sup>316</sup> Article 1 of the Frattini Law.

<sup>317</sup> Article 3 of the Frattini Law.

<sup>318</sup> Venice Commission, Opinion no. 309/2004 on the compatibility of the Laws 'Gasparri' and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, [http://www.venice.coe.int/docs/2005/CDL-AD%282005%29017-e.asp#\\_ftn83](http://www.venice.coe.int/docs/2005/CDL-AD%282005%29017-e.asp#_ftn83)

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)017-e).

<sup>319</sup> See, e.g., B. Valensise, Il conflitto di interessi nella legge n. 215 del 2004 tra luci (poche) ed ombre (molte), *Studium iuris*, 2005, 834 et seq. and 1034 et seq.; F. Scintola, La disciplina del conflitto di interessi dei membri del Governo, *Nuova rassegna di legislazione, dottrina e giurisprudenza*, 2005, 2131 et seq.; R. Zaccaria and A. Valastro, *Diritto dell'informazione e della comunicazione* (Padua: Cedam, 2010) 72-77.

<sup>320</sup> <http://www.telegraph.co.uk/news/worldnews/silvio-berlusconi/10479012/Silvio-Berlusconi-expelled-from-parliament.html>.



was approved by the Chamber of Deputies only in 2016,<sup>322</sup> and it is still being discussed in the Senate.<sup>323</sup> While the outcome of the legislative process is difficult to predict, at this juncture it is fair to say that the new conflict of interest bill does not appear to be a priority.

The current discussion instead focuses on the Internet, which has a significant impact on media pluralism insofar as it is the third means of information for Italian users, yet it lies beyond the scope of the SIC (except for the revenues from online publishing) and the attendant anti-concentration limits. For this reason, AGCOM called on the legislature to amend the SIC so as to enable a better understanding and more accurate assessment of the current challenges to media pluralism.<sup>324</sup>

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<sup>321</sup> Bill no. 275 submitted by Mr. Bressa on 15 March 2013 setting out provisions on conflicts of interest of the holders of governmental posts, available at:

[http://www.camera.it/leg17/995?sezione=documenti&tipoDoc=lavori\\_testo\\_pdl&idLegislatura=17&codice=17PDL0009930](http://www.camera.it/leg17/995?sezione=documenti&tipoDoc=lavori_testo_pdl&idLegislatura=17&codice=17PDL0009930).

<sup>322</sup> [http://documenti.camera.it/votazioni/votazionitutte/schedaVotazione.asp?progrID=risultatidb&Legislatura=17&CDDANNO=2016&CDDMESE=02&CDDGIORNO=25&TipoRicerca=t&PAGESIZE=10&RifVotazione=577\\_133&tipo=dettaglio&PagCorr=1](http://documenti.camera.it/votazioni/votazionitutte/schedaVotazione.asp?progrID=risultatidb&Legislatura=17&CDDANNO=2016&CDDMESE=02&CDDGIORNO=25&TipoRicerca=t&PAGESIZE=10&RifVotazione=577_133&tipo=dettaglio&PagCorr=1).

<sup>323</sup> <http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/966134/index.html>.

<sup>324</sup> AGCOM Decision no. 555/10/CONS, at 230-1.



## 7. Media concentration in France

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### 7.1. Summary

In French law, plurality – to be understood as the plurality of socio-cultural currents of expression – is a principle of constitutional value.

Although it may be preserved, and sometimes reinforced, by the application of the rules of competition, there is no specific reference to plurality in the general texts on competition, or more particularly in the rules on concentration.

Nevertheless, Act No. 86-1067 of 30 September 1986 on freedom of communication contains a complex set of rules that apply specifically to holdings and changes in holdings in the audiovisual sector, aimed at preserving the plurality of the audiovisual media. Other rules reinforce the powers of the audiovisual sector's regulator in this area.

The Act also determines the organisation of the respective areas of competence of the national authorities with responsibility for competition (the most important of which is the Competition Authority – *Autorité de la Compétition*) and the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA), by providing possibilities for reference and dialogue between these authorities.

### 7.2. Constitutional context

In French law, freedom of expression is guaranteed under Article 11 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789,<sup>326</sup> a text which has constitutional status; the Article provides that:

*The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.*

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<sup>326</sup> 1789 Declaration of the Rights of Man and the Citizen, <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (in French).



This freedom is not unlimited. In a decision delivered on 27 July 1982,<sup>327</sup> the French Constitutional Council (*Conseil Constitutionnel*) stated that:

*It is for the legislator to reconcile the present state of technologies and mastery of them with the exercise of the freedom of communication (...), bearing in mind on the one hand the technical constraints inherent in the means of audiovisual communication and on the other the objectives of constitutional value involving maintaining public order, respecting the freedom of others, and preserving the multiple nature of the socio-cultural currents of expression that these modes of communication could have an adverse on by virtue of their substantial influence.*

These principles are enshrined in Act No. 86-1067 of 30th of September 1986 on the freedom of communication<sup>328</sup>.

In its Decision No. 93-333 DC of 21 January 1994,<sup>329</sup> the Constitutional Council confirmed that “the plurality of socio-cultural currents of expression” is itself an objective of constitutional value.<sup>330</sup>

Thus plurality appears to be both a necessary corollary to the freedom of audiovisual communication, and indeed to the freedom of expression in general, and a fundamental principle of the law governing audiovisual communication.

Although it has not been defined precisely, plurality appears to cover currents of expression in the political field in a very broad sense. It is not certain, however, that it includes purely ‘cultural’ plurality and hence a principle of ‘cultural plurality’. It will be noted however that Article 3-1 of the Act of 30 September 1986 tasks the CSA with ensuring “the quality and plurality of programmes”, which perhaps broadens the significance of the principle in the context of this Act.

### 7.3. Delimitation of agreements and effects of convergence

The competition authorities have had occasion to delimit a number of relevant agreements in the field of television, at every stage: at the time of acquiring television rights, regarding advertising on

<sup>327</sup> Decision by the Constitutional Council (*Conseil Constitutionnel*) No. 82-141 DC of 27 July 1982 on Act No. 82-652 of 29 July 1982 on audiovisual communication, JORF (French Gazette), 29 July 1982, p. 2422,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000883985> (in French).

<sup>328</sup> Article 1 states that “The exercise of this freedom can only be limited to such an extent that, firstly, by respect for the dignity of the human person, the freedom and property of others, the pluralist nature of the expression of currents of thinking and opinion and, secondly, by the protection of children and adolescents, the maintenance of public order, the requirements of national defence, public service demands, the technical constraints inherent in means of communication, and the necessity for audiovisual services to develop audiovisual production”. See Act No. 86-1067 of 30 September 1986 on freedom of communication (the “Léotard Act”) - consolidated version as at 4 October 2016, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930> (in French).

<sup>329</sup> Decision No. 93-333 DC of 21 January 1994, JORF no. 21, 26 January 1994, page 1377,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000181704&categorieLien=id> (in French).

<sup>330</sup> In it the Court affirms that “respect of this plurality is one of the conditions for democracy: the free communication of thoughts and opinions, guaranteed by Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen, would not be effective if the target audience of the audiovisual means of communication were not in a position, in both the public and private sectors, to provide programmes which guaranteed the expression of differing trends while respecting the imperative of the honesty of information; ultimately, the aim to be achieved is for listeners and viewers (...) to be capable of exercising their free choice without either private interests or public authorities being able to impose their own decisions, or being able to make these the subject of an agreement”.



television, at the stage of editing and commercialising television channels, and lastly at the stage of distributing television services.

With regard to the acquisition of rights for broadcasting on television, the Competition Authority's practice in decision-making<sup>331</sup> uses two main segmentations, and identifies a number of specific agreements for certain types of content.

The first segmentation concerns the type of audiovisual content, drawing a distinction between stock programmes (excluding cinema films and recent American series<sup>332</sup>) and flow programmes.<sup>333</sup> Agreements on sports rights also constitute a separate type.<sup>334</sup> These are limited to the territory of France, since the rights are acquired for that territory alone. The second segmentation concerns the way in which the content is broadcast. On this point, there is no difference in practice between agreements according to the distribution platform used, since the rights acquired for television also cover the main distribution platforms.<sup>335</sup> On the other hand, a distinction is drawn between agreements on the acquisition of rights for linear and non-linear use.<sup>336</sup> As yet, the competition authorities have not adopted a specific agreement for the acquisition of television programmes intended for broadcasting as catch-up television.<sup>337</sup>

Advertising on television is not the same as other types of advertising, particularly advertising in cinema theatres, in the press, on the radio, by means of posters, or on the Internet. It will be noted nevertheless that in 2014 the competition authority noted "a decrease in the gap between advertising on the Internet and advertising on television as a result of the development of advertising using display video on the Internet".<sup>338</sup> The two types of advertising are nevertheless still considered to be separate.<sup>339</sup>

<sup>331</sup> Decision no. 16-DCC-10 of 21 January 2016 on TF1 and FIFL taking joint control of FLCP; letters from the Ministry for the Economy concerning Canal +/UGC operations: DA of 5 December 1996, and France Télévisions/TF1/CFII of 25 May 2005, <http://www.autoritedelacompetition.fr/pdf/avis/16DCC10VersionPublication.pdf> (in French).

<sup>332</sup> Regarding rights in respect of cinematographic work and television series, decision-making practice adopts three-fold segmentation according to the broadcasting window, the broadcasting mode (linear, on-demand, subscription service on demand), and the origin of the work acquired. See Decision No. 12-DCC-100 of 23 July 2012, [http://www.autoritedelacompetition.fr/doc/liste\\_injonctions\\_tps.pdf](http://www.autoritedelacompetition.fr/doc/liste_injonctions_tps.pdf) (in French); Decision No. 14-DCC of 10 February 2014, [http://www.autoritedelacompetition.fr/pdf/avis/14DCC15decision\\_version\\_publication.pdf](http://www.autoritedelacompetition.fr/pdf/avis/14DCC15decision_version_publication.pdf) (in French); Decision No. 14-DCC-50 of 2 April 2014, [http://www.autoritedelacompetition.fr/pdf/avis/14DCC50decision\\_version\\_publication.pdf](http://www.autoritedelacompetition.fr/pdf/avis/14DCC50decision_version_publication.pdf) (in French).

<sup>333</sup> There is also a specific market for rights in respect of European fiction works and works originally made in the French language.

<sup>334</sup> Decision-making practice (European Commission Decision GCP/RTL/GJCD of 13 November 2001 (in English); letter no. C2006-02; Competition Authority decisions 14-DCC-50, 10-DCC-11 and 12-DCC-100, [www.autoritedelacompetition.fr](http://www.autoritedelacompetition.fr) (in French)) draws a distinction between rights in respect of football and rights in respect of other sports, and identifies the following markets: the market for purchasing rights for broadcasting French premier league football matches on pay and free television (excluding pay-per-view); the market for purchasing rights for broadcasting the most attractive foreign football championship matches on pay and free television (excluding pay-per-view); the market for purchasing rights for broadcasting other football competition matches on pay and free television services (excluding pay-per-view); the market for purchasing the rights for broadcasting sports events of major importance other than football on pay and free services (excluding pay-per-view); and the market for purchasing the rights for broadcasting competitions on pay and free television services (excluding pay-per-view).

<sup>335</sup> Decision No. 16-DCC-10 referred to above; letter from the Minister for the Economy, Finance and Employment dated 15 April 2008, to the boards of the Société Française du Radiotéléphone S.A. on concentration in the telecommunications sector, ref. C2007-181, [http://www.economie.gouv.fr/files/directions\\_services/dgccrf/boccrf/2008/08\\_04bis/c2007\\_181\\_sfr\\_9cegetel.pdf](http://www.economie.gouv.fr/files/directions_services/dgccrf/boccrf/2008/08_04bis/c2007_181_sfr_9cegetel.pdf) (in French).

<sup>336</sup> At least for stock programmes, as opposed to flow programmes, for which the distinction does not seem to be relevant. Decision No. 16-DCC-10 referred to above.

<sup>337</sup> Ibid. Points 33 to 35.

<sup>338</sup> Decision No. 14-DCC-50 of 2 April 2014, Point 106, [http://www.autoritedelacompetition.fr/pdf/avis/14DCC50decision\\_version\\_publication.pdf](http://www.autoritedelacompetition.fr/pdf/avis/14DCC50decision_version_publication.pdf) (in French).

<sup>339</sup> Competition Authority, in its Decision No. 14-DCC 50 referred to above, including quotation of European Commission Decision No. COMP/M.4731 of 11 March 2008, Google/DoubleClick, [http://ec.europa.eu/competition/mergers/cases/decisions/m4731\\_20080311\\_20682\\_fr.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_fr.pdf) (in French), its own Decision No. 10 DCC-11,



Regarding the edition and commercialisation of pay television channels, the decision-making practice of the competition authorities does draw a distinction between the distribution platforms used by the channels; instead, it segments the agreements according to the channels' themes, drawing a distinction between agreements for premium channels<sup>340</sup> and those that are specific to cinema channels, sport channels, children's channels, and news channels.<sup>341</sup> Decision-making practice also differentiates between linear and non-linear television services, but does not consider catch-up television services as a separate type. In the past, the competition authorities have also considered sub-segmentation according to the type of network on which the channels are broadcast (mobile and fibre networks).

Lastly, regarding the distribution of television services, a first distinction is drawn between agreements for pay television and for free television. For pay television, there is segmentation according to the levels of services and differentiation between offers of linear and non-linear services.<sup>342</sup> There is no segmentation by distribution platform, except with regard to pay television on mobile devices<sup>343</sup> and to the situation in the French overseas territories.<sup>344</sup>

These definitions take convergence into account; this can be seen, for example, in the absence of segmentation according to distribution platform, although there are some exceptions which actually do take into account the limits of convergence in certain territories and the practices specific to certain media.

## 7.4. Supervision and prevention of concentration in the audiovisual sector

### 7.4.1. Rules specific to the audiovisual sector

As already indicated, the Act of 30 September 1986 contains specific rules aimed at preserving plurality in the audiovisual field. These rules limit the holding any one person may have in the capital of audiovisual communication companies,<sup>345</sup> and lay down specific mechanisms to counter concentration.<sup>346</sup> In addition to these arrangements, the CSA is also required to take action in the context of its power to allocate frequencies.

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<http://www.autoritedelacompetition.fr/pdf/avis/10DCC11decisionversionpublication.pdf> (in French), and an opinion issued by the CSA on 22 May 2012,

<http://www.csa.fr/Espace-juridique/Avis-du-CSA-a-l-Autorite-de-la-competition/Avis-du-CSA-a-l-Autorite-de-la-competition-sur-la-notification-de-l-acquisition-des-societes-Direct-8-Direct-Productions-Direct-Digital-et-Bollore-Intermedia-par-les-societes-Vivendi-et-Groupe-Canal-Plus> (in French).

