



# Media pluralism and competition issues

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# Media pluralism and competition issues

**Amedeo Arena, Sandra Bašić Hrvatin, Mark D. Cole, Elise Defreyne, Jessica Durehed, Christina Etteldorf, Jan Henrich, Daniel Knapp, Lenart J. Kučić, Michèle Ledger, Karin Lundin, Andris Mellakauls, Kerstin Morast, Marie Swanström, Jörg Ukrow, Krzysztof Wojciechowski, Lorna Woods**



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# Foreword

You cannot compare apples and pears, or so the saying goes, because they are different things. And yet, if you put together a bunch of those diverse but equally delicious fruits in a container you will have a fruit basket.

Union often comes from adding diverse elements into a single entity. Actually, in societal terms it could be argued there can be no union without diversity - because we are all equal, but at the same time we are all unique, hence diverse. Every time two or more people meet, there is certainly diversity or plurality: of views, backgrounds, you name it. We are all different persons after all. We also share a number of values that make up a democratic, cohesive society. Not surprisingly, this somewhat paradoxical idea appears in the mottos of many countries around the world. For example, the Great Seal of the United States of America contains among its features a traditional motto of the United States, *E pluribus unum*, which is Latin for "Out of many, one" (or "One out of many" or "One from many"), and was designed to portray the country as the union of the original Thirteen Colonies. The same idea is found in the mottos of Indonesia, Papua New Guinea and South Africa. Not surprisingly, it also appears in the European Union motto, which is "United in diversity", representing the coming together of different European countries into a single supranational organisation.

In order to reflect this diversity and cater for every type of person, the media has also to be not only diverse but also plural. That is why the concept of media pluralism covers, on the one hand, the availability of a variety of choice in the programming of the different media players and, on the other hand, the effective presence of a multitude of operators so as to avoid an excessive concentration of the market. Variety of choice in programming on one side, plurality of operators on the other.

Concerning plurality of operators, the European Audiovisual Observatory published in 2016 an IRIS *Special* titled "Media ownership - Market realities and regulatory responses", which provided an overview of the market realities at the time of publication and a selection of regulatory responses from six European countries.

The present IRIS *Special* complements in a certain way our publication from 2016 by discussing the relationship between safeguarding media pluralism and effective competition in the age of digitisation and globalisation, especially with regard to new diversity-relevant phenomena in the digital platform economy. It examines the concept of media pluralism, provides an economic analysis of how algorithm-based decisions may influence the media sector, analyses the European legal framework for media pluralism, compares instruments to safeguard media pluralism enshrined in the legislation of Germany, France, Italy, Latvia, Poland, Sweden and the United Kingdom, and identifies media pluralism trends.

Under the scientific coordination of Mark D. Cole and Jörg Ukrow from our partner institution – the Institute of European Media Law (EMR) in Saarbrücken, Germany - this publication includes country reports by Elise Defreyne and Michèle Ledger (Belgium), Jan Henrich (Germany), Lorna Woods (UK), Amedeo Arena (Italy), Andris Mellakauls (Latvia), Krzysztof Wojciechowski (Poland), Jessica Durehed, Marie Swanström, Karin Lundin and Kerstin Morast (Sweden), Sandra Bašić Hrvatina and Lenart J. Kučič (Slovenia).

Furthermore, Daniel Knapp, a partner at Ecuity in London, provides insight into media pluralism from an economic perspective, and EMR's own research staff shed light on the complex framework underpinning media pluralism from the legal point of view in the introductory chapters, and on the national trends in the concluding remarks.

I would like to extend my warmest thanks to all of them and in particular to Christina Etteldorf and Jan Henrich, researchers at EMR, for their valuable contributions and day-to-day engagement during the production process.

Strasbourg, October 2020

**Maja Cappello**

IRIS Coordinator

Head of the Department for Legal Information

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# 1. Introduction

*Jörg Ukrow, Institute of European Media Law (EMR), Saarbrücken*

Media pluralism stems from media freedom as a prerequisite for a free democratic process and there is both a content- and an actor-based dimension to the preconditions for guaranteeing it. It can be achieved neither through the establishment of monopolies in one or more media categories, nor through a curtailment of the content range provided by media players, limiting it to areas such as education, advice, information, culture, sports or entertainment.

The need to promote and safeguard media pluralism is not least a consequence of the dual function of the media as intermediary and factor in the formation of individual and public opinion. However, the social and democratic significance of the media can only be appreciated if media content is sufficiently balanced and objective, and if there is a minimum degree of mutual respect among media outlets.

In the past, threats to media pluralism arose in particular because spectrum scarcity and high technical and financial costs meant only a few providers could develop, produce and distribute audiovisual media content. This specific situation with regard to power over opinion-forming has largely disappeared in the course of digitisation, at least as far as transmission-path bottlenecks are concerned. However, digitisation is accompanied by new threats to media pluralism: selection processes due to limited transmission capacities have lost their former importance in terms of ensuring media pluralism, at least in the case of television, they have been replaced or supplemented, as a new regulatory challenge, by an oft-confusing plethora of audiovisual offerings in the digital jungle which play a particularly important role in the formation of public opinion, and in decision-making.

This is accompanied by a change in the instruments available for safeguarding media pluralism: the classic instruments, which include not least a public broadcasting service that promotes diversity and is independent of the state and the creation of an overall pluralistic media landscape, are being supplemented by new ones that counteract threats to media pluralism posed by new media players. Models guaranteeing internal and external pluralism continue to be important. An organisation based on internal pluralism ensures the expression of different opinions through the diverse composition of the bodies responsible for supervising the media providers. The external-pluralism model guarantees the expression of different opinions through the diversity of the various providers and their respective socio-political stance. In addition to these models, there are instruments such as “must carry” regulations regarding the carriage of media via existing infrastructure in the case of media platforms (such as cable systems) and user interfaces, as well as “must be found” regulations for new media intermediaries such as search engines, with regard to

particularly significant offerings, not least to ensure regional and local diversity. As far as offerings are concerned, new challenges for effective media pluralism may arise from phenomena such as disinformation and fake news: even though these phenomena can also be observed in states with a pluralistically structured media landscape, without diversity disinformation and fake news can have a particularly significant and dangerous effect on the free flow of information and opinion forming. However, a refusal to comply with journalistic quality standards also poses a new challenge – not least in the user-generated content environment.

This IRIS *Special 2020-1* report makes a contribution to the more fundamental debate on the relationship between safeguarding media pluralism and effective competition in the age of digitisation and globalisation, especially with regard to new diversity-relevant phenomena in the digital platform economy. It first examines the concept of media pluralism and provides an overview of the different ways in which media pluralism can (and should) be approached. At the same time, it looks at those aspects and limits that can help instruments of competition law ensure media pluralism. There then follows an economic analysis of how, in a broader sense, computer-aided decision-making influences media markets and market players' economic success. This includes questions on the importance and possible applications of personalisation algorithms and curation mechanisms as market power factors. The overview will show the fundamental effects of the market situation of the dominant platforms in the various sectors. In a following section, the European legal framework for media pluralism with particular emphasis on EU competition law will be discussed, together with more recent EU legal acts tending to promote and protect diversity, including individual provisions of the Electronic Communications Code (EECC)<sup>1</sup>, the revised AVMS Directive<sup>2</sup>, the P2B Regulation<sup>3</sup> and the Directive on Copyright and Related Rights in the Digital Single Market<sup>4</sup>. Based on these considerations, a comparative legal analysis will be carried out of instruments to safeguard media pluralism enshrined in constitutional law, the law on media concentration, competition law and the law relating to the public-service remit of the media in the implementation of EU law, as well as of financial instruments in Germany, France, Italy, Latvia, Poland, Sweden and the United Kingdom. Building on this analysis, media pluralism trends will be identified. This IRIS Special ends with a short conclusion.

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<sup>1</sup> Directive (EU)2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN>.

<sup>2</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32018L1808>.

<sup>3</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32019R1150>.

<sup>4</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, <https://eur-lex.europa.eu/eli/dir/2019/790/oj?locale=en>.

## 2. How to define media pluralism?

*Jörg Ukrow, Institute of European Media Law (EMR)*

### 2.1. Concentration dimensions in the digital transformation

When considered from a traditional legal point of view, media freedom is more related to media independence from state or regulatory control, whereas media pluralism has more to do with media independence from private control by third parties and disproportionate influence from economic, social and/or political forces.

Over the last two decades, fundamental developments have changed the media sector and posed new challenges to safeguarding media pluralism. These changes are affecting both the providers of journalistic content and media-use behaviour.

Regulations to safeguard media pluralism, which towards the end of the 20th century could still focus on the broadcasting media, increasingly need to be adapted. It is true that radio and television, with a still significant penetration rate, continue to considerably influence individual and public opinion, but video on demand and other services distributed via the Internet, particularly in the context of social networks, are significantly expanding the range of media, and increasingly becoming an important source of information, not least for younger users. At the same time, these offerings are displacing the traditional media repertoire to a considerable extent, especially in populist discourses. In addition, the convergence of production, aggregation, selection, presentation and the carriage of media content is of fundamental importance for the shaping and further development of media pluralism in today's world.

The safeguarding of media pluralism traditionally focuses on horizontal, vertical and diagonal concentration developments or trends regarding the regulatory approach to applying both media and competition law:

- **Horizontal** media concentration exists when media companies operating in the same field, such as television broadcasters, and at the same level of the media value chain, merge with one another. A broadcaster monopoly, as the strongest form of this concentration, at least if not accompanied by internal checks on adherence to pluralistic principles, holds the most obvious potential danger for diversity of opinion. Even below the monopoly situation, horizontal media concentration can hinder the market entry of new providers;
- **Vertical** concentration results from the cooperation or even merger of media companies at upstream or downstream stages of the value chain, for example when a television broadcaster acquires a stake in a film production company or broadcasters and infrastructure providers enter into exclusive or preferential agreements on the carriage of media content. Such vertical concentration also renders it more difficult for third parties to enter or hold their own in that particular market.

- **Diagonal** concentration occurs when a company begins to operate in a completely different market and in a completely different value chain through a merger or stake acquisition. Such cross-media strategies are also relevant for media pluralism: agreements between media companies relating to non-media areas can have an extreme impact that also affects the formation of public opinion, in the same way that co-operation between a media company and a third-party company can influence the critical classification of the latter's behaviour and its market prospects.

The above-mentioned increases in market power can also lead to greater power in terms of the process of opinion formation, even beyond the borders of the economy where the concentration occurs. The fact that opinion-forming processes are increasingly transnational speaks against conducting a territorially limited examination of the potential risk posed by concentration to media pluralism

The traditional value chain in the media industry consisted of a linear stringing together of content production, content compilation and content carriage. In the course of digitisation, though, this traditional value chain has been subject to considerable change. The linear structure has disappeared and given way to new, shorter value chains. New media players, such as media agencies, are exerting a significant influence on the advertising market, and new players, such as influencers, are in some cases achieving considerable user reach, which companies take into account in their commercial communication strategy, thus influencing the financial basis of media pluralism. Platforms and intermediaries such as Google, Facebook, Instagram and YouTube play an important role in preserving media pluralism, not only in the advertising market but also in the recipient market. From the user's perspective, they play a central role in content findability and selection, which can be tailored to interests and preferences with the aim of maximising the time users spend on the site. This, in turn, can result in the strengthening of opinions, or the adoption of similar ones. A climate of opinion can be presented and perceived in a distorted way – with exponential effects well beyond the medium involved.

The algorithmically controlled selections can develop echo chambers, which can restrict diversity. Although a connection between algorithmically controlled content personalisation and the emergence of filter bubbles or echo chambers and their effects on diversity of opinion has not yet been empirically investigated or conclusively proven, and although recent studies put into perspective the negative effects of large platforms, there are still potential threats to media pluralism and diversity of opinion.<sup>5</sup> Factors influencing

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<sup>5</sup> For an overview and analysis of the current state of research, see as one example of many Stark B., Magin M. and Jürgens P. (2019) Maßlos überschätzt. Ein Überblick über theoretische Annahmen und empirische Befunde zu Filter. Preprint), 2019 [http://melanie-magin.net/wp-content/uploads/2019/11/Stark\\_Magin\\_Juergens\\_2019\\_Preprint.pdf](http://melanie-magin.net/wp-content/uploads/2019/11/Stark_Magin_Juergens_2019_Preprint.pdf). Contains further references who conclude that the significance of filter bubbles and echo chambers is largely overestimated but note that algorithmic personalisation unquestionably influences individual and collective opinion-forming. For an overview in English and an analysis of the current state of research, see also Borgesius F.Z. et al., "Should we worry about filter bubbles?", *Internet Policy Review* 5(1), 2016, <https://doi.org/10.14763/2016.1.401>. Here, the authors reach a similar conclusion and refer, in connection with risk, to further development of algorithmic techniques. For further

the extent of these potential risks include the transparency of algorithmic systems and, directly related to this, users' media skills. For example, "following" a person/channel or "liking" an area of interest are actions that influence the display of certain content in a way the user understands. By contrast, the tracking of visited websites via cookies, and the algorithmic inferences drawn from them about content, are less transparent, and a certain level of media literacy is required to control or at least correctly assess this.

From a market perspective, the digital platform economy restricts competition network effects. Platforms and intermediaries have enormous amounts of personal user data at their disposal – digital raw material that allows them to increasingly define the rules in the online advertising market in an informally binding way for third-party media players.

## 2.2. An approach based on competition law: Quantity and market power

In order to ensure unimpeded economic competition that promotes the diversity of market players, competition law limits the scope with which such player may engage in economic activity. It guarantees a market economy system by defining the framework within which competitors should and can offer their products and services as freely as possible. The intended self-optimising allocation through supply and demand requires economic freedom, which is safeguarded by provisions of competition law, for example in order to prevent the abuse of dominant positions, or by means of merger control.

Media companies are subject to general commercial and economic competition law insofar as they are involved in market competition. At the same time, however, they are often subject to a special regulatory regime relating to media diversity, which aims to create competition in journalism and guarantee media diversity, and thus enable free individual and public opinion-forming and decision-making.

In principle, antitrust law, with the instruments available to it, is also a suitable mechanism for preventing anti-competitive practices in the area of media regulation. The law on media concentration and antitrust law each pursue their own objectives. The aim of antitrust law is to safeguard competition between economic operators. In the case of merger control, its purpose is specifically to ensure a sufficient variety of competing players and in doing so to cover both sides of the dualistic markets that have traditionally existed in the media sector: on the one hand, offerings available to media consumers, and on the

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discussion, see Helberger N. et al., "Implications of AI-driven tools in the media for freedom of expression", <https://rm.coe.int/cyprus-2020-ai-and-freedom-of-expression/168097fa82>; Bruns, "Echo Chamber? What Echo Chamber? Reviewing the Evidence", presented at the 2017 Future of Journalism conference, Cardiff, 15 Sept. 2017, <http://snurb.info/files/2017/Echo%20Chamber.pdf>; Haim/Graefe/Brosius, "Burst of the Filter Bubble? Effects of Personalization on the Diversity of Google News", in *Digital Journalism* 6 (3) 2018, pp. 330–43, <https://doi.org/10.1080/21670811.2017.1338145>; Nechushtai/Lewis, "What Kind of News Gatekeepers Do We Want Machines to Be? Filter Bubbles, Fragmentation, and the Normative Dimensions of Algorithmic Recommendations", *Computers in Human Behavior* 90, 2019: pp. 298–307, <https://doi.org/10.1016/j.chb.2018.07.043>.

other, opportunities for the advertising industry. The aim of the law on media pluralism and concentration, meanwhile, is to ensure diversity of opinion. Measures taken by the competition authorities can have a positive effect on the objectives of media law in that the supervision of mergers and monopolies also indirectly promotes the diversity of different, independent media providers. And a large number of different providers in a market increases the likelihood that they will also carry a wide range of information and opinions into the market.

It cannot be ruled out, however, that existing instruments of competition law may actually not promote pluralism but instead limit diversity, especially if they are applied in a way that takes insufficient account of the influence of global players on the market under investigation. Suppliers that are subject to national or EU regulations are increasingly competing with international suppliers that are not, which suggests that existing antitrust and competition law should be interpreted and applied in such a way as to strengthen European media companies' global competitiveness.

Antitrust law can also have an inhibiting effect on the digitisation of the broadcasting infrastructure and at the same time clash with the objective of strengthening media pluralism. Digital infrastructure enables significantly more offerings to be carried in the same bandwidth as analogue, so the positive effect on pluralism is clear. However, media providers must be able to agree on a uniform switchover from an analogue to a digital variant of media content distribution and redistribution, both in their own interests and in those of media users, in order to be able to effectively reap the economic and pluralistic benefits of digitisation; it must remain possible for users to receive linear offerings by technically uniform means.

Antitrust law reaches its limits when focused on merger control as a regulatory instrument, especially in the case of network industries, if mergers do not result in powerful market players but, instead, network effects and vertical integration lead to the creation of quasi-monopolies or oligopolies. Antitrust law is therefore already being partly geared, either by way of interpretation or reform, to meeting new challenges in the data economy and thus to counteracting new aspects of the abuse of a dominant position, not least by non-European companies. This also takes account of the fact that market power and power over the dissemination of information are so closely linked in the digital age that antitrust and data protection law need to be better co-ordinated; there is a close link between the supervision of market power and the protection of media users' informational self-determination. Moreover, if there are too few or even no privacy-compliant alternatives for media consumption or there is no alternative guidance for that consumption, media users are forced to use the predominant non-data-protection-compliant offering even if this use is accompanied by the strengthening of a company's market power and thus by a threat to media pluralism.



### 2.3. A fundamental rights-based approach: Quality and “public value”

Media market concentration processes and changing business models often lead to a decline in the quality of (investigative and other forms of) journalism, to a restriction of the scope for editorial freedom and to an erosion of journalists' working conditions and job security, all of which is detrimental to media pluralism based on democratic diversity.

In order to fulfil its role in a democratic society, quality journalism will have to do even more in the future to help people navigate the increasing wealth of information available and to promote understanding of ever more complex developments. Therefore, the quality of journalistic work and the ability to place news in the context of a value-based, free and democratic state and social order will become even more important.

Public service broadcasters have always been essential for media pluralism in this context too as they cover a certain range of opinions, including minority interests. They can be particularly important in smaller markets in which it is not profitable for private broadcasters to operate. So, it is not just funding for broadcasters commensurate with their function that is important. In this context, the Amsterdam Protocol to the EU treaties<sup>6</sup> recognises the important and positive role of public service broadcasting for democracy and pluralism, while at the same time placing certain restrictions on national funding mechanisms in order to maintain realistic opportunities for private competitors to compete. The systemic relevance of public broadcasting in times of crisis translates into clear limits to any possible reduction in the financing of public broadcasting, in the interests of ensuring media pluralism. Media pluralism cannot be reconciled with state efforts to influence the editorial independence of public service broadcasters, nor is it conducive to safeguarding it if public authorities switch to eliminating the media as information intermediaries by distributing information exclusively on their own social media channels. Moreover, the public task of ensuring pluralism is not limited to media providers in a public law based organisational structure. Incentive-based regulation can, not least, contribute to promoting this task, for example through a significant scope and prominent placement of public-value offerings.

Digitisation and globalisation offer new, easily comprehensible and, based on a traditional understanding of funding flows, free-to-the-user opportunities to disseminate information and opinions on a large scale, quickly and accurately worldwide, especially via social networks such as Facebook or Twitter. However, this new service is not necessarily one that, like traditional media, observes or must observe journalistic due diligence. That's another reason why these new content production and distribution techniques can also be used as powerful echo chambers for disinformation campaigns which weaken trust in institutions and in digital and traditional media and harm the democratic process because citizens can no longer make informed choices. Disinformation can divide people instead of

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<sup>6</sup> Statement for the minutes relating to the Treaty of Amsterdam on public broadcasting in the member states, OJ EC C 340 of 10.11.1997, p. 109, carried forward with adjusted wording as Protocol No. 29 to the Treaty of Lisbon, last consolidated version OJ EU C 202 of 7.6.2016, p. 311, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN>.

bringing them together in dialogue and can create or increase social tensions, and it opens up ways of undermining the preparation and integrity of elections. Ultimately, it can deprive democratic change of its legitimacy or even legality from the point of view of a significant proportion of society by influencing the outcome of elections in a targeted and manipulative manner. In this way, it unpredictably undermines fundamental European values that member states have hitherto taken for granted as a common reference point in the shaping and conduct of democratic processes. It can also have a chilling effect and inhibit freedom of expression. The right to freedom of expression includes freedom and pluralism of the media as well as citizens' right to freedom of opinion and expression and their freedom to receive and impart information and ideas "without interference by public authority and regardless of frontiers". Media pluralism can currently or potentially be threatened in this digital age, but not only by the state in which a media user lives. Disinformation campaigns by third countries or private, not least politically motivated individuals are also capable of deliberately manipulating opinions and covertly influencing democratic decisions. In this respect, the democratic community of states may be faced with new tasks with regard to teaching the population digital literacy and new duties to provide safeguards for a free democratic discourse.

## 3. Media pluralism from an economic perspective: Algorithmic media – new considerations for media plurality

*Daniel Knapp, Partner Ecuity, London*

### 3.1. Introduction: Expanding debates on media pluralism

As media have become embedded in a platform economy, discussions of media pluralism are increasingly considering factors located outside the inherent properties of media themselves. This means that issues of media ownership, concentration (e.g. audience, distribution and revenue) and diversity of opinion have been joined by considerations of the roles that wider services and infrastructures play in affecting the production, distribution and monetisation of media. Especially debates around personalisation algorithms and curation mechanisms, whether through the trope of ‘filter bubbles’ or fake news, demonstrate a widespread acknowledgement that platforms and software are complicit in the shaping of media. The maturation of on demand services from video streaming to podcasts has further highlighted the role that algorithms play as gatekeepers of content, and technical resources like the *Netflix Tech Blog*<sup>7</sup> demonstrate that algorithms and data are not merely an add-on to media in a digital age, but a foundational component through the entire value chain.

Yet discussions have thus far not systematically considered what the economy of media algorithms looks like, what new questions arise if more media become algorithmic, and even how practices within algorithmic media can foster a more plural media environment. A key issue in this context is how algorithms and, more widely, computational decision-making affect media markets and enable or constrain the ability of market participants to succeed economically. This article aims to provide some signposts for such a discussion by combining key concepts in the social sciences with practical experiences in the design and forensic analysis of media algorithms. Purely for illustration purposes, it will look primarily at on demand streaming services and digital advertising.

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<sup>7</sup> The Netflix Tech Blog, about how Netflix designs, builds, and operates systems and engineering organisations. Available at <https://netflixtechblog.com>.

## 3.2. Computation: From mediation to the production of media outcomes

In the 1970s, when his objects of study were still few and the size of a wardrobe, computer scientist Joseph Weizenbaum predicted that human decision-making would increasingly become supplanted by computational judgements.<sup>8</sup> He suggested that this algorithmisation of the world would coincide with a crisis of interpretation, where principles of human reasoning are rendered powerless in grasping the reality of an increasingly computerised world. Weizenbaum stressed that the proliferation of computers needed to coincide with human sovereignty over them and their output.

A few decades on, big data and the digital economy have created an empirical reality in which the urgency of Weizenbaum's ideas is gathering pace. The digital economy is built on a comprehensive re-architecting of commerce and consumption through programs, apps and digital platforms.<sup>9</sup> The notion of big data is reconfiguring how data are produced, managed, stored, interpreted and applied, leading to "the worlds we inhabit to be captured as data and mediated through data-driven technologies."<sup>10</sup>

But these are not just epistemological developments that affect how information and knowledge is generated. Sociological work on databases, in particular the analysis of rationales of classifying people and its consequences, was one of the earliest contributions to understanding how the process of computational calculation produces real-world outcomes and defines what is possible and impossible, desirable and undesirable. Roger Burrows highlights that, in a digital economy, databases are

*[...] no longer just about emergent properties that derive from a complex of social associations and interactions. These associations and interactions are now not only mediated by software and code they are becoming constituted by it".<sup>11</sup>*

Against the background of a world constituted by software and code, the idea of the "computational rendition of reality" denotes the computational factors that "[remake] key principles upon which social agents frame and act on the world"<sup>12</sup>. These social agents also include economic actors in the media supply chain. This can have either direct or indirect implications for media pluralism, in particular if computational principles co-determine how economic exchange is organised and how benefits are allocated.

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<sup>8</sup> Weizenbaum J (1977) *Computer power and human reason: From judgment to calculation*. San Francisco, CA: W.H. Freeman & Co.

<sup>9</sup> Andreessen M (2011) "Why Software Is Eating The World." Wall Street Journal. Available at <http://www.wsj.com/articles/SB10001424053111903480904576512250915629460>.

<sup>10</sup> Kitchin R (2014) *The data revolution: Big data, open data, data infrastructures and their consequences*. Thousand Oaks, CA: SAGE, XV.

<sup>11</sup> Foth, Marcus, and Roger Burrows, eds. 2009. Afterword: Urban informatics and social ontology. In *Handbook of research on urban informatics: The practice and promise of the real-time city*, pp. 450–54. Hershey, PA: IGI Global. p. 451.

<sup>12</sup> Kallinikos Jannis (2009) On the computational rendition of reality: Artefacts and human agency. *Organization* 16 (2): pp. 183–202, p. 184.

A growing body of empirical work investigates the computational rendition of reality at the intersection of consumers and media and platforms. For instance, Alaimo<sup>13</sup> shows how data-driven interpretations of acts of consumption by online companies disaggregate individual practices, re-aggregate them according to their own logic and recast them to consumers as representation of reality that in turn shapes consumers' experience. Bucher<sup>14</sup> offers a perspective on how ordinary people relate to computation on Facebook through the notion of “algorithmic imaginaries”, which are lay assumptions about how the algorithms on the platform affect them and shape their experience.