<sup>340</sup> Decision 12-DCC-100 already mentioned.

<sup>341</sup> Ibid.

<sup>342</sup> Decision No. 14-DCC-15; No. 12-DCC-100 (in French). A distinction is drawn between pay-per-view services and subscription viewing, and no separate contract/market/agreement has been adopted for the distribution of video services to subscribers.

<sup>343</sup> Letter No. C2006-02, p. 27 et seq.; Opinion No. 06-A-13, p. 22 et seq.; Competition Authority Decision No. 10-D-32, p. 53 et seq. (in French).

<sup>344</sup> Decision 14-DCC-15, which notes that cable, ADSL and fibre do not constitute perfect substitutes for satellite (points 98 to 104) (in French).

<sup>345</sup> Act No. 86-1067 of 30 September 1986, Art. 39.

<sup>346</sup> Act No. 86-1067 of 30 September 1986, Art. 41 et seq.



Act No. 82-652 of 29 July 1982<sup>347</sup> contained the germ of arrangements to keep concentration in check, consisting of a ban on holding more than one authorisation of the same type (television or radio). Act No. 86-1067 of 30 September 1986 had substantially strengthened these arrangements in its Articles 38, 39 and 41, although it did not lay down rules aimed at limiting holdings in several companies, known as ‘plurimedia concentration’. In its Decision No. 86-217 of 18 September 1986<sup>348</sup>, the Constitutional Council cancelled this arrangement on the grounds of its defectiveness. Further to the Constitutional Council’s Decision, the provisions of Articles 39 to 41-3 of the Act on freedom of communication were introduced by means of Act No. 86-1210 of 27 November 1986,<sup>349</sup> which laid down a set of bans, referring to both mono- and plurimedia. These arrangements were partially relaxed by Act No. 94-88 of 1 February 1994.<sup>350</sup> The arrangements were subsequently adapted to the development of digital terrestrially television by Act No. 2000-719 of 1 August 2000<sup>351</sup> and again by Act No. 2001-624 of 17 July 2001.<sup>352</sup> They were then adjusted by Act No. 2004-669 of 9 July 2004<sup>353</sup> and by Acts No. 2008-776 of 4 August 2008<sup>354</sup> and No. 2009-258 of 5 March 2009.<sup>355</sup>

The result of this succession of texts is a set of comprehensive arrangements, based on three sets of rules: rules on capital holdings, rules to counter monomedia concentration, and rules to counter plurimedia concentration.

These rules do not refer to competition alone, since the ban applies equally even if there is no quantifiable effect on the market, and some thresholds are set at a very low level. They also guarantee a framework that is conducive to preserving a degree of independence or autonomy for editors, and consequently a degree of plurality.

It should be noted that these rules do not apply to the public sector; different treatment was validated by the Constitutional Council in its Decision No. 2000-433 of 27 July 2000.<sup>356</sup>

A specific restriction applies to foreign investments from a country outside the European Union. Article 40 of Act No. 86-1067 states that, subject to international undertakings entered into

<sup>347</sup> Act No. 82-652 of 29 July 1982 on audiovisual communication, consolidated version as at 4 October 2016, JORF 30 July 1982, p. 2431, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000880222>.

<sup>348</sup> Constitutional Council Decision No. 86-217 DC of 18 September 1986 – Act on freedom of communication – partial non-compliance with the Constitution, <https://www.legifrance.gouv.fr/affichJuriConst.do?oldAction=rechJuriConst&idTexte=CONSTEXT000017667436&fastReqId=20822449&fastPos=1> (in French).

<sup>349</sup> Act No. 86-1210 of 27 November 1986 supplementing Act No. 86-897 of 1 August 1986 reforming the legal scheme applicable to the press and Act No. 86-1067 of 30 September 1986 on freedom of communication, JORF, 28 November 1986, p. 14297, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000693913> (in French).

<sup>350</sup> Act No. 94-88 of 1 February 1994 amending Act No. 86-1067 du 30 September 1986 on freedom of communication, JORF, 2 February 1994, p. 1800, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000363209> (in French).

<sup>351</sup> Act No. 2000-719 of 1 August 2000 amending Act No. 86-1067 of 30 September 1986 on freedom of communication, JORF, 2 August 2000, p. 11903, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000402408&dateTexte=&categorieLien=id> (in French).

<sup>352</sup> Act No. 2001-624 of 17 July 2001 laying down various provisions of a social, educational and cultural nature (1), JORF, 18 July 2001, p. 11496, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000757800> (in French).

<sup>353</sup> Act No. 2004-669 of 9 July 2004 on electronic communications and audiovisual communication services (1), JORF, 10 July 2004, p. 12483, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000439399> (in French).

<sup>354</sup> Act No. 2008-776 of 4 August 2008 on modernising the economy (1), JORF, 5 August 2008, p. 12471, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019283050> (in French).

<sup>355</sup> Act No. 2009-258 of 5 March 2009 on audiovisual communication and the new public-sector television service (1), JORF, 7 March 2009, p. 4321, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020352071> (in French).

<sup>356</sup> Constitutional Council Decision No. 2000-433 DC of 27 July 2000, JORF, 2 August 2000, p. 11922, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2000/2000-433-dc/decision-n-2000-433-dc-du-27-july-2000.452.html> (in French).



by France, no foreign national may make an acquisition that has the effect of directly or indirectly increasing the proportion of capital held by foreigners to more than 20% of the company's capital or of voting rights at general meetings of shareholders in a company holding an authorisation in respect of a radio or television service broadcast terrestrially in the French language.<sup>357</sup> Subject to this limitation, investments in the audiovisual sector are not considered by the French Monetary and Financial Code (*Code Monétaire and Financier*) as constituting foreign investments requiring prior authorisation.<sup>358</sup>

The general thresholds for holding capital are defined in Article 39 of Act No. 86-1067. Certain thresholds only relate to analog terrestrial television,<sup>359</sup> which no longer exists. For the remainder, two thresholds are defined:

- Firstly, no one natural person or legal entity acting alone or in concert may hold, either directly or indirectly, more than 49% of the capital or voting rights of a company that holds an authorisation for a national television service broadcast terrestrially which has an average annual audience over an electronic telecommunications network that exceeds 8% of the total audience of television services.<sup>360</sup>
- Secondly, no one natural person or legal entity holding an authorisation in respect of a national television service broadcast terrestrially with an audience that exceeds this threshold may hold, either directly or indirectly, more than 33% of the capital or voting rights of a company that holds an authorisation in respect of a service that is not national and which does not consist essentially of relaying a national television service in the French overseas territories.<sup>361</sup>

The arrangements to prevent monomedia concentration are provided for in Article 41 of Act No. 86-1067, which refers to both radio and television services. Regarding television services,<sup>362</sup> the Article provides that no-one may hold two authorisations each for a national television service broadcast terrestrially.<sup>363</sup> However, a single person may, directly or indirectly, hold up to seven authorisations each for a national television service or programme other than personal mobile television broadcast terrestrially in digital mode if the services or programmes are edited by separate companies.<sup>364</sup> A number of restrictions are then imposed, mainly in respect of geographic

<sup>357</sup> For the purpose of application of this Article, a "person of foreign nationality" is deemed to be any natural person of foreign nationality, any company in which the majority of the company capital is not held, directly or indirectly, by natural or legal persons of French nationality and any association whose leaders are of foreign nationality. This rule does not apply to editors of services with at least 80% of their capital and voting rights in the hands of public-sector broadcasters belonging to Council of Europe member States and where the proportion of the capital and voting rights held by a French public-sector audiovisual company are at least 20%. Restrictions on foreign holdings, which are now irrelevant, had also been included in the Act on the State's sale of the company TF1 (Articles 61 and 63 of the Act of 30 September 1986).

<sup>358</sup> Art. R.153-2 ([www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)) (in French).

<sup>359</sup> The thresholds for analog terrestrial television are stricter than those applicable to digital terrestrial television.

<sup>360</sup> Act of 30 September 1986, Art. 39-I. For the application of these thresholds, the audience of each of the programmes consisting of the partial or full repeat showing of a broadcast television service is calculated together with that of the repeated service.

<sup>361</sup> Act of 30 September 1986, Art. 39, III.

<sup>362</sup> And to the exclusion of the rules specific to analog terrestrial television, which we shall not deal with here.

<sup>363</sup> However, this provision does not apply to services broadcast on personal mobile television (a detail arising from Act No. 2007-309 of 5 March 2007).

<sup>364</sup> Or when they consist of a repeat showing of terrestrially-transmitted programmes.



areas and the size of the potential audience.<sup>365</sup> Audience thresholds are only used for radio and personal mobile television.<sup>366</sup>

The arrangement for preventing plurimedia concentration, meaning solely the combination of radio services, television services (with no conditions as to content) and “printed daily publications of political and general news”, is included in Articles 41-1, 41-1, 41-2 and 41-2-1 of Act No. 86-1067. The Act does not as yet take into account developments in the electronic press and on-line media, or the convergence being effected by the Internet’s major stakeholders.

As we have indicated, apart from these anti-concentration arrangements, the CSA is required to check on the effect of certain concentration operations in the context of the exercise of its power to allocate authorisations to radio and television services for the use of frequencies. The Act of 30 September 1986 states that the CSA shall grant these authorisations “by appreciating the value of each project for the public, in the light of the priority imperatives of safeguarding the plurality of socio-cultural currents of expression, the diversification of operators, and the need to avoid abuse of a dominant position, as well as practices which might stand in the way of the free exercise of competition”.<sup>367</sup> In exercising its appreciation, the CSA takes into account the positions of the players in the markets concerned, and of the structure of their capital.<sup>368</sup>

Furthermore, under the Act, an authorisation may be withdrawn without notice in the event of substantial changes being made to the information on the basis of which the authorisation was issued, particularly in respect of changes in the composition of the company’s capital or its management bodies and in the ways in which the operator concerned is financed.<sup>369</sup> Thus in 2003, as part of the *Suez group’s* plan to distance itself from the communication sector, which involved disposing of most of its shares in the company *Métropole Télévision*, thereby increasing from 34% to 49% of the company capital of *M6* the voting rights of its other reference shareholder, *RTL Group*, the CSA demanded a number of amendments be made to the channel’s articles of association and conditions of share ownership.<sup>370</sup> Similarly, in 2010, the CSA pronounced on the acquisition of the companies which edited the television services *TMC* and *NT1* by the *AB group* and *TF1*.<sup>371</sup>

<sup>365</sup> “A person who holds one or more authorisations each for a television service broadcast terrestrially in analog mode that is not national may not become the holder of a new authorisation for a service of the same type that is not national if the authorisation would have the effect of increasing to more than twelve million inhabitants the population living in the areas served by all the services of one type for which the person holds authorisations.

A person who holds one or more authorisations each for a television service broadcast terrestrially in digital mode that is not national may not become the holder of a new authorisation for a service of the same type that is not national if the authorisation would have the effect of increasing to more than twelve million inhabitants the population living in the areas served by all the services of one type for which the person holds authorisations.

A person who holds an authorisation for operating a television service broadcast terrestrially in analog mode in a given area may not become the holder of a new authorisation for a service of the same type broadcast exclusively in the same area in analog mode.

A person who holds an authorisation for operating a television service broadcast terrestrially in digital mode in a given area may not become the holder of a new authorisation for a service of the same type broadcast exclusively in the same area in digital mode.”

<sup>366</sup> “No-one may hold one or more authorisations each for a radio service with a cumulated terrestrial audience of more than 20% of the cumulated potential audiences for all the radio services, both public and subject to authorisation, that are broadcast terrestrially.

No-one may hold one or more authorisations each for a service broadcast on personal mobile television with a cumulated terrestrial audience of more than 20% of the cumulated potential audiences for all the services, whether public or authorised, broadcast on personal mobile television.”

<sup>367</sup> Act of 30 September 1986, Art. 30-1; see also Art. 29, 30-6.

<sup>368</sup> Ibid.

<sup>369</sup> Act of 30 September 1986, Art. 42-4 *in fine*.

<sup>370</sup> Deliberation of 20 November 2003 *M6/Suez*, <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/M6-Suez-deliberation-du-20-novembre-2003> (in French).

<sup>371</sup> The company *TF1* wished to acquire the entire capital of the *AB group*, which would have enabled it to control 80% of the company capital of the company *Télé Monte-Carlo (TMC)* and 100% of that of the company *NT1*, which edit the channels *TMC* and *NT1* on digital



## 7.4.2. Rules on competition

Despite the existence of specific rules and procedures, common law on competition is still meant to apply in the audiovisual sector. Indeed the applicable rules do not contain any specific waiver with regard to either the cinema or the cultural industries.

The internal rules on competition are varied. They are constituted in the main by a ban on anti-competition agreements<sup>372</sup> and abuse of a dominant position<sup>373</sup>, and by rules on concentration.<sup>374</sup> The other violations,<sup>375</sup> which have no equivalent in Community law on competition, are only of very limited relevance to the matters of interest to us here.

It should nevertheless be recalled that it is not the purpose of these rules to preserve the plurality of socio-cultural currents of expression. Damage to competition remains the sole criterion in the various applicable texts (and more particularly in the regulations on concentration); holdings that could be damaging to plurality may in fact be authorised on the basis of these texts (or escape their application). All of which justified introducing specific regulations in the Act of 30 September 1986.

## 7.4.3. Connection between specific regulations and competition law

The authorities responsible for applying the rules provided for in the Act of 30 September 1986 on the one hand and the rules on competition contained in the French Commercial Code (*Code de Commerce*) on the other are quite separate.

The CSA, an independent administrative authority with responsibility for the audiovisual sector, is not an authority on competition, and does not have any powers to apply the rules on competition contained in the Commercial Code.<sup>376</sup> Article 3-1 of the Act of 30 September 1986 does however give it the general task of guaranteeing the fundamental freedoms and principles of the law on audiovisual communication, and states that the CSA “shall ensure the promotion of free competition and the establishment of non-discriminatory relations between the editors and distributors of services, whatever electronic communications network they may use, in accordance with the principle of technological neutrality” and shall “shall ensure the quality and diversity of programmes, the development of national production and audiovisual creation, and the defence and portrayal of French language and culture”.

This definition of the CSA’s general missions is important, as it may trigger application of the power to impose sanctions provided for in Articles 42 et seq. of Act No. 86-1067, which refer to complying with the obligations imposed on editors and distributors of sound radio or television services by the laws and regulations and by the principles defined in Articles 1 and 3-1.

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terrestrial television. The CSA’s approval was issued on 23 March 2010. The appeal brought by the company *M6* before the French Council of State (*Conseil d’Etat*) was turned down (Council of State, Disputes Section, 30 December 2010, the company *Métropole Télévision (M6)*, no. 338197 and no. 338273, <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000022203522> (in French).

<sup>372</sup> Commercial Code, Art. L. 420-1.

<sup>373</sup> Commercial Code, Art. L. 420-2.

<sup>374</sup> Commercial Code, Art. L. 430-1 to L. 430-10.

<sup>375</sup> Such as the abuse of economic dependence or exploitation of a state of economic dependence (Commercial Code, Art. L. 420-2). The Commercial Code also prohibits a number of “anti-competition practices” (Art. L. 442-1 to L. 441-10).

<sup>376</sup> Act of 30 September 1986, Art. 41-4: “The CSA shall notify the Competition Authority of any anti-competition practices that come to its knowledge in the sectors of radio, television, and on-demand audiovisual media services.”



We may deduce from this that an operator's failure to comply with the common-law rules on competition, as noted by the competent authorities (the first of which is the Competition Authority), may, in as much as it would affect the principles mentioned above, cause the CSA to pronounce administrative penalties that could be as extreme as withdrawal of the authorisation, in addition to the penalties imposed in application of the Commercial Code.

Failure to abide by the specific anti-concentration rules and mechanisms included in the Act of 30 September 1986 triggers the mechanisms of sanctions provided for in the event of failure to abide by the regulations governing the audiovisual sector.

To enable the CSA to exercise its power of supervision, Article 38 of the Act of 30 September 1986 provides that "any natural or legal person holding a proportion of at least 10% of the capital or voting rights at general meetings of shareholders of a company that holds an authorisation is required to inform the CSA accordingly within one month of the date on which these thresholds are exceeded".

The Act states that the CSA must inform the Competition Authority of any anti-competition practices that come to its knowledge in the sectors of radio, television, and on-demand audiovisual media services.<sup>377</sup> The CSA may also ask the Competition Authority for its opinion on matters involving competition and concentration that come to its knowledge in these sectors. The CSA must also be consulted by the Competition Authority on practices restricting competition and on economic concentrations in the audiovisual sector.<sup>378</sup>

Lastly, it should be noted that, in the context of its power to settle disputes between an editor and a distributor of services, the Act invites the CSA to ask for the opinion of the regulatory authority for electronic communications and the postal system (*Autorité de Régulation des Communications Electroniques and des Postes*) "when the facts at the origin of the dispute are likely to restrict the offer of electronic telecommunications services".<sup>379</sup>

At the present time, the sharing of areas of competence among the various authorities with responsibility for ensuring the application of the general and specific rules applicable to the ownership of audiovisual media and to the mechanisms of concentrations does not seem to be raising any questions.

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<sup>377</sup> Act of 30 September 1986, Art. 17 and Art. 41-4. For anti-competition practices, precautionary measures subject to the conditions provided for in Article L. 464-1 of the Commercial Code may be requested at the time of referral.

<sup>378</sup> Act of 30 September 1986, Art. 41-4.

<sup>379</sup> Act of 30 September 1986, Art. 17-1.





## 8. Media concentration in Spain

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### 8.1. Constitutional background

Media pluralism or media concentration regulation as such are not present in the 1978 Spanish Constitution. Only political pluralism is acknowledged as one of the highest values of its legal system together with liberty and justice (Article 1.1). Freedom of expression is regulated in Spain by Article 20 of the Constitution of 1978, democratically passed after 40 years of Franco's dictatorship. Article 20.1.a recognises "the right to freely express and spread thoughts, ideas, and opinions through words, in writing or by any other means of reproduction." Article 20.1.d defines "the right to freely communicate or receive truthful information by any means of dissemination whatsoever." Finally, pluralism of society is another principle that has to be protected by public media (Article 20.3). These are the only mentions of pluralism in the Spanish Constitution. In short, there are no direct provisions or articles related to media concentration or media ownership in the Spanish Constitution.

However, as Spain signed the European Convention on Human Rights (ECHR) in 1977 and ratified it in 1979, Article 10 of the ECHR, on freedom of expression and exceptions thereto, applies to Spanish media regulation. According to this provision, "a) States could require the licensing of broadcasting, television or cinema enterprises" and "b) this right could be limited in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." As a result, media ownership regulation came late to Spain: in 1987 for radio and in 1988 for television companies when the first act on private television (10/1988) was enacted.<sup>381</sup> In addition, it is important to take into account that the 1978 Constitution divides Spanish territory into autonomous communities that are granted broad, yet limited, political and legal autonomy. These regional governments have normative competencies with which to establish, organise, and develop audiovisual media services in their own territories. This report will focus only on national media concentration regulations, as the 17 autonomous communities present a wide variety of norms and situations.

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<sup>381</sup> Ley 10/1988, de Televisión Privada de 3 de mayo 1988 (Private TV Act 10/1988 of 3 May 1988), <https://www.boe.es/buscar/doc.php?id=BOE-A-1988-11073>.



## 8.2. Convergent audiovisual/media markets

### 8.2.1. Traditional market definition

Media concentration laws in Spain have traditionally differed from those in other Western countries: there are no rules to prevent press concentration or to impede cross-media concentration. The reasons for this are historical: most of the Spanish press played an important and positive role in the country's democratization, so any control over ownership was considered a form of unlawful state control over freedom of expression. In addition, the financial interests of Spanish press groups in developing private television in Spain collaborated against the powers that be, in order to impede any attempt to place limits on press and television cross-media ownership. Consequently, the only regulation existing in the Spanish democracy to limit media concentration applies to television and radio.

The absence of such cross-media legislation has profoundly shaped the media sector in Spain, as in the pre-crisis era it facilitated the existence of 5-7 medium-sized multimedia groups that competed against each other in the television, radio, press, and internet sectors. As a consequence, the media sector in Spain presented itself as being relatively diverse in monomedia terms, but had a high degree of cross-media concentration of ownership before 2012. However, the economic downturn precipitated a wave of consolidation across media industries, which has reduced media diversity, especially in the broadcasting and radio sector between 2010 and 2014.

The traditional market definition was linked to private television and radio licences. The first media concentration regulation was applied in 1988 through the Spanish Private Television Act and established that no individual or institution could hold more than 25% of the shares in any of the three national licenses available at that time. The idea behind this regulation was to protect the internal pluralism of each television broadcaster: no single company could have complete control over a private television broadcasting license, because a minimum of four shareholders was required. The initial 25% share-ownership threshold in a national broadcasting license was amended several times in the following 20 years, always in the direction of liberalization. An initial reform raised the threshold of shares that a single shareholder could hold in a television company from 25% to 49% in 1998 by Ley 50/1998 de Medidas Fiscales, Administrativas y del Orden Social (Act 50/1998 on Taxation, Administrative Provisions and Social Affairs of 30 December).<sup>382</sup> Later on, any shareholder was able to hold 100% of the shares of a national television station, provided that it held no more than 5% in another television station according to Act 62/2003).<sup>383</sup>

Regarding the radio sector, the first ownership regulation was laid down in Ley 31/1987 de Ordenación de las Telecomunicaciones (Act 31/1987 on the Organization of Telecommunications of 18 December<sup>384</sup>), later amended by Ley de Medidas Urgentes para el Impulso de la Televisión Digital Terrestre, de Liberalización de la Televisión por Cable y de Fomento del Pluralismo (Act 10/2005 on Urgent Measures for the Promotion of Digital Terrestrial Television, Cable TV Liberalization and

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<sup>382</sup> Ley 50/1998 de Medidas Fiscales, Administrativas y del Orden Social de 30 de diciembre 1998 (Act 50/1998 on taxation, administrative provisions and social affairs of 30 December 1998), <https://www.boe.es/buscar/doc.php?id=BOE-A-1998-30155>.

<sup>383</sup> Ley 62/2003 de Medidas Fiscales, Administrativas de 30 de diciembre 2003 (Act 62/2003 on taxation, administrative provisions and social affairs of 30 December 2003), <https://www.boe.es/buscar/doc.php?id=BOE-A-2003-23936>.

<sup>384</sup> Ley 31/1987 de Ordenación de las Telecomunicaciones de 18 de diciembre 1987 (Act 31/1987 on the Organization of Telecommunications of 18 December 1987), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-1987-28143](https://www.boe.es/diario_boe/txt.php?id=BOE-A-1987-28143).



Promotion of Media Pluralism of 14 June)<sup>385</sup>. It established that a legal or natural person can control up to 50% of the radio broadcasting licenses available in a certain area, so long as the total number of overlapping radio broadcasting licenses controlled in that area is no higher than five. A person could also control up to a third of the radio broadcasting licenses with total or partial coverage of the state. Where there is only one frequency available in a particular area, no corporate entity or natural person could control more than 40% of radio broadcasting licenses of that kind in the same region. These percentages were calculated by excluding public radio stations, and the limits are applied separately to analogue and digital radio stations.

## 8.2.2. Convergent media market definition

Spain has not changed the traditional media market definition based on licenses. There is no new definition of media markets in the text of Ley 7/2010 General de la Comunicación Audiovisual (Audiovisual Act 7/2010 of 31 March),<sup>386</sup> which currently regulates media ownership in Spain. Following the definitions of the European Union Audiovisual Media Services Directive, broadcasters operating on a national level are called “linear audiovisual media services”. However, the Spanish media ownership regulation applies to the same players and to the same markets: national television operators and radio owners.

## 8.3. Prevention of media concentration by law

### 8.3.1. Laws applicable: sector-specific media regulation

The most profound reform of Spanish media concentration regulation since 1989 has been generated, to a great extent, by the process of television digitization. The limits on shares and licences were impossible to sustain in a plethora of digital channels. As a consequence, the socialist government issued a Real Decreto Ley 1/2009 de Medidas Urgentes en Materia de Telecomunicaciones (Royal Decree-Law 1/2009 on Urgent Measures on Telecommunications of 24 February<sup>387</sup>), which amended the Private Television Act 10/1988, and included new norms on broadcasting ownership. The whole new media concentration regulation was finally incorporated in the Audiovisual Act approved in April 2010. The most significant change was the added limit on audience share ratio of each operator in case of merger, as a tool to avoid dangerous levels of ownership concentration. However, several limitations on licence ownership are still in place. The new regulation retained the principle whereby a corporate entity or natural person directly or indirectly holding 5% or more of the share capital or voting rights of a broadcasting license-holder cannot have a significant shareholding in any other company within the same coverage area. However, there is an important exception for national broadcasting license-holders: they are

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<sup>385</sup> Ley 10/2005 de Medidas Urgentes para el Impulso de la Televisión Digital Terrestre, de Liberalización de la Televisión por Cable y de Fomento del Pluralismo de 14 de junio 2005 (Act 10/2005 on Urgent Measures for the Promotion of Digital Terrestrial Television, Cable TV Liberalization and Promotion of Media Pluralism of 14 June 2005), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2005-10069](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2005-10069).

<sup>386</sup> Ley 7/2010 General de la Comunicación Audiovisual de 31 de marzo 2010 (Audiovisual Act 7/2010 of 31 March 2010), <https://www.boe.es/buscar/act.php?id=BOE-A-2010-5292>.

<sup>387</sup> Real Decreto Ley 1/2009 de Medidas Urgentes en Materia de Telecomunicaciones de 23 de febrero 2009 (Royal Decree-Law 1/2009 on Urgent Measures on Telecommunications of 23 February 2009), <https://www.boe.es/buscar/doc.php?id=BOE-A-2009-3022>.



allowed to hold various and simultaneous shares in several national television stations as a result of a merger, so long as their average audience is no higher than 27% of the total audience over the 12 consecutive months prior to the acquisition. This percentage figure was carefully chosen because it only prevented a merger between the two dominant commercial channels in Spain, *Telecinco* and *Antena 3 TV*, owned by *Mediaset* and *A3 Media* groups respectively.

As an external pluralism safeguard, the regulation provides that no corporate entity or natural person directly or indirectly holding rights in a national broadcasting license-holder can acquire significant shareholding or voting rights in other broadcasting license-holders, where such an acquisition would involve preventing the co-existence of at least three national broadcasting license-holders. Therefore, a minimum threshold of three independent operators was established. As another safeguard, the new regulation restricts the number of DTT multiplexes that can be owned by a single operator. Of six national digital commercial multiplexes in 2010, it established that no corporate entity or natural person could acquire significant shareholding or voting rights in a broadcasting license-holder if it involved controlling more than two multiplexes of the public spectrum. Again, a minimum of three multiplex operators must be present in the market.

The regulation for ownership in the radio sector is also included in the Audiovisual Act. It establishes that a corporate or physical person may control up to 50% of the radio broadcasting licenses available in a certain area, so long as the total number of overlapping radio broadcasting licenses controlled in that area is no higher than five. A person can also control up to a third of the radio broadcasting licenses with total or partial coverage of the state. Where there is only one frequency available in a particular area, no corporate entity or natural person may control more than 40% of radio broadcasting licenses of that kind in the same region or Autonomous Community. These percentages are calculated by excluding public radio stations, and the limits are applied separately to analogue and digital radio stations. These limits are established in line with the market status quo, with a high dominance of frequencies owned by *PRISA's* radio group, *PRISA Radio* (former *Unión Radio*).

Regarding local terrestrial television, according to Ley 41/1995 de televisión local por ondas terrestres (Terrestrial Local Televisión Act 41/1995 of 27 December),<sup>388</sup> which was amended in 2002<sup>389</sup> and 2003,<sup>390</sup> broadcasting license-holders cannot create a network or enter into networking agreements with other license-holders. They may only do so with the authorisation of the government of the region in which they are located.

### 8.3.2. Laws applicable: competition law

In Spain, antitrust enforcement is regulated by the Ley 15/2007 de Defensa de la Competencia (Competition Act of 3 July),<sup>391</sup> which entered into force on 1 September 2007 and which has been further developed by Real Decreto 261/2008, por el que se aprueba el Reglamento de Defensa de la

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<sup>388</sup> Ley 41/1995 de televisión local por ondas terrestres de 22 de diciembre 1995 (Terrestrial Local Televisión Act 41/1995 of 22 December 1995), <https://www.boe.es/buscar/doc.php?id=BOE-A-1995-27707>.

<sup>389</sup> Ley 53/2002, de Medidas Fiscales, Administrativas y del Orden Social de 30 de diciembre 2002 (Act 53/2002 on taxation, administrative provisions and social affairs of 30 December 2002), <https://www.boe.es/buscar/doc.php?id=BOE-A-2002-25412>.