While these approaches can be adopted to inform media pluralism from a consumer perspective, it is important to also look at the economic perspective and business-to-business relationships. Any such analysis first requires an understanding of the three intersecting forces of (1) mediatisation, (2) datafication, and (3) algorithmisation that shape today's media economy.

### 3.3. Mediatisation, datafication, algorithmisation

#### 3.3.1. Mediatisation

Mediatisation – a social science concept - is an extension of the idea of mediation. While mediation refers to how the process of communication is organised to produce meaning, mediatisation denotes changes to the process of mediation.<sup>15</sup> For instance, the rise of video on demand services changes the relationship between the content provider (e.g. Netflix) and the audience by enabling audiences to select content to watch. The rise of programmatic advertising, which uses data to make buying and selling decisions and often takes place using real-time auctioning, has replaced the fax machine and email.

#### 3.3.2. Datafication

Datafication describes the procedures through which events and interactions occurring in the domain of human experience are converted into data for the purpose of computer processing<sup>16</sup> – it is both a process as well as an imperative for media today. In fact, media

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<sup>13</sup> Alaimo Cr (2014) Computational consumption: Social media and the construction of digital consumers. Phd, The London School of Economics and Political Science (LSE). Available at <http://etheses.lse.ac.uk/975/>.

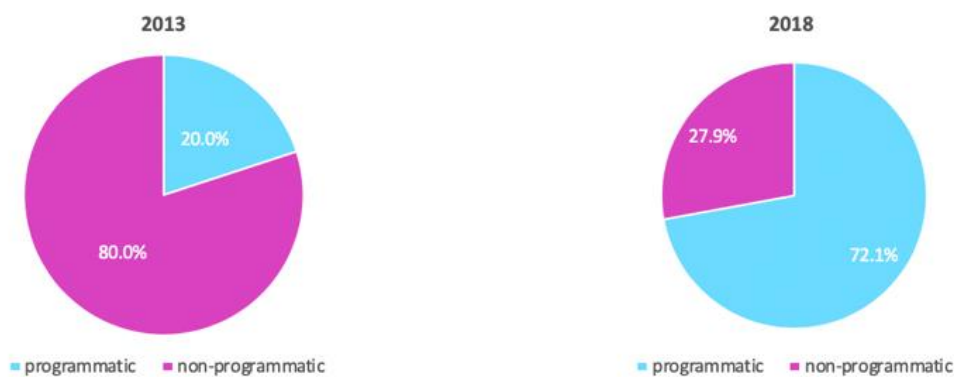
<sup>14</sup> Bucher Taina (2017) The algorithmic imaginary: Exploring the ordinary affects of Facebook algorithms. *Information, Communication & Society* 20 (1): pp. 30–44.

<sup>15</sup> Couldry N and A Hepp (2013) Conceptualizing mediatization: Contexts, traditions, arguments. *Communication Theory* 23 (3) pp. 191–202.

<sup>16</sup> Couldry N and J Yu (2018) Deconstructing datafication's brave new world. *New Media and Society* 20: pp. 4473–4491. The authors add an imperative (must be converted) to their definition. This alludes to the observation that datafication is not optional, but mandatory.

are not only supported by data (e.g. audience statistics), but increasingly dependent on data to operate. Content recommendation algorithms that enable particular patterns of mediatisation rely on behavioural data, quality of service statistics, content metadata and other sources in order to make their basic proposition possible in the first place. Similarly, advancements of technology and expectations of return of investment by marketers have changed how value is generated in digital advertising. In 2018, 72.1% of digital advertising<sup>17</sup> was transacted programmatically, using data and algorithms to target audiences and optimise the campaign.

**Figure 1. Digital advertising spend by transaction mechanism**



Source: IAB Europe

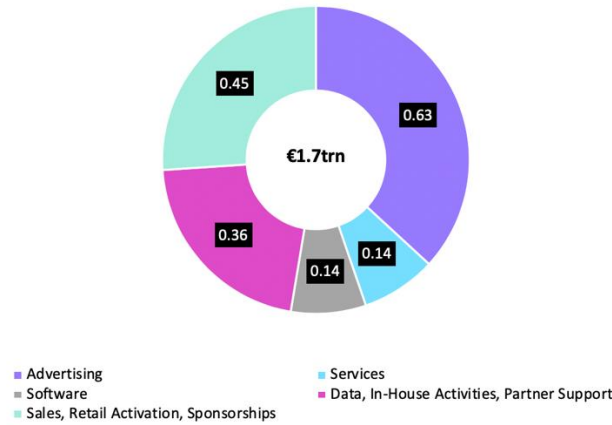
This has two implications: First, the willingness to pay for advertising on a given publisher website means that the value lies not just in the editorial context or the audience but is co-defined by data about that audience. Secondly, data itself now have crucial value: the value of the data surrounding an advertising placement can be higher than the advertising placement itself. For publishers, this completely changes the economics of content monetisation.

The role of data is not confined to programmatic advertising. It extends further across the wider marketing ecosystem. Advertising (including programmatic) accounts for roughly one third of all marketing investments. Other areas like software and data by their very definition are data-centric. And in particular sales and retail activation are increasingly data-driven.

<sup>17</sup> Banner, video and social, excl. paid-for search and classifieds & directories. Source: IAB Europe.

Figure 2. Global marketing expenditure by type

Global Marketing Expenditure 2019



Source: GroupM

### 3.3.3. Algorithmisation

The third force, algorithmisation, can be used to describe the computational logics that turn data into decisions. A useful way to understand algorithms in the context of media is to recognise that they are both technical systems and also shaped by human assumptions and business rationales encoded in them. As technical systems, algorithms are ‘performative infrastructures’<sup>18</sup> in the sense that they modulate social and economic outcomes. For instance, the sheer volume of data in programmatic advertising means that it is often not economically viable for either the buyer or the seller to scan the entire market before entering into an agreement (i.e. buying/selling advertising inventory). Instead, filtering algorithms are used that look at past purchase patterns and other factors to tell buyers what supply to look at, and that instruct sellers which demand sources they should consider. This step decouples a direct relationship between supply and demand and inserts algorithmic gatekeepers that determine what the market looks like and how different market participants are evaluated. This practice is neither inherently good nor bad. Primarily, it illustrates the role that algorithms take in making markets and ensuring their operation in a data-rich and ever more complex media supply chain. However, it raises a fundamental question about where market knowledge is located in the value chain, how decisions about what constitutes economic value are generated, and how accountable decision-making processes are. Transparency about the rules and processes underlying these decisions has become a key debate in advertising. For instance, without sufficient

<sup>18</sup> Thrift N (2005) *Knowing capitalism*. London: SAGE.

transparency, it is unclear to publishers how they can attract more ad spend, and at fair prices.

Generally, algorithms have a capability for (autonomous) decision-making, which generates flexible and often unpredictable consequences. This is particularly evident in the notion of cognitive automation, often subsumed under the label 'AI' (artificial intelligence) where feedback loops to self-improve create systems possessing a logic emancipated from the original code by which they were conceived.<sup>19</sup> This can produce various types of bias and harm, as Noble<sup>20</sup> demonstrates through her analysis of how search engines reproduce racial stereotypes. Those who write algorithms and contribute to the design of cognitive systems themselves also encode moral judgments, lay-sociological and lay-psychological assumptions, economic objectives and many other factors. For instance, the proverb 'opposites attract' has been translated into the matchmaking criteria of dating websites<sup>21</sup>, and Alaimo<sup>22</sup> has shown empirically how online companies select particular design infrastructures and assumptions of personal relevance for consumers that are encoded into their platforms. An example of how the combination of technical and human factors generates desired economic outcomes is the concept of an optimisation logic. Media platforms usually operate on the basis of business principles that their algorithms optimise for, such as maximising engagement, time on platform or other criteria.<sup>23</sup>

Beyond platforms, media economics are becoming increasingly dependent on algorithms as the example of programmatic advertising shows. For instance, advanced advertisers now use custom algorithms to replace the out-of-the box algorithms of the trading platform they are using. These custom algorithms allow them to better represent their business objectives in the buying of advertising inventory. This culminates in relatively new business practices like 'supply path optimisation'. Here, advertising professionals use a mixture of data science and business domain expertise to optimise the routes that buying an ad takes out of thousands of possible options - from brand and agency, to a complex array of technical intermediaries. Some publishers have adopted similar practices to adjust their prices dynamically to demand and to select those advertisers most beneficial to them ('demand preference optimisation'). This means that the ability to create and maintain a pluralistic media ecosystem is connected to the ability to engage with the algorithmic infrastructure that underpins the advertising business model of publishers.

### **3.4. From interface to infrastructure: Multi-level media pluralism**

In order to address media pluralism from an economic perspective in a digital world, it is critical to consider how mediatisation, datafication and algorithmisation interact with one

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<sup>19</sup> Lewis M (2014) *Flash boys: Cracking the money code*. New York, NY: Allen Lane.

<sup>20</sup> Noble S (2018). *Algorithms of Oppression*. New York: New York University Press.

<sup>21</sup> Ayres I (2008) *Super crunchers: How anything can be predicted*. London: John Murray.

<sup>22</sup> Alaimo C (2014) *Computational consumption: Social media and the construction of digital consumers*. Phd, The London School of Economics and Political Science (LSE). Available at <http://etheses.lse.ac.uk/975/>.

<sup>23</sup> <https://medium.com/@francois.chollet/what-worries-me-about-ai-ed9df072b704>.

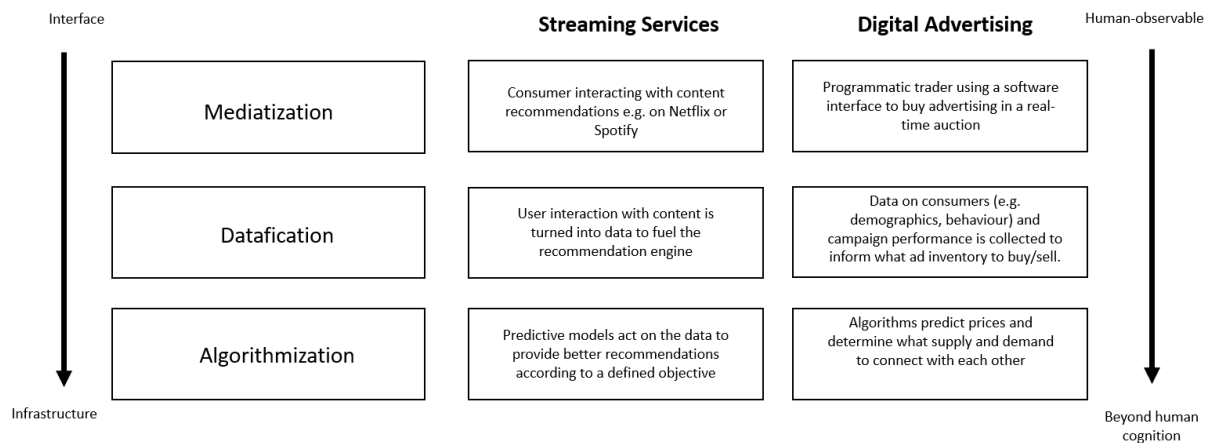


another. These three aspects can be classified on a spectrum of interface and infrastructure, i.e. what happens in the realm of the screen and can be directly perceived by end users (consumers or business users), and what is happening behind the scenes on the level of the infrastructure. This infrastructure is typically removed from broader access – either by design or for legal reasons, or because the decisioning logic of machines is cognitively too complex for human agents to understand. As the role of data and algorithms suggests, processes at the infrastructural level are growing in importance:

*“[m]ost of the communication will be automated between intelligent devices. Humans will intervene only in a tiny fraction of that flow of communication. Most of it will go on unsensed and really unknown by humans.”<sup>24</sup>*

In a digital economy, discussions of media pluralism need to consider how each of these layers may play a role in enabling or constraining plurality. All three layers are intertwined. For instance, access to data may affect the quality of machine-learning models designed to optimise advertising revenue. The amount of controls and insights offered in a digital advertising trading dashboard may enable an advertiser or publisher to determine what is happening ‘under the hood’ and claim control over economic fortunes, or remain disconnected from the real mechanics of the trade in a ‘vanity dashboard’. Similarly, the optimisation logic encoded in a video streaming recommendation algorithm may prioritise or deprioritise certain types of content without the user’s knowledge or their ability to intervene.

**Figure 3. Interface and infrastructure**



Source: author’s own depiction

The interplay of these three layers also means that issues potentially affecting media pluralism may be generated in a different layer than the one in which they appear. For

<sup>24</sup> Hayles interviewed in Gane et al (2007) Ubiquitous surveillance: Interview with Katherine Hayles. *Theory, Culture & Society* 24 (7–8), p. 350.

policymakers, it is therefore important to grasp the concepts, processes and economics of each layer. The issue they seek to monitor or change may be rooted in different issues than where they are visible.

### 3.5. Pluralism in algorithmic media – learnings from digital advertising

Pluralism in algorithmic media is not just an abstract concept. Observations from the practical experience of media economics highlight potential areas of consideration for scholars of media pluralism. Programmatic advertising is a particularly suitable case study. This is not because it positively or negatively affects media pluralism. But because all three layers of mediatisation, datafication and algorithmisation are well-developed, the ecosystem of market participants is particularly complex, and the industry and market participants have developed tactics and strategies to manage complexity and reveal the often algorithmic principles that govern the marketplace. Programmatic advertising has itself been subject to analyses relating to transparency and competition issues, especially the role of platforms within its ecosystem.<sup>25</sup> Attempts in the industry to address these challenges add to the suitability of programmatic advertising as a “bellwether” for issues and potential remedies set to affect discussions across the wider media industry in coming years.

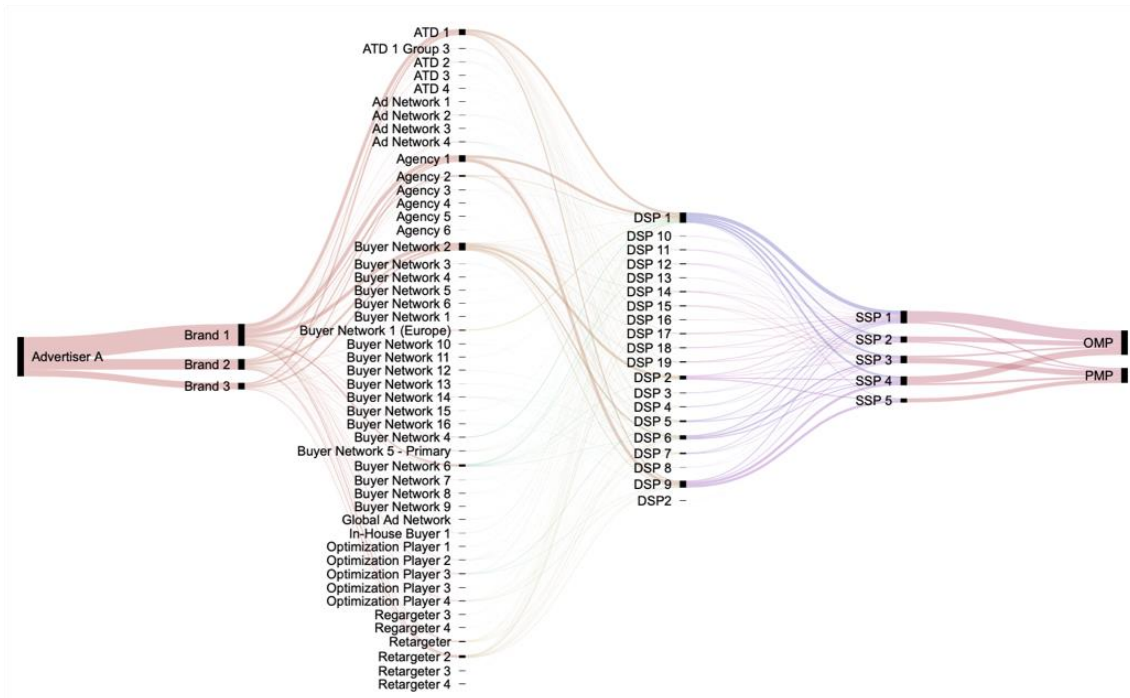
Crucially, data and algorithms hold the key for institutional knowledge about advertising. Institutional knowledge refers to the systematic knowledge on how the marketplace operates and the ability to convert that knowledge into economic practice. The system of programmatic advertising has democratised access to global supply and demand of advertising: it has created a large and open marketplace, where, at least in theory, every buyer can now connect with every seller and vice versa. At the same time, both advertisers and publishers have realised that in order to succeed in the market, they need data and, as mentioned above, potentially even custom algorithms. Programmatic systems provide potentially increasingly rich sources of data for reporting, analytics and optimisation. But they are often unstandardised and only provide a partial view. This poses challenges for market participants. The programmatic supply chain has been described as “murky”.<sup>26</sup> It features a host of different intermediaries and potentially millions of paths between advertiser and publisher. This creates inefficiencies and market opacity, amplifying the power of “infrastructure”. For instance, the chart below was generated from API data and extensive cleaning from several sell-side technologies. It shows the different paths between a single advertiser (left) and publisher (right) during a single week.

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<sup>25</sup> See for instance: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

<sup>26</sup> See for instance: <https://rubiconproject.com/insights/thought-leadership/bringing-clarity-to-a-murky-programmatic-supply-chain/> and <https://www.forbes.com/sites/avidan/2017/05/29/a-new-study-zeroes-in-on-the-murky-world-of-programmatic-buys/>.

**Figure 4. Programmatic supply chains**



Source: *The Guardian & Ecuity*

A functioning market requires that market participants are able to interpret the market and make decisions accordingly. From a media plurality perspective, it is vital to prevent a division into data-rich and data-poor. Fundamentally, this means that publishers need to be able to develop unique data sets that allow them to attract advertiser demand, and to invest in the analytical and data science skills needed to peek behind the interfaces of reporting dashboards and make use of the data generated by the wider programmatic trading systems. A key challenge many publishers face today is not the availability of data, but a paucity of skills needed to analyse and act on the data. The economic fortunes of advertising-funded publishers are not just determined by the quality of content, or even the ability to use data to convert it into an attractive advertising proposition, but also by the ability to analyse a market whose logic resides in technical systems and algorithms.

The need for not just data, but methods and capabilities of interpretation, is an area of growing importance for understanding media plurality in a digital media environment. For instance, the phasing out of third-party cookies moves existing methods of data-driven advertising (also beyond programmatic) to a world where consumers are anonymous by default. This enhances data protection and privacy. It also means that the industry will increasingly rely on machine-learning models and more sophisticated algorithms to analyse aggregated advertising performance data and draw conclusions from it. However, skills and tools to do so are not evenly distributed. In this environment, media plurality is connected to the ability to have access to, and interpret, the algorithmic models that determine how ad spend is allocated and value is generated.

### 3.6. Implications for policymakers and academics

The issues unfolding – and being addressed – in the domain of advertising are a precursor to problems and potential solutions in other areas of media. For instance, the need to be in control of data and to understand or shape the decisioning logic of machine-learning models is a key issue for content discovery on streaming platforms or the ability of publishers to optimise and benchmark their subscription offerings.

A range of studies has been conducted to understand the economics and role of market participants in programmatic advertising.<sup>27</sup> Blockchain-based approaches have also been deployed to track advertising transactions and help with industry transparency. However, despite commendable effort and insight, such approaches can only depict part of the economic landscape in media markets that rely on mediatisation, datafication and algorithmisation. Fundamentally, they can only record what is directly observable and struggle to reach the heart of the infrastructure that is hidden from view or so complex that it is hard for human observers to process. They may even provide inaccurate information for decision-making. This means that as all media markets become further embedded in data and algorithms, there is increasing urgency around the need for new methods to make robust decisions about the operation of the market – for the media industry itself, but also for policy-makers, regulators and academics studying the issue of media pluralism.

Such new approaches do exist. For instance, advertising optimisation specialists on both the advertiser and the publisher side are using techniques from the forensic analysis of platform economics. A cornerstone of such approaches is experimentation.<sup>28</sup> Here, data scientists inject stimuli into the market, for instance by changing prices or switching off buying paths. These stimuli follow statistical recipes and come in vast scale – often thousands at a time. Scientists then analyse the feedback from these experiments in the data reporting from advertising intermediaries. This provides proxies to the underlying algorithmic logic of the market and hidden market factors. Several cottage industries in the field of media and advertising have used versions – albeit simpler – of this approach for years. Practitioners in search engine optimisation have deployed experiments to see how to obtain the best rank in a search engine. Similarly, influencers monitor through tests and shared experiences how their content performs when YouTube changes the parameters of its algorithm. For even longer, such principles have been prominent in media art, where as a form of subversive practice, “glitches” have been produced to generate a view from the interface into the infrastructure:

*“A glitch is a mess that is a moment, a possibility to glance at software’s inner structure, whether it is a mechanism of data compression or HTML code. Although a glitch does not reveal the true functionality of the computer, it shows [how] digital spaces are organized.”<sup>29</sup>*

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<sup>27</sup> See most recently: <https://www.isba.org.uk/media/2424/executive-summary-programmatic-supply-chain-transparency-study.pdf>.

<sup>28</sup> The Harvard Business Review recently dedicated a whole issue to the notion of experimentation in the digital economy, and its role in generating competitive advantages. See: <https://hbr.org/2020/03/productive-innovation>.

<sup>29</sup> Goriunova O and A Shulgin (2008) Glitch. In *Software Studies: A Lexicon*, edited by Matthew Fuller, p. 114.

Experimentation approaches then are a critical contribution to how, true to Weizenbaum's call for action, human agents can exert sovereignty over computers and their decisions.

Policymakers, regulators and academics often do not possess such tools for experimentation at scale. But they can adopt standards, tools and best practices from within the media industry and advance their ability to understand the increasingly complex dynamics of markets that are out of grasp even for experts. Precedents are available in the financial industry. In order to come to terms with the complexity of financial technology and volume of data, financial regulators have entered public-private partnerships with "regulation tech" providers.<sup>30</sup> Such models, while not the only approach, can ensure policy, regulatory and academic insight into the economics of media markets remains relevant.

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<sup>30</sup> Yang, Alex Yueh-Ping and Cheng-Yun Tsang. 2018. RegTech and the New Era of Financial Regulators: Envisaging More Public-Private Partnership Models of Financial Regulators. *University of Pennsylvania Journal of Business Law*, 21 (2).



## 4. Media pluralism from a legal perspective

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*Christina Etteldorf, Institute of European Media Law (EMR)*

### 4.1. European and national law on media mergers and media concentration

Standards and instruments for safeguarding media diversity also exist at the European level. The IRIS *Special 2016-2* report, “Media ownership - market realities and regulatory responses”<sup>31</sup>, examined them in particular from the point of view of fundamental rights, jurisdictional considerations and EU competition law, which remains highly relevant and makes it necessary to deal with the issue again, not least because of developments in the media market.

The fundamental rights framework for safeguarding diversity enshrined in Article 10 of the European Convention on Human Rights (ECHR)<sup>32</sup> and Article 11(2) of the Charter of Fundamental Rights of the European Union (CFR)<sup>33</sup> as well as the relevant decisions of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) show the fundamental importance of guaranteeing diversity in the democratic system. The ECtHR has concluded that the protection of media diversity is a basic condition of media freedom<sup>34</sup> and that there is no democracy without pluralism.<sup>35</sup> Here, safeguarding media diversity has not just a protective dimension; the ECtHR understands states to be the “ultimate

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<sup>31</sup> See on this and the following, together with further references, European Audiovisual Observatory, Strasbourg (2016) Media ownership - market realities and regulatory responses. In IRIS Special 2016-2. Maja Cappello (Ed.). See in particular section 2, pp. 17 ff.

<sup>32</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms in the version of Protocols Nos. 11 and 14. Available at [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>33</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A12012P%2FTXT>.

<sup>34</sup> See on this ECtHR, Application No. 37374/05, *Társaság a Szabadságjogokért v. Hungary*; Application No. 17207/90, *Informationsverein Lentia and Others v. Austria*; Application No. 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*; Application No. 13936/02, *Manole and Others v. Moldova*; Application No. 48876/08, *Animal Defenders International v. the United Kingdom*.

<sup>35</sup> ECtHR, Application No. 13936/02, *Manole and Others v. Moldova*, para. 95.

guarantors” of media pluralism, and so they must create both a legal and a practical framework to enable the public to access impartial information and a range of opinions and debate which, among other things, reflect the diversity of political outlook within a country.<sup>36</sup> Particular importance is attached to audiovisual media as the ECtHR considers them to have a particularly high penetration level.<sup>37</sup>

The ECJ also recognises that media pluralism is linked to freedom of expression, guaranteed by Article 10 ECHR and Article 11 CFR, and, in particular, that a cultural policy that pursues the objective of ensuring pluralism as a compelling reason in the general interest may justify restrictions on freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union<sup>38</sup>).<sup>39</sup> From the point of view of fundamental rights, safeguarding media diversity is therefore not only a guiding principle and recognised public interest objective but also entails obligations at the EU level to provide protection. Although these obligations result from European legal bases, they are not directed at the EU as a player but at the member states. In particular, Article 11 (2) CFR, which stipulates that the Union shall respect pluralism in the media, does not change the existing competence structure, which is based on the principle of limited individual empowerment and provides for limited powers in the media sector in connection with single market competence and competition policy. In particular, there is no regulatory competence to actively protect media diversity, so this task remains with the member states. This is also supported and substantiated by Article 167 TFEU, which shows that active European media regulation in the sense of the standardisation of cultural aspects is not desired and that the EU’s competence in this respect is more limited to promotional measures.

Although the aim of EU competition policy is not directly to create pluralism in the media, it affects this area at least indirectly. It is not aimed at the media in their function as a cultural asset but as an economic asset, in other words their involvement in economic transactions in the internal market in the same way as all other businesses. This does not involve regulation of journalistic competition. Nonetheless, the influence of competition law on the shaping of the media landscape should not be underestimated, since properly functioning free competition in the internal market is an important factor in ensuring media pluralism in the sense of a dualism of market power and the control of power over opinion-forming. With the instruments of market power control (ban on cartels under Article 101

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<sup>36</sup> Op. cit., para 107.

<sup>37</sup> ECtHR, Application No.17207/90, *Informationsverein Lentia and Others v. Austria*, para. 38; Application No. 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, para. 73.

<sup>38</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ EU C 202 of 7.6.2016, pp. 47-390, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC>.

<sup>39</sup> See on this ECJ, Case 353/89, *Commission v. The Netherlands*, para. 30; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariaat voor de Media*, para. 23; Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, para. 9; Case C-23/93, *TV10 SA v Commissariaat voor de Media*, para. 18; Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, para. 19; Case C-250/06, *United Pan-Europe Communications Belgium SA and Others v. État belge*, para. 41; Case C-336/07, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG v. Niedersächsische Landesmedienanstalt für privaten Rundfunk*, para. 37; Case C-87/19, *TV Play Baltic AS v. Lietuvos radijo ir televizijos komisija*, para. 38. A detailed discussion on its importance in practice can be found in Cole M.D., *Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit*, <https://emr-sb.de/wp-content/uploads/2020/06/Zum-Gestaltungsspielraum-der-EU-Mitgliedstaaten-bei-Einschr%3a4nkungen-der-Dienstleistungsfreiheit.pdf>.



TFEU, ban on abuse of a dominant position under Article 102 TFEU and merger control under the Merger Regulation)<sup>40</sup>, the European Commission can to some extent exert (limited) influence on companies' power to form opinions if they adopt or would adopt a dominant position in a specific market. The definition of the relevant market is therefore essential and is characterised by several specific features in the media sector. On the one hand, the media operate in a two-sided market consisting of the audience market and the advertising market, where they compete with each other for attention and advertising revenues. Both markets are also important in the context of guaranteeing diversity of opinion, since diversity is only present where content reaches an audience, and the (re)financing of content also directly affects the existence of media providers. On the other hand, the media sector is characterised by (increasing) media convergence, which leads to a blurring of the boundaries between different forms of transmission, types of offering and providers, and has led to the considerable influence of gatekeepers such as search engines and other platforms.

A detailed analysis of the relevant decisions in the IRIS *Special* 2016-2 report showed that the Commission nonetheless continues<sup>41</sup> to distinguish significantly between the markets for free-to-air TV, pay TV and the purchase of transmission rights and, in particular, still insists on the separation of the online and offline markets. By contrast, media convergence, which plays a major role in ensuring diversity because of the recipient's level of understanding, which is (also and above all) relevant here, plays only a minor role in economically driven EU competition law. For this reason, and also because the objective of antitrust measures is to create fair conditions from an economic point of view and, notably, not to ensure the existence of diversity, EU antitrust law is therefore not a suitable or sufficient means to bring about diversity in the media sector.

## 4.2. Possibilities of promoting media diversity under EU state aid law

The provision of an active guarantee of pluralism at member state level is limited by another area of EU competition law. State aid law sets out rules on how member states can introduce financial and comparable support measures. In contrast to media concentration law, state aid law is particularly relevant with regard to maintaining externally pluralistic

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<sup>40</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation; text with EEA relevance), OJ L 24, 29.1.2004, pp. 1–22. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0139>.

<sup>41</sup> This was also confirmed in subsequent decisions: in the Walt Disney Company / Twenty-First Century Fox case (M.8785) of 6.11.2018, the Commission insisted on the separation of digital and physical forms of film distribution. Cf. para. 50. Available at [https://ec.europa.eu/competition/mergers/cases/decisions/m8785\\_2197\\_3.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8785_2197_3.pdf); In the Sky / Fox case (M.8354) of 7.4.2017, it insisted on differentiating between the commissioned production of TV content and the licensing of broadcasting rights to pre-produced TV content, cf. para. 62. Available at [https://ec.europa.eu/competition/mergers/cases/decisions/m8354\\_920\\_8.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8354_920_8.pdf).

structures in the context of the financing of offerings or providers by means of subsidies or other forms of financial relief.

Article 107(1) TFEU prohibits state aid in the EU as a matter of principle because it favours certain undertakings, sectors or industries over competitors and consequently (may) distort free competition in the European internal market, insofar as the distortion adversely affects trade between member states. The concept of state aid must be interpreted broadly and covers all support granted to undertakings by public authorities.<sup>42</sup> This includes both direct support, for example in the form of financial contributions, and indirect support, such as tax breaks or other forms of relief that benefit the recipient, irrespective of the reason for, or purpose of, the support. There is (a threat of) distortion of competition in the sense of an impact on trade between member states if the aid affects trade in goods or services by favouring certain businesses in such a way that transport within the Union develops or could develop differently from the way it would have without the benefit, leaving purely domestic effects out of account. This includes, for example, the state or state-sponsored financing of public service broadcasting<sup>43</sup> and film support schemes in member states.<sup>44</sup> The question of whether other financing or support models are also covered by this definition cannot be answered in general terms but depends – outside the limits of *de minimis* aid<sup>45</sup> – in particular on the cross-border relevance of the respective measure<sup>46</sup>, which is, however, also interpreted broadly by the European Commission<sup>47</sup>. The attractiveness of media also as advertising platforms for international companies may suggest such relevance.

There are no general sectoral exceptions from the state aid rules for the cultural sector<sup>48</sup> but there are exceptions to the basic prohibition of state aid, which the Commission must approve (Article 107(2) TFEU) or may approve (Article 107(3) TFEU). In the media sector, Articles 106(2), 107(3)(d) and 107(3)(c) TFEU in particular are relevant on this matter.

For companies entrusted with the operation of services of general economic interest, Article 106(2) TFEU allows member states to make an exception - a possibility they mainly take advantage of in order to finance public service broadcasting. The parameters to be taken into account in this context are specified in case practice and in a Commission

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<sup>42</sup> See for example ECJ, judgment of 7 March 2002, Case C-310/99, *Italian Republic v. Commission of the European Communities*.

<sup>43</sup> See on this, for example, the Commission's arguments in the proceedings concerning the German broadcasting contribution, Commission Communication of 24 April 2007, K(2007) 1761 final, – State aid E 3/2005 (ex CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 and CP 195/2004) – Financing of public service broadcasters in Germany.

<sup>44</sup> See Cole M.D. (2019) *Filmförderung und Europarecht – ein Überblick. UFITA 83(2)*, pp. 520-535; Etteldorf C. (2019) *Das Recht der Filmförderung im europäischen Vergleich UFITA 83(2)*, pp. 536-542.

<sup>45</sup> A limit on the applicability of Article 107(1) TFEU of EUR 200 000 or EUR 500 000, respectively, is set by Regulation (EU) No. 360/2012 on the application of Articles 107 and 108 TFEU to *de minimis* aid granted to undertakings (for services of general economic interest, OJ L 114 of 26.4.2012, pp. 8–13) and the (more general) *de minimis* Regulation (EU) No. 1407/2013 (OJ L 352, 24.12.2013, pp. 1–8).

<sup>46</sup> With regard to measures to support local and regional media, see Ukrow J. and Cole M.D. (2019) *Aktive Sicherung lokaler und regionaler Medienvielfalt*. *Schriftenreihe der TLM* 25, pp. 73 ff.

<sup>47</sup> See for example ECJ, judgment of 29 April 2004, Case C 298/00 P, *Italy v. Commission*, para. 49 concerning the Commission's decision 98/182/EC of 30 July 1997 (OJ 1998, L 66, p. 18).

<sup>48</sup> ECJ, judgment of 28 January 1999, T-14/96, *Bretagne Angleterre Irlande (BAI) v. Commission of the European Communities*.

Communication.<sup>49</sup> The importance of public service broadcasting for the promotion of cultural diversity and the possibility for member states to take measures to increase diversity are emphasised.<sup>50</sup> With regard to the establishment of financing systems, the Commission above all requires independent control, transparency and measures against overcompensation, but only to a limited extent examines the reasons for providing the funding, that is to say the details of the contract. It requires that the design of the funding models take into account the competitive relationship with commercial broadcasters and the print media, which can potentially be adversely affected by state funding of public service broadcasting when it comes to the development of new business models. As commercial broadcasters also enrich the cultural and political debate and broaden the choice of content, their protection must be taken into consideration as well.<sup>51</sup>

It is precisely these commercial media which are eligible for support, in the light of the need to ensure diversity, in particular under Article 107(3)(d) TFEU, which allows aid to promote culture and heritage conservation if such aid does not affect trading conditions and competition in the EU to an extent contrary to the common interest. The concept of culture is defined in parallel with the respective concepts in Article 167 TFEU and thus also covers in particular the promotion of artistic and literary creation, including journalistic and editorial activities, in a broadly defined audiovisual sector that in particular covers all broadcasting.<sup>52</sup> When it has examined cases in the past, the Commission has partially considered support for media with reference to Article 107(3)(d) TFEU, a narrow interpretation of which results in the examination focusing on the content and nature of the “product” rather than on the media or its distribution as such.<sup>53</sup> The support measure must therefore have a cultural emphasis, so support for an overall activity that includes both cultural and commercial aspects is in principle not possible. Conditions and limits specific to the film industry and other audiovisual works are set out in a Commission Communication<sup>54</sup>, but support for audiovisual production is also, and specifically, seen as an appropriate means of promoting the diversity and richness of European culture.<sup>55</sup> The Commission also applies the criteria set out in the Communication to support for certain broadcast programmes and, by analogy, to radio programmes when they are connected to them.<sup>56</sup>

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<sup>49</sup> Especially the Commission Communication on the application of state aid rules to public service broadcasting, OJ C 257 of 27.10.2009, pp. 1–14. Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC1027\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC1027(01)); And decisions in individual cases (for a list, see [http://ec.europa.eu/competition/sectors/media/decisions\\_psb.pdf](http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf)).

<sup>50</sup> Commission Communication (op. cit), para. 13.

<sup>51</sup> Commission Communication (op. cit), para. 16.

<sup>52</sup> For a more in-depth discussion of this, see Ress G. and Ukrow J., “Art. 167 AEUV” in Grabitz E., Hilf M. and Nettesheim M. (eds.), *Das Recht der Europäischen Union: Grundwerk zur Fortsetzung*, paras. 128 f.

<sup>53</sup> Decision of 1 August 2016, C(2016) 4865 final, State aid SA.45512 (2016/N). The case concerned aid for print and digital media in minority languages.

<sup>54</sup> Commission Communication on state aid for films and other audiovisual works, OJ C 332 of 15 November 2013, pp. 1–11. Available at [https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:52013XC1115\(01\)](https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:52013XC1115(01)); In the version of Commission Communication 2014/C 198/02, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0627\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0627(02)).

<sup>55</sup> Commission Communication (op. cit), para. 4.

<sup>56</sup> See the decision of 27 February 2008 in case E 4/2005 – *Ireland*, COM (2008) 723 final, which already established this with reference to the previous version of the Cinema Communication.

In the context of the coronavirus pandemic that has spread across Europe in 2020 and has severely, and probably permanently, affected the media sector as a result of the collapse of advertising revenues, mention may be made of current debates on ways of providing support for media, which must (also) take into consideration EU state aid law. The pandemic threatens not only the existence of individual media undertakings but also the diversity of the media sector. Many member states have enacted support measures to counter this threat.<sup>57</sup> For example, Denmark has set up a “COVID 19 compensation plan” for the media sector (print media, electronic media, broadcasting, etc.) amounting to the equivalent of about EUR 32 million, which was notified to the Commission. In a decision of fundamental importance, the Commission considered this to be aid within the meaning of Article 107(1) TFEU but held it to be lawful under Article 107(2)(b) TFEU as so-called rescue aid in its specific, compensatory form.<sup>58</sup> While the Commission predominantly based its assessment on economic factors, the Danish government mainly stressed in the proceedings the need for state support in view of the importance of cultural diversity as an essential asset in a democratic society, which requires there to be a balance of publicly funded and private media. Cases concerning aid for the media sector in view of Covid-19 are also pending in other member states.<sup>59</sup>

Regarding EU state aid law, the overlaps between the promotion of diversity and competition law become very clear. The promotion of media pluralism through state funding remains possible, but there are limits to it.

### **4.3. Reference points for the promotion or protection of diversity in existing and future EU law**

In addition to establishing reference points for the creation or safeguarding of media diversity, secondary law also contains a number of criteria that address pluralism from very different points of view. The following is therefore intended to provide an overview of the relevant provisions, showing what different forms of pluralism exist, what protection objectives they pursue and how differently they impact the media sector.

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<sup>57</sup> See on this the European Audiovisual Observatory’s tracker on Covid-19 measures in the audiovisual sector. Available at <https://www.obs.coe.int/en/web/observatoire/covid-19-audiovisual-sector-measures>; and Ukrow J. (2020) Schutz der Medienvielfalt und medienbezogene Solidaritätspflichten in Corona-Zeiten. *Impulse aus dem EMR*. Available at <https://emr-sb.de/wp-content/uploads/2020/03/EMR-Impulse-Vielfalt-Corona-200330.pdf>.

<sup>58</sup> Decision of 28 May 2020, SA.57106, C(2020) 3566 final. Available at [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_57106](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_57106).

<sup>59</sup> SA.57601 concerning the French compensation fund for the audiovisual sector. Available at [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_57601](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_57601); SA.57536 concerning the Italian package of measures, which also covers the media sector. Available at [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_57536](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_57536).

### 4.3.1. European Electronic Communications Code

The European Electronic Communications Code (EECC)<sup>60</sup> entered into force on 21 December 2018. It both amended in particular Directives 2002/19/EC (Access Directive), 2002/20/EC (Authorisation Directive), 2002/21/EC (Framework Directive) and 2002/22/EC (Universal Service Directive), and merged them into a comprehensive set of rules for telecommunications services.

Although the Code essentially regulates electronic communications networks and services, that is to say transmission paths and technical services, it contains provisions that are relevant in the context of ensuring pluralism in the media sector.

According to Article 61(2)(d) EECC (formerly Article 5(1)(b) of the Access Directive), the member states' regulatory authorities can order undertakings with significant market power to grant digital radio and television services and related complementary services access to application program interfaces (APIs) and electronic programme guides (EPGs) on reasonable and non-discriminatory terms. In addition, under Article 114(1) EECC the member states can provide in their domestic law for so-called "must carry" obligations, in other words oblige network operators to transmit specified radio and television channels and related complementary services. These provisions are aimed in particular at operators of cable TV networks, IP TV, satellite broadcasting networks and terrestrial broadcasting networks and may also apply to operators of other networks if they are (or may be in the future) used by a significant number of end-users as their principal means of receiving radio and television channels.

In each case, the imposition of obligations is subject to the condition that they are necessary for an (explicitly defined) objective of general interest, proportionate and transparent. Such an objective can, as described in section 3.1 in the context of fundamental rights, also be the safeguarding of pluralism – and it is the case in practice primarily with regard to must-carry regulations. Accordingly, the rules were also introduced because the member states must, in consideration of their cultural sovereignty, be able to ensure that certain programmes, and especially the information they contain, are accessible to a wide audience.<sup>61</sup>

The member states have made use of this possibility in different ways but have essentially followed the wording of the (previously applicable) directives.<sup>62</sup> The EECC, which must be transposed by 21 December 2020, significantly adds to the existing provisions:

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<sup>60</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

<sup>61</sup> See on this European Audiovisual Observatory (2005) To Have or Not to Have Must-Carry Rules. *IRIS Special 2005*. EAO: Strasbourg. Available at <https://rm.coe.int/168078349b>.

<sup>62</sup> For a detailed discussion on Article 31 of the Universal Services Directive, see European Audiovisual Observatory (2015) Access to TV platforms: Must-carry rules, and access to free-DTT. Available at <https://rm.coe.int/16807835e4>.

Article 5(1)(b) Access Directive	Article 61(2)( d) EECC
<p>In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:</p> <p>[...]</p> <p>(b) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms.</p>	<p>In particular, without prejudice to measures that may be taken regarding undertakings designated as having <b>significant market power</b> in accordance with Article 68, national regulatory authorities, <b>or other competent authorities in the case of points (b) and (c) of this subparagraph</b>, shall be able to impose:</p> <p>[...]</p> <p>(d) to the extent necessary to ensure accessibility for end-users to digital <b>radio</b> and television broadcasting services <b>and related complementary services</b> specified by the Member State, obligations on operators to provide access to the other facilities referred to in Part II of Annex II on fair, reasonable and non-discriminatory terms.</p>
Article 31(1) Universal Services Directive	Article 114(1) EECC
<p>Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.</p> <p>Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent.</p> <p>[...]</p>	<p>Member States may impose reasonable "must carry" obligations for the transmission of specified radio and television broadcast channels <b>and related complementary services, in particular accessibility services to enable appropriate access for end-users with disabilities and data supporting connected television services and EPGs, on undertakings under their jurisdiction</b> providing electronic communications networks and services used for the distribution of radio or television broadcast channels to the public, where a significant number of end-users of such networks and services use them as their principal means to receive radio and television broadcast <b>channels</b>. Such <b>obligations</b> shall be imposed only where they are necessary to meet general interest objectives <b>as clearly defined by each Member State</b> and shall be proportionate and transparent.</p>

In addition to the now explicit call for the objective to have a legal basis and the demand that the review clause (Article 114(2) EECC) be clarified in relation to Article 31 of the Universal Service Directive, the amendments mainly concern the inclusion of "complementary services" in the must-carry provisions. Such complementary services may include programme-related services specifically designed to improve accessibility for end-users with disabilities (e.g. teletext, subtitling for deaf or hearing impaired persons, audio

description, spoken subtitling and sign language interpretation) and may if necessary include access to the source data, as well as programme-related connected-TV services.<sup>63</sup> Programme-related data means data necessary to support connected-TV functions and electronic programme guides and (should) normally include information on programme content and means of access.<sup>64</sup> This mainly takes account of any further development in the field of audiovisual media, which have long since ceased to consist solely of image and sound and may also display further information, based on their users' interests, in their programme metadata.

From the perspective of the EECC, the question of diversity is therefore addressed by regulating the means of transmission, the aim being to ensure accessibility for the population, which guarantees pluralism of opinions and the diversity of forums in which they may be expressed.

### 4.3.2. Audiovisual Media Services Directive

Unlike the other aforementioned provisions of secondary legislation, the Audiovisual Media Services Directive explicitly covers the media and not the co-regulation of specific media aspects. The original aim of the Television without Frontiers Directive was the adoption of measures to ensure the transition from national markets to a common market for the production and distribution of programmes and to guarantee fair competition without prejudice to the function of television as a means of safeguarding the general interest.<sup>65</sup> Therefore, the key issue was not (and still is not) the creation of rules on culture policy but rather to remove obstacles to, and enable the free movement of, television as a “service” in the European internal market. Regulations that directly pursue the objective of creating or safeguarding diversity in audiovisual media are thus still not included in the directive, even though mention is made in several places of safeguarding diversity as a fundamental EU objective and asset, albeit primarily in the context of the possibilities and objectives of the member states (or as an overarching regulatory objective).<sup>66</sup> Rather, Recitals 19 and 94 make it clear that the directive does not affect the competence of the member states in this respect and that it remains possible for there to be both independent cultural developments in the member states, and for cultural diversity in the EU to be preserved.

However, in particular the reform of the directive in 2018 introduced rules providing a starting point for member states to ensure diversity, either by actively promoting certain media content or by limiting certain negative developments or threats (also in the light of

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<sup>63</sup> See on this concept also the European Parliament resolution of 4 July 2013 on “connected TV” (2012/2300(INI)). Available at <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0329+0+DOC+XML+V0//EN>.

<sup>64</sup> Cf. Recitals 153 and 310 of the EECC.

<sup>65</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, pp. 23–30, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31989L0552>.

<sup>66</sup> See Recitals 5, 8, 12, 34, 48 and 94 to the AVMS Directive.

pluralism). This concerns in particular the new or amended provisions on the promotion of European works, content searchability and content integrity.

While television broadcasters will continue to comply with the existing rules on the scheduling of European works, on-demand audiovisual media service providers are to ensure in future that their catalogues contain a minimum of 30% of such works and that they also highlight them in their offering. Up to now, they have only been required in a general way to promote European works, which has led to very different solutions at the national level.<sup>67</sup> The introduction of a fixed catalogue percentage underlines the objective of regulatory convergence for different forms of offering, as television broadcasters have long been subject to a quota of more than 50% of transmission time. Moreover, where a member state also requires broadcasters to make payments to promote production it may even extend this obligation to broadcasters not subject to its jurisdiction but targeting it with their content. However, media service providers with low revenues or low audience figures are excluded from the obligations.<sup>68</sup> Member states may also provide for exemptions where the obligation would be impracticable or unjustified because of the nature or subject matter of the audiovisual media services. It is crucial that the AVMS Directive has a targeted effect on competition at this point by ensuring that European films have a firm place in the market, irrespective of the providers' economic interests, thus guaranteeing a certain degree of diversity on certain platforms in Europe. As with must-carry obligations, the aim is to ensure public availability, which is a particularly powerful instrument for ensuring diversity.

The new Article 7a, on the other hand, focuses on another factor besides the mere existence of pluralistic subject matter, by emphasising certain content. It clarifies that the directive is without prejudice to the possibility for member states to impose obligations to ensure the appropriate prominence of content that is of general interest according to defined public interest objectives, such as media pluralism, freedom of expression and cultural diversity, provided that such obligations are necessary and proportionate for the attainment of objectives of general interest – according to the wording of Recital 25 of the Directive, which closely follows the wording of the EEC Directive. Unlike in the case of must-carry obligations, though, the issue here is not access to particular platforms but the ability of those for whom diversity of content is intended, that is to say society at large, to locate and view content on them. This perceptibility of certain content appears more important than ever bearing in mind current developments surrounding the issue of disinformation.<sup>69</sup> The effects under competition law within the competitive relationship with other (non-beneficiary) providers will – not least because of the very open wording of Article 7a –

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<sup>67</sup> European Audiovisual Observatory, “Mapping of national rules for the promotion of European works in Europe”, <https://rm.coe.int/european-works-mapping/16809333a5>.

<sup>68</sup> For an in-depth discussion of this and the guidelines issued by the Commission in this connection, cf Mark D. Cole, “Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD”, 2019, <https://emr-sb.de/wp-content/uploads/2019/05/Study-AVMSD-guidelines-Art-13.pdf>.

<sup>69</sup> See for example the Joint Communication of the Commission and the High Representative on “Tackling COVID-19 disinformation - Getting the facts right”, 10 June 2020, JOIN(2020) 8 final. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020JC0008>.



depend decisively on the key implementation aspects, in particular on who decides on classifying content as being of general interest, and according to what criteria.<sup>70</sup>

The latter applies even more to another area that is now explicitly covered for the first time by the reform of the AVMS Directive and that plays a role in the context of media pluralism, especially with respect to algorithmically controlled content selection<sup>71</sup>. According to Article 33a, “Member States shall promote and take measures for the development of media literacy skills”. The European Regulators Group for Audiovisual Media Services (ERGA) is also directed to exchange experiences and best practices in the area of media literacy (Article 30b(3)(b)). While the directive does not contain a definition of this term, which is generally understood very broadly<sup>72</sup>, nor does it provide concrete implementation guidelines, Recital 59 states that only media literacy enables citizens “to access information and to use, critically assess and create media content responsibly and safely”. The promotion of such literacy aims “to equip citizens with the critical thinking skills required to exercise judgment, analyse complex realities and recognise the difference between opinion and fact”.

While the focus of the recital is clearly on the phenomenon of disinformation, media literacy (especially in relation to digital media) is also generally required in order to properly navigate through the digital information environment, and especially to access diverse sources. Media literacy contributes to media pluralism and media diversity by reducing the digital divide, facilitating informed decision-making and making it possible to identify and combat false or misleading information and harmful and illegal online content.<sup>73</sup> The existence of a pluralistic media landscape on its own will not fulfil its fundamental purpose in the context of democratic decision-making if it is not, or cannot be, perceived as such. It remains to be seen whether the member states will take Article 33a of the AVMS Directive as an opportunity to address this aspect with regard to promoting media literacy. However, the member states already have a number of mechanisms with a particular focus on the promotion of critical thinking.<sup>74</sup> The implementation of behavioural science methods in the case of users of social networks, for example, is discussed as a

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<sup>70</sup> In addition, the new Article 7b can also be regarded as indirectly safeguarding diversity if the possibility it gives member states to take appropriate and proportionate measures to protect content against cross-fading and alteration is also understood as protecting relevant content from unintentional alteration and thus, in turn – taking a positive viewpoint – as safeguarding the recipient’s perception.

<sup>71</sup> Cf. sections 2.1 and 4.3.5. below. See also Devaux A. et al (2017) Study on media literacy and online empowerment issues raised by algorithm-driven media services. SMART 2017/0081. Available at <https://ec.europa.eu/digital-single-market/en/news/study-media-literacy-and-online-empowerment-issues-raised-algorithm-driven-media-services-smart>.