<sup>390</sup> Ley 62/2003 de medidas fiscales, administrativas y del orden social de 30 de diciembre 2003 (Act 62/2003 on taxation, administrative provisions and social affairs of 30 December 2003), <https://www.boe.es/buscar/doc.php?id=BOE-A-2003-23936>.

<sup>391</sup> Ley 15/2007 de Defensa de la Competencia de 3 de julio 2007, (Competition Act 15/2007 of 3 July 2007), <http://www.boe.es/buscar/doc.php?id=BOE-A-2007-12946>.



Competencia (Royal Decree 261/2008 of 22 February).<sup>392</sup> The Competition Act aligned Spanish competition law with EC antitrust rules in many relevant aspects. For example, the Competition Act created a new antitrust agency, introduced a leniency regime, and laid out new rules on gathering and submitting evidence and the timing of investigations. Spanish competition law applies to all agreements, abusive conduct, mergers, or acquisitions that have significant effects on the Spanish market, regardless of the nationality or territorial location of the undertakings involved.

The independent authority enforces the Competition Act throughout the Spanish territory for all markets or productive sectors of the economy. It retains exclusive jurisdiction over (1) merger control; (2) state aid; (3) block exemption regulations; (4) representation before other national and international organizations in matters relating to competition; and (5) the application of EU competition rules in Spain.

According to the Competition Act, the antitrust agency will assess economic concentrations with regard to the likely hindering of the maintenance of effective competition in all or part of the national market (Article 10). In case of such economic concentration, the concerned undertakings have to meet at least one of the following two conditions: a) as a result of the concentration a quota equal to or higher than 30% of the relevant product or service market at the national level is acquired; b) that the global turnover in Spain of all participants combined exceeded in the last financial year the amount of EUR 240 million, provided that at least two of the participants have individually a revenue of over EUR 60 million in Spain.

However, the Minister of Economy and Finance may raise objections against the final agency decision on the concentration to the Council of Ministers (Article 60) for reasons of general interest. The Council of Ministers may then assess economic concentrations according to the following criteria of general interest other than the competition:

- a) defence and national security;
- b) protection of public health or safety;
- c) free movement of goods and services within the national territory;
- d) protection of the environment;
- e) promoting research and technical development; and
- f) ensuring proper maintenance of the objectives of sectoral regulation.

As can be observed, pluralism is not included in this general interest list. However, the last general interest criteria: “ensuring proper maintenance of the objectives of sectoral regulation” could be used as a tool to protect media pluralism because external pluralism is one of the principles of the Audiovisual Act (Article 4.1), which provides that: “Everyone has the right to audiovisual communication provided through a plurality of public, commercial, and community media that reflect the ideological, political and cultural pluralism of society”. Finally, the Council of Ministers may: a) confirm the decision of the Council of the National Competition Commission; or b) agree to authorize the merger, with or without conditions. This agreement shall be duly motivated by reasons of general interest other than the competition.

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<sup>392</sup> Real Decreto 261/2008, por el que se aprueba el Reglamento de Defensa de la Competencia de 22 de febrero 2008 (Royal Decree 261/2008 on Antitrust of 22 February 2008), <https://www.boe.es/buscar/doc.php?id=BOE-A-2008-3646>.



### 8.3.3. Interaction between specific media regulation and competition law

As shown above, Spanish regulation does not directly address a link between specific media regulation and competition law. However, it is clear that the potential intervention of the Council of Ministers in any merger decision and the creation of a new and extensive cross-sectorial independent regulator in 2013 made this interaction possible, even if through informal and non-normative ways.

### 8.3.4. Regulatory/monitoring bodies and competition authorities

Spain was, until 2013, the only European country without a nationwide independent regulatory authority for the audiovisual sector. First, a low-level department at the Ministry of Industry monitored broadcasting issues. Later, in 2010, the Audiovisual Act defined a new independent audiovisual regulator. However, political disagreements prevented it to develop as a formal and enacted body. Finally, the conservative party decided to merge the previously existing regulators in the fields of telecommunications, energy, and competition and created the National Commission of Markets and Competition ("*Comisión Nacional de los Mercados y de la Competencia*", CNMC) in 2013.<sup>393</sup> Some competences on audiovisual matters related specially to content and advertising limits were included in this new body, but not any related to licensing or media concentration and ownership control.<sup>394</sup> This new cross-sectorial independent body was justified by the government as a cost-cutting measure. The CNMC should be independent; however, the government appoints all ten of its members for a six-year period and Parliament can only veto these appointments.

The CNMC is a "super-regulator", in that it brings together different economic sectors and areas of interest. As a result, there is no independent authority that deals only with media-related issues. The fact that media regulation and general market competition are merged together may be detrimental to the development of clear and specific policies in relation to freedom of expression and media pluralism. There is no specific relation between media and competition either on regulation or at CNMC. Therefore, the particularities of the media markets are not envisaged. This latter issue was also raised by the Spanish Supreme Court, which, in its reference for a preliminary ruling, asked the Court of Justice of the European Union whether this "super-regulator", realised by the new law on CNMC, is compatible with EU law as or if there is a threat to its independence.<sup>395</sup> On 19 October 2016 the CJEU ruled that Directive 2002/21/EC as amended (Framework Directive)<sup>396</sup> is to be interpreted as not precluding, in principle, national legislation which entails the merger of a national regulatory authority with other national regulatory authorities, such as the authorities

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<sup>393</sup> Ley 3/2013 de la de creación de la Comisión Nacional de los Mercados y la Competencia de 4 de junio 2013. (Act 3/2013 on the National Commission of Markets and Competition of 4 June 2013), <https://www.boe.es/buscar/doc.php?id=BOE-A-2013-5940>. Real Decreto 657/2013 por el que se aprueba el Estatuto Orgánico de la Comisión Nacional de los Mercados y la Competencia de 30 de agosto 2013 (Royal Decree 657/2013 approving the Organic Rules of the Competition and Market National Commission of 30 August 2013), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2013-9212](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-9212).

<sup>394</sup> Cabrera, F.J. "Creation of National Commission for Markets and Competition". IRIS 2014-2:1/16, <http://merlin.obs.coe.int/article.php?id=14553>.

<sup>395</sup> Muñoz, R. "El Supremo cuestiona la legalidad de la CNMC y pide opinión a la UE", El País, 23 July 2015, [http://economia.elpais.com/economia/2015/07/22/actualidad/1437562895\\_956039.html](http://economia.elpais.com/economia/2015/07/22/actualidad/1437562895_956039.html).

<sup>396</sup> 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), <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002L0021>, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0140>.



responsible for competition, the postal sector and the energy sector, in order to create a multisector regulatory body. This body would be responsible for, inter alia, the tasks entrusted to national regulatory authorities, provided that, in performing those tasks, that body meets the requirements of competence, independence, impartiality, and transparency laid down by that directive and that an effective right of appeal is available against its decisions to a body independent of the parties involved, which is a matter to be determined by the national court.<sup>397</sup>

## 8.4. Key decision(s)

Even before 2009 when the Parliament validated new and more flexible media ownership thresholds based on audience share, some commercial operators were already in merger talks. The Spanish economic slump started in 2008 and it sank advertising funding. As a consequence, several commercial broadcasting operators, especially those born with the Digital Terrestrial Television, were in jeopardy. As the Audiovisual Act made it impossible for the two big broadcasting operators *Antena 3* and *Telecinco* to merge because of the maximum threshold of 27% of the Spanish audience, the economic rationale imposed a merger or acquisition between big players and minor actors. Soon after, *PRISA* group, the Spanish leader on press and radio markets and owner of the television station *Cuatro*, decided to start talks to merge its minor free-to-air channel *Cuatro* with *Mediaset's Telecinco* in December 2009. The former competition authority, the CNC ("*Comisión Nacional de la Competencia*") was still in place and approved the merger in October 2010. The merger was subject to commitments by *Telecinco* to limit its power in the television advertising and free-to-air terrestrial and audiovisual content markets.<sup>398</sup>

As concerns the advertising market, *Telecinco* agreed not to sell the advertising time of the two open channels with a wider audience in the same commercial package, with the additional condition that the joint audience of the channels included in a commercial package will not exceed 22%. Nor can it develop policies tying the various advertising packages. Furthermore, *Telecinco* did not extend its offer of free TV channels by leasing third-party DTT operators. *Telecinco* agreed not to block the quality improvements that its competitors may want to launch, especially *La Sexta*, with which it will share many DTT channels until 2015. *Telecinco* accepted to counter its power as an audiovisual content consumer, limiting to three years the duration of contracts for the purchase of exclusive content, such as films and series, ensuring that these will periodically be on the market. It has also limited to five years the period of exclusive exploitation of a film. The channel is also committed to restricting its ability to exclude national television producers as suppliers of programmes to open competitors.

However, two years later, on 6 February 2013, the CNC ruled that these commitments had been breached and that *Mediaset España Comunicación, S.A.* (owner of *Telecinco*) had therefore committed a very serious infringement under Article 62.4.c) of the Spanish Competition Act 15/2007 of 3 July 2007. Accordingly, it fined *Mediaset* EUR 15.6 million pursuant to Article 63.1.c) of that Act. *Mediaset* had breached the requirement for advertising companies *Publiespaña* and *Publimedia* to be functionally separate from each other, as the same persons were members of the managing

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<sup>397</sup> Judgment of the Court (Second Chamber), Case C-424/15, 19 October 2016,

<http://curia.europa.eu/juris/document/document.jsf?text=CNMC&docid=184670&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404152#ctx1>.

<sup>398</sup> C-020-10-Telecinco/Cuatro, Resumen Informe Propuesta C-230 (Summary Proposed Resolution C-230),

<https://www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=25260>.



bodies of both enterprises. *Mediaset* had unjustifiably delayed waiving its pre-emptive rights for the acquisition of audiovisual content, and had also delayed or omitted granting option rights for adjusting the term of contracts in force. Furthermore, *Mediaset* had included prohibited clauses in certain contracts for the acquisition of audiovisual content. CNC found prima facie evidence that *Mediaset* had breached a commitment relating to the advertising market by implementing a strategy to link, de facto, the sale of advertising time on its different channels, a strategy strengthened by the recent introduction of a new advertising sales model by *Mediaset*.<sup>399</sup>

In 2015, Spain's antitrust watchdog fined *Telecinco* again with EUR 3 million. The National Commission of Markets and Competition announced that it found new violations of terms in the 2010 agreement that allowed the merger of *Mediaset Espana's Telecinco* and a second channel, *Cuatro*, related to advertising. Specifically, the agency found that *Mediaset* violated tenets of the agreement for advertising independence. Under the agreement, *Mediaset* was prohibited from joint marketing advertising on the newly joined channels, or requiring minimum advertising buys across the channels. The antitrust watchdog allegedly found that from at least February 2013 to March 2014, *Mediaset España* required minimum advertising buys across the channels, in violation of the agreement.<sup>400</sup> *Mediaset España's* position regarding these CNMC fines has been to appeal to regular and higher courts.

*La Sexta* and *Antena 3*, for their part, reached a final agreement in December 2011 after two years of talks. The CNC merger review in July 2012 imposed tougher conditions than the merger between *Telecinco* and *Cuatro*.<sup>401</sup> The competition authorities at the time of the merger determined that it reinforced the market power of *Antena 3* in the TV advertising market, and favoured creating a de facto duopoly between *Antena 3* and *Telecinco* groups, with the control of more than 85% of advertising investment on broadcasting. As a consequence, *La Sexta* and *Antena 3* announced their decision to abandon the merger because of the low profitability envisaged with the strict CNC conditions. Shortly after, on 24 August 2012, as the merger was passed to the Council of Ministers, the Government decided to relax the requirements imposed by the CNC on general interest grounds and made them similar to those imposed to the *Cuatro* and *Telecinco* merger: limits to television advertising and to the acquisition of audiovisual content.<sup>402</sup> Finally, the merger took place in October 2012. Since then, the Spanish broadcasting market is a duopoly with two prominent players (*A3Media* and *Mediaset*) and a set of minor companies, which either rent their channels to content made for USA channels, or try to survive with very low ratings.

On 24 August 2012 the National Commission for Markets and Competition (CNMC) extended for two years the conditions by which the merger agreement between *Antena 3* and *La Sexta* was authorised by the Council of Ministers.<sup>403</sup> After this period, the CNMC would assess whether there had been a significant change in the markets affected by the merger, and whether to maintain,

<sup>399</sup> Cabrera, F.J. "Mediaset Fined for Breach of Commitments in Telecinco/Cuatro Merger", IRIS 2013-3:1/12, <http://merlin.obs.coe.int/iris/2013/3/article12.en.html>.

<sup>400</sup> CNMC, Resolución del Consejo, VC/0230/10 Telecinco /Cuatro de 21 de febrero 2014 (Telecinco/ Cuatro Council Resolution of 21 February 2014), <https://www.cnmc.es/es-es/Competencia/Buscadores/Expedientes?num=VC%2f0230%2f10&ambito=Vigilancia>.

<sup>401</sup> C-0432/12, Antena 3/La Sexta (Summary Proposed Resolution, C-0432/12), <https://www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=203934>.

<sup>402</sup> Ministerio de Economía y Competitividad, Acuerdo por el que se autoriza la operación de concentración económica Antena 3/la Sexta y se imponen condiciones a la misma de 27 de agosto 2012 (Ministry for Economy and Competition, Agreement authorizing the economic operation of concentration between Antena 3 / La Sexta and the conditions imposed, 27 August 2012), <https://www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=211819>.

<sup>403</sup> Enrich, E. "CNMC extends conditions for Antena 3 and La Sexta merger", IRIS 2015-8:1/13, <http://merlin.obs.coe.int/iris/2015/8/article13.en.html>.



adjust, or withdraw the conditions for a further period of two years. The CNMC believes that the competitive position of the television advertising market in Spain has not improved since the merger was authorised and, to a large extent, competition in these markets is determined by the duopoly situation of the TV advertising market. In fact, the CNMC ruled six months later that those commitments had been breached in 2014 and that Antena 3 had therefore committed a very serious infringement under Article 62.4.c) of the Ley de la Competencia (Spanish Competition Act 15/2007 of 3 July 2007).<sup>404</sup> The fine imposed on *Antena 3* reached EUR 2.8 million.

## 8.5. Current discussion

Reform on Media ownership regulation is not a heated debate in Spain today, although in April 2016 a newly-created political party, *Podemos* (“We can”), presented a set of initiatives concerning this issue at the Parliament.<sup>405</sup> They have not come forward by the dissolution of Parliament and the call for new elections for the 26 June 2016.