<sup>72</sup> The Council of the European Union defines it as “all the technical, cognitive, social, civic and creative capacities that allow us to access and have a critical understanding of and interact with both traditional and new forms of media”, in Developing media literacy and critical thinking through education and training – Council conclusions, 30 May 2016, S. 6. Available at <http://data.consilium.europa.eu/doc/document/ST-9641-2016-INIT/en/pdf>.

<sup>73</sup> Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member states on media pluralism and transparency of media ownership, para. 10. Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680790e13](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13).

<sup>74</sup> For a more in-depth discussion, see European Audiovisual Observatory (2016) Mapping of media literacy practices and actions in EU-28”. European Audiovisual Observatory: Strasbourg. Available at <https://ec.europa.eu/digital-single-market/en/news/reporting-media-literacy-europe>.

possible approach to counteracting cognitive bias and promoting pluralistic media consumption.<sup>75</sup>

### 4.3.3. The P2B Regulation

The findability of content is not only covered by the AVMS Directive for the field of audiovisual media services but also by the so-called Platform-to-Business (P2B) Regulation, which has directly applied in all member states since 12 July 2020. Its aim is to create more transparency, fairness and effective means of redress in the area of online intermediation services, and it is accordingly limited to the relationship between these services, search engines and commercial service providers without taking account of public interests, such as the ensuring of pluralism. It does, however, contain points of reference that have at least an indirect impact on ensuring (media) diversity. Article 5 of the P2B <sup>Regulation</sup> states in particular that providers of online intermediation services<sup>76</sup> and online search engines must make the main parameters determining the listing or ranking of services clear and transparent. This is essentially about describing the algorithms that (partly) determine what is displayed and therefore also determine content findability. Since the definition of “business users”<sup>77</sup> or “corporate website users”<sup>78</sup>, for whose benefit this obligation applies, potentially also includes media companies with their online offerings, these are given a means (economically intended, but actually culturally significant) of reacting to gatekeepers such as online search engines and social media<sup>79</sup>, which play an important role in the online distribution and findability of their content.

Online intermediation services are obliged to set up complaints systems for business users for this purpose, but this does not apply to online search engines. Nonetheless, member states will be obliged to ensure adequate and effective enforcement (Article 15), there is to be monitoring by the Commission (Article 16), and codes of conduct are to be developed as a tool of specific co-regulation (Article 17) to ensure the effectiveness of the new transparency requirements. It is not yet possible to predict the actual consequences for the media sector in any detail, but these are nevertheless provisions concerning the undistorted visibility of relevant services (including content) and they will therefore have to be monitored with particular attention to the ensuring diversity angle.

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<sup>75</sup> See on this and on additional proposals Devaux A. et al (2017), op. cit. (Fn. 71).

<sup>76</sup> According to Article 2(2) P2B Regulation, information society services that enable business users to offer consumers goods or services on the basis of a contractual relationship by initiating direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded.

<sup>77</sup> According to Article 2(1) P2B Regulation “any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession”.

<sup>78</sup> According to Article 2(7) P2B Regulation “any natural or legal person which uses an online interface, meaning any software, including a website or a part thereof and applications, including mobile applications, to offer goods or services to consumers for purposes relating to its trade, business, craft or profession”.

<sup>79</sup> See Recital 11 of the P2B Regulation.

It's not just media undertakings that can benefit either directly or perhaps through improved means of influencing the findability of their content; the transparency requirements also enable the public to explore this sector (better), and this could be the starting point for future regulation, based on research results obtained in this context. Last but not least, the regulatory approaches in the P2B Regulation could serve as a template for more general EU level platform regulation, both in terms of content and form.

#### 4.3.4. Copyright in the Digital Single Market Directive

The modernisation of copyright law through the Directive on Copyright in the Digital Single Market (DSM Directive) also introduces rules that, once implemented by member states, can indirectly ensure diversity. In principle, provisions on copyright protection can be interpreted as contributing to this by ensuring opportunities for remuneration as incentives for content creation. On the one hand, there is a risk that the new provisions may also be accompanied by developments that restrict diversity, for example if those to whom they apply refrain from distributing content because of the risks involved or limit its distribution to undertakings that make their content freely available. On the other hand, however, the adoption of new obligations for platforms that include or refer to content created by third parties is clearly also intended to protect content providers from making content produced and financed by them accessible without adequate compensation, and thus to ensure that such content continues to be created because of the prospect of refinancing. Article 15 provides, for example, that member states shall establish an ancillary copyright right for press publishers to ensure they receive a fair share of the revenues generated by information society service providers from the online use of their press publications. According to its wording, the provision even goes so far as to allow in future only the setting of hyperlinks or the “use of individual words or very short extracts of a press publication” without the need for a licence, thus ensuring very extensive protection of this media content. The regulation aims at protecting investments, and thus also recognises the importance of investment in journalistic work, which in turn indirectly secures the financing of media services and thus ultimately also indirectly helps safeguard diversity in as far as the preservation of external pluralistic structures is concerned.

Ultimately, the provisions of Article 17 of the DSM Directive have similar effects. They first of all clarify that content sharing service providers perform an act of communication to the public in terms of copyright law when they make protected works available to an audience and then state that providers are also responsible for copyright infringements (committed by their users) unless they supply evidence to the contrary, which is linked to the fulfilment of certain criteria. This provision, which was hotly debated during and in the run-up to the reform<sup>80</sup> under the heading of so-called “upload filters”, is associated with increased obligations on the part of the providers concerned, such as video

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<sup>80</sup> Cf. Henrich J. (2018) Nach der Abstimmung ist (fast) vor der Umsetzung - Ein kurzer Einblick in die Bedeutung der „Upload-Filter“ Regelung der Richtlinie über das Urheberrecht im digitalen Binnenmarkt. Available at <https://emr-sb.de/wp-content/uploads/2019/04/EMR-Aktuelles-Stichwort-EU-Urheberrechtsreform.pdf>.

sharing platforms, which must clarify, for example, the licensing of content before it is released. This too is primarily aimed at protecting the interests of authors, including their economic interests. The creative production of works should be protected and adequately remunerated, for which it is necessary to establish the relevant effective systems, which must also be employed in a way that protects fundamental rights. Although the aim is naturally the (financial) preservation of a large number of diverse offerings, the two-sided nature of this provision in the context of safeguarding pluralism is made clear by the wording in Recital 61, which points out that online services are both an opportunity and a challenge for safeguarding the relevant diversity.

#### 4.3.5. Regulation of data processing operations

The value of data is undisputed in an economic context, especially given the increasing importance of algorithms for new business models in all kinds of sectors. Regulation, which identifies the limits and possibilities of accessing and processing data, is therefore of crucial relevance. In the context of safeguarding media diversity, this has two areas of implication.

On the one hand, data-driven algorithms can decide what content is displayed or made accessible as well as how and to whom. This leads us above all to consider the potential danger of so-called filter bubbles or echo chambers<sup>81</sup> for diversity of opinion in the democratic decision-making process. This must be distinguished from user-controlled personalisation of content (through the targeted selection, liking, following or indication of interests), which can also lead to users wrapping themselves in an “information cocoon”<sup>82</sup> but which, through will-driven action, is precisely an expression of democracy-based freedom of opinion and information and can thus also be an opportunity to ensure pluralism. On the other hand, the controlled personalisation of content, at least with the use of algorithms, can lead to a situation in which “extraneous” considerations (i.e. not supported by freedom of opinion and information in the context of the democratic decision-making process) in the form of the providers’ economic interests are relevant for the selection of the content displayed, and the selection criteria (e.g. products viewed, websites visited, interests of friends within networks, etc) are often not (or not sufficiently) transparent and controllable for users.<sup>83</sup> This means above all that the user cannot easily know what he or she is not seeing and why. This also involves a danger for diversity of opinion and diversity of the media, whose access to such externally controlled “filter

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<sup>81</sup> On the conceptual and actual distinction between the two phenomena, cf. Stark B., Magin M. and Jürgens P. (2020) Maßlos überschätzt. Ein Überblick über theoretische Annahmen und empirische Befunde zu Filterblasen und Echokammern. In Eisenegger M., Blum R., Ettinger P. and Prinzing M. (eds.) *Digitaler Strukturwandel der Öffentlichkeit: Historische Verortung, Modelle und Konsequenzen*. Also available as a preprint at [http://melanie-magin.net/wp-content/uploads/2019/11/Stark\\_Magin\\_Juergens\\_2019\\_Preprint.pdf](http://melanie-magin.net/wp-content/uploads/2019/11/Stark_Magin_Juergens_2019_Preprint.pdf), with further references.

<sup>82</sup> See on this Sunstein C.R. (2006). *Infotopia: How many minds produce knowledge*. Oxford University Press.

<sup>83</sup> On the selection criteria, see for example Schweiger W. et al (2019) *Algorithmisch personalisierte Nachrichtenkanäle: Begriffe, Nutzung, Wirkung*. Available at <https://doi.org/10.1007/s11616-019-00527-w>. On the relevance of algorithms for opinion-forming and diversity, see Heidtke A. (2020) *Meinungsbildung und Medienintermediäre: Vielfaltssichernde Regulierung zur Gewährleistung der Funktionsbedingungen freier Meinungsbildung im Zeitalter der Digitalisierung*, pp. 132 ff.

bubbles” and thus to the recipients is made more difficult or impossible, unless they rely on algorithms for their content.<sup>84</sup> Germany’s Federal Constitutional Court, for example, stated in a judgment in a different context that “[s]uch offers are not aimed at diversity of opinion but are determined by unilateral interests or the economic rationality of a business model, namely to maximise the time users spend on websites and thereby increase the platform’s advertising value for customers”.<sup>85</sup> This applies irrespective of whether the algorithm-controlled personalisation of content is regarded as a danger that is present/acute or merely has that potential.<sup>86</sup>

To strengthen pluralism, there is a need for greater media literacy, which enables users to recognise distortions of the overall picture as far as opinions are concerned and, if necessary, to actively counteract them (an approach already adopted by the AVMS Directive, as mentioned above), as well as ensuring transparency<sup>87</sup> and controllability. The latter two aspects are required by data protection law<sup>88</sup>, albeit not in the context of safeguarding media diversity but in that of protecting the rights of those affected, which nevertheless naturally has an impact on media content and the media environment. This is to be found in similar terms in the above-mentioned P2B Regulation but from the point of view of competition law. In addition, more recent work in connection with platform regulation on a non-legislative level has also considered the issue of the transparency of data and processing procedures and, in the case of disinformation, unquestionably also in connection with safeguarding the democratic decision-making process.<sup>89</sup>

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<sup>84</sup> Conversely, the adaptation of content to user interests by news media entails the risk that the focus will no longer be on qualitative and pluralistic content but on commercial interests. EPRA refers to this danger as a “feedback effect”. Cf. Media plurality in the age of algorithms - New challenges to monitor pluralism and diversity. Background document, 51st EPRA Meeting. Available at <https://www.epra.org/attachments/51st-epra-meeting-media-plurality-in-the-age-of-algorithms-new-challenges-to-monitor-pluralism-and-diversity-background-document>.

<sup>85</sup> Federal Constitutional Court, judgment of 18 July 2018, - 1 BvR 1675/16 – inter alia para. 79. Available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/07/rs20180718\\_1bvr167516.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/07/rs20180718_1bvr167516.html).

<sup>86</sup> See for example Borgesius F.Z. Should we worry about filter bubbles? *Internet Policy Review* 5(1), 2019, DOI: 10.14763/2016.1.401. Borgesius and others say there is no acute danger but, given the possibility of future technical developments, see problems in connection with diversity aspects.

<sup>87</sup> This is demanded by the European Parliament in para. 21 of its report on media pluralism and media freedom in the European Union (2017/2209(INI)). Available at [https://www.europarl.europa.eu/doceo/document/A-8-2018-0144\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2018-0144_EN.html); and in para. 4 of the opinion of the Committee on Culture and Education (op. cit.), which also puts this demand into the context of filter bubbles.

<sup>88</sup> Cf. for example the obligations to provide information contained in Articles 13 ff. of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679>; and the consent requirements and conditions set out in Articles 6(1)(a) and 7 GDPR, as well as for the area of online activities Article 6 of the ePrivacy Directive (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0058>. In the version of Directive 2009/136/EC).

<sup>89</sup> See for example, with respect to political advertising, the EU Code of Practice on Disinformation, <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

At the same time, power to control data can also mean power over markets, which in the case of media companies can also imply power over opinions. Against this background, national authorities and courts are now starting to assess data processing in the context of competition law, for example by questioning whether it may lead to the creation of a dominant position or whether a breach of personal data protection rules also constitutes abusive conduct under competition law and can therefore be the subject of a legal complaint by competitors<sup>90</sup>. So far, though, the EU has been reluctant to act. In its capacity as guardian of EU competition law, the Commission recognises in principle that certain data or data sets may constitute essential facilities and that their misuse may constitute an abuse of a dominant position, but it requires a case-by-case assessment that cannot be extended to data in general.<sup>91</sup>

There are, though, indications that this issue will play a role in the creation of a level playing field in European digital markets, which, with reform through the Digital Services Act, will also address platform regulation, although it is not yet clear whether and to what extent this will affect the media and their diversity as well.<sup>92</sup>

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<sup>90</sup> See on this the country report from Germany at 5.2.3.

<sup>91</sup> See the reply to a parliamentary question concerning data power and processing by Facebook in the context of the merger with WhatsApp: reply to parliamentary question E-000408/2019 of 2 May 2019, [https://www.europarl.europa.eu/doceo/document/E-8-2019-000408-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2019-000408-ASW_EN.html). The merger was, incidentally, approved by the Commission in 2014 on the basis of the Merger Regulation but subsequently led to discussions owing to the provision of false information by Facebook on data matching and resulted in the Commission imposing a fine (see the documentation of the proceedings M.7217, [https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_result&policy\\_area\\_id=2&case\\_number=7217](https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=2&case_number=7217) and the Commission's press release of 18 May 2017, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1369](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369)).

<sup>92</sup> See the Commission's press release of 2 June 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_962](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962), which also announced in connection with the public consultation on platform regulation that non-personal data access obligations, specific requirements regarding personal data portability or interoperability requirements may be relevant.

## 5. Country reports

### 5.1. BE - Belgium

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#### 5.1.1. Introduction

In the federal state of Belgium, the competence for audiovisual matters is split between various linguistic regions.<sup>93</sup> Four distinct legislative and regulatory frameworks apply and are enforced by separate regulatory authorities: one for Flanders (the Flemish-speaking community); one for the Wallonia-Brussels Federation (the French-speaking community); one for the German-speaking community; and one for the bilingual Brussels-Capital Region. This country report focuses on the French-speaking and Flemish-speaking communities as these zones are where most of the services are regulated. The Flemish regulatory body is the *Vlaamse Regulator voor de Media* (VRM) and the regulatory body for the French-speaking community is the *Conseil Supérieur de l'Audiovisuel* (CSA).

The media landscapes in both communities present very different features: in Flanders, local actors play a major role. By contrast, the audiovisual landscape in the French-speaking community is characterised by the endemic cultural dependence on France<sup>94</sup> and the role played by the Luxembourg-based company CLT-UFA. The latest media pluralism monitor report for Belgium notes that “markets are very small and media actors very concentrated to stay afloat”. It adds: “Recent years have witnessed a growing consolidation between media actors (within and across sectors). Belgium has focused its energy on maximum transparency to help mitigate the risks of such concentrations.”<sup>95</sup>

In the exercise of their competences, the French-speaking and Flemish-speaking communities have chosen very different paths. In the French-speaking community, the CSA is authorised to take regulatory action if – thanks to its monitoring – it concludes that the media market is becoming too concentrated. In the Flemish-speaking region, the VRM can

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<sup>93</sup> For the sake of clarity in the rest of this national report, we refer to the ‘French-speaking and Flemish-speaking communities of Belgium’.

<sup>94</sup> F. Antoine & F. Saeys (2007), “Belgium” in L. D’Haenens & F. Saeys (Eds.), *Western broadcast models: structure, conduct, and performance* (Vol. 5, pp. 105–144). Berlin, Germany; New York, NY, USA, de Gruyter, p. 124.

<sup>95</sup> See also the conclusions of the report of the Media Pluralism Monitor on Belgium: P. Valcke, P.-J. Ombelet & I. Lambrecht, *Media Pluralism Monitor 2016 – Monitoring Risks for Media Pluralism in the EU and Beyond*, p. 3. Available at: [https://cadmus.eui.eu/bitstream/handle/1814/46788/Belgium\\_EN.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/46788/Belgium_EN.pdf?sequence=1&isAllowed=y)

only provide an overview of media concentration by publishing annual reports about the state of media markets.<sup>96</sup> Finally, it must be noted that the federal level remains responsible for monitoring the general rules of competition, through the Belgian competition authority (NCA).

## 5.1.2. Control mechanisms under national (media) concentration law

In the French-speaking community, legislation exists to safeguard transparency and to prevent media concentration (Articles 6, 7 and 55 of the Coordinated Act on Audiovisual Media Services).<sup>97</sup> In Flanders, the Act on Radio and Television Broadcasting<sup>98</sup> obliges the VRM to publish an annual report on media pluralism.<sup>99</sup> However, there is no general legal provision aimed at preventing media concentration.

### 5.1.2.1. Transparency measures

#### 5.1.2.1.1. French-speaking community

Article 6 of the AVMS Act sets out quite detailed transparency requirements to enable the public and the CSA to understand the ownership structure of audiovisual media service (AVMS) providers. The public service broadcaster (RTBF) and all AVMS providers (TV and radio, linear and on-demand) must make available basic information about them “to allow the public to forge an opinion on the value of the information and opinion contained in their programmes”. The government has published a decree specifying the content of this basic information, as well as where it needs to be made available.<sup>100</sup> On top of this, these same providers (including radios) but also distributors (such as cable operators), and network operators need to communicate to the CSA<sup>101</sup> more detailed information when they seek an authorisation to enter the market (or any equivalent request). This information is aimed to ensure transparency in their ownership and control structure as well as an understanding of their level of independence. Providers also need to communicate to the CSA all changes in the information submitted during the authorisation period.

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<sup>96</sup> Ibid, p. 2.

<sup>97</sup> Décret coordonné sur les services de médias audiovisuels (Coordinated Act on Audiovisual Media Services - hereafter 'AVMS Act'). Available at: <http://www.csa.be/documents/2882>.

<sup>98</sup> Décret van 27 maart 2009 betreffende radio-omroep en televisie (Flemish Act on Radio and Television Broadcasting – hereafter 'RTB Act'). Available at: [https://cjsm.be/media/sites/cjsm.media/files/public/190614\\_mediadecreet.pdf](https://cjsm.be/media/sites/cjsm.media/files/public/190614_mediadecreet.pdf).

<sup>99</sup> RTB Act, Article 218, § 2, 8°.

<sup>100</sup> The list comprises the name, address of the head office, phone number, email and website address, VAT number, of the CSA, as well as a list of shareholders or members, and their contact details Cf. Arrêté du gouvernement de la Communauté française du 3 décembre 2004 relatif à la transparence des éditeurs de services de radio-diffusion, M.B., 10 mars 2005.

<sup>101</sup> The information must be communicated to the College of Authorisation and Control.



#### 5.1.2.1.2. Flemish-speaking community

The VRM has the responsibility to map concentrations in the media sector.<sup>102</sup> Since 2008, the VRM has published annual reports on media concentration, analysing the situation mainly from an economic perspective. Valcke and Voorhoof explain the methodology followed by the VRM in the compilation of these reports.<sup>103</sup> First, the VRM identifies all companies responsible for, or connected with, the Flemish media offering (television and radio broadcasters, newspaper groups, distributors, telecom operators and advertising agencies). Second, the VRM collects information concerning these media enterprises from two federal databases (Crossroads Bank for Enterprises, National Bank of Belgium) and one Flemish database (Enriched Crossroads Bank for Enterprises - VKBO).

These annual reports present the different players in the Flemish media sector, examine how they relate to each other, and offer a number of indicators allowing the measurement of media concentration. In the 2019 report, the VRM highlights several important changes in the Flemish media landscape. First, the digitalisation of the radio sector has been increasing since 2018. With the granting of a licence to offer two new multiplexes, the available commercial DAB+ capacity doubled in 2019 (this extra capacity has already been completely used up). The report thus notes that the demand for DAB+ capacity already exceeds the available spectrum.<sup>104</sup> Second, media groups are trying to further strengthen their position through acquisition strategies and vertical integration, i.e. taking positions in other links in the value chain. For example, Telenet and Proximus, two companies originally only active in the distribution sector, are also positioning themselves in content production and/or aggregation. The complete acquisition of De Vijver Media (SBS Belgium) by Telenet fits with this strategy (see below).<sup>105</sup> On international developments, the report notes that Netflix is growing in popularity among Flemish viewers. Other international players (Disney, Warner Media, Apple, ...) will focus on Flanders in the near future with the launch of new VOD platforms. The report also notes a general trend towards maximising media consumer satisfaction through personalised offers using algorithms and personal data. These developments are putting pressure on the traditional roles performed by the media. While broadcasters have traditionally exercised editorial responsibility by selecting and organising content, this role is increasingly being played by service distributors and distribution platforms.<sup>106</sup>

#### 5.1.2.2. Measures preventing media concentration

In Belgium, the NCA controls anti-competitive practices and major mergers and acquisitions. Communities may also adopt specific rules aimed at preserving media pluralism. In the French-speaking community, Article 7 of the AVMS Act sets up a general

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<sup>102</sup> RTB Act, Article 218, § 2, 8°.

<sup>103</sup> P. Valcke & D. Voorhof (2014) *Handboek mediarecht*, Brussel, Larcier, p. 650.

<sup>104</sup> VRM, *Mediaconcentratie in Vlaanderen - Rapport 2019*, p. 92. Available at: [https://www.vlaamseregulatormedia.be/sites/default/files/pdfversions/mediaconcentratierapport\\_2019\\_zonder\\_afloop.pdf](https://www.vlaamseregulatormedia.be/sites/default/files/pdfversions/mediaconcentratierapport_2019_zonder_afloop.pdf).

<sup>105</sup> *Ibid*, p. 150.

<sup>106</sup> *Ibid*, p. 92.

mechanism – enforced by the CSA – for the protection of pluralism. Such a general provision does not exist in the Flemish legal framework, where the VRM's main responsibility is to “map” the state of media pluralism in the Flemish-speaking community (see above).

#### 5.1.2.2.1. French-speaking community

Article 7 of the AVMS Act provides as a matter of principle that the exercise of a *significant position* in the audiovisual sector by an AVMS provider or by a distributor or by a number of these providers controlled by a single physical person or legal entity cannot deprive the public from having access to a *pluralistic offering* of AVMS services. A pluralistic offering is defined by reference to an offering by a pluralism of media and/or services that reflect the widest possible diversity of social cultural expressions, opinions and ideas. The College of Authorisation and Control is the internal organ within the CSA in charge of overseeing whether a provider holds a *significant position* and if the finding is positive it will evaluate whether the offering (edited or distributed) by that provider is pluralistic. Article 7 contains a non-exhaustive list of indicators – based on the audience of the provider – to help the College determine if a provider has a significant position. If – following an investigation where interested parties are heard and where the NCA needs to be consulted – it concludes that the public does not have access to a pluralistic offering, it informs the provider(s) and starts negotiations to restore a pluralistic media offering. If a formal agreement is not reached within six months, or if the agreement is not complied with, the College has a range of sanctions at its disposal such as warnings, fines (up to 5 % of annual turnover) and the removal of the licence/authorisation. To date, the CSA has never found an infringement of the public's right to a pluralistic offering. The College must evaluate the state of media pluralism regularly, and at least every two years.

The main other direct link to media pluralism is contained in Article 55 of the AVMS Act which empowers the College of Authorisation and Control of the CSA to grant authorisations to terrestrial radios with a view to making sure that it “ensures a diversity in the radio landscape and an equilibrium between the different radio formats through a musical, cultural and news offering”. When granting authorisations, the CSA must avoid creating situations of significant position.<sup>107</sup> The last implementation of this authorisation procedure took place in 2019. To frame its actions, the College adopted a recommendation explaining how it achieves the objective of ensuring this diversity<sup>108</sup>, as well as internal rules.<sup>109</sup>

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<sup>107</sup> F. Jongen & B. Strowel (2017) *Droit des médias et de la communication*, Bruxelles, Larcier, n° 796.

<sup>108</sup> CSA, *Recommandation relative à la diversité du paysage radiophonique, à l'équilibre des formats et à l'accès du public à une offre pluraliste en radiodiffusion sonore*. Available at : <https://www.csa.be/wp-content/uploads/documents-csa/RECOMMANDATION%20RELATIVE%20A%20LA%20DIVERSITE%20DU%20PAYSAGE%20RADIOPHONIQUE.pdf>.

<sup>109</sup> <https://www.csa.be/document/reglement-dordre-interieur-du-college-dautorisation-et-de-controle-du-csa/>

#### 5.1.2.2.2. Flemish-speaking community

The RTB Act does not contain a general provision to prevent media concentration. However, it does enshrine a limited number of ownership restrictions. For example, a legal entity may not operate (directly or indirectly) more than two national radio services.<sup>110</sup> Similar restrictions also apply to regional and local radio broadcasters, as well as network radio broadcasters.<sup>111</sup> Radio broadcasters cannot have identical programming, with the exception of important one-off actions.<sup>112</sup> Furthermore, there is no mandatory separation between broadcasters, service distributors and network operators, except in two instances: First, terrestrial (digital) broadcasting network operators cannot also provide an electronic communications service to end-users in Flanders.<sup>113</sup> Second, a local television broadcaster can, for the commercial exploitation of its broadcasting programme, conclude an agreement with an operating company in which one or more local television broadcasters may hold shares, but that shareholding cannot exceed 25%, plus one share.<sup>114</sup>

As regards the use of the radio spectrum, the Flemish government is responsible for the recognition of national, regional, network and local radio broadcasters. In order to be recognised, radio broadcasters must meet a number of statutory conditions.<sup>115</sup> The Flemish government imposes additional qualification criteria and assigns a weighting to each of them. One of these additional qualification criteria relates to “the concrete implementation of the programme offering and the broadcasting schedule, in particular the diversity in the programming”.<sup>116</sup> Once recognised, radio broadcasters must submit amendments relating to the information programmes, the articles of association or the shareholder structure to the Flemish government for approval. When assessing such amendments, the Flemish government takes into account the preservation of pluralism and diversity in the radio landscape.<sup>117</sup>

### 5.1.3. (Recent) Decisions of national competition and antitrust authorities regarding media providers or intermediaries/platforms

Two recent cases may be highlighted.

The first concerns the conditional clearance decision by the NCA of the acquisition by Liberty Global (LG) of all the remaining shares of Belgian broadcaster De Vijver Media

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<sup>110</sup> RTB Act, Articles 138.

<sup>111</sup> RTB Act, Articles 141, 143/2 and 145.

<sup>112</sup> RTB Act, Article 134/1.

<sup>113</sup> RTB Act, Article 202, 7°.

<sup>114</sup> RTB Act, Article 166/1.

<sup>115</sup> For example, for the national radio broadcasters: RTB Act, Article 138, par. 1.

<sup>116</sup> RTB Act, Article 138, par. 2, 1°.

<sup>117</sup> RTB Act, Article 139, par. 2.

(DVM) from shareholders Mediahuis and Waterman & Waterman.<sup>118</sup> In Belgium, LG is a fixed and mobile telecoms operator operating under the Telenet and Base brands. Its cable network covers Flanders and the Brussels area, and it is the largest distributor of TV services in Flanders. DVM broadcasts three Dutch-language free-to-air (FTA) TV channels -Vier; Vijf; and Zes - in Belgium. It also produces TV content. The transaction initially fell under the exclusive jurisdiction of the European Commission but upon request by Belgium and in accordance with Article 9 of the EU Merger Regulation,<sup>119</sup> the Commission referred the case to Belgium. The NCA had a number of concerns linked to the fact that the operation created a fully vertically integrated player from the production of content to the distribution of TV channels through a dominant distribution platform. Telenet offered a series of commitments to the NCA in exchange for clearance, including on channel numbering, distribution fees, targeted TV advertising and access to data. These commitments are subject to oversight by a trustee.

The second case concerns the use of infrastructure for the broadcasting of radio programmes by the Flemish public broadcaster VRT. Back in 2009, VRT sold its transmission and mast infrastructure to Norkring Belgium. It also concluded a Service Agreement with Norkring Belgium in March 2009, for a period of 10 years. On the basis of a public tender launched in 2017, VRT decided to entrust the management of the infrastructure to another company – Broadcast Partners – for a period of seven years as from March 2019. This decision led to a dispute between Norkring Belgium and Broadcast Partners at the beginning of 2019, as the latter wanted to rely on Norkring's infrastructure for distribution. However, the two network operators could not reach an agreement. To guarantee the continuity of FM radio broadcasts, VRT filed a complaint with the NCA. As a result of this complaint, Norkring Belgium was obliged by the NCA to ensure the continuity of radio broadcasts via the four major masts until an agreement could be reached.<sup>120</sup> In the Media Committee of the Flemish Parliament, the dispute was raised from the point of view of avoiding a switch-off of radio broadcasts. The Flemish minister for media argued that the NCA's ruling ensured continuity of broadcasts and that the two network operators were responsible for reaching a contractual agreement regarding the use of Norkring's infrastructure.<sup>121</sup>

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<sup>118</sup> Belgian Competition Authority, Decision of 13 May 2019, available at: [https://www.bma-abc.be/sites/default/files/content/download/files/bma-2019-cc-16\\_pub.pdf](https://www.bma-abc.be/sites/default/files/content/download/files/bma-2019-cc-16_pub.pdf).

<sup>119</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

<sup>120</sup> Belgian Competition Authority, Decision of 22 January 2019, available at: [https://www.bma-abc.be/sites/default/files/content/download/files/bma-2019-vm-01\\_pub.pdf](https://www.bma-abc.be/sites/default/files/content/download/files/bma-2019-vm-01_pub.pdf).

<sup>121</sup> VRM, Mediaconcentratie in Vlaanderen, Rapport 2019, p. 23. Available at: [https://www.vlaamseregulatormedia.be/sites/default/files/pdfversions/mediaconcentratierapport\\_2019\\_zonder\\_afloop.pdf](https://www.vlaamseregulatormedia.be/sites/default/files/pdfversions/mediaconcentratierapport_2019_zonder_afloop.pdf).

## 5.1.4. Relationship between public service and private/commercial media

### 5.1.4.1. General overview

The Belgian public broadcasting company was set up in 1930. The National Institute for Radio Broadcasting (NIR-INR) was a unitary organisation, which provided radio programmes both in Dutch and French. In 1960, the NIR-INR was split into two distinct organisations. In the French-speaking community, RTBF is an autonomous public undertaking which operates under a special act (RTBF Act).<sup>122</sup> A management contract, concluded with the government of the French-speaking community, determines more precisely the rights, obligations and financing of the public broadcaster. The current RTBF management contract covers the period 2019-2022.<sup>123</sup> In addition to its public funding, RTBF is also allowed to have commercial revenues. In the Flemish-speaking community, VRT is a limited company of public law, currently governed by the Radio and Television Broadcasting Act (RTB Act) and a management contract, valid for the years 2016-2020.<sup>124</sup> VRT also implements a mixed financial system as it receives public funding and generates its own income from advertising and merchandising.

#### 5.1.4.1.1. Flemish-speaking community

In 2004, a private television broadcaster (VMMA)<sup>125</sup> and some radio broadcasters lodged a complaint to the European Commission. Their arguments mainly concerned the creation of the sports channel Sporza, as well as the financing strategies and the monitoring mechanisms of VRT.<sup>126</sup> The development of new media services by VRT was not an issue for the private actors who filed the complaint but the Commission itself put the issue on the table of negotiations with the Flemish government. The commitments made by the Flemish government in this instance were leaner than those made in cases related to other countries (e.g. a case involving Germany<sup>127</sup>). The Commission's decision, adopted in February 2008, led to the development a more specific framework with regard to the definition of public service missions.<sup>128</sup> For example, a public consultation on VRT's public service mission is now foreseen every five years, prior to the signature of a new management contract. Article 18 of the RTB Act introduces an ex-ante test according to which "VRT can provide new

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<sup>122</sup> Décret de la Communauté française du 14 juillet 1997 portant statut de la Radio-Télévision belge de la Communauté française.

<sup>123</sup> RTBF Management Contract (2019-2022). Available at: <https://ds1.static.rtbf.be/article/pdf/2018-12-12-contrat-gestion-rtbf-2019-2022-version-definitive-1545319225.pdf>.

<sup>124</sup> VRT Management Contract (2016-2020). Available at: <https://www.vrt.be/nl/over-de-vrt/beheersovereenkomst/>.

<sup>125</sup> Now DPG Media.

<sup>126</sup> K. Donders (2012) Public service media and policy, Palgrave Macmillan, p.152.

<sup>127</sup> European Commission, Decision n° E 3/2005 (ex- CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 and CP 195/2004) – Financing of public service broadcasters in Germany, 24 April 2007.

<sup>128</sup> European Commission, Decision n° E 8/2006 (ex CP 110/2004 et CP 126/2004) - Financement du radiodiffuseur public VRT, 27 February 2008.

services or activities that are not covered by the management contract after explicit approval by the Flemish Government only”.<sup>129</sup> The scope of application of the test is limited, as the current list of existing services is so large that in practice only the launch of a new channel could be subject to an *ex ante* test. Indeed, the only such procedure initiated to date is the evaluation of a new linear channel (Ketnet Jr), aimed specifically at the 0-5 age group. The evaluation procedure started at the beginning of 2017. The general chamber of VRM was responsible for carrying out a public consultation during the evaluation process. The regulator drew up a list of questions, which were sent to all interested stakeholders and distributed widely via different channels. In addition to this public consultation, the regulator also consulted with key stakeholders (competitors, relevant VRT officials, members of the chamber for impartiality and protection of minors). The Flemish government took a negative decision in December 2017 and the channel was therefore never launched.

#### 5.1.4.1.2. French-speaking community

In the French-speaking community, the various actors of the media landscape had long maintained a climate for discussion, which soured, though, in 2010 when RTBF transformed its website into a genuine source of written information.<sup>130</sup> Newspaper publishers then considered RTBF an unfair competitor. The government brought them to the negotiating table, but an agreement could not be reached. Therefore, newspaper publishers turned to the domestic courts in 2010<sup>131</sup> and also filed a complaint to the Commission in February 2011. After the filing of the complaint, the government partly responded to the Commission’s arguments by introducing *ex ante* tests and clarifying RTBF’s mandate in the management contract. In its decision of May 2014<sup>132</sup>, the Commission imposed a clarification of the scope of public service missions, in particular for these three types of content: online services including text, linear radio and television services, and non-linear media services.<sup>133</sup> Any major new media service project not covered by the management contract must be subject to an *ex ante* evaluation.<sup>134</sup> Moreover, the negotiation of the RTBF management contract must be open to a public consultation.<sup>135</sup> Ten months before the expiry of the management contract, the government must seek the opinion of parliament on the main elements of the next management contract. To this end, the government must provide parliament with a detailed memorandum of intent, specifying the scope of the missions and services RTBF would be required to implement under its next management

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<sup>129</sup> Translation by the author.

<sup>130</sup> E. Lecroart (2014) *La concurrence entre presse écrite et médias audiovisuels de service public sur internet*, A& M, p. 455.

<sup>131</sup> The President of the Commercial Court of Charleroi rejected the request of the newspaper publishers considering that “the activity conducted by RTBF on the Internet does not exceed the mandate assigned by its statutory act” (cf. *Comm. Charleroi (pres.)*, 30 December 2011, A&M, 2012/6, p. 610). This decision was confirmed by the Court of Appeal of Mons (*Mons*, 20 January 2014, A&M, 2014/6, p. 527).

<sup>132</sup> European Commission, Decision n° SA.32635 - Financing of the Radio-Télévision belge de la Communauté française (RTBF), 7 July 2014, par. 293.

<sup>133</sup> RTBF Management Contract, Articles 42bis to 42septies.

<sup>134</sup> RTBF Act, Article 9bis ; RTBF Management Contract, Article 45.

<sup>135</sup> RTBF Act, Article 9,3bis.

contract. Parliament then organises a broad public consultation. Within four months, parliament submits its recommendations to the government and publishes them on its website. Finally, the government finalises the new management contract with RTBF, taking into account these recommendations.

### 5.1.5. Transposition of pluralism-related EU provisions

Belgium has not yet proposed any draft laws to implement the new AVMS directive, the European Electronic Communications Code or the Digital Single Market Directive.

A few elements can however be highlighted. On Article 7a (prominence), an advisory committee for culture, youth media and sports (*Strategische Adviesraad voor Cultuur Jeugd, Sport en Media* - SARC) advised the Flemish government to introduce prominence requirements in favour of (linear and on-demand) Flemish content (through regulation or self/co-regulation) into the draft law.<sup>136</sup> The CSA did not include the introduction of the article in its recommendations on the future decree that will transpose the directive in the French-speaking region.<sup>137</sup>

On signal integrity, the Flemish-speaking region stands out because it is one of the only jurisdictions where the rule already exists (since 2013).<sup>138</sup> Distributors must transmit linear TV programmes that form a part of their offering in Flanders in full, unaltered form and in their entirety, simultaneously with the broadcast. The same applies to associated services i.e. subtitles, audio description, etc. When a distributor offers a broadcasting programme on demand, in a shortened or modified form, the distributor must obtain a prior authorisation from the TV broadcaster. The broadcaster and distributor concerned need to negotiate in good faith and must exercise their consent in a reasonable and proportionate manner. If no agreement can be reached within three months, parties invoke mediation through the media regulator.

### 5.1.6. Funding mechanisms to ensure media diversity

In both communities, a range of funding measures exists, with very diverse objectives (e.g. support for media training, development of local information, promotion of cultural diversity), all of which contribute to media pluralism.

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<sup>136</sup> SARC (sectorraad Media), Advies over de omzetting van de herziene AVMD-richtlijn, 18 November 2019. Available at: [https://cjsm.be/sarc/SR\\_media/adviezen/20191118\\_Advies\\_omzetting\\_herziene\\_AVMD-richtlijn.pdf](https://cjsm.be/sarc/SR_media/adviezen/20191118_Advies_omzetting_herziene_AVMD-richtlijn.pdf).

<sup>137</sup> CSA (Collège d'Avis), Avis n° 03/2019-Avis relatif à la transposition de la Directive européenne 2018/1808 dans le Décret sur les SMA. Available at: <https://www.csa.be/document/transposition-de-la-directive-sur-les-services-de-medias-audiovisuels-avis-du-csa>.

<sup>138</sup> Art. 180 was introduced in the RTB Act.

### 5.1.6.1. Local television broadcasters

#### 5.1.6.1.1. French-speaking community

The legal regime for local television broadcasters is set out in the AVMS Act. Local television broadcasters have a public service mission to produce and distribute local information, entertainment, cultural and educational programmes. They must promote the active participation of the local population.<sup>139</sup> Their missions are carried out within a well-defined geographical area of coverage.<sup>140</sup> In the French-speaking community, local television broadcasters are the only editors that still require a licence, which is given for a period of nine years.<sup>141</sup> An agreement is concluded between each local television broadcaster and the government.<sup>142</sup> In order to be authorised and to retain authorisation, each local broadcaster must fulfil numerous conditions laid down by the decree.<sup>143</sup> The composition of the organs of local broadcasters is also governed by very detailed rules.<sup>144</sup> Authorised local television broadcasters receive an annual operating subsidy and may also receive an investment subsidy.<sup>145</sup> Furthermore, any service distributor offering a service package that includes a local television service must pay an annual fee to the local television broadcaster.<sup>146</sup>

#### 5.1.6.1.2. Flemish-speaking community

Under the Radio and Television Broadcasting Act, local television broadcasters are required to perform certain public missions: providing local information, promoting communication among the population and contributing to local cultural and social development.<sup>147</sup> They must receive an authorisation delivered by the Flemish government.<sup>148</sup> In total, 10 local television broadcasters have been recognised, grouped under the association NORTV. Under the current cooperation 2018-2022 agreement, the local television broadcasters commit – in addition to the missions provided for in the Media Decree – to work together for mutual understanding and close cooperation between themselves and with other players, with a view to improving and guaranteeing their economic viability, for example by developing advertising.<sup>149</sup> The local television broadcasters have received a structural

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<sup>139</sup> AVMS Act, Art. 65, §§1-2, art. 68.

<sup>140</sup> AVMS Act, Art. 66.

<sup>141</sup> AVMS Act, Art. 64.

<sup>142</sup> AVMS Act, Art. 65, § 5.

<sup>143</sup> AVMS Act, Art. 67.

<sup>144</sup> AVMS Act, Article 71.

<sup>145</sup> AVMS Act, Article 75, § 1.

<sup>146</sup> AVMS Act, Article 81.

<sup>147</sup> RTB Act, Article 165.

<sup>148</sup> RTB Act, Article 166.

<sup>149</sup> Website of the Flemish government: <https://cjsm.be/media/themas/omroepen/regionale-tv>



subsidy in exchange for various commitments laid down in the cooperation agreement. Since 2015, local television stations also receive an annual fee paid by distributors.<sup>150</sup>

### 5.1.6.2. Financing of audiovisual production

#### 5.1.6.2.1. French-speaking community

The *Centre du Cinéma et de l'Audiovisuel* (CCA) or Film and Audiovisual Centre administers film support based on cultural criteria to feature fiction film, documentary and animation productions, as well as to short films, films intended for TV and TV series.<sup>151</sup> In the realm of features, support is provided at all stages of creation, from script-writing to distribution.<sup>152</sup> A 100% territorial spending obligation applies and a cultural test must be passed. Support based on economic criteria is administered by Wallimage to feature fiction, documentary and animation productions, but also to TV series and new media. Projects must pass a cultural test.<sup>153</sup>

Moreover, the RTBF management contract also stipulates that RTBF must support independent Belgian production and participate in a fund financing the production of new Belgian series. The quantification of these participations is specified in the RTBF management contract.<sup>154</sup>

#### 5.1.6.2.2. Flemish-speaking community

The VAF/Film Fund, which is part of the *Vlaams Audiovisueel Fonds* or VAF (*Flanders Audiovisual Fund*),<sup>155</sup> provides support based on cultural criteria for feature-length fiction films, documentaries, animations and experimental films as well as to medium-length and short films.<sup>156</sup> The fund provides support in the script-writing and development phase, as well as in the production phase of a project. Screen Flanders also provides support for feature fiction films, documentaries and animations, as well as to TV series and single works. VRT also has the obligation to invest a percentage of its total income in external production.<sup>157</sup> The investment obligation only applies to television production (TV fiction and non-fiction) and not to cinema films. In Flanders there is also, notably, a system in place

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<sup>150</sup> RTB Act, Article 166/1, par. 2.

<sup>151</sup> Décret de la Communauté française du 10 novembre 2011 relatif au soutien au cinéma et à la création audiovisuelle.

<sup>152</sup> Website of the Film and Audiovisual Centre: <https://audiovisuel.cfwb.be/missions/centre-cinema-audiovisuel/>.

<sup>153</sup> Website of Wallimage: <https://www.wallimage.be/fr>.

<sup>154</sup> RTBF Management Contract (2019-2022): <https://ds1.static.rtbf.be/article/pdf/2018-12-12-contrat-gestion-rtbf-2019-2022-version-definitive-1545319225.pdf>.

<sup>155</sup> Decreet van de Vlaamse Gemeenschap van 13 April 199 houdende machtiging van de Vlaamse regering om toe te treden tot en om mee te werken aan de oprichting van de vereniging zonder winstgevend doel Vlaams Audiovisueel Fonds.

<sup>156</sup> Website of the Flanders Audiovisual Fund: <https://www.vaf.be/flanders-audiovisual-fund>.

<sup>157</sup> VRT Management Contract (2016-2020). Available at: <https://www.vrt.be/nl/over-de-vrt/beheersovereenkomst/>.

since 1 January 2019 whereby VOD providers under EU jurisdiction that target their activities towards Flanders must contribute to content creation in Flanders. They can choose between a financial investment in original co-productions or the payment of a levy to the VAF. The amount in both cases is set at 2% of the annual gross income generated from VOD activities in Flanders.<sup>158</sup>

Additionally, since 2003, Belgium has in place a national-level incentive system in the form of a tax shelter, aiming to unlock the investment of private capital in the production of films.<sup>159</sup>

### 5.1.6.3. Financial support for journalists

#### 5.1.6.3.1. French-speaking community

The Journalism Fund, created in 2009, aims to support and promote investigative journalism. It encourages the publication/dissemination of quality content in the Belgian French-speaking news media through the provision of direct assistance to the journalist. It is organised and managed by the Association of Professional Journalists and financed by the Wallonia-Brussels Federation.<sup>160</sup>

#### 5.1.6.3.2. Flemish-speaking community

The Flemish Journalism Fund was launched in 2018 as a project of the non-profit organisation Journalismfund.eu, in collaboration with the Flemish Association of Journalists (VVJ) and the Flemish government. In 2016 and 2017, project grants were already distributed by the Flemish government's Department of Culture, Youth and Media. In November 2019, however, the new Flemish government decided not to provide any more funds in its budget for 2020.<sup>161</sup>

There is also financial support for the training of journalists. MediAcademie is an initiative of professional organisations of the written press aimed at supporting training courses for journalists. Due to its success, MediAcademie is now divided into two sections: MediAcademie Journalistiek and MediAcademie Audiovisueel (the latter is managed by Mediarte, a social fund for the entire Belgian audiovisual, film and digital sector). MediAcademie Journalistiek also extends to online media. The training is financed through a system of co-financing, whereby up to 50% of the cost of a training course is subsidised by the government.<sup>162</sup>

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<sup>158</sup> RTB Act, Article 157; Decision of the Flemish Government of 1 February 2019.

<sup>159</sup> Website of the Belgian Film Tax Shelter: <https://www.belgiumfilm.be/film-financing/tax-shelter>.

<sup>160</sup> Website of the Belgian French-speaking Journalism Fund: <https://fondspourlejournalisme.be/le-fonds>.

<sup>161</sup> Website of the Flemish Journalism Fund: <https://www.vlaamsjournalistiekfonds.be/>.

<sup>162</sup> Website of MediAcademie: <https://www.mediacademie.be/>.

## 5.2. DE -Germany

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### 5.2.1. Introduction

In Germany, the constitutional basis for the protection of diversity of opinion and media diversity is Article 5(1) of the *Grundgesetz* (Basic Law), which guarantees freedom of the press and freedom of reporting by means of broadcasts and films.<sup>163</sup> The *Bundesverfassungsgericht* (Federal Constitutional Court) plays a decisive role in shaping the legal framework that guarantees diversity, especially in the area of broadcasting, and has acknowledged its obligation “to achieve and ensure the highest possible level of balanced diversity in private broadcasting”.<sup>164</sup> This forms the basis of the dual broadcasting system in Germany, comprising public service broadcasters and private broadcasters that are subject to special media concentration controls. As the *Bundesverfassungsgericht* underlined most recently in 2018,<sup>165</sup> the principle of a positively structured broadcasting system and the safeguarding of diversity continue to apply, even in a rapidly changing media landscape. Nevertheless, the increasing intertwining of media markets and radical changes in media usage are currently provoking new discussions. According to the *Medienvielfaltsmonitor* (Media Pluralism Monitor), 2019 was the first year in which more people used the Internet than television as their main source of news.<sup>166</sup> As a result, a growing number of people now believe that current media concentration laws, which are largely television-focused, are out of date, and they are calling for the adoption of a cross-media, whole-market approach to pluralism regulation.<sup>167</sup> However, it is a call that has so far been ignored in the ongoing reform of the *Rundfunkstaatsvertrag* (Interstate Broadcasting Treaty – RStV), which will be known in future as the *Medienstaatsvertrag* (Interstate Media Treaty – MStV).<sup>168</sup>

While the *Bundesländer* (federal states) are tasked with preventing companies from holding a dominant influence over public opinion, and with guaranteeing diversity of opinion, the federal government is responsible for monitoring compliance with competition and cartel law. This monitoring, which is designed to protect economic competition, is

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<sup>163</sup> *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law of the Federal Republic of Germany). Available at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0037](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0037).

<sup>164</sup> Federal Constitutional Court decision 73, 118 (118).

<sup>165</sup> Federal Constitutional Court, decision of the First Senate of 18 July 2018, 1 BvR 1675/16, rec. 79.

<sup>166</sup> 2019 pluralism report, ALM GbR, die Medienanstalten. Available at <https://www.die-medienanstalten.de/publikationen/vielfaltsbericht/news/vielfaltsbericht-der-medienanstalten-2019/>.

<sup>167</sup> Schmid T., J. Braam and L. Mischke (2019) Gegen Meinungsmacht – Reformbedürfnisse aus Sicht eines Regulierers, MMR 1/2019, p. 19; Georgios Gounalakis, chairman of the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media [KEK]), in an interview published on [medienpolitik.net](http://medienpolitik.net) on 21 October 2019. Available at <https://www.medienpolitik.net/2019/10/die-gefahr-vorherrschender-meinungsmacht-ist-nicht-gebannt/>.

<sup>168</sup> Signed version of the *Staatsvertrag zur Modernisierung der Medienordnung in Deutschland* (Interstate Treaty Modernising the Media System in Germany) of 28 April 2020. Available at [https://www.bayern.landtag.de/www/ElanTextAblage\\_WP18/Drucksachen/Basisdrucksachen/0000005000/000005098.pdf](https://www.bayern.landtag.de/www/ElanTextAblage_WP18/Drucksachen/Basisdrucksachen/0000005000/000005098.pdf).

becoming increasingly important in the media sector. Under a current draft bill reforming German cartel and competition law, known as the *GWB-Digitalisierungsgesetz* (Act on Digitalisation of German Competition Law), the system for monitoring abuses is to be modernised in order to control the behaviour of digital platforms more effectively.<sup>169</sup>

## 5.2.2. Control mechanisms under national (media) concentration law

The key provisions of German media concentration law, which is designed to protect pluralism, are found in Articles 26 *et seq.* of the *Rundfunkstaatsvertrag*<sup>170</sup>, which is due to be replaced by the *Medienstaatsvertrag* in September 2020. The new treaty is the German legislator's response to changes in the media landscape and develops further the legal framework for safeguarding and promoting media pluralism. It also transposes the Audiovisual Media Services Directive (AVMSD) into German law. The rules protecting diversity of opinion on television remain unchanged in Article 60 MStV.