From an industrial perspective, there is a growing concern for the need of a new convergent definition of media, for economic reasons as opposed to for pluralism issues. There are calls from the association of Spanish private broadcasters (UTECA) to extend certain broadcasting regulations to new OTT operators such as *Netflix*, *Amazon*, or *iTunes*. They requested the homogenization of the obligations imposed on OTT operators through a neutral regulatory level playing field. UTECA’s president clarified that “private operators have a number of obligations or limitations that hinder the work of distribution of audiovisual content and ultimately discriminate against other DTT distribution models.”<sup>406</sup>

## 8.6. Specific ownership restrictions/barriers to Ownership

Constraints on non-EU nationals have been in place since the establishment of the Private TV Act 10/1988. The latest reform included in the Audiovisual Act 7/2010 established that non-EU nationals can buy new shares only if a reciprocal agreement with the country of origin is acknowledged. It also states that non-EU nationals or firms can hold directly or indirectly a maximum of 50% of broadcasting license-holder share capital.<sup>407</sup>

<sup>404</sup> CNMC, “La CNMC sanciona con 2,8 millones de euros a Atresmedia por incumplir las condiciones de fusión de Antena 3 y la Sexta”, Nota de prensa de 18 de noviembre 2015 (CNMC, Atresmedia sanctioned by 2.8 million euros by CNMC for violating the conditions of the merger of Antena 3 and La Sexta, Press Release of 18 November 2015),

[https://www.cnmc.es/Portals/0/Ficheros/notasdeprensa/2015/COMPETENCIA/20151118\\_NP\\_Sancionador\\_Atresmedia-dcv.pdf](https://www.cnmc.es/Portals/0/Ficheros/notasdeprensa/2015/COMPETENCIA/20151118_NP_Sancionador_Atresmedia-dcv.pdf).

<sup>405</sup> Manetto, F., “Podemos propone limitar la concentración de medios audiovisuales”, *El País*, 29 de abril 2016 (Podemos proposes to limit the concentration of audiovisual media, *El País*, 29 April 2016),

[http://politica.elpais.com/politica/2016/04/28/actualidad/1461871447\\_009236.html](http://politica.elpais.com/politica/2016/04/28/actualidad/1461871447_009236.html).

<sup>406</sup> UTECA, “Alejandro Echevarría reclama la actualización de la normativa audiovisual y la equidad en el tratamiento de las distintas plataformas”, Nota de prensa de 31 de mayo 2015 (UTECA, Alejandro Echevarría calls for updating the audiovisual regulation and equity of treatment of different TV platforms, Press Release of 31 May 2015), <http://uteca.tv/download.php?cp=120>.

<sup>407</sup> For further information see:

Closs, W. and Nikoltchev, S. “Television and Media Concentration. Regulatory Models on the National and the European Level”. IRIS Special, European Audiovisual Observatory, Strasbourg, 2001.

Fernández, M. “Independent Audiovisual Regulator in Spain: A unique Case in Europe” *International Journal of Communication* 10 (2016), pp. 359–376, <http://ijoc.org/index.php/ijoc/article/view/3845>.



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Llorens, C. "Spain's Media Concentration Policy: A Patchwork Crucial to the Understanding of the Spanish Media System," *International Journal of Communication* 4 (2010), pp. 844–864, <http://ijoc.org/ojs/index.php/ijoc/article/viewFile/791/462>.

Llorens, C., Luzón V. and Grau, H. "Mapping Digital Media — Spain". Opens Society, London, Open Society Foundations. 2013. 129p, <https://www.opensocietyfoundations.org/sites/default/files/mapping-digital-media-spain-20131023.pdf><https://www.opensocietyfoundations.org/sites/default/files/mapping-digital-media-spain-20131023.pdf>.

Manfredi, J.L., Herranz, JM and de la Sierra, S. "Media Pluralism in Spain. A Test implementation of the Media Pluralism Monitor 2015". The Center for Media Pluralism And Media Freedom, European University Institute, <http://monitor.cmpf.eui.eu/mpm2015/results/spain/>.



## 9. Media concentration in Poland

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### 9.1. Constitutional background

The Constitution of the Republic of Poland of 1997<sup>408</sup> provides for guarantees of both freedom of expression and media, as well as freedom of economic activity. Moreover, in provisions concerning the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji* – KRRiT) the public interest in broadcasting is explicitly mentioned as a constitutional value.

According to Article 54 (1) of the Constitution, “the freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone”. Under para. 2 “preventive censorship of the means of social communication and the licensing of the press shall be prohibited”. “[S]tatutes may require”, however, “the receipt of a permit for the operation of a radio or television station”. Article 14 of the Constitution stipulates that “the Republic of Poland shall ensure freedom of press and other means of social communication”.

Under both doctrine and case law, freedom of expression (Article 54 of the Constitution) includes three interrelated freedoms: a) freedom to express opinions; b) freedom to receive information; and c) freedom to impart information. Freedom of expression has the mixed nature of a personal freedom in private life and a political freedom in the public sphere. The latter aspect is of fundamental importance, as it is linked to Article 14 of the Constitution (media freedom), and as such goes beyond the freedom of an individual, becoming a “principle of the state system” and a “guarantee of institutional nature”.<sup>409</sup>

The principle of the state system, according to the Constitutional Tribunal (*Trybunał Konstytucyjny*), may also constitute the source of positive obligations of the State. Not only should the State protect this freedom through non-interference, but also take actions in case the freedom of the media is endangered.<sup>410</sup> This principle concerns in particular regulatory as well as

<sup>408</sup> *Konstytucja Rzeczypospolitej Polskiej* of 2 April 1997, available in English at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>409</sup> Judgment of the Constitutional Tribunal (Trybunał Konstytucyjny – TK) of 20 July 2011, K 9/11, <http://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=7034&dokument=6861>, English translation: [http://trybunal.gov.pl/fileadmin/content/omowienia/K\\_09\\_11\\_EN.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_09_11_EN.pdf); TK Judgment of 30 October 2006, P 10/06; TK Judgment of 5 May 2004, P 2/03, <http://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=661&sprawa=2622>, English summary: [http://trybunal.gov.pl/fileadmin/content/omowienia/P\\_2\\_03\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/P_2_03_GB.pdf); Sarnecki P., commentary to Article 54 in: Garlicki L. (ed.), “Konstytucja Rzeczypospolitej Polskiej. Komentarz”, Warsaw 2003; Sokolewicz W., “Prasa i Konstytucja”, Warsaw 2011; Sokolewicz W., “Wolność prasy i jej konstytucyjne ograniczenia”, Państwo i Prawo 2008/6, p. 22-37. Sadowski J., commentary to Article 14 in: Safjan M., Bosek L. (ed.), “Konstytucja RP. Tom I. Komentarz do art. 1-86”, Warsaw 2016.

<sup>410</sup> TK Judgment of 30 October 2006, P 10/06, <http://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=827&sprawa=4155>.



organisational and supervisory measures aimed at ensuring media pluralism, including measures under competition law counteracting excessive concentration of the media market.<sup>411</sup>

In this context, the role of *Krajowa Rada Radiofonii i Telewizji* (National Broadcasting Council – KRRiT) is also important. KRRiT is a constitutional body with the task of “safeguard[ing] freedom of speech, the right to information as well as the public interest regarding radio broadcasting and television” (Article 213 para. 1 of the Constitution). This clause is developed in *ustawa o radiofonii i telewizji*, the Broadcasting Act of 1992 (BA),<sup>412</sup> in Article 6 para. 1, pursuant to which KRRiT shall also “... protect the independence of media service providers and the interests of the public, as well as ensure the open and pluralistic nature of radio and television broadcasting”.

Public interest in broadcasting as a constitutional value under Article 213 (1) of the Constitution includes media pluralism, in both the external and internal sense. The latter element relates in particular to public service broadcasting.<sup>413</sup> The public service remit of the Constitution belongs to the public interest in broadcasting and is subject to the constitutional competences of KRRiT.<sup>414</sup>

Freedom of economic activity and the right of ownership are also constitutionally protected. Pursuant to Article 20 of the Constitution “social market economy, based on freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland”.

Limitations upon freedom of economic activity and right of ownership are allowed under the Constitution, but may be imposed only by means of statute and have to comply with a proportionality test.<sup>415</sup> The same concerns the freedom of expression.

## 9.2. Convergent audiovisual/media markets

### 9.2.1. Traditional market definition

Media markets definitions vary depending on the legal basis. Limited media-specific statutory anti-concentration rules exist only in the BA, in the context of broadcasting licences. These rules do not use a coherent terminology to define the markets in question. In the case of refusal to grant a broadcasting licence, a reference is made to “a dominant position of the applicant in mass media in the given area”, without any reference to the competition law (Article 36 (2) (2), BA). However, with regard to a revocation of the license or refusal of consent for transferring the licence, the BA refers to “a dominant position in mass media on the given relevant market” within the meaning of the competition law (Article 38 (2) (3) and Article 38a (3) (1) BA). These differences in terminology allow for different interpretations and make the application of those provisions difficult.

<sup>411</sup> Sadomski J., commentary to Article 14 in: Safjan M., Bosek L. (ed.), “Konstytucja RP. Tom I. Komentarz do art. 1-86”, Warsaw 2016.

<sup>412</sup> The Act of 29 December 1992 with amendments. English translation of the Broadcasting Act is available at: <http://www.krrit.gov.pl/Data/Files/public/Portals/0/angielska/ustawa-o-radiofonii-i-telewizji-2016-eng.pdf>.

<sup>413</sup> TK resolution of 13 December 1995, W 6/95, <http://prawo.money.pl/orzecznictwo/trybunal-konstytucyjny/uchwala;zdnia;1995-12-13,w.6,95,228,orzeczenie.html>.

<sup>414</sup> TK Judgment of 9 September 2004, K 2/03, <http://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=440&sprawa=2593>, English summary: [http://trybunal.gov.pl/fileadmin/content/omowienia/K\\_2\\_03\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_2_03_GB.pdf).

<sup>415</sup> Article 22 (freedom of economic activity), Article 64 para. 3 (right of ownership), Article 31 para. 3 (proportionality test for limitations of constitutional rights and freedoms).



Media market definitions in these provisions were considered in KRRiT's Regulatory Strategy for 2011-2013, taking into account different functions of media law and competition law. The term "mass media" refers to the entire media market (radio, TV, press, online media), which allows a broader approach, rather than the one normally taken under competition law. At the same time, however, KRRiT admitted that anti-concentration rules in the BA are not effective, in particular due to the absence of a clear definition of the term "dominant position in mass media" and KRRiT's lack of powers to gather the information necessary to assess media concentration.<sup>416</sup>

In its next Regulatory Strategy for 2014-2016, KRRiT mentioned its limited statutory competences with regard to media concentration and noted that neither in the radio market nor on the television market did any broadcaster have a market share that could indicate its dominant position. This statement illustrates an apparently narrower approach to the market definition by the regulator: TV or radio, instead of mass media as a whole. KRRiT admitted that the TV market had an oligopolistic nature, but conceded the progressively diminishing market share of the three main media groups,<sup>417</sup> which is a sign of a medium level of concentration. However it is not excluded, according to KRRiT, that a broadcaster might reach a position in which it can limit competition, e.g. via vertical integration with platform operators, dumping of advertising prices, or price cartels. The assessment of such practices belongs to the competences of *Urząd Ochrony Konkurencji i Konsumentów* (Office of Competition and Consumers Protection – UOKiK). Moreover KRRiT noted that the anti-concentration provisions in the BA are not consistent with the competition act. The regulator declared that it would propose the alignment of these provisions and would strive to a closer co-operation with UOKiK and *Urząd Komunikacji Elektronicznej* (Office of Electronic Communications – UKE) to counteract the concentration of media services providers and platform operators.<sup>418</sup>

The legal doctrine notes the difference in the media markets definitions in the anti-concentration provisions of the BA. The market of "mass media means", as referred to in the context of reasons for refusal of granting a broadcasting licence (Article 36 (2) (2) BA), is understood as the market of all mass media services, including press, radio, television, and online mass media services. In this case, the definition of a relevant market under the competition law does not apply.<sup>419</sup> In the context of the revocation of a license and the refusal of consent for transferring a licence, under the BA (Article 38 (2) (3) BA and Article 38a (3) (1)) a dominant position in mass media shall be assessed in the meaning of the *ustawa o ochronie konkurencji i konsumentów* (the Act on competition and consumers protection – CA).<sup>420</sup> Consequently "relevant market" shall mean "a market of goods which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered in the area in which, by reason of the nature and characteristics of such goods, the existence of market barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous" (Article 4 (9) CA). On the basis of this definition the relevant media market is assessed on a case-by-case basis.

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<sup>416</sup> KRRiT, *Strategia regulacyjna na lata 2011-2013*, Warsaw 1 March 2011, p. 57-59:  
[www.krrit.gov.pl/Data/Files/\\_public/pliki/publikacje/strategie/strategia\\_110420.pdf](http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/strategie/strategia_110420.pdf).

<sup>417</sup> 66,7 per cent in 2012 in comparison with 81,7 per cent in 2006.

<sup>418</sup> KRRiT, *Strategia regulacyjna na lata 2014-2016*, Warsaw 18 March 2014, pp. 11 and 25:  
[http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/strategia\\_final.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/strategia_final.pdf)

<sup>419</sup> Piątek S., in Piątek S. (ed.), Dziomdziora W., Wojciechowski K., *Ustawa o radiofonii i telewizji. Komentarz*, Warsaw 2014, p. 385.

<sup>420</sup> Act of 16 February 2007. English translation available at: [https://www.uokik.gov.pl/competition\\_protection.php](https://www.uokik.gov.pl/competition_protection.php).



The definitions of media markets under the competition law deriving from case law are based on a narrow approach. Media sectors, such as press, radio, and television, are seen as separate markets, and are then further divided into more specific markets, often with reference to decisions under EU competition law.<sup>421</sup> Consequently, within the television broadcasting sector, the market for pay-TV and the market for free-to-air television are distinct.<sup>422</sup> In cases concerning relationships between broadcasters of pay-TV channels and pay-TV (mostly cable) operators, UOKiK and courts have identified, within the national market for pay-TV, several separate national markets for (the wholesale distribution of) thematic pay-TV channels in the Polish language. This includes, respectively: news, entertainment, films, sports, music, children, science and nature, and weather channels. In addition, the market for generalist pay-TV channels in Polish has been distinguished.<sup>423</sup>

Similarly, narrow market definitions are adopted in case law concerning printed press. The market (either national or local) of daily newspapers is distinguished from the market of magazines (periodicals). Within each of those markets more specialised markets are identified. The national market for tabloid newspapers and national market for sports daily newspapers, as distinct from financial and generalist press, have been recognised.<sup>424</sup> As far as markets for magazines are concerned, such national markets have been identified as: luxury magazines for women, other women's magazines, building and interiors magazines, hobby and science magazines, and health magazines.<sup>425</sup>

Case law broadly defines the product market for pay-TV access services as covering services of cable television (CATV), satellite platforms, and IPTV operators.<sup>426</sup> However, due to the different reach of cable networks and satellite platforms, the geographical aspect of the market is assessed

<sup>421</sup> E.g. decision of UOKiK of 31 July 2013, DKK-100/2013, on concentration *Burda International* and *G+J*, [http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/1/8354D826BA7A8D86C1257EC6007BA0C7?editDocument&act=Decyzja](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/1/8354D826BA7A8D86C1257EC6007BA0C7?editDocument&act=Decyzja), with reference to the European Commission decisions in cases: IV/M.1401, 1 February 1999, *Recoletos/Uniseda* and IV/M.665, 29 November 1995, *Havas/Groupe de la Cité*.

<sup>422</sup> Decision of UOKiK of 16 December 2002, DDI-110/2002, *TVP Advertising*, [http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/1/0B9BD1D24378987EC1257EC6007B96C9?editDocument&act=Decyzja](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/1/0B9BD1D24378987EC1257EC6007B96C9?editDocument&act=Decyzja).

<sup>423</sup> Judgment of the *Sąd Ochrony Konkurencji i Konsumentów* (the Court of Competition and Consumers Protection – SOKiK) of 14 September 2006, XVII Ama 71/05, *TVN24/TVNMeteo*; judgment of the SOKiK of 28 November 2008, XVII Ama 107/07, *Animal Planete*; Decision of UOKiK of 9 March 2010, DKK-24/10, *Polsat JimJam*, [http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/742A93121911461CC1257EC6007B8E83/\\$file/Decyzja%20DKK-24%202010%20z%20dnia%209%20marca%202010.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/742A93121911461CC1257EC6007B8E83/$file/Decyzja%20DKK-24%202010%20z%20dnia%209%20marca%202010.pdf).

<sup>424</sup> Judgment of the *Sąd Apelacyjny* (Court of Appeal – SA) in Warsaw of 20 November 2008, VI ACa 704/08, *Fakt v. Super Express*, available at: <http://www.infor.pl/akt-prawny/U29.2009.002.0000016.wyrok-w-prawie-z-powodztwa-media-express-sp-z-oo-w-warszawie-przeciwko-prezesowi-uokik-sygn-akt-vi-aca-70408.html>.

<sup>425</sup> Decision of UOKiK of 31 July 2013, DKK-100/2013, *Burda International* and *G+J*, [http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/8354D826BA7A8D86C1257EC6007BA0C7/\\$file/DKK2-421-18\\_13\\_ML-decyzja-\\_Burda%20i%20G%20BJ\\_.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/8354D826BA7A8D86C1257EC6007BA0C7/$file/DKK2-421-18_13_ML-decyzja-_Burda%20i%20G%20BJ_.pdf).

<sup>426</sup> Judgments of the *Sąd Antymonopolowy* (Antimonopoly Court; now: SOKiK) of 17 March 1999, XVII Ama 77/98; of 12 August 2002, XVII Ama 30/02 and of 2 April 2001, XVII Ama 12/01; decisions of UOKiK of 24 February 2005, RKT-8/2005, [http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/AF2D16FB6D9A2089C1257EC6007B7CBB/\\$file/decyzja\\_nr\\_rkt08\\_2005\\_z\\_dnia\\_24.02.05.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/AF2D16FB6D9A2089C1257EC6007B7CBB/$file/decyzja_nr_rkt08_2005_z_dnia_24.02.05.pdf); of 28 December 2005, RWR-73/2005,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/565849024BFEA696C1257EC6007B7E71/\\$file/Decyzja\\_nr\\_RWR73\\_2005\\_z\\_dnia\\_28.12.05.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/565849024BFEA696C1257EC6007B7E71/$file/Decyzja_nr_RWR73_2005_z_dnia_28.12.05.pdf); of 31 December 2008, RBG-50/2008,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/A5675FF564C4C9C2C1257EC6007B8DCA/\\$file/Sp%C3%B3%C5%82dzielnia%20Mieszkanio wa%20w%20Lubiczu\\_antym\\_31.12.08\\_KB.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/A5675FF564C4C9C2C1257EC6007B8DCA/$file/Sp%C3%B3%C5%82dzielnia%20Mieszkanio wa%20w%20Lubiczu_antym_31.12.08_KB.pdf); of 14 September 2012, DKK-93/2012,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/146382E83C2AF388C1257EC6007B99E8/\\$file/Decyzja%20DKK-93.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/146382E83C2AF388C1257EC6007B99E8/$file/Decyzja%20DKK-93.pdf) and DKK-94/2012,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/7F61A0854353D6FFC1257EC6007B99E9/\\$file/Decyzja%20DKK-94.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/7F61A0854353D6FFC1257EC6007B99E9/$file/Decyzja%20DKK-94.pdf). Conversely: decision of UOKiK of 10.11.2001, DDI-59/2001, *Wizja TV/UPC*,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/287FEE4E121C3AD7C1257EC6007B9466/\\$file/DDI%2059\\_2001.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/287FEE4E121C3AD7C1257EC6007B9466/$file/DDI%2059_2001.pdf) – in which the digital satellite pay-TV market was found as relevant for the merger of two such platforms.



differently for each of them – as local (relevant cities) in case of cable and national for satellite platforms, with important practical consequences in merger cases in those sectors.<sup>427</sup>

## 9.2.2. Convergent media market definition

Convergence has so far had no direct impact on the media market definition under the media law. Limited anti-concentration rules in the BA have not been amended to deal with specific problems emerging from the convergence. However, as the relevant provisions refer respectively to the “dominant position in mass media in the given area” and the “dominant position in mass media in the given relevant market” (in the meaning of the competition law), media markets should be understood in a technologically neutral and dynamic way, including phenomena emerging due to convergence. This would be particularly justified following the extension of the BA in 2012 to include on-demand audiovisual media services, in the implementation of the Audiovisual Media Services Directive 2010/13/EU.

The methodology of media market definitions under competition law has not significantly changed due to convergence. New phenomena are obviously noted and taken into account through case law. Digital terrestrial TV, as long as it is not used to offer pay-TV channels, is distinguished from the market of pay-TV access services.<sup>428</sup> This market is also seen as distinct from the retail market for fixed services of broadband Internet access, and the later is assessed as separate from the retail market for mobile broadband Internet access.<sup>429</sup>

A narrow and sector-specific approach to the relevant market, taken in telecommunications cases, was reflected in the important merger case concerning the takeover of a major mobile telephone operator (*Polkomtel*) by a powerful media group (*Solorz-Żak*).<sup>430</sup> Though the merger could be seen as a significant concentration of power in a converging media and telecommunications sector, UOKiK cleared the transaction, having assessed that the merger would not significantly restrict competition in the identified markets for mobile telecommunications services. The impact of the merger on the market of dissemination of programme services via pay-TV satellite platforms was noted, but with no assessed risks for competition.<sup>431</sup>

<sup>427</sup> Decision of UOKiK of 5 September 2011, DKK 101/2011, *UPC/Aster*

([http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/EB5F0A1B546C8B58C1257EC6007B93AC/\\$file/decyzja%20UPC.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/EB5F0A1B546C8B58C1257EC6007B93AC/$file/decyzja%20UPC.pdf)) – in which the merger of two major cable operators was assessed as significantly restricting competition on pay-TV markets in Warsaw and Cracow, and consequently allowed subject to conditions; decisions of UOKiK of 14 September 2012, DKK-93/2012, *Canal+ Cyfrowy/ITI Neovision* and DKK-94/2012, *Canal+/N-Vision* (links available in the previous footnote) – in which the merger of two of the three competing satellite platforms was evaluated from the national pay-TV perspective with the conclusion that neither dominant positions nor other significant impediments to competition would be created. At the time of writing another merger of the two biggest cable operators (*UPC* and *Multimedia*) is pending before the UOKiK.

<sup>428</sup> Decisions of UOKiK of 5 September 2011, DKK 101/2011, *UPC/Aster* (the link – in the previous footnote) and of 13 April 2012, DKK-32/2012, *Multimedia/Stream*,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/1/5425FDF830ABA398C1257EC6007B9949?editDocument&act=Decyzja](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/1/5425FDF830ABA398C1257EC6007B9949?editDocument&act=Decyzja).

<sup>429</sup> Decisions of UOKiK of 5 September 2011, DKK 101/2011, *UPC/Aster* and of 24 October 2011, DKK- 126/2011, *Spartan/Polkomtel*, [http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/1/ABFF5B1D76E3C174C1257EC6007B9761?editDocument&act=Decyzja](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/1/ABFF5B1D76E3C174C1257EC6007B9761?editDocument&act=Decyzja).

<sup>430</sup> The acquiring company, Spartan Holding, belonged to the capital group controlled by Zygmunt Solorz-Żak, that included inter alia a leading private national TV station (Polsat) and other TV channels, the satellite TV platform Cyfrowy Polsat and some major VoD services (Ipla/Iplex).

<sup>431</sup> Decision of UOKiK of 24 October 2011, DKK- 126/2011, *Spartan/Polkomtel*, as referred to above.



Another converging market case concerned an allegedly anticompetitive agreement between major mobile telephone operators with regard to the introduction of DVB-H mobile television services.

The decision of the competition authority, that had found such practice,<sup>432</sup> was annulled by the Court of Competition and Consumer Protection (SOKiK), following the assessment that the actions taken neither constituted an agreement restricting competition nor went beyond a co-operation allowed, with the consent of UOKiK, for the establishment of the new operator by those involved.<sup>433</sup> The markets identified in the case, both by the authority and the Court, were: 1) national retail market for mobile telephones and 2) national wholesale market for mobile television services in DVB-H technology.

## 9.3. Prevention of media concentration by law

### 9.3.1. Laws applicable: sector-specific media regulation

Media specific anti-concentration regulation in Poland is limited and applies only in the field of broadcasting in the context of granting, withdrawing, and transferring a broadcasting licence.

The basic statutory act for all media – *ustawa Prawo prasowe* (Press law) of 1984<sup>434</sup> – does not include any specific rules aimed at preventing media concentration. The requirement of registration in a court for publishing a daily or periodical,<sup>435</sup> applicable both to printed and electronic press, has no relevance in this context. Consequently, the printed press and electronic media other than broadcasting are not subject to any media-specific anti-concentration rules, foreign capital limits, or specific legislative requirements on media ownership transparency (beyond general rules applicable to all companies).

Sector-specific rules intended for preventing media concentration are included in the BA of 1992. The broadcasting licence shall not be awarded if transmission of a programme service by the applicant could result in the applicant achieving a dominant position in mass media in the given area.<sup>436</sup> Similarly, the broadcasting licence may be revoked, if by transmitting the programme service, the broadcaster gains a dominant position in mass media on the given relevant market, as defined in regulations on protection of competition and consumers.<sup>437</sup> The achievement of an identically defined dominant position by the broadcaster shall result in the refusal of KRRiT to consent to the transfer of rights under the broadcasting licence in case of merger, division, or other transformations of companies.<sup>438</sup> The licence to broadcast is in principle inalienable.<sup>439</sup>

<sup>432</sup> Decision of UOKiK of 23 November 2011, DOK -8/2011,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/AA4443CB93A73FB2C1257EC6007B9768/\\$file/decyza%20DOK-8\\_2011.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/AA4443CB93A73FB2C1257EC6007B9768/$file/decyza%20DOK-8_2011.pdf).

<sup>433</sup> Judgment of SOKiK of 19 June 2015, XVII AmA 112/12,

[http://decyzje.uokik.gov.pl/bp/wyroki.nsf/0/46D4DD45E3A04874C1257F4E004A3DA5/\\$file/XVII%20ama%20112-12%20Polkomtel.pdf](http://decyzje.uokik.gov.pl/bp/wyroki.nsf/0/46D4DD45E3A04874C1257F4E004A3DA5/$file/XVII%20ama%20112-12%20Polkomtel.pdf); statement of reasons: <http://www.bwhs.pl/data/news/61/photo/Uzasadnienie-XVII-AmA-112-12.pdf>. Critically about the Judgment: Streżyńska A., “Prosty przepis na kartel”, 31 August 2015, <http://www.telko.in/prosty-przepis-na-kartel>.

<sup>434</sup> The Act of 26 January 1984 with amendments.

<sup>435</sup> Articles 20-21 of the Press Law.

<sup>436</sup> Article 36 para. 2 subpara. 2 BA.

<sup>437</sup> Article 38 para. 2 subpara. 3 BA.

<sup>438</sup> Article 38a para. 3 subpara. 1 BA.

<sup>439</sup> Article 38a para. 1 BA.



Consequently, the law provides for the possibility of revocation of the licence and refusal of consent for the transfer of rights under it, if another person takes over direct or indirect control of the activity of the broadcaster.<sup>440</sup> The BA also includes the limit of 49 per cent on foreign capital and control in companies – beneficiaries of broadcasting licences, except for foreign entities established in the European Economic Area (EEA).<sup>441</sup>

### 9.3.2. Applicable laws: competition law

Media enterprises, as all undertakings, are subject to *ustawa o ochronie konkurencji i konsumentów* (the Act on Competition and Consumer Protection – CA). The act prohibits competition-restricting practices, including such agreements and abuse of a dominant position, as well as regulating the control over concentration of undertakings. It also prohibits practices infringing on the collective interests of consumers.

Aspects of media concentration are present particularly in concentration cases. The intention of concentration is subject to a notification to UOKiK, if the combined worldwide turnover of participating undertakings in the preceding financial year exceeds one billion EUR and/or their combined turnover in Poland in that year exceeds 50 million EUR.<sup>442</sup> UOKiK issues its consent to implement a concentration which does not result in significant impediments to competition in the relevant market, in particular through the creation or strengthening of a dominant position.<sup>443</sup> “Dominant position” is defined as an undertaking’s market position which enables it firstly to prevent effective competition in a relevant market, and thus secondly act to a significant degree independently of its competitors, contracting parties, and consumers. If the market share of the undertaking in the relevant market exceeds 40 per cent, a dominant position of this undertaking is assumed.<sup>444</sup> This presumption is rebuttable and a high market share alone may not suffice for a dominant position.

In line with the nature of competition law, the cases are assessed from the general economic perspective of market power, rather than media-specific opinion-forming power. The later considerations are hardly visible in the competition law cases concerning media enterprises. Major concentrations involving media enterprises were cleared by UOKiK.<sup>445</sup> In some cases the authority imposed special conditions on merging entities, like reselling parts of networks in a concentration case concerning major cable operators,<sup>446</sup> or reselling the regional daily newspaper and related

<sup>440</sup> Article 38 para. 2 subpara. 4 and Article 38a para. 3 subpara. 2 BA.