Under these provisions, media-specific concentration controls must be used to prevent, as far as possible, the creation of a dominant influence over public opinion.<sup>171</sup> This monitoring is carried out by the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media – KEK), which operates on behalf of the *Landesmedienanstalten* (state media authorities). Under a so-called “audience share model”, a broadcaster is deemed to have a dominant influence over public opinion if, across all its channels, it exceeds a certain annual average audience threshold (in principle 30%). Related, media-relevant markets can play a role here, albeit a limited one. Once a dominant influence over public opinion has been established, the company concerned may not be granted a licence to broadcast any additional channels and is prevented from acquiring further channels unless measures are taken to protect diversity of opinion (Article 60(3) and (4) MStV).<sup>172</sup>

Under a ruling of the *Bundesverwaltungsgericht* (Federal Administrative Court) of 29 January 2014, when calculating a broadcaster's audience share under Article 26(2) RStV, bonus points are deducted from its audience share if it transmits regional and third-party

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<sup>169</sup> Draft 10<sup>th</sup> amendment of the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 (*GWB-Digitalisierungsgesetz*), published by the *Bundesministerium für Wirtschaft und Energie* (Federal Ministry of Economics and Energy), as at 24 January 2020. Available at [https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?__blob=publicationFile&v=1).

<sup>170</sup> *Staatsvertrag für Rundfunk und Telemedien* (Interstate Agreement on Broadcasting and Telemedia, *Rundfunkstaatsvertrag* [RStV]) of 31 August 1991, as amended by the 22nd Agreement Amending the Interstate Broadcasting Agreement, in force since 1 May 2019. Available at [https://www.die-medienanstalten.de/fileadmin/user\\_upload/Rechtsgrundlagen/Gesetze\\_Staatsvertraege/Rundfunkstaatsvertrag\\_RStV.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Rundfunkstaatsvertrag_RStV.pdf).

<sup>171</sup> See Federal Constitutional Court decisions 57, 295 (323), 73, 118 (160) and 95, 163 (173).

<sup>172</sup> For details of the KEK's monitoring activities under media concentration law, see Cappello M. (ed.), *Media ownership – Market realities and regulatory responses*, IRIS Special 2016-2, European Audiovisual Observatory, Strasbourg, 2016, pp. 51 *et seq.*

window programmes.<sup>173</sup> For this reason, it is virtually inconceivable that any proposed merger would trigger an in-depth examination under media concentration law, even when related, media-relevant markets are included.<sup>174</sup> Even if an intermediary such as Google acquired a large German television broadcaster, broadcasting law would not stand in its way. The KEK is therefore calling for a new concept for the safeguarding of pluralism to be drawn up, adopting an overall market approach that includes all media markets that play a role in the formation of public opinion, rather than just focusing on television.<sup>175</sup>

In contrast to media concentration law, which focuses on influence over public opinion, cartel law is designed to maintain economic competition and is enshrined in the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints on Competition – GWB).<sup>176</sup> In principle, the law on media concentration controls is also not limited to individual markets. Although merger examinations carried out under cartel law can produce different outcomes to those conducted under media concentration law, no harm is caused when they do. However, to improve the connections between the two, the ninth amendment of the GWB provides for better cooperation between the relevant authorities. Under Article 50c(2)(2) GWB, the competition authorities exchange information with the state media authorities on a mutual basis to the extent that is necessary for the performance of their respective functions.

### 5.2.3. (Recent) Decisions of national competition and antitrust authorities regarding media providers or intermediaries/platforms

In recent years, the decision of the *Bundeskartellamt* (Federal Cartels Office), which supervises competition and cartel law in Germany, to prohibit data aggregation by Facebook has caused a particular stir. In February 2019, after an investigation lasting more than two years, the cartel authority prohibited Facebook from only allowing private users resident in Germany to use its social network if it could assign data collected from its other services – WhatsApp, Oculus, Masquerade and Instagram – and from third-party websites containing Facebook interfaces to their Facebook account without their specific consent.<sup>177</sup> The decision was based on the fact that Facebook had breached Article 19(1) GWB in abusing its dominant position in the German social network market by processing data in

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<sup>173</sup> Federal Administrative Court decision of 29 January 2014 - 6 C 2.13.

<sup>174</sup> The only exception would be a merger between the two major broadcasting groups RTL and ProSiebenSat.1. For details, see *Sechster Konzentrationsbericht (2018) - Sicherung der Meinungsvielfalt im digitalen Zeitalter*, KEK, p. 31.

<sup>175</sup> *Sechster Konzentrationsbericht (2018) - Sicherung der Meinungsvielfalt im digitalen Zeitalter*, KEK, p. 36.

<sup>176</sup> *Gesetz gegen Wettbewerbsbeschränkungen* (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 25 May 2020 (Federal Gazette I p. 1067). Available at <https://www.gesetze-im-internet.de/gwb/BJNR252110998.html>.

<sup>177</sup> *Bundeskartellamt* (Federal Cartels Office) decision of 6 February 2019, B6-22/16. Available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4).

this manner. Facebook had required private users to agree to contractual conditions that were inappropriate in view of the data protection law assessments conducted under the General Data Protection Regulation (GDPR) and that allowed it to collect, link and use additional data generated outside its network. Facebook successfully appealed to the *Oberlandesgericht Düsseldorf* (Düsseldorf Higher Regional Court – OLG), which temporarily lifted the *Bundeskartellamt’s* decision.<sup>178</sup> Contrary to the view of the Cartels Office, the OLG felt that the data processing by Facebook which was the subject of the complaint did not give rise to any relevant competitive damage or undesirable development of competition. Although the OLG Düsseldorf confirmed that Facebook held a dominant market position, it opined that Facebook could not be found to have violated the abuse prohibition of Article 19 GWB (exploitative abuse). A violation of the GDPR alone was not sufficient evidence of anti-competitive behaviour. However, the *Bundesgerichtshof* (Federal Supreme Court – BGH) disagreed. In June 2020, after the *Bundeskartellamt* had lodged an appeal, the BGH cartels chamber overturned the OLG Düsseldorf decision and rejected the application for the original decision to be stayed.<sup>179</sup> The prohibition notice issued by the *Bundeskartellamt* can therefore be temporarily enforced. The case is of particular interest because it is the first time that data protection regulations, which were originally to be monitored by the data protection authorities, have played a role in a decision issued under competition law in relation to the data-centred business models of large platforms.

Other recent media-related *Bundeskartellamt* decisions have concerned matters including the tender process for domestic media rights for Bundesliga football matches. The Cartels Office considered the central marketing of media rights by Deutsche Fußball Liga GmbH (DFL) an anti-competitive agreement and ordered that no single buyer should be allowed to acquire all the rights packages on an exclusive basis.<sup>180</sup>

Meanwhile, in April 2020, the *Bundeskartellamt* closed its proceedings in a case concerning potentially anti-competitive agreements between DAZN Group Ltd., London and Sky Ltd., London. It suspected that the two companies had agreed to split the rights to broadcast football matches in Germany prior to the award procedure. However, on account of the uncertainty of the evidence and the impossibility of predicting how the market would develop due to the impact of the coronavirus pandemic, it decided to close the proceedings.<sup>181</sup>

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<sup>178</sup> *OLG Düsseldorf* (Düsseldorf Higher Regional Court) decision of 26 August 2019, Kart 1/19 (V).

<sup>179</sup> *Bundesgerichtshof* (Federal Supreme Court) press release no. 80/2020, KVR 69/19. Available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=107146&linked=pm>.

<sup>180</sup> *Bundeskartellamt* (Federal Cartels Office) press release of 20 March 2020. Available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2020/20\\_03\\_2020\\_DFL.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2020/20_03_2020_DFL.html).

<sup>181</sup> *Bundeskartellamt* (Federal Cartels Office) press release of 15 April 2020. Available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2020/15\\_04\\_2020\\_Champions\\_League.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2020/15_04_2020_Champions_League.html).

## 5.2.4. Relationship between public service and private/commercial media

In its most recent broadcasting-related decision, issued in 2018, the *Bundesverfassungsgericht* (Federal Constitutional Court) stressed that reporting remained part of the remit of public service broadcasters. Public broadcasters therefore had a duty, as a counterbalance to private broadcasters, to offer a service that “follows a different decision-making rationale to that based on economic incentives” and thereby contribute to diversity of content in a way that could not be achieved in the free market alone.<sup>182</sup> The *Bundesverfassungsgericht* explained that editorial and economic competition did not automatically reflect the full diversity of information, experience and patterns of behaviour available in society. Public broadcasters have a universal service remit and are publicly funded in return. Conversely, the demands on private broadcasters that do not receive public funding to ensure a balanced diversity of content are less stringent.<sup>183</sup>

According to a study published by the state media authorities, public broadcasters ARD and ZDF (including special-interest and third-party channels) held a combined 52.4% share of the television market in 2019. Between them, the two largest private broadcasters have a 40.2% audience share. In the radio sector, the ARD’s public service stations are even more dominant, with a 54.3% market share.<sup>184</sup>

Under constitutional law, the German legislator is not bound by the current structure of the dual broadcasting system. Rather, the legislator the freedom to change it and could, for example, introduce different variations of a dual system or hybrid funding mechanisms for broadcasters,<sup>185</sup> although occasional calls for such a reform have so far gone unheeded.

## 5.2.5. Transposition of pluralism-related EU provisions

### 5.2.5.1. Articles 61(2)(d) and 114 of the European Electronic Communications Code

The obligation to provide access to media platforms without discrimination, enshrined in Article 61(2)(d) of the European Electronic Communications Code (Directive 2018/1972) and Article 5(1)(b) of the Access Directive (2002/19/EC), has been transposed into German law by Article 52c RStV (Article 82 of the future MStV). Under this provision, the technology used by media platforms must allow for a varied range of offerings, and there must be no

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<sup>182</sup> Federal Constitutional Court, decision of the First Senate of 18 July 2018, 1 BvR 1675/16, rec. 1-157, 77.

<sup>183</sup> Federal Constitutional Court decision 74, 297.

<sup>184</sup> State media authorities’ pluralism report 2019, p. 26.

<sup>185</sup> Cole M.D. and J. Oster (2017) Zur Frage der Beteiligung privater Rundfunkveranstalter in Deutschland an einer staatlich veranlassten Finanzierung, p. 107.

direct or indirect discrimination, such as through the use of application programming interfaces.

Article 114 of the Electronic Communications Code (Article 31 of the Universal Service Directive 2002/22/EC) has been transposed in Germany by Article 51b(3) RStV (Article 104(3) MStV). In principle, the recent media reforms have not altered this provision, which allows the individual *Bundesländer*, in order to safeguard media pluralism, to enact regulations on digital channel allocation (or, in future, media platform allocation). All German *Bundesländer* have taken the opportunity to include such “must carry” rules in their respective media laws. Under these provisions, platforms may be obliged to carry the universal service channels of public service broadcasters or certain other channels selected by the local state media authority in order to ensure diversity.<sup>186</sup>

#### 5.2.5.2. Articles 7a and 7b of the Audiovisual Media Services Directive (AVMSD)

Article 7a AVMSD (Directive (EU) 2018/1808) has been transposed by the new Article 84 MStV, which imposes obligations on prominence in user interfaces. For example, Article 84(4) MStV stipulates that public service channels and similar services that “particularly contribute to diversity of opinion and content”, must be “easy to find” on media platforms.

Rules on signal integrity, transposing Article 7b AVMSD, will be contained in Article 80 MStV.<sup>187</sup>

#### 5.2.5.3. Articles 15 and 17 of the Digital Single Market Directive

The German *Bundesjustizministerium* (Federal Ministry of Justice – BMJV) launched a public consultation on the transposition of the DSM Directive (Directive (EU) 2019/790) in summer 2019.<sup>188</sup> In January 2020, it published a discussion draft containing a proposal to implement Article 15 of the directive.<sup>189</sup> This article states that a publisher of press publications has the exclusive right to allow information society service providers to make all or parts of their press publications publicly available for online use and to reproduce them for this purpose. Germany had already introduced a protection right for press publications in 2013,

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<sup>186</sup> Cole M.D. (2020) Rundfunkstaatsvertrag. In: HartsteinR., W.D. Ring et al. (eds.) *Heidelberger Kommentar*, RStV §51b, rec. 31 *et seq.*

<sup>187</sup> For further information, see Cole M.D. (2019) Die Neuregelung des Artikel 7b Richtlinie 2010/13/EU (AVMD-RL). Available at [https://emr-sb.de/wp-content/uploads/2019/12/emr-gutachten\\_neuregelung-des-artikel-7b-avmd\\_11.2019.pdf](https://emr-sb.de/wp-content/uploads/2019/12/emr-gutachten_neuregelung-des-artikel-7b-avmd_11.2019.pdf).

<sup>188</sup> Call to participate in the public consultation on the transposition of the EU copyright directives [DSM Directive (EU) 2019/790 and SatCab Directive (EU) 2019/789] of 28 June 2019. Available at [https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Konsultation\\_UrhR-Richtlinien.html](https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Konsultation_UrhR-Richtlinien.html).

<sup>189</sup> Discussion draft of the *Bundesministerium der Justiz und für Verbraucherschutz* (Federal Ministry of Justice and Consumer Protection) – Draft First Act to adapt copyright law to the requirements of the Digital Single Market, 15 January 2020. Available at [https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE\\_Anpassung%20Urheberrecht\\_digitaler\\_Binnenmarkt.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=1).



although this was declared invalid by the Court of Justice of the European Union in 2019 because it had not been properly notified. The current draft is similar to the previous rules.

In June 2020, the BMJV published another discussion draft for a “Second Act to adapt copyright law to the requirements of the Digital Single Market”, which contains proposals for the implementation of the remaining provisions of the directive. It introduces two new legal instruments into German copyright law in the form of provisions on the liability of platforms that allow users to upload content, and rules on extended collective licences. The draft also contains a new statutory exception for caricatures, parodies and pastiches and a rule on minor non-commercial uses on upload platforms, for which rightsholders should receive a fee from the platform concerned.<sup>190</sup>

## 5.2.6. Funding mechanisms to ensure media diversity

German media law contains a variety of measures to actively promote diversity in the broadcasting sector. Germany has a well-resourced public service broadcasting system heavily funded through a contribution paid by all households. The previous model, based on reception devices, was replaced by the so-called “broadcasting contribution” in 2013.

Otherwise, there are only limited possibilities in law to finance private or non-commercial media services. A central rule on the “funding of special tasks” from broadcasting contribution revenue is enshrined in Article 40 RStV (Article 114 MStV), under which state legislators can create opportunities to fund community media (public access channels), technical infrastructure, non-commercial broadcasters and media literacy projects. Additional support can be provided in Bavaria thanks to specific provisions in the Bavarian constitution.<sup>191</sup> In the context of the coronavirus crisis in particular, the idea of expanding media support has once again been a topic of debate in Germany. Some *Bundesländer* extended their existing programmes or launched new funding initiatives during the crisis in order to offset the negative consequences of plummeting advertising revenue.<sup>192</sup> The idea of strengthening local and regional broadcasting is being discussed

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<sup>190</sup> BMJV press release of 24 June 2020. Available at [https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz\\_II\\_Anpassung-Urheberrecht-dig-Binnenmarkt.html](https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_II_Anpassung-Urheberrecht-dig-Binnenmarkt.html).

<sup>191</sup> Constitution of the Free State of Bavaria in the version promulgated on 15 December 1998 (GVBl pp. 991, 992, BayRS 100-1-I), last amended by laws of 11 November 2013 (GVBl. pp. 638, 639, 640, 641, 642).

<sup>192</sup> Thüringen, for example, used state funds to offer up to EUR 20 000 of emergency aid to local broadcasters. See Thüringen state media authority press release of 14 May 2020. Available at <https://www.tlm.de/infotehk/pressemitteilungen/pm-einzelansicht/article/soforthilfe-fuer-thueringer-lokal-tv-veranstalter-staatskanzlei-und-landesmedienanstalt-ermoeglichen-bi/>; In North Rhine-Westphalia, local radio stations’ distribution costs were paid for three months. See *Landesanstalt für Medien NRW (LfM)* press release of 4 May 2020. Available at <https://www.medienanstalt-nrw.de/presse/pressemitteilungen/pressemitteilungen-2020/2020/mai/solidarpakt-lokalfunk-nrw.html>; See also Ukrow J. (2020) Schutz der Medienvielfalt und medienbezogene Solidaritätspflichten in Corona-Zeiten, Eine europa- und verfassungsrechtliche Betrachtung, Impulse aus dem EMR. Available at <https://emr-sb.de/wp-content/uploads/2020/03/EMR-Impulse-Vielfalt-Corona-200330.pdf>.

with particular intensity.<sup>193</sup> Aiming to ensure varied, professional and relevant reporting from all parts of the country, in a joint protocol declaration on the *Medienstaatsvertrag* that goes beyond the agreements already reached in connection with the *Medienstaatsvertrag*, which require special prominence to be afforded to regional channels, the *Länder* have agreed to examine measures to safeguard the diversity of regional and local media.

Film aid in Germany is provided by both federal institutions and the *Länder*.<sup>194</sup> Although there is no direct support for the press, it benefits indirectly from measures including a discounted postal delivery service and a reduced VAT rate.

### 5.2.7. Other developments regarding media pluralism on the national level

Intermediaries are playing an increasingly prominent role in the debate over measures to guarantee media diversity.<sup>195</sup> According to the legal definition contained in the MStV, “media intermediaries” relevant to media law include all telemedia that aggregate, select or make available to the public third-party editorial services.<sup>196</sup> The recent media reforms address issues relating to access (Art. 82 *et seq.* MStV), prominence (Art. 84 MStV), discrimination (Art. 94 MStV) and transparency (Art. 93 MStV). These issues are nowadays not only considered from a media law perspective, but increasingly play a role in competition and cartel law. According to a draft bill on the 10<sup>th</sup> amendment of the GWB, published in January, the concept of “intermediary power” will feature in future German cartel law and constitute an additional criterion in the analysis of market dominance.<sup>197</sup> Under the regulations, companies will be prohibited from treating competitors’ services differently to their own when providing access to markets. The draft also extends the general ban on restrictive and discriminatory conduct to include intermediaries which, although not holders of a dominant market position, have at least relative market power compared with certain users. These could include operators of cable networks, set-top boxes or games consoles, for example.<sup>198</sup>

The cross-over between media and cartel law in Germany therefore looks set to grow in the future.

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<sup>193</sup> Concerning funding of local and regional broadcasting, see also Ukrow J. and Cole M.D. (2019) *Aktive Sicherung lokaler und regionaler Medienvielfalt. TLM-Schriftenreihe (25)*.

<sup>194</sup> For information about film aid in Germany, see Ukrow J. and Cole M.D. (2019) *Aktive Sicherung lokaler und regionaler Medienvielfalt*, p. 129 *et seq.*

<sup>195</sup> Schmid T., L. Braam and J. Mischke (2020) *Gegen Meinungsmacht – Reformbedürfnisse aus Sicht eines Regulierers. MMR (1)*, p. 21.

<sup>196</sup> In a previous version of the draft *Medienstaatsvertrag*, examples also included search engines, social networks, app portals, user-generated content portals, blogging portals and news aggregators. See *Medienstaatsvertrag* discussion draft, July to September 2018. Available at [https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/04\\_MStV\\_Online\\_2018\\_Fristverlaengerung.pdf](https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/04_MStV_Online_2018_Fristverlaengerung.pdf).

<sup>197</sup> With the reduction of a turnover threshold, the draft also amends merger controls in the press sector in order to reduce the number of examination procedures in cases that are insignificant in macroeconomic terms.

<sup>198</sup> Höppner T. and J.M. Weber (2020) *Modernisierung der Missbrauchskontrolle im GWB. K&R (1)*, p. 43.

## 5.3. GB - United Kingdom

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### 5.3.1. Introduction

The UK's constitution is, famously, unwritten; yet, this does not mean there is no document identifying rights – including freedom of expression – guaranteed in the UK. The Human Rights Act incorporates the provisions of the European Convention on Human Rights (ECHR) into domestic law. As a result, public bodies are bound to act in accordance with the ECHR. Specifically, Section 3 requires the courts to interpret the law so that it is compatible with the convention. Ofcom, the communications and media regulator, as a public body is also bound by it and many of its content decisions expressly have regard to the importance of freedom of expression. The impact of the obligation on the approach of the competition authorities is unclear, especially as regards Article 10 ECHR and positive obligations on the state arising therefrom. Nonetheless, it is clear that there is some concern to safeguard pluralism in the media, at least to a minimal degree. The UK has, in addition to generally applicable competition rules, specific merger rules applying to media mergers. The broadcasting regime also includes competition powers and rules controlling ownership. The question is whether these rules, which are based in traditional conceptions of the media, are broad enough or flexible enough to take into account the impact of “new” media. Certainly, it can be seen that the media market in the UK has been affected by the development of Internet-delivered services and their global nature.

### 5.3.2. Control mechanisms under national (media) concentration law

There are two main regulatory bodies in relation to media concentrations in the UK: the Competition and Market Authority (CMA), which runs the general competition regime, and Ofcom, which is the sector regulator for, inter alia, electronic communications and media. These powers sometimes overlap: the CMA and Ofcom have concurrent powers in relation to anti-competitive agreements and abuse of a dominant position under the Competition Act 1998, and both have powers to undertake market studies. The Concurrency Regulations set out the basic rules as to how the bodies should cooperate.<sup>199</sup> The CMA issued guidance on the concurrent application of competition powers<sup>200</sup> and has further entered into a

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<sup>199</sup> The Competition Act 1998 (Concurrency) Regulations 2014. Available at [http://www.legislation.gov.uk/ukxi/2014/536/pdfs/ukxi\\_20140536\\_en.pdf](http://www.legislation.gov.uk/ukxi/2014/536/pdfs/ukxi_20140536_en.pdf).

<sup>200</sup> CMA, Regulated industries: Guidance on concurrent application of competition law to regulated industries (CMA10) (2014). Available at: <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>.

memorandum of understanding<sup>201</sup> with Ofcom setting out more details on the application of the principles in the Concurrency Regulations.

Ofcom has two general duties set out in Section 3 of the Communications Act 2003,<sup>202</sup> the second of which is to further the interests of consumers in relevant markets, where appropriate, by promoting competition. It has the more specific obligation to ensure that sufficient pluralism among the providers of different television and radio services is maintained. Ofcom's competition powers can be found in the regulatory regime as well as the competition regime. To the extent that Ofcom may approach a matter under its general regulatory powers or as a matter of competition law, Section 317 specifies that Ofcom must consider whether a more appropriate way of proceeding would be under the Competition Act 1998. When Ofcom initiates action, it sets out its reasons for the course of action taken.

Section 316 Communications Act specifies that “[t]he regulatory regime for every licensed service [i.e. a service with a licence issued under the Broadcasting Act] includes the conditions (if any) that Ofcom consider appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services”.

A standard form condition is contained in the licences granted. For example, the standard form for the Television Licensable Content Service Licence (relevant to cable and satellite services) contains at Condition 14, the following:

*1)The Licensee shall:*

- (a) not enter into or maintain any arrangement, or engage in any practice, which is prejudicial to fair and effective competition in the provision of licensed services or of connected services; and*
- (b) comply with any code or guidance for the time being approved by Ofcom for the purpose of ensuring fair and effective competition in the provision of licensed services or of connected services; and*
- (c) comply with any direction given by Ofcom to the Licensee for that purpose.*

An example of this was the imposition, following a market investigation, of a wholesale must-offer obligation on Sky with respect to its sports channels; Ofcom removed the obligation in 2015.<sup>203</sup> If Ofcom concludes that such a licence condition has been breached, it may impose a financial penalty on the licensee up to GBP 250 000 or 5% of “qualifying revenue” (whichever is greater), or require the licensee to comply with directions given by Ofcom. The outcome of an Ofcom investigation can be challenged by appealing to the Competition Appeals Tribunal (CAT). For example, Sky challenged the wholesale must-offer obligation before CAT, and the outcome of that was then challenged at the Court of Appeal.<sup>204</sup>

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<sup>201</sup> Available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0021/83523/cma\\_and\\_ofcom\\_mou\\_on\\_use\\_of\\_concurrent\\_consumer\\_powers\\_webversion.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0021/83523/cma_and_ofcom_mou_on_use_of_concurrent_consumer_powers_webversion.pdf).

<sup>202</sup> Communications Act 2003. Available at: <http://www.legislation.gov.uk/ukpga/2003/21/contents>.

<sup>203</sup> Ofcom, Review of the pay TV wholesale must-offer obligation. Available at: <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-must-offer>.

<sup>204</sup> *BT v Sky, Ofcom and others* [2014] EWCA Civ 133. Available at: [https://www.catribunal.org.uk/sites/default/files/1156-59\\_Judgment\\_CAT\\_9\\_060515.pdf](https://www.catribunal.org.uk/sites/default/files/1156-59_Judgment_CAT_9_060515.pdf).

Ofcom is obliged to draw up a code<sup>205</sup> in relation to prominence of public service broadcasters and electronic programme guides (EPGs).<sup>206</sup> The code also may deal with issues relating to access by those with disabilities.

Ofcom publishes details of cases being investigated under each of its powers in the Competition and Consumer Enforcement Bulletin (which also covers decisions made under Ofcom's telecommunications and postal competition powers and Ofcom's consumer powers). Not many of these decisions relate to the media sector but instead to the telecommunications regime.