<sup>441</sup> Article 35 BA.

<sup>442</sup> Article 13 para. 1 CA.

<sup>443</sup> Article 18 CA.

<sup>444</sup> Article 4 subpara. 10 CA.

<sup>445</sup> Examples include: 1) merger of two major audiovisual media groups, *Canal+* and *ITI/TVN*, with the active role of *Canal+*, approved in two decisions by UOKiK of 14 September 2012, DKK-93/2012, *Canal+ Cyfrowy/ITI Neovision* and DKK-94/2012, *Canal+/N-Vision* (as referred to above); 2) acquisition of control over major mobile telephone operator – *Polkomtel* by the *Spartan Holding*, company belonging to the capital group controlled by Zygmunt Solorz-Żak, that involves TV stations (*Polsat*), a satellite TV platform (*Cyfrowy Polsat*) and VoD services (*Ipla/Iplex*) – decision of UOKiK of 24 November 2011, DKK-126/11 (referred to above); 3) takeover of control of a major Internet portal (*Onet*) by a major press editor (*Ringier Axel Springer*) – decision of UOKiK of 17 September 2012, DKK-95/2012 ([http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/AFBC93E7349F4CC4C1257EC6007B9A76/\\$file/DKK2-421-26\\_11\\_LK-Decyzja%20-%20Ringier\\_bip.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/AFBC93E7349F4CC4C1257EC6007B9A76/$file/DKK2-421-26_11_LK-Decyzja%20-%20Ringier_bip.pdf)); 4) takeover of *G+J* companies in Poland by *Burda International GmbH* – decision of 31 July 2013, DKK-100/2013 (referred to above); 5) takeover of control of *N-Vision* – owner of *TVN* (major private TV) by the *Southbank Media Ltd* belonging to the group *Scripps Networks Interactive* – decision of 16 June 2015, DKK-83/2015 ([http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/1/4CD28A001AE53BF0C1257EC6007BA9FB?editDocument&act=Decyzja](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/1/4CD28A001AE53BF0C1257EC6007BA9FB?editDocument&act=Decyzja)).

<sup>446</sup> Decision of UOKiK of 5 September 2011, DKK-101/2011, *UPC/Aster* (referred to above).



websites following the takeover of the regional press editor by another editor active in the same market.<sup>447</sup>

The application of competition law to media in cases concerning competition-restricting practices (abuse of a dominant position or agreements restricting competition) covered such aspects as aggressive pricing of printed press,<sup>448</sup> TV advertising prices,<sup>449</sup> relations between broadcasters and pay-TV operators with regard to the retransmission of programme services,<sup>450</sup> abuse of TV sports rights exclusivity,<sup>451</sup> and matching rights clauses in TV sports rights contracts.<sup>452</sup> There is also rich case law on relations between pay-TV operators and their clients, with numerous decisions by UOKiK and courts declaring different practices by such operators as infringing the collective interests of consumers.

### 9.3.3. Interaction between specific media regulation and competition law

The relation between the anti-concentration rules in the Broadcasting Act and the Competition Act should be seen as complementary. As explained by the Supreme Court, the Competition Act applies in all instances, when “regulatory provisions” leave “the margin for freedom of actions” to the undertakings.<sup>453</sup> In such circumstances the rules of broadcasting law, including those aimed at preventing excessive media concentration, do not preclude the application of the competition law, as confirmed by a rich competition related case law on media, including broadcasting.<sup>454</sup>

<sup>447</sup> Decision of UOKiK of 24 October 2013, DKK-135/2013, *Polskapresse/Media Regionalne*,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/3E4B81C8DD138703C1257EC6007BA21A/\\$file/DECYZJA\\_nr\\_DKK\\_135\\_2013.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/3E4B81C8DD138703C1257EC6007BA21A/$file/DECYZJA_nr_DKK_135_2013.pdf).

<sup>448</sup> Judgment of *Sąd Najwyższy* (the Supreme Court) of 19 August 2009, III SK 5/09, *Przełqđ Sportowy v.Sport*, <http://www.sn.pl/sites/orzecznictwo/orzeczenia1/iii%20sk%205-09-1.pdf>; judgment of the Court of Appeal (SA) in Warsaw of 20 November 2008, VI ACa 704/08, *Fakt v.Super Express*, <http://www.infor.pl/akt-prawny/U29.2009.002.0000016.wyrok-w-prawie-z-powodztwa-media-express-sp-z-oo-w-warszawie-przeciwno-prezesowi-uokik-sygn-akt-vi-aca-70408.html>.

<sup>449</sup> Decision of UOKiK of 16 December 2002, DDI-110/2002,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/0B9BD1D24378987EC1257EC6007B96C9/\\$file/Decyzja%20DDI%20110\\_2002.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/0B9BD1D24378987EC1257EC6007B96C9/$file/Decyzja%20DDI%20110_2002.pdf).

<sup>450</sup> Judgment of the SOKiK of 14 September 2006, XVII Ama 71/05, *TVN24/TVNMetro*; judgment of the SOKiK of 28 November 2008, XVII Ama 107/07, *Animal Planete*.

<sup>451</sup> Decision of UOKiK of 12 February 2012, DOK-1/2010, *Euro 2008 public viewing*,

[http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/2A748DED413B9B9EC1257EC6007B8F2C/\\$file/DOC%20\(11\).pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/2A748DED413B9B9EC1257EC6007B8F2C/$file/DOC%20(11).pdf); decision of UOKiK of 21 August 2013, DOK-2/2013, *Sportfive/Cyfrowy Polsat* and others

([http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/0/585CACD095EDFCD6C1257EC6007BA217/\\$file/Decyzja\\_nr\\_DOK\\_2\\_2013.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/0/585CACD095EDFCD6C1257EC6007BA217/$file/Decyzja_nr_DOK_2_2013.pdf))

annulled by the Judgment of SOKiK of 8 December 2013, XVII Ama 153/13, [http://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/585cacd095edfcd6c1257ec6007ba217/\\$FILE/XVII%20ama%20153-13%20Cyfrowy%20Polsat%20i%20inni.pdf](http://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/585cacd095edfcd6c1257ec6007ba217/$FILE/XVII%20ama%20153-13%20Cyfrowy%20Polsat%20i%20inni.pdf); Statement of reasons:

[http://orzeczenia.ms.gov.pl/content/\\$N/154505000005127\\_XVII\\_AmA\\_000153\\_2013\\_Uz\\_2014-12-17\\_001](http://orzeczenia.ms.gov.pl/content/$N/154505000005127_XVII_AmA_000153_2013_Uz_2014-12-17_001)).

<sup>452</sup> Judgment of *Sąd Najwyższy* (the Supreme Court) of 7 January 2009, III SK 16/08, *PZPN v.Canal+*,

<http://sn.pl/Sites/orzecznictwo/Orzeczenia1/III%20SK%2016-08-1.pdf>.

<sup>453</sup> Judgment of *Sąd Najwyższy* (the Supreme Court) of 19 October 2006, III SK 15/06 ([https://mojepanstwo.pl/dane/sn\\_orzeczenia/10808,iii-sk-15-06](https://mojepanstwo.pl/dane/sn_orzeczenia/10808,iii-sk-15-06)) – on the relation between the CA and the Telecommunications Law; Judgment of *Sąd Najwyższy* (the Supreme Court) of 3 March 2010, III SK 37/09 ([https://mojepanstwo.pl/dane/sn\\_orzeczenia/10860,iii-sk-37-09](https://mojepanstwo.pl/dane/sn_orzeczenia/10860,iii-sk-37-09)).

<sup>454</sup> See above. However, in case the broadcaster is subject to a strict rule under the BA, this should be taken into account also in the application of the Competition Act. For example, the Supreme Court found that the broadcasting of the TV advertising spot in the style of a news programme, within the advertising block indicated as advertising in accordance with the BA, does not constitute surreptitious advertising within the meaning of the Unfair Competition Act, and so as such does not fall under the prohibition of infringement of consumers’ collective interest in the CA – Judgment of 6 December 2007, III SK 20/07,

[https://mojepanstwo.pl/dane/sn\\_orzeczenia/17367,iii-sk-20-10](https://mojepanstwo.pl/dane/sn_orzeczenia/17367,iii-sk-20-10).



The interaction between provisions in the BA aimed at preventing media concentration and competition law is however problematic, for several reasons. As outlined above, the anti-concentration provisions of BA do not coherently refer to competition law. Provisions on the revocation of the licence and the refusal to consent to a transfer of rights under the licence, in case the broadcaster gained a dominant position in the relevant market, refer to the meaning of these notions under the CA. In contrast, the rule on the refusal of the licence, when the broadcasting of the programme service could result in the dominant position of the applicant, does not include such reference to the Competition Act. Additionally, instead of “relevant market” it refers to “mass media in the given area”, which should be interpreted autonomously, with the normal result of a broader market definition than under the CA. Such a situation is criticised in the doctrine for a lack of coherency.<sup>455</sup> Moreover, there are no indications of how the position of the provider (broadcaster) in the entire field of mass media in the given area should be measured, in particular what weight should be assigned to its position on each of the mass media sectors (e.g. press, radio, TV, online media) in the overall assessment.

KRRiT also raises the absence of statutory instruments with which the regulator can measure the dominant position of broadcasters, and sees the need for closer co-operation in these matters with UOKiK.

### 9.3.4. Regulatory/monitoring bodies and competition authorities

The regulatory authority for broadcasting in Poland is KRRiT – the National Broadcasting Council, composed of 5 members.<sup>456</sup> Decisions on broadcasting licences (including award, revocation, and consent for transfer) are formally issued by the Chairman of KRRiT on the basis of a resolution of KRRiT, adopted by a two-third majority of the votes of Council’s members.<sup>457</sup> Such decisions have the formal status of administrative decisions, and as such they are final.<sup>458</sup> However, a dissatisfied party may ask the Chairman of KRRiT to review the case again.<sup>459</sup> The decision taken following such a review is subject to an appeal to the administrative court (*wojewódzki sąd administracyjny*). Its ruling may be subject to a cassation appeal to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*).

The competition authority in Poland is the President of UOKiK.<sup>460</sup> The President is competent to issue administrative decisions in competition law cases.<sup>461</sup> A decision of the President of UOKiK is subject to an appeal to the District Court in Warsaw – the Court of Competition and Consumer Protection (*Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów – SOKiK*).<sup>462</sup> The SOKiK ruling, in turn, is subject to appeal to the Court of Appeal (*Sąd Apelacyjny*) in Warsaw. A cassation appeal from its judgment may be filed with the Supreme Court (*Sąd Najwyższy*).

<sup>455</sup> Czarny-Drożdziejko E., *Komentarz. Ustawa o radiofonii i telewizji*, Warsaw 2014, p. 384.

<sup>456</sup> Articles 213-215 of the Constitution, Articles 5-12 BA.

<sup>457</sup> Article 33 para. 2 and Article 33 para. 3 BA in conjunction with Article 9 para. 2 BA.

<sup>458</sup> Article 33 para. 3 BA.

<sup>459</sup> Article 127 para. 3 of the *Kodeks postępowania administracyjnego* (Code of administrative proceedings).

<sup>460</sup> Article 29 CA.

<sup>461</sup> In this article all references to “decisions of UOKiK”, used in the interest of simplicity, mean formally “decisions of the President of UOKiK”.

<sup>462</sup> Article 81 CA.



## 9.4. Current discussion

The rather limited broadcasting media-specific anti-concentration measures in the BA 1992 are often considered insufficient. A much broader cross-media set of rules was proposed in 2002, but was finally rejected, following the disclosure of possible political and bribery motivations behind some of those proposals (so-called “Rywin-gate”). In effect, the public debate on further anti-concentration measures in the media sector was frozen for several years.

Difficulties with the application of the current regulation have consequently been raised by KRRiT, together with calls for its revision. KRRiT saw the need for more coherence between anti-concentration provisions in the BA and the Competition Act, as well as more formalized co-operation between KRRiT and UOKiK.<sup>463</sup> KRRiT also prepared a study on regulation concerning media ownership concentration in other selected countries, illustrating the scarcity of the existing regulation preventing media concentration in Poland.<sup>464</sup> A small amendment to these rules was formally proposed in the draft revision of the BA (the so-called draft “Deregulatory Act”), made subject to public consultations in 2015.<sup>465</sup> Article 38 (2) (2) BA, concerning the refusal of the broadcasting licence in case of risk of a dominant position, was supposed to be clarified by adding reference to the relevant market within the meaning of competition law. However, the draft revision was not formally submitted to the Parliament by the government, due to upcoming elections.

Discussions on media concentration revived following the parliamentary elections in 2015. Some politicians criticised the excessive role of foreign media ownership, in particular on the written press market, and noted insufficient media concentration regulation. No concrete legislative proposals have been presented so far. Studies and analyses were declared as a first step. In press articles different ideas for further considerations in the public debate were proposed. They included, for example: 1) a possible lower media-specific threshold for the presumption of a dominant position (e.g. 25 per cent instead of 40 per cent); 2) clearer definition of the relevant markets based on public opinion-forming factors, rather than economic ones; 3) stricter rules for cross-media ownership and vertical integration of media; and 4) better protection of small and medium sized media enterprises.<sup>466</sup> It remains to be seen how the discussion on these ideas will develop.

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<sup>463</sup> For example: KRRiT, *Strategia regulacyjna na lata 2011-2013*, Warsaw 1 March 2011, p. 57-59, [www.krrit.gov.pl/Data/Files/\\_public/pliki/publikacje/strategie/strategia\\_110420.pdf](http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/strategie/strategia_110420.pdf); KRRiT, *Strategia regulacyjna na lata 2014-2016*, Warsaw 18.3.2014, pp. 11 and 25, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/strategia\\_final.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/strategia_final.pdf); KRRiT, *Sprawozdanie KRRiT z działalności w 2015 roku* (KRRiT's Report for 2015), Warsaw 31 March 2016, p. 27-29, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/komunikaty/spr-info-krrit-2015/sprawozdanie--krrit-z-dzialalnosci-w-2015-r..pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/spr-info-krrit-2015/sprawozdanie--krrit-z-dzialalnosci-w-2015-r..pdf).

<sup>464</sup> Rostek H., “Regulacje dotyczące koncentracji własności na rynku mediów w wybranych krajach”, KRRiT Departament Strategii, Warsaw 2015, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/komunikaty/koncentracja-mediow/antykoncentracjne-regulacje\\_analiza.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/koncentracja-mediow/antykoncentracjne-regulacje_analiza.pdf).