The Broadcasting Act 1990<sup>207</sup> contained restrictions on who may hold certain types of broadcasting licences (amended by the Communications Act). While the Communications Act removed many restrictions or relaxed them (for example: the restriction on foreign ownership has been removed; prohibitions on religious organisations controlling broadcast licences have been relaxed to a limited extent; and local authorities can now own broadcast licences for specific purposes), some remain. Schedule 14 of the Communications Act contains restrictions on cross-media ownership. Notably, it prohibits a newspaper proprietor with a market share of 20% or more of newspaper circulation (excluding online circulation) from holding a Channel 3 licence or a stake in a Channel 3 licensee that is greater than 20%. Further, BBC subsidiaries and Channel 4 are restricted from holding Channel 3 or Channel 5 licences. There are also less detailed rules in relation to local radio licences. Ofcom also ensures that the new body is a "fit and proper person". It should be noted that the public interest grounds for intervention in a merger are different from the question of whether a person is "fit and proper" and that being "fit and proper" or not is not a ground for intervention in a media merger. There is no equivalent "fit and proper" test in relation to newspapers, and newspapers in general are, with regard to standards, subject to self-regulation. There are two self-regulatory bodies: the Independent Press Standards Organisation (IPSO) and the Independent Monitor for the Press (IMPRESS). Only IMPRESS has been recognised by the Press Recognition Panel<sup>208</sup> established after the Leveson Inquiry<sup>209</sup> triggered by the phone hacking scandal, the role of which is to ensure that any self-regulatory body that applies for approval meets certain minimum criteria.<sup>210</sup>

The Communications Act introduced a media pluralism test for qualifying mergers, amending the Enterprise Act<sup>211</sup>. It envisages that Ofcom and the CMA will report on the public interest (including pluralism issues) and competition issues, respectively, when instructed so to do by the Secretary of State (in a Public Interest Intervention Notice [PIIN]). An investigation proceeds in two stages: the first of which determines whether more

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<sup>205</sup> The EPG Code is available: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0025/154384/annex-5-epg-code-appropriate-prominence-provisions.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0025/154384/annex-5-epg-code-appropriate-prominence-provisions.pdf).

<sup>206</sup> Section 310 of the Communications Act.

<sup>207</sup> Broadcasting Act 1990. Available at <http://www.legislation.gov.uk/ukpga/1990/42/contents>.

<sup>208</sup> The Press Recognition Panel's website is here: <https://pressrecognitionpanel.org.uk/>.

<sup>209</sup> Documents available at <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>.

<sup>210</sup> Royal Charter on Self-Regulation of the Press, 3 November 2014. Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/254116/Final\\_Royal\\_Charter\\_25\\_October\\_2013\\_clean\\_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean_Final.pdf).

<sup>211</sup> Enterprise Act 2002. Available at <http://www.legislation.gov.uk/ukpga/2002/40/contents>.

detailed investigation is required. The final decision on any referred merger would be taken by the Secretary of State. The regime applies to newspapers and to broadcasters; the Secretary of State may change these definitions and, indeed, may change the basis of intervention in the regime, but has not done so to date. Though there is no specific statutory requirement for them to do so, the parties normally notify the Government Department for Digital, Culture, Media & Sport (DCMS) and/or the CMA of mergers and acquisitions in media or newspaper merger cases. When composing its report, Ofcom has regard only to the public interest considerations specified by the Secretary of State in the PIIN, which themselves are limited by the scope of the statute. The grounds of intervention are set out in Section 58 Enterprise Act and differ between those relevant for newspapers and those for broadcasters, as follows:

- For newspapers: accurate presentation of the news; free expression of opinion; a sufficient pluralism of views (whether the UK as a whole or a part of the UK).
- For broadcasters (media enterprises, television and radio): a sufficient pluralism of persons with control of media enterprises serving a given audience (whether national or a part of the UK); availability for a wide range of broadcasting of high quality and calculated to appeal to a wide variety of interests and tastes; genuine commitment to broadcasting standards (as set out in Section 319 of the Communications Act). Guidance on the public interest test was issued by the then Department for Trade and Industry in 2004.<sup>212</sup> This guidance remains valid.

Following the News Corp/BSkyB merger in 2011, as well as the recommendations from the Leveson Inquiry, Ofcom was requested by the Secretary of State to provide advice on the measurement of media plurality (2015). During the passage of the Digital Economy Act 2017,<sup>213</sup> the then government agreed to a limited review into the public interest regime; this has not been initiated, however. This guidance is now applied by Ofcom in its practice in a way that reflects the passage of time since its original introduction, as has been clearly stated by Ofcom in several reports as outlined below.

Ofcom's Framework for Measurement of Media Plurality consists of three categories of quantitative metrics and some qualitative contextual factors. The three categories are: availability; consumption; and impact. The contextual factors are: governance and funding models; the potential power or editorial control exercised by owners; internal plurality; market trends; and regulation and oversight. The contextual factors are used to inform understanding of the other metrics. All forms of media, including print, radio, TV and online, are taken into account. The type of content to be considered in the framework is limited to news and current affairs.

Section 391 Communications Act requires Ofcom to review media ownership rules (including the media merger public interest test) at least every three years and to make recommendations to the Secretary of State as to whether any changes are needed. The most

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<sup>212</sup> Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/595816/file14331\\_1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595816/file14331_1.pdf).

<sup>213</sup> Digital Economy Act 2017. Available at <http://www.legislation.gov.uk/ukpga/2017/30/contents/enacted>.

recent such report was produced in 2018;<sup>214</sup> Ofcom did not recommend any changes to the regime.

### 5.3.3. (Recent) Decisions of national competition and antitrust authorities regarding media providers or intermediaries/platforms

Initially, there were few government interventions in transactions on public interest grounds, which averaged about one a year across all areas in which public interest interventions could occur - not just media mergers.<sup>215</sup> Between 2002 and 2017 there were 13 interventions, four of which related to the media.<sup>216</sup> More recently, though, there has been increased activity generally: in 2019 the government intervened in five transactions, one of which was in the newspaper sector and at the time of writing there had already been one decision to intervene in 2020. Over the last couple of years, the interventions have occurred in both the broadcast and the newspaper sectors.

#### 5.3.3.1. Twenty First Century Fox/ Sky – and Comcast and Disney (2017/18)

In 2011, a high-profile and highly contentious attempt at a merger between News Corp and Sky was cleared on condition that Sky News be transferred to a different company. The merger did not, ultimately, take place because of the phone hacking scandal, which implicated a News Corp newspaper.

Another attempt, in 2016, to increase the Murdoch holding in Sky (through 21st Century Fox [Fox]) was equally contentious.<sup>217</sup> This time, the move occurred amid market consolidation on a global scale – involving a contest between Comcast and Disney seemingly spurred on by the rise of video on demand services such as Netflix.

The most recent matter arose when Fox sought to acquire the 61% share of Sky Plc it did not already own. A PIIN was issued expressing concerns about media plurality and

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<sup>214</sup> Report to the Secretary of State on the operation of the media ownership rules listed under Section 391 of the Communications Act 2003, 23 November 2018. Available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0030/127929/Media-ownership-rules-report-2018.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0030/127929/Media-ownership-rules-report-2018.pdf).

<sup>215</sup> The other areas are national security and the stability of the UK financial system.

<sup>216</sup> BskyB/ITV (2007). Available at <https://www.gov.uk/cma-cases/british-sky-broadcasting-group-plc-itv-plc>; News Corp/BSkyB (2010). Available at <https://www.gov.uk/cma-cases/newscorp-bskyb>; Global Radio/Guardian Media Group (2012). Available at [https://webarchive.nationalarchives.gov.uk/20121204123324\\_f](https://webarchive.nationalarchives.gov.uk/20121204123324_f); and 21<sup>st</sup> Century Fox/Sky (2017). Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/600344/European\\_Intervention\\_Notice\\_Sky\\_Fox\\_16\\_March\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/600344/European_Intervention_Notice_Sky_Fox_16_March_2017.pdf). These cases are discussed below. They are not the only media mergers, but they are the mergers where a PIIN was issued. Note: one of the national security PIINs related to the acquisition of Inmarsat, the UK's largest satellite company, by private equity firms.

<sup>217</sup> Sky's attempt to acquire ITV shares was also deemed problematic, resulting in an appeal to the Competition Appeal Tribunal, with a request to appeal to the Court of Appeal rejected.

whether there was a genuine commitment to broadcasting standards. Specifically, the Secretary of State indicated that the merger might be expected to increase the Murdoch Family Trust's (MFT) influence over Sky, which owned Sky News, when it already could have material influence over News Corporation, owner of *The Sun*, *The Times* and *The Sunday Times* newspapers. Moreover, over the previous 10 years, and relative to the number of services they operate in the UK, the number of breaches for Fox were proportionately higher than for Sky, a lower proportion of cases were resolved for Fox than for Sky, and Fox had a higher proportion of breaches involving editorially related matters as compared to Sky.<sup>218</sup> The Secretary of State noted that Fox was the successor company to News Corporation, as well as James Murdoch's specific role in the phone hacking scandal (Ofcom also carried out a separate "fit and proper" investigation).

Phase 1 investigations and supplementary advice from Ofcom led to the merger being referred to the CMA for a Phase 2 investigation on both grounds. Ofcom noted the size and reach of Fox and Sky, especially given the success of *The Sun* newspaper and Sky in attracting readers online. Ofcom raised concerns over the influence of the MFT over Fox, Sky and News Corporation and the consequent risk to the news agenda and to the political process. Ofcom specifically highlighted that Sky News is a trusted voice, and that this raised the risk factors in the transaction. As regards commitment to broadcasting standards, Ofcom noted that the behaviours alleged at Fox News amounted to significant corporate failure. There was insufficient evidence to conclude that this would mean Sky would cease to be a "fit and proper" person once controlled by Fox.

While the CMA's phase 2 investigation was ongoing, on 7 May 2018 Comcast issued notification of an intention to acquire Sky.<sup>219</sup> The Secretary of State in June 2018 announced that this merger did not raise public interest concerns<sup>220</sup> and therefore no PIIN was issued. At the same time, the Secretary of State published the CMA's report in relation to Fox's proposed acquisition of Sky, which concluded that the merger would not be expected to operate against the public interest, on the grounds of a genuine commitment to broadcasting standards. As regards media plurality, however, the merger would likely operate against the public interest because of the potential erosion of Sky News's editorial independence and also because of the possibility of increased influence by the MFT over public opinion in the UK. To address these problems, Fox proposed to divest Sky News to Disney (or another buyer) which, subject to certain commitments, the Secretary of State was minded to accept. The offer to buy Sky News was a separate commitment by Disney from Disney's own attempts to buy Sky and Fox. Disney – in a deal subject to review by multiple competition authorities globally (including the European Commission) – acquired Fox's film and TV assets in a deal worth USD 71.3 billion (one of the largest media mergers ever). News Corporation, however, remains part of Murdoch's holdings as does the newly formed Fox Corp (including Fox Sports, Fox News and the Fox TV network). The battle for Sky was resolved through a formal auction process initiated by the Takeover Panel in the UK

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<sup>218</sup> Ofcom provided a list to the Secretary of State, available here:

<https://www.gov.uk/government/publications/ofcom-sky-21cf-breaches>.

<sup>219</sup> Comcast considered buying Fox but withdrew that bid to focus on buying Sky, due to the uncertain implications of the AT&T/Time Warner merger litigation in the US.

<sup>220</sup> Letter from DCMS to Comcast can be found here: <https://www.gov.uk/government/publications/letter-from-dcms-to-comcast-on-the-consideration-of-media-public-interests>.



between Fox and Comcast, which Comcast won. This means that the commitments that Disney made vis-à-vis Sky News (e.g. committing to fund it for 15 years with a minimum of GBP 100 million per annum in funding and measures to preserve editorial independence) fell away. Comcast, however, committed to funding Sky News, which is loss-making, for at least 10 years. Subsequently, Fox agreed to sell its 39% share of Sky to Comcast, bringing Comcast's holding in Sky to more than 75%. Combined, Comcast and Sky constitute the biggest private sector provider of pay TV (the collective term for cable, satellite and telecom TV services) in the world with 52 million customers; Sky News is now part of the same family as NBC News and the company has plans to launch a global news service. It is possible (subject to the outcome of the review of public service broadcasting) that Sky may launch a local news service.

#### 5.3.3.2. Trinity Mirror/Northern & Shell's [Reach plc] (2018)

Trinity Mirror acquired some publishing assets of Northern & Shell, including the *Daily Express* and *Daily Star* newspapers. The Secretary of State issued a PIIN on the basis of free expression and plurality of views.<sup>221</sup> As regards the free expression ground, the 2004 guidance suggested this concerned the potential impact on editorial decision-making, namely, the extent to which it would affect the ability of the editors to make choices without interference by the owner. The newspapers emphasised their need to maintain the distinct identity of each publication for its readership, to counter this concern – but the Secretary of State noted that, on completion of the deal, there was a change in editors for two of the five titles bought. It was therefore unclear whether there was a need for specific mechanisms to ensure that editorial independence would be maintained at the acquired titles. The plurality ground allows consideration of the structural impact of the transaction – though as the guidance notes, this consideration is qualified by a requirement for reasonableness and practicability. The merged entity would have the largest share of national titles within the UK newspaper market, owning (post-merger) nine out of 20 national newspaper titles, and it would become the second-largest national newspaper organisation in circulation terms, with a 28% share of average monthly circulation based on circulation figures for 2017, among national titles, including daily and Sunday titles.

In assessing these questions, Ofcom noted the challenges faced by newspapers in the current environment, a point it has returned to in a number of recent newspaper mergers.<sup>222</sup> Referring to its 2015 framework, Ofcom assessed the merger taking into account the cross-media nature of news production and consumption. As well as taking this broader view, Ofcom considered the narrow print market as well. Despite the figures that informed the Secretary of State's PIIN, Ofcom found that in the context of cross-media consumption, the merged entity was a small player. In terms of impact, the brands were found to be less significant than others. In terms of the print market in particular, Ofcom emphasised that

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<sup>221</sup> Documents available at <https://www.gov.uk/cma-cases/trinity-mirror-northern-shell-media-group-merger-inquiry>.

<sup>222</sup> Public interest test for the acquisition by Trinity Mirror plc of publishing assets of Northern & Shell Media Group Limited, 31 May 2018. Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/717994/Ofcom\\_PIT\\_TMNS\\_31052018\\_redacted.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717994/Ofcom_PIT_TMNS_31052018_redacted.pdf).

the merged entity intended to retain all the titles. This was the first time Ofcom applied its plurality framework in the newspaper context.

This merger also constituted the first occasion on which Ofcom considered free expression or editorial independence. Ofcom expressed concerns that the 2004 guidance no longer reflected the news market – and this is a theme in other subsequent newspaper mergers. Ofcom distinguished between the editorial stance and the ability of the proprietor to influence the editorial stance; it was this latter issue on which Ofcom focussed. While the Secretary of State expressed reservations about the appointment of new editors, the fact that neither the board nor shareholders were involved in the appointment process meant there was not a problem. Further, neither the board nor shareholders were in a position, or had the incentive, to influence the editorial stance. The shareholders are institutional shareholders; internal reporting structures create distance between editors and the board. The Secretary of State announced that a second phase inquiry was unnecessary.

#### 5.3.3.3. Acquisition of a 30% shareholder stake in the *Evening Standard* and *Independent* newspapers (2019)

The DCMS was not notified of a deal involving acquisition of a 30% shareholder stake in the *Evening Standard* and *Independent* newspapers in 2019. After some initial investigation, the Secretary of State issued a PIIN on 27 June 2019<sup>223</sup> (which was challenged by the parties to the deal before the CAT) raising two issues: a) the need for accurate presentation of news in newspapers; and b) the need for free expression of opinion in newspapers. The parties made representations about the means to ensure independence of the editors, but in issuing the PIIN, the Secretary of State expressed concerns about the beneficial ownership of the companies acquiring the shares, and the links between the various shareholders and their possible impact on the newspapers' news agendas (specifically as regards the Middle East). While Ofcom took a similar approach to that in other cases involving newspapers in recognising the changed news environment, this case is interesting for three other reasons: the interpretation of the meaning of "newspaper"; the approach to accuracy; and time limits.<sup>224</sup> As regards the first point, since the issues referred only to newspapers, Ofcom did not consider wider holdings (for example the local TV licence – London Live – operated by a subsidiary of Lebedev Holdings). The term "newspaper" is defined in the Enterprise Act as "a daily, Sunday or local (other than daily or Sunday) newspaper circulating wholly or mainly in the United Kingdom or in a part of the United Kingdom",<sup>225</sup> which Ofcom determined to refer only to print newspapers. *The Independent*, one of the publications affected by the transaction, is now (though it was not always) an online-only publication. This meant that the focus of the investigation was the *Evening Standard* (the London daily paper), though Ofcom took the view that the parties' approach in relation to the *Evening Standard* was likely

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<sup>223</sup> Available at <https://www.gov.uk/government/publications/public-interest-intervention-notice-issued-by-secretary-of-state-jeremy-wright>.

<sup>224</sup> Ofcom report to DCMS LHM and IDNM, 21 August 2019. Available at <https://www.gov.uk/government/publications/ofcom-report-to-dcms-lhm-and-idnm-21-august-2019>.

<sup>225</sup> Section 44(1) Enterprise Act.

to be representative of their approach to *The Independent*. Ofcom also contrasted the position of newspapers with that of broadcasters, noting in particular that newspapers may be partisan and that it is not necessarily against the public interest for “newspapers to get things wrong sometimes”.<sup>226</sup>

As regards editorial independence, Ofcom took a similar approach to the Reach decision above. It was arguable that the buyers might have some ability to influence the editorial stance, but the corporate structures imposed some constraints, including commitments to editorial independence in shareholder agreements. This countered the fact that it was not possible to identify the motivation for the deal; in Ofcom’s view where there is a clear financial motive for a transaction, there is less likely to be a problem with interference with editorial freedom. Reviewing the position for both editorial freedom and accuracy, Ofcom placed significant weight on the fact that there had been no evidence of any influence in practice at either *The Evening Standard* or *The Independent* in the period from completion of the deal to the time of the report. Further, Ofcom noted that the publications were already owned by an “active proprietor” with overseas links. Ofcom also took the view that transparency about ownership did not itself justify a second stage investigation. Ofcom further suggested that readers of the publications would tend to “multi-source” their news and would therefore be less likely to be adversely influenced by any change in editorial approach.

Finally, this merger revealed a weakness in the regime. As the Secretary of State noted in the Commons: “While the Secretary of State has powers under the Enterprise Act 2002 to intervene in certain media mergers raising public interest concerns, there is no requirement under the Enterprise Act 2002 for parties to advise us of the transaction.”<sup>227</sup> This is noteworthy because of the time limits imposed in the act, which start with notification of a merger is or when it becomes generally known – a less certain point in time. In this case the parties challenged the issuing of the PIIN as being “out of time”; or that the time limit given for a phase two investigation exceeded the period of time allowed under the act. The CAT found that while the PIIN was “within time”, the applicants were correct on the second point.<sup>228</sup> This meant that the Secretary of State could no longer refer to a phase two inquiry.

#### 5.3.3.4. DMG Media/JPI Media Publications (2020)

Daily Mail and General Trust (DMGT) acquired JPI Media Publications (including the “i” newspaper and website – positioned as “non-partisan” - and regional titles *The Scotsman* and the *Yorkshire Post*). DMGT owns Associated Newspapers and thus the *Daily Mail*, *The Mail on Sunday*, *MailOnline*, *Metro* and *metro.co.uk*. (as well as a residual 5% financial stake

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<sup>226</sup> Ofcom Report para 2.11.

<sup>227</sup> Lebedev Holdings: Written question – 218767. Available at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-02-08/218767/>.

<sup>228</sup> *Lebedev Holdings Limited and Independent Digital News and Media Limited v Secretary of State for DCMS* [2019] CAT 21. Available at [https://www.brickcourt.co.uk/images/uploads/documents/1328\\_Lebedev\\_Judgment\\_160819.pdf](https://www.brickcourt.co.uk/images/uploads/documents/1328_Lebedev_Judgment_160819.pdf).

in the *Evening Standard*). Another subsidiary holds a 20% stake in Independent Television News Ltd. In January 2020, the Secretary of State consulted on whether to intervene in this completed transaction, issuing a PIIN on 21 January 2020.<sup>229</sup> The PIIN raised the question of whether there was sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom, or part thereof.

Again, Ofcom's analysis began with the recognition that newspapers are facing a challenging time and that they contribute to a well-functioning democracy.<sup>230</sup> In general terms, Ofcom welcomed investment to support the long-term viability of newspapers. Its analysis looked at "external plurality" across newspaper providers and "internal plurality" within the DMGT – taking into account the wider news market and the cross-media nature of news production and consumption of television, radio, print and online news media. Following the approach in its Measurement framework, Ofcom took the view that the most relevant genres for plurality are those of news and current affairs. It also noted that it had carried out a number of plurality assessments since 2017 and included in this not just the newspaper mergers but also 21<sup>st</sup> Century Fox's attempt to buy Sky – and that it seemed that the principles adopted here were the same. As well as looking at the number of titles and their market shares, Ofcom considered the impact of different titles based on views of their readers towards them. According to Ofcom, readers of the *i* newspaper are more likely to rate it highly for being "accurate", "trustworthy", "helping readers understand what's going on in the world today" and "impartial" compared to ratings that readers give to DMGT titles. The *i* has less agenda-setting influence, however. While the merger made of the DGMT the paper with the largest reach, that reach is significantly smaller than that of the BBC and ITV. This all factors into the question of external plurality. As regards internal plurality, the merger did not reduce the number of titles and the purchase of the title ensured its long-term viability. The existing DMGT titles confirmed that they make editorial decisions independently; operational practice and internal decision-making structures are designed to support this independence. Further, DMGT has a financial incentive to maintain the *i*'s non-partisan stance, as it is distinct from the other, highly partisan titles. Ofcom concluded that there were no plurality concerns.

#### 5.3.3.5. The "fit and proper" criterion

With regard to the proposed acquisition of Sky by Fox, Ofcom carried out an assessment of whether Sky would remain a "fit and proper" person to hold a broadcasting licence after the change of ownership.<sup>231</sup> In particular, it considered the behaviour at - and compliance record of other companies in - the group, even if those companies were not based in the UK and even if the compliance was not in relation to media standards. Specifically, Ofcom took into account allegations of sexual and racial harassment at Fox

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<sup>229</sup> Available at <https://www.gov.uk/government/publications/public-interest-intervention-notice-issued-by-the-secretary-of-state-baroness-morgan-of-cotes>.

<sup>230</sup> Public interest test for the acquisition by DMGT of JPI Media Publications Ltd., 25 March 2020. Available at <https://www.gov.uk/government/publications/ofcom-public-interest-report>.

<sup>231</sup> Cf. Decision under Section 3(3) of the Broadcasting Act 1990 and Section 3(3) of the Broadcasting Act 1996: Licences held by British Sky Broadcasting Ltd., published on 29 June 2017. Available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/106285/decision-fox-sky-september-2017.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/106285/decision-fox-sky-september-2017.pdf).

News indicating significant failings in the corporate culture. Nonetheless, to take this into account in relation to Sky, Ofcom argued it would need to see clear evidence that executives in the parent company of both companies were aware of the problem. Moreover, Fox had instituted new procedures and Sky's own culture was deemed good. While in its evidence to the Secretary of State, Ofcom flagged that Fox's compliance was judged less good than that of Sky, it determined that nonetheless Fox had a satisfactory compliance record. Since the consequence of finding a licensee unfit is that the channels are taken off air (to the detriment of viewers), Ofcom determined that the "fit and proper" test should be a high bar to clear.

Ofcom's decision was the subject of a challenge by the Avaaz Foundation.<sup>232</sup> Its application to bring an action was rejected by the administrative court with several arguments, confirming that Ofcom had not erred in law by stating that the 'fit and proper' test required a high threshold and had adopted a rational approach in relation to broadcasting regulation, that its assessment of Fox's corporate governance was adequate and that Ofcom had not failed to take account of earlier findings in 2012 (phone hacking) in respect of James Murdoch. No "fit and proper" test was published in relation to Sky as concerns the acquisition by Comcast; the question of "fit and proper" was, however, raised in 2011 in relation to the News Corp/BSkyB merger. It has also been used when licensees fail to comply with broadcasting standards.

#### 5.3.4. Relationship between public services and private/commercial media

The BBC is a publicly funded public service broadcaster which carries no advertising. Its role and remit are set down in the Agreement and Charter.<sup>233</sup> The Charter is the BBC's constitutional document; the agreement provides more detail on the obligations set down in the charter. The BBC's mission is "to act in the public interest, serving audiences through the provision of impartial, high quality and distinctive output and services which inform, educate and entertain". The mission is elaborated through five specified "public purposes": to provide impartial news and information to help people understand and engage with the world around them; to support learning for people of all ages; to show the most creative, highest-quality and distinctive output and services; to reflect, represent and serve the diverse communities of all of the United Kingdom's nations and regions and, in so doing, support the creative economy across the United Kingdom; and to reflect the United Kingdom, its culture and values to the world. The BBC may carry out the activities listed in the charter.<sup>234</sup> In Ofcom's recent report on the BBC, it raised questions about whether the

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<sup>232</sup> R (on the application of Avaaz Foundation) v Office of Communications (Ofcom) [2018] EWHC 1973 (Admin), 27 July 2018.

<sup>233</sup> Charter (2016) available at: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how\\_we\\_govern/2016/charter.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/charter.pdf).

<sup>234</sup> Art 7 Charter (2016).

BBC does enough in terms of diversity, both with regard to who is represented on screen, and to people involved at the BBC.

The BBC may carry out commercial activities, but it must do so through subsidiary companies (so as to avoid distorting competition through use of the licence fee funding to subsidise such activities). Ofcom now regulates the BBC; Section 198 Communications Act states that Ofcom shall, to the extent that provision for it to do so is contained in the Charter and Agreement, regulate the provision of the BBC's services and the carrying on by the BBC of other activities for purposes connected with the provision of those services. The BBC Charter and Agreement contain provisions to ensure that the relationship between the BBC's commercial activities and its public service role does not distort the market or create an unfair competitive advantage (Article 46 charter). Clauses 23 to 27 of the BBC Agreement provide that the BBC may only make a "material change" to the commercial activities once Ofcom has determined that the BBC may carry out the change.<sup>235</sup> So, when the BBC proposes to make a change to its commercial activities, Ofcom will review the matter, bearing in mind its general duties under the Communications Act and also having regard to the protection of fair and effective competition. Ofcom recognises the parallels between its assessment here and the approach taken by the European Commission in relation to state aid.

#### 5.3.4.1. Changes to BBC iPlayer (2019)

The BBC proposed changing the BBC iPlayer service so that programmes would be available for a standard 12 months, with some available for longer, rather than the current 30 days. These changes were deemed to be "material", resulting in Ofcom carrying out a competition assessment.<sup>236</sup> While Ofcom assessed the change as having an adverse impact on new services (e.g. Britbox) it determined that this impact was unlikely to be large. Ofcom concluded that the changes could deliver significant public value, increasing choice and availability of public service content, and supporting the BBC in remaining relevant given changing viewing habits. Change in the way people watch television – and the market developments underpinning it – were important considerations Ofcom's assessment. Although it approved the change, Ofcom required certain safeguards to be instituted, including that the BBC establish a revised performance measurement framework for iPlayer in consultation with Ofcom and that it provide greater transparency over the scale and impact of its programming. The latter requirement was intended to assist Ofcom and the BBC in their consideration of the potential impact on competition. The BBC committed to make content available on an equal basis on standard and bespoke versions of iPlayer carried by platform operators.

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<sup>235</sup> See generally at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0026/99503/BBC-competition-framework.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0026/99503/BBC-competition-framework.pdf).

<sup>236</sup> Ofcom, BBC iPlayer Competition Assessment, final determination, 1 August 2019, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0029/159725/statement-bbc-iplayer-final-determination.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0029/159725/statement-bbc-iplayer-final-determination.pdf).

#### 5.3.4.2. Britbox

Ofcom investigated whether the BBC's stake in a subscription video on demand (SVOD) service with ITV triggered an Ofcom obligation to carry out an assessment. The venture will be held 90% by ITV and 10% by the BBC through its commercial arm (with the possibility of Channel 4 and Channel 5 becoming involved). The platform will contain ITV and BBC material after it has been made available on ITV and BBC catch-up services. The BBC will license content to Britbox (as it does to other platforms). Ofcom agreed with the BBC that this constitutes a new commercial activity; Ofcom therefore undertook a review of whether this would distort the market or create an unfair competitive advantage.<sup>237</sup> The majority of industry bodies were also supportive of a new British-focused SVOD service that would buy and commission content in the UK market. Some, however, were concerned about the involvement of the BBC. Ofcom identified three concerns that were dealt with adequately by its current rules on trading and separation: information sharing between the public service element of the BBC and the BBC's commercial subsidiaries or the new BritBox service; the prices that BBC Studios pay the public service element for inputs that they use (such as the programme rights it holds and the use of the BBC brand); and the public service broadcaster favouring BBC Studios (or ITV Studios) in its commissioning process to secure content for BritBox.

Ofcom also had concerns that it did not feel were addressed by the current rules: the changes to the BBC's programme release policy;<sup>238</sup> and cross-promotion of Britbox services or programmes.<sup>239</sup> Ofcom concluded that the changes to the programme release policy were appropriate but said it would continue to monitor the BBC's approach; it also considered that the change would not significantly distort the market. The BBC had already strengthened its rules on cross-promotion, though Ofcom said it would continue to keep this under review. In sum, Ofcom concluded that there was no significant risk of market distortion or unfair competitive advantage and that therefore the BBC's involvement in Britbox did not give rise to a material change.

The BBC is not the only public service broadcaster; the Communications Act 2003 recognised that every Channel 3 licensee, as well as Channel 4 and Channel 5, are public service broadcasters and as such aim to achieve the purposes of public service television broadcasting (defined in Section 264 Communications Act). Ofcom is obliged to produce periodic reviews on the extent to which the broadcasters have provided relevant services and complied with their licence obligations. In addition to annual reports, it recently published a five-year review of public service broadcasting.<sup>240</sup> In contrast to previous reviews, this one aimed to stimulate a debate about the future of public service broadcasting and was part of a larger project on the topic.

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<sup>237</sup> Ofcom, BritBox materiality assessment – final determination, 19 September 2019. Available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0028/167149/statement-britbox-final-determination.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0028/167149/statement-britbox-final-determination.pdf).

<sup>238</sup> See: <http://downloads.bbc.co.uk/commissioning/site/bbc-programme-release-policy-october-2019.pdf>.

<sup>239</sup> Cross-promotion of BBC services are subject to Clause 63 BBC Agreement; other broadcasters are subject to Ofcom's code on cross-promotion made under S. 316 Communications Act. The Code is available at <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/cross-promotion-code>.

<sup>240</sup> Ofcom, Small Screen: Big Debate – a five-year review of Public Service Broadcasting (2014-18), 27 February 2020. Available at <https://www.smallscreenbigdebate.co.uk/what-is-ssbd/ssbd-five-year-review>.

### 5.3.5. Transposition of pluralism-related EU provisions

Article 31 Framework Directive was implemented in Section 64 Communications Act, which allows Ofcom to set “general conditions” in relation to must-carry so as to ensure that particular services are transmitted. Section 64(2) and (3) set down the types of service which may benefit (essentially the public service broadcasters [PSBs] as identified in the act) and identify the categories of networks on which the obligation may be imposed. The UK system envisages that the broadcasters pay no fee for this but that the PSB providers must offer content. DCMS carried out a review of the balance of payments between television platforms and public service broadcasters in 2016.<sup>241</sup> It concluded that deregulation of the must-offer/must-carry provisions was not desirable.

As part of the “PSB compact”, the terrestrial public service broadcasters receive transmission, allocated frequency and prominence in electronic programme guides (EPGs). The 2016 DCMS review recognised that prominence was an important and complex matter. Subsequently, in the Digital Economy Act 2017, Ofcom was assigned a new duty: to review the EPG code by December 2020. As a result, it made some changes to its EPG code,<sup>242</sup> but also made recommendations to the government that new legislation was needed in this area to support PSBs.<sup>243</sup> While the UK government has confirmed that it will implement the Audiovisual Media Services Directive (2018), the legislation is not yet available. In its consultation response regarding the implementation of the revised directive, the government stated that it proposed to implement the provision on signal integrity by introducing a penalty scheme.<sup>244</sup> The UK has indicated that it will not be implementing the Digital Single Market Directive (and at the moment copyright appears also outside the scope of the proposed online harms legislation).<sup>245</sup>

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<sup>241</sup> DCMS, The balance of payments between television platforms and public service broadcasters consultation report: Government response, 5 July 2016. Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/534872/The\\_balance\\_of\\_payments\\_between\\_television\\_platforms\\_and\\_public\\_service\\_broadcasters\\_consultation\\_report\\_1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/534872/The_balance_of_payments_between_television_platforms_and_public_service_broadcasters_consultation_report_1.pdf).

<sup>242</sup> See amendments here: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0025/154384/annex-5-epg-code-appropriate-prominence-provisions.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0025/154384/annex-5-epg-code-appropriate-prominence-provisions.pdf).

<sup>243</sup> Ofcom, Review of prominence for public service broadcasting: Recommendations to Government for a new framework to keep PSB TV prominent in an online world, 4 July 2019. Available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf).

<sup>244</sup> Consultation outcome: Audiovisual media services, government response to public consultations on the government’s implementation proposals, 30 May 2019. Available at <https://www.gov.uk/government/consultations/audiovisual-media-services/outcome/audiovisual-media-services-government-response-to-public-consultations-on-the-governments-implementation-proposals>.

<sup>245</sup> Copyright: EU action: Written question – 4371 answered by Chris Skidmore. Available at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371>.



### 5.3.6. Funding mechanisms to ensure media diversity

The BBC, the public service broadcaster, is funded by a licence fee and is subject to certain programming commitments to support independent filmmakers, as are the other public service broadcasters. There are specific regional funds for films: Ffilm Cymru Wales aims to identify and nurture Welsh filmmakers, and there are similar funds in relation to Scotland, Northern Ireland and England. More locally still, there is the Isle of Man Development Fund, the Yorkshire Content Fund and the Liverpool City Region Production Fund. The British Film Institute has lottery funding of GBP 26 million per year for films and a separate fund to support new filmmakers. A number of tax reliefs are available for film and high-end children's television programmes and animation, as well as for video games. The British Film Commission in the pre-Covid19 2020 budget received GBP 4.8 million to support its work. The British Film Commission has a remit that includes strengthening and promoting the UK film and television infrastructure. It should be noted that the UK government does not intend to implement the levies permitted under the Audiovisual Media Services Directive.<sup>246</sup>

Newspapers, books and some other printed products have benefited from a zero rate for VAT on the basis that their consumption is in the public interest. Recently, a tax tribunal ruled that digital newspapers could be treated as print newspapers; the tribunal relied on the fact that the website editions of *The Times* and *The Sunday Times* are only updated four times a day and are therefore, it held, equivalent to print.<sup>247</sup> It should be noted that the Cairncross Review (below) had suggested removing taxes on online subscriptions. A similar point was raised by the publishers of books. The abolition of VAT on online newspapers, magazines and journals was announced in the 2020 budget, effective 1 December 2020. The exemption does not apply to audiobooks.

### 5.3.7. Other developments regarding media plurality on the national level

The Cairncross Review<sup>248</sup> was commissioned to consider the sustainability of the production and distribution of high-quality journalism, especially the press, and given the impact of, in particular, social media and search engines. The review put forward suggested measures to improve the power relationship between online platforms/search engines and the press. It also questioned how the holding to account of public bodies, national and local, should be carried out. This included a recommendation regarding competition in the advertising

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<sup>246</sup> Under the Withdrawal Agreement, the UK is obliged to implement the AVMS Directive (implementation date is before the end of the implementation period).

<sup>247</sup> *News Corp v Commissioner for HM Revenue and Customs* [2019] UKUT 404 (TCC). In an earlier case, the opposite was found: *News Corp v Commissioner for HM Revenue and Customs* [2018] UKFTT 129 (TC); note EU rules changed in the interim.

<sup>248</sup> The Cairncross Review: A sustainable future for journalism, 12 February 2019. Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779882/02\\_1919\\_DCMS\\_Cairncross\\_Review\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/02_1919_DCMS_Cairncross_Review_.pdf).

market<sup>249</sup> and a recommendation to Ofcom to consider whether BBC News should do more to channel traffic from its online site to commercial news organisations, particularly local ones. The review also suggested the establishment of a fund (to be run by Nesta) to support the improvement of public interest news, and the introduction of new tax relief and direct funding for local public interest news. Ofcom published a review in October 2019 which considered the BBC's links to third-party websites. The government also launched a pilot innovation fund in October 2019 which was to be evaluated in spring 2020.

In addition to Ofcom's review of public service broadcasting (see above), the Lords Select Committee on Communications and Digital carried out an inquiry on the future of public service broadcasting (November 2019), which resulted in the publication of a report, "Public service broadcasting: as vital as ever".<sup>250</sup> The report emphasises the importance of public service broadcasting and notes that public service broadcasters need to be better supported. In considering public service broadcasting, the report adds, the role of commercial broadcasters must also be taken into consideration. The committee recognised that support for the licence fee might drop given that public service broadcasters appear to have less engagement with 16- to 34-year-olds and are not as successful as subscription video on demand services in appealing to black, Asian and minority ethnic (BAME) viewers. The government has not yet responded to the report.

The government is once again considering de-criminalising non-payment of the BBC licence fee (an issue considered in 2015) and issued a consultation.<sup>251</sup> The response was expected to be published in the summer of 2020, though because of Coronavirus the timetable may slip. Decriminalisation would have a potential significant impact on the BBC; the decision will in any event have an impact on the licence fee settlement negotiations, which begin later in 2020.

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<sup>249</sup> Note that the government commissioned an expert panel to carry out a review of competition in digital markets and the CMA has undertaken some work in this field too. The CMA recently concluded its market study report into online platforms and the digital advertising market. It did not focus on plurality but analysed matters from a competition perspective; it found major issues and proposed ex ante regulation. See <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

<sup>250</sup> Report here: <https://publications.parliament.uk/pa/ld201919/ldselect/ldcomuni/16/16.pdf>; Government response here: <https://www.parliament.uk/documents/lords-committees/communications-and-digital/psbs-and-vod/government-response-psb-as-vital-as-ever.pdf>.

<sup>251</sup> <https://www.gov.uk/government/consultations/consultation-on-decriminalising-tv-licence-evasion>.

## 5.4. IT - Italy

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### 5.4.1. Introduction

Article 21 of the Italian Constitution enshrines the right to inform and to be informed. A corollary of that right is the principle of media pluralism,<sup>252</sup> which first emerged with regards to television broadcasting and subsequently extended to other media, eventually becoming the cornerstone of freedom of information in the Italian legal order.

Media pluralism has three dimensions: internal; external; and substantive.<sup>253</sup> Internal pluralism is about each medium's ability to be receptive to and to convey the diversity of the political, cultural, and social landscape. External pluralism calls for the greatest possible number of media and information outlets the current technology can enable. Substantive pluralism ("pluralismo sostanziale"),<sup>254</sup> instead, entails a level playing field in the domain of political communication.<sup>255</sup>

In the Italian legal order, the Italian Constitutional Court has for several years acted as the guardian of media pluralism.<sup>256</sup> On several occasions, it has called upon the Italian parliament to adopt legislation to outlaw dominant positions in the media sector.<sup>257</sup> It has also struck down several pieces of legislation that had proven unsuitable to prevent excessive concentration in the broadcasting sector.<sup>258</sup>

Notwithstanding the constitutional character of the principle of media pluralism, market concentration in the media sector has been a critical aspect in Italy for over 20 years. Even the Council of Europe's Parliamentary Assembly highlighted the issue in its Resolution No. 1387 (2004)<sup>259</sup> on monopolisation of the electronic media and possible abuse of power in Italy, where it referred to Italy's television market duopoly as an "anomaly from an antitrust perspective", characterised by a situation of conflict of interest whereby the leader

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<sup>252</sup> Constitutional Court, Judgment No. 155 of 2002, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2002&numero=155>.

<sup>253</sup> See, generally, Roberto Mastroianni and Amedeo Arena, *Media Law in Italy*, Wolters Kluwer, 2014, 36 et seq.

<sup>254</sup> "Pluralismo sostanziale" is a key concept in Italian media law and is employed both by legal scholars and Italian courts (see <http://www.giurcost.org/decisioni/2002/0155s-02.html>).

<sup>255</sup> Constitutional Court, Judgment No. 112 of 1993; <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1993&numero=112>.

<sup>256</sup> See Roberto Mastroianni and Amedeo Arena, *Media concentration in Italy*, in Maja Cappello (ed), *Media ownership: market realities and regulatory responses*, IRIS Special 2016-2, p. 73-74.

<sup>257</sup> Constitutional Court, Judgment No. 826 of 1988, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1988&numero=826>.

<sup>258</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).

<sup>259</sup> Resolution 1387 (2004) *Monopolisation of the electronic media and possible abuse of power in Italy*, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17237&lang=en>.

of a major political party was also the owner of “approximately half of the nationwide broadcasting in the country”.<sup>260</sup>

## 5.4.2. Control mechanisms under national (media) concentration law

The Italian Consolidated Law on Audiovisual and Radio Media Services or AVMS Code<sup>261</sup> lays down three types of anti-concentration limits for the media sector: technical; economic; and diagonal (cross-ownership).

The technical limit<sup>262</sup> places a 20% cap on the channels a given audiovisual media services provider can broadcast, relative to the total number of available television and radio channels.<sup>263</sup> The Italian Media Regulator (*Autorità per le Garanzie nelle Comunicazioni*, AGCOM) is responsible for the enforcement of the technical limit. As per Deliberation No. 353/11/CONS<sup>264</sup>, AGCOM monitors compliance with the technical limit every time it is notified of a concentration in the media sector and, in any case, by 30 October of each year. Up until now, no infringements of the technical limit have been established by AGCOM.

The economic limits,<sup>265</sup> first and foremost, prohibit dominant positions in the Integrated Communications System and in its constituent sub-markets.<sup>266</sup> The Integrated Communications System (*Sistema integrato delle comunicazioni*, SIC) is a relevant market defined by the AVMS Code as encompassing revenues from: daily newspapers and periodicals; yearly and electronic publishing; radio and audiovisual media services; cinema; outdoor advertising; communication initiatives for products and services; and sponsorships.<sup>267</sup> Moreover, as per the economic limits, no communication operator may achieve revenues exceeding 20% of the total revenues of the SIC,<sup>268</sup> as listed in Article 43, para. 10 AVMS Code.<sup>269</sup> The 20% cap is reduced to 10% for the SIC revenues for companies achieving more than 40% of the revenues of the electronic communications sector.<sup>270</sup> Every

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<sup>260</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>261</sup> Legislative Decree No. 177/2005 (the AVMS Code), [www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig](http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig).

<sup>262</sup> See Roberto Mastroianni and Amedeo Arena, Italy, in Susanne Nikoltchev (ed), *Converged Markets – Converged Power? Regulation and Case Law*, IRIS Special 2012, 114.

<sup>263</sup> Article 43, para. 7, AVMS Code.

<sup>264</sup> Delibera n.353/11/CONS del 23 giugno 2011, Nuovo regolamento relativo alla radiodiffusione televisiva terrestre in tecnica digitale, Gazzetta Ufficiale della Repubblica italiana del 6 luglio 2011 Serie Generale n. 155 (AGCOM Regulation no. 353/11/CONS concerning the licensing of digital terrestrial television broadcasting).

<sup>265</sup> See Roberto Mastroianni and Amedeo Arena, Italy, in Susanne Nikoltchev (ed), *Converged Markets – Converged Power? Regulation and Case Law*, IRIS Special 2012, 114-115.

<sup>266</sup> Article 43, para. 7, AVMS Code.

<sup>267</sup> Article 2 para. 1, lit. s) of Legislative Decree no. 177 of 31 July 2005.

<sup>268</sup> Article 43, para. 9, AVMS Code.

<sup>269</sup> As from 2012, the list of SIC revenues also includes online advertising, resources collected by search engines, social media, and sharing platforms.

<sup>270</sup> Article 43, para. 11 of Legislative Decree No. 177 of 31 July 2005.

year, AGCOM estimates the overall value of the SIC (EUR 18.4 billion in 2018, accounting for 1,04% of Italy's GDP).<sup>271</sup> AGCOM also monitors compliance with the economic anti-concentration limits<sup>272</sup> and is mandated to adopt appropriate measures if it detects an infringement.<sup>273</sup>

Turning to diagonal (cross-ownership) limits,<sup>274</sup> the AVMS Code prohibits nationwide broadcasters that have achieved more than 8% of the revenues of the SIC, and electronic communications companies exceeding 40% of the revenues of the electronic communications sector, from acquiring equity or participating in the establishment of publishers of daily newspapers (with the exception of daily newspapers issued only in electronic form).<sup>275</sup>

Companies operating in the media sector must also comply with EU competition rules, laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and in Council Regulation 139/2004, and Italian competition rules, set out in Law 287/1990 of 10 October 1990,<sup>276</sup> establishing the Italian Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM). Article 101 TFEU and Article 2 of Law 287/1990 prohibit agreements, concerted practices, and decisions by associations of undertakings which have as their object or effect the restriction of the competition within, respectively, the EU internal market and Italy's national market, or a substantial part thereof. Article 102 TFEU and Article 3 of Law 287/1990 prohibit abuse of a dominant position by one or more undertakings within, respectively, the EU internal market and Italy's national market, or a substantial part thereof. Council Regulation 139/2004 and Article 16 of Law 287/1990 set out a prior notification requirement for concentrations involving companies exceeding certain turnover thresholds. Companies operating in the media sector must notify their concentrations, ownership transfers, and agreements both to the AGCM and to AGCOM,<sup>277</sup> which are mandated to assess those transactions in accordance with the regulation laid down in AGCOM Deliberation No. 368/14/CONS,<sup>278</sup> and may declare them

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<sup>271</sup> Attachment A to Deliberation No. 25/20/CONS. AGCOM has not yet published its 2019 estimate of the SIC value.

<sup>272</sup> Article 43, para. 5 of Legislative Decree No. 177 of 2005.

<sup>273</sup> Article 43, para. 5, AVMS Code.

<sup>274</sup> See Roberto Mastroianni and Amedeo Arena, Media concentration in Italy, in Maja Cappello (ed), Media ownership - Market realities and regulatory responses, IRIS Special 2016-2, p. 77.

<sup>275</sup> Article 43, para.12, AVMS Code.

<sup>276</sup> Legge 10 ottobre 1990, n. 287 - Norme per la tutela della concorrenza e del mercato (Gazzetta Ufficiale del 13 ottobre 1990, n. 240), <https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato>.

<sup>277</sup> Article 43, para. 1 AVMS Code; Article 1, para. 1(6)(c)(13) of Law 31 July 1997, No. 249. See also Regional Administrative Court for Latium, Judgment of 7 September 2001, No. 7286 (holding that undertakings are not required to obtain clearance from AGCOM prior to notifying concentrations to the AGCM).

<sup>278</sup> Delibera n. 368/14/CONS Regolamento recante la disciplina dei procedimenti in materia di autorizzazione ai trasferimenti di proprietà, delle società radiotelevisive e dei procedimenti di cui all'articolo 43 del decreto legislativo 31 luglio 2005, n. 177, as amended by AGCOM Deliberation No. 110/10/CONS. [https://www.agcom.it/documentazione/documento?p\\_p\\_auth=fLw7zRht&p\\_p\\_id=101\\_INSTANCE\\_FnOw5IVOIXoE&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&\\_101\\_INSTANCE\\_FnOw5IVOIXoE\\_struts\\_action=%2Fasset\\_publisher%2Fview\\_content&\\_101\\_INSTANCE\\_FnOw5IVOIXoE\\_assetEntryId=1501602&\\_101\\_INSTANCE\\_FnOw5IVOIXoE\\_type=document](https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5IVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5IVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5IVOIXoE_assetEntryId=1501602&_101_INSTANCE_FnOw5IVOIXoE_type=document).

null and void if they are at variance with the technical, economic, or diagonal (cross-ownership) limits laid down in the AVMS Code.<sup>279</sup>

### 5.4.3. (Recent) Decisions of national competition and antitrust authorities regarding media providers or intermediaries/platforms

Over the last decade, the AGCM and AGCOM have taken a number of decisions with a significant impact on the media environment. For instance, on 18 April 2017, AGCOM established that Vivendi S.A., by virtue of its connection with Telecom and Mediaset, exceeded the economic limit, by achieving more than 40% of the revenues of the electronic communications sector and more than 10% of the SIC revenues.<sup>280</sup> Furthermore, on 13 April 2016, the AGCM cleared, subject to commitments, the concentration between the broadcaster Reti Televisive Italiane S.p.A (a branch of Mediaset S.p.A.) and Gruppo Finelco S.p.A, a company active in the production of radio programs and the marketing of advertising space.<sup>281</sup> Similarly, on 20 May 2019, the AGCM cleared, subject to commitments, the concentration between the pay tv broadcaster Sky Italia Srl and R2 Srl (a branch of Mediaset Premium S.p.A.), a company providing technical, administrative, and commercial support for the purpose of setting up a pay tv offering on DTT.<sup>282</sup>

As concentrations in the media sectors must be notified both to the AGCM and AGCOM, this can lead to conflicting outcomes:<sup>283</sup> in the *SEAT/Cecchi Gori* case, for instance, AGCOM opposed the concentration<sup>284</sup> while the AGCM cleared it, subject to commitments.<sup>285</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>286</sup>

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<sup>279</sup> Article 43, para. 4 of Legislative Decree No. 177 of 2005.

<sup>280</sup> AGCom Deliberation No. 178/17/CONS.

<sup>281</sup> AGCM, case C12017, Reti televisive Italiane/Gruppo Finelco, Decision No. 25957 of 13 April 2016.

<sup>282</sup> AGCM, case C12207, Sky Italia/R2, Decision No. 27784 of 20 May 2019.

<sup>283</sup> See Roberto Mastroianni and Amedeo Arena, Media concentration in Italy, in Maja Cappello (ed), *Media ownership - Market realities and regulatory responses*, IRIS Special 2016-2, p. 79.

<sup>284</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.

<sup>285</sup> AGCM, Case C4158 - SEAT Pagine Gialle/Cecchi Gori Communications, Decision of 23 January 2001, No. 9142.

<sup>286</sup> See AGCOM Decision of 14 September 2009, No. 519/09/CONS.

#### 5.4.4. Relationship between public service and private/commercial media

The AVMS Code entrusts the operation of public service media (PSM) to RAI-Radiotelevisione Italiana S.p.A. (RAI). PSM have a set of specific duties, the so-called PSM remit, in the framework of the general interest duties all media providers must comply with.

This general interest language is currently used also with reference to commercial operators: the AVMS Code stipulates that “the provision of information through audiovisual media services by any broadcaster or content provider constitutes a service of general interest” and must therefore comply with a number of horizontal requirements (e.g. the obligation to broadcast news programs every day).<sup>287</sup> Furthermore, other provisions of the AVMS Code, such as those on short news reports<sup>288</sup> and the promotion of European works,<sup>289</sup> require commercial operators to comply with general interest obligations comparable to those laid down in the PSM remit. By the same token, just like commercial operators, PSM operators are entitled to engage in commercial activities, as long as they do not hinder compliance with the PSM remit and contribute to ensuring a balanced management of the company.<sup