<sup>465</sup> *Ustawa o zmianie ustawy o radiofonii i telewizji* – draft of 4 February 2015. Public consultations:

<http://bip.mkidn.gov.pl/pages/legislacja/projekty-aktow-prawnych/projekty-ustaw/projekt-ustawy-o-zmianie-ustawy-o-radiofonii-i-telewizji.php>.

<sup>466</sup> Bubula B. (Poseł na Sejm RP – Member of the Parliament), Jak repolonizować media? Pilnie potrzeba prawa ograniczającego koncentrację kapitału na rynku mediów, *Nasz Dziennik* 24 June 2016.



## 10. Conclusions

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The previous chapters of this edition of IRIS Special have shown that the protection of media pluralism and the related issues of media concentration and ownership structures are extremely important. Media pluralism is a basic requirement for the development of appropriate freedom of expression in a democratic civil society. Mass media provide a way for individuals to acquire information, a necessary part of the formation and freedom of opinion, which is why they are often described as the “fourth branch of power” of the state, alongside the executive, judicial and legislative branches. It is important that individuals can acquire information from a selection of different sources so they can form their opinions in a critical way.

### 10.1. The importance of guaranteeing media pluralism

The protection of media diversity and of a functioning, pluralistic media landscape is therefore extremely important, not only in individual states, but also at European Union and Council of Europe level. In most of the states examined in this report, media pluralism is a constitutional principle which, although it is not expressly mentioned in the constitution, has been developed by constitutional courts as an important component of the freedom of expression and/or information.

- In Germany, the constitutional basis for the guarantee of media pluralism is the freedom of the press and broadcasting enshrined in Article 5(1) of the *Grundgesetz* (Basic Law). The *Bundesverfassungsgericht* (Federal Constitutional Court) emphasises the role of broadcasters and the press as instruments of mass communication and factors in the formation of public opinion, which is why it believes that problematic concentrations should be the subject of preventive rather than just repressive measures. In particular, it points out that there is no reason to assume that the need to guarantee diversity could be reduced as a result of digitisation and technical innovation.
- In France, freedom of expression is protected under Article 11 of the Declaration of the Rights of Man and of the Citizen. According to the case law of the French Constitutional Court, media pluralism is also expressly protected by the same article, since in its decision of 27 July 1982 it refers to the protection of the pluralistic character of socio-cultural channels of expression (“*la préservation du caractère pluraliste des courants d’expression socioculturels*”).
- Article 20 of the Spanish Constitution protects freedom of expression. The protection of media diversity is not expressly mentioned in the Constitution, but according to its Article 20.3, the public-service broadcaster must protect pluralism in society. In Spain media diversity is expressly protected in Article 10 of the ECHR. The safeguarding of media diversity



is also viewed as a constitutional principle in Italy. It is directly related to the right to information enshrined in Article 21 of the Italian constitution, which has been referred to in connection with television broadcasts and, later, other information tools. In Italy, a distinction is made between internal, external and substantive media pluralism and the central role played by the Constitutional Court in its protection is recognised.

- In Poland, Article 50(1) of the Polish constitution protects the freedom of the media and of expression, while Article 213(1) safeguards the public interest regarding broadcasting. According to the case law of the Polish Constitutional Court, this means that the state may not interfere in media freedom and must actively protect it if it is threatened. In particular, this means taking organisational and supervisory measures designed to guarantee media pluralism.
- Only Great Britain has no written constitutional guarantees concerning the freedom of expression and of the media, nor indeed of any other fundamental rights. However, they are protected through Article 10 ECHR, which is enshrined in British law through the Human Rights Act, and relevant case law.

## 10.2. The importance of European provisions for the protection of media diversity

At European level, the nature and scope of competences in terms of guaranteeing media diversity are unclear. At the heart of European media “regulation” is Article 10 ECHR, which protects fundamental rights as interpreted by the European Court of Human Rights, and which has been incorporated in EU law through Article 6 of the Treaty on European Union. The need to protect media pluralism is also expressly recognised at EU level in Article 11(2) of the Charter of Fundamental Rights. However, there are no media-specific rules on diversity in EU law. Some authors suggest that the EU does not have the power to enact such rules. Meanwhile, there are no Council of Europe conventions concerning the protection of media diversity that would result in ratifying states introducing relevant legislation.

The most effective way in which the European Union can respond to media concentration is therefore through the general competition law provisions enshrined in Articles 101 and 102 TFEU and the Merger Regulation, which enable it to investigate, in a non-media-specific way, the dominant market positions and co-ordinated practices of undertakings as well as the effects of planned mergers, in order to guarantee the maintenance of functioning, free competition. However, on the basis of these provisions, the European Commission and the Court of Justice of the European Union exert a decisive influence on the protection of media diversity. As part of its obligation to protect competition, the Commission monitors and, if necessary, prohibits market concentrations by carrying out detailed market investigations, including in the media sector. In doing so, in particular in relation to market definitions, it provides guidance on how to deal with the increasing phenomenon of convergence that is resulting from digitisation and technical innovation. Important cases such as the cartel law investigations against *Google* or the examination of takeovers proposed by *Sky*, show that the importance of EU competition-related decisions for the protection of media diversity should not be underestimated. European media competition law is expected to become even more important as time goes on.

The main Council of Europe instruments in terms of ensuring media pluralism and preventing media concentration are the relevant resolutions and recommendations of the Committee of Ministers and Parliamentary Assembly, which provide political impetus for the shaping



of media regulation in the Council of Europe member states. The most recent such recommendation and resolution, published in 2015, deal with the ownership structure of media companies and seek to draw attention to media companies whose ownership structures lack transparency. Although these Council of Europe measures are only political in nature, their potential impact should not be underestimated. The Council of Europe's influence covers 47 states, including almost all central and east European countries.

### 10.3. Summary of the main findings in the states examined

The high level of importance attached to the protection of media diversity in the states examined in this document is reflected in the existence of various instruments, both proactive and reactive, designed to guarantee media pluralism. Generally speaking, these instruments fall into three categories and can be applied cumulatively.

Firstly, there are special media law provisions designed to combat media concentration and guarantee media pluralism. These regulations deal with the prevention of concentration of opinion in the media sector and can be used to prevent concentrations proactively, before they take place. They often form the main pillar of a state's efforts to guarantee media diversity. At the same time, many states have general competition rules that are designed to prevent undertakings in any sector of industry from holding dominant market positions and engaging in concerted practices in the market. These rules are not specifically tailored to the media sector – although media-specific rules can be added in individual cases – but they are applicable to media undertakings. They can be used to proactively prevent mergers taking place or to break up dominant market positions in a reactive way. However, it should be noted that general competition law provisions can only protect media pluralism indirectly. Finally, member states can take other positive measures to guarantee media pluralism. The most important of these include the implementation and protection of public service broadcasting or public media services that are subject to minimum quality standards and required to provide a certain breadth of information in an independent and balanced way. However, it should be borne in mind that public service broadcasting can also be threatened if a government or politicians use their position to influence it, as happened recently in Poland.

For historical reasons, the regulation of linear broadcasting services, especially audiovisual media services, remains central to the examined states' efforts to guarantee media pluralism. This is not surprising, since television is still the most popular medium in the EU. In addition, there are strong concentration trends in the audiovisual sector in many states. For example, an investigation by the European Audiovisual Observatory, based on analysis of data from 30 European countries, found that, on average, the two main broadcasting groups had a 51% TV audience share, and the three main groups 64%.

- In Germany, media concentration control, including measures taken by the *Bundesverfassungsgericht*, is primarily linked to broadcasting. Concentration tends to be measured using the viewer rating model, i.e. each television broadcaster can operate an unlimited number and type of channels as long as it does not achieve dominant power of opinion by exceeding a certain audience threshold. The market is monitored by the 14 *Landesmedienanstalten* (State media authorities), which have set up a joint body, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK), to monitor the nationwide broadcasting of private television programmes.



- Italy has a highly concentrated TV market, which is dominated by the oligopoly of *Mediaset*, public service broadcaster *RAI* and pay-TV provider *Sky Italia*. This high level of concentration has been a subject of debate in Italy for over 20 years. Meanwhile, the consolidated Law on Audiovisual and Radio Media Services has imposed technical and economic limits in the media sector, which is monitored by the regulator, AGCOM.
- In Poland also, the only media-specific anti-concentration regulations concern television services. They are found in the Broadcasting Act, which deals in particular with the limitation of foreign ownership of media companies and the transparency of media ownership structures. The national Broadcasting Council regularly publishes papers on the regulatory strategy.
- France also has a law that was specifically designed to protect media pluralism in the audiovisual sector. The regulations can be divided into three categories: regulations on the ownership of media companies, single-media anti-concentration regulations and cross-media anti-concentration regulations.
- There are no such legal instruments in the United Kingdom, where the 2003 Communications Act sets out the regulatory framework, including rules on ownership restrictions. However, this is not limited to the regulation of audiovisual media, but deals with broadcasting, the press and communication on an equal footing. The Enterprise Act also recognises public interests as an important decision-making criterion in the context of media concentrations.

Furthermore, in all the states that were examined, the provisions of European and domestic competition law and the relevant competition authorities play a role in media concentration control, even though their main focus is different to that of specific media-related regulations.

The importance of protecting media diversity in the countries examined in this report is illustrated by recent and, in some cases, ongoing debates in these countries.

- The position of former Italian Prime Minister Silvio Berlusconi, who was the largest shareholder in *Mediaset* and therefore owned around half of the national broadcasting market, triggered intensive debate in Italy concerning media ownership structures, the protection of media diversity and prevention of undue influence. This resulted in the adoption of new legislation, including the *Frattini* law, which prohibits holders of government office from carrying out certain business activities. This debate has died down considerably since Berlusconi was convicted of tax evasion in 2013.
- From a European perspective, Poland is currently at the centre of the debate over the protection of media diversity. After the 2015 parliamentary election, some politicians publicly criticised the significant role of foreign media owners, especially in the print media market, and the ineffectiveness of media concentration regulations. However, no concrete legislative proposals to tighten existing laws have been tabled so far. Poland also hit the headlines for the wrong reasons when, after the 2015 election, the conservative government passed a media law that placed public service broadcasters under firmer state control.
- The role and structure of public service broadcasting, which can be particularly important for the protection of media diversity, is also under discussion in Great Britain, where the *BBC* plays a key role in ensuring access to a broad spectrum of media content. Topics under discussion include the renewal of the *BBC's* charter and administrative structures, which also involves issues related to the regulation of non-linear services (catch-up TV via *iPlayer*).



- In Germany, a proposed merger between a media company primarily involved in print publications and a TV broadcasting group was debated for many years. Administrative courts at every level were asked to review an earlier decision to ban the merger. The case concerned the planned takeover of *ProSiebenSat.1* by *Axel Springer*, the importance of cross-media ties between TV and print media when evaluating the effect of such a merger under media concentration laws, and the extent of the powers of the body responsible for monitoring concentrations in the television sector.

## 10.4. Challenges created by convergence

Digitisation, technical advances, new types of service and changing user behaviour are setting new challenges for the protection of media pluralism at both national and European levels. It is not only the fact that convergence exists, but also the lightning speed of change that is creating obstacles that must be overcome. New big players such as *Google* and *Facebook* are developing innovative business models and changing existing power structures for the long term. Even though television remains the most popular medium in Europe, with viewing figures as high as ever, the increasing consumer focus on Internet services is becoming more and more relevant and the importance of digital intermediaries such as search engines or news aggregators is growing. This is especially true for certain user groups, such as people in particular age categories. To date, there are no concrete answers to these questions, either at European or national level. Long-established market definitions adopted for the purposes of competition law remain in place both nationally and at EU level. However, it is becoming clear in individual cases that adherence to traditional structures is beginning to change and convergence is gradually starting to play a role in market definition. This is linked in no small part to the fact that the challenges of convergence and the technology-neutral nature of regulation are increasingly the focus of debate at national and European levels.

- In Great Britain, for example, the opportunities and threats created by services such as *Netflix* and *Amazon Prime* in a context of increasing Internet use are under discussion, along with the effectiveness of the current regulatory regime in relation to such services.
- In Germany, the KEK and *Land* legislators are wondering whether and how media concentration law could be reformed in order to take into account the increasing importance of online media and the changing relationship between linear and non-linear media use.
- The French and German cartel authorities have jointly published a position paper on the importance of data in proposed merger procedures, in order to paint a more accurate picture of the market power of companies such as *Google* and *Facebook* than is possible using traditional criteria alone.
- In Italy, the regulator AGCOM is calling for the amendment of the *Sistema integrato delle comunicazioni*, which does not fully take online services into account at present, as well as a detailed evaluation of current challenges for media pluralism.

We should not rush to the conclusion that the numerous opportunities for low-cost publishing created by the Internet and the resulting proliferation of content and services mean that media diversity can be protected solely thanks to these new technical possibilities. Rather, at both national and European levels, safeguarding media pluralism remains an important task and the bodies responsible are examining various measures that might be required. These include measures to guarantee the transparency of ownership and influence structures in the context of new media



services and providers, such as by establishing relevant monitoring procedures at both European and national levels.







# EUROPEAN AUDIOVISUAL OBSERVATORY

Set up in December 1992, the European Audiovisual Observatory's mission is to gather and distribute information on the audiovisual industry in Europe.

The Observatory is a European public service body comprised of 41 member states and the European Union, represented by the European Commission. It operates within the legal framework of the Council of Europe and works alongside a number of partners and professional organisations from within the industry and with a network of correspondents.

## **Major activities of the Observatory are**

- the Yearbook online service  
[www.yearbook.obs.coe.int](http://www.yearbook.obs.coe.int)
- the publication of newsletters and reports  
[www.obs.coe.int/publications](http://www.obs.coe.int/publications)
- the provision of information through the Observatory's Internet site  
[www.obs.coe.int](http://www.obs.coe.int)
- contributions to conferences  
[www.obs.coe.int/events](http://www.obs.coe.int/events)

## **The Observatory also makes available free-access databases, including:**

### **IRIS Merlin**

Database on legal information relevant to the audiovisual sector in Europe  
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Database on TV and on-demand audiovisual services and companies in Europe  
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Database on the transposition of the AVMS Directive into national legislation  
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Database on admissions to films released in Europe  
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## **Media ownership - Market realities and regulatory responses**

This IRIS *Special* provides an overview of the current market realities and a selection of regulatory responses that have been put in place across Europe since the Observatory's report on "Converged markets – converged power? Regulation and case law" of 2012.

It has been prepared by the Institute of European Media Law (EMR) in Saarbrücken and collects contributions from various authors. It focuses on a selection of European countries (Germany, United Kingdom, Italy, France, Spain, and Poland), which have been chosen with the intention of providing a set of different approaches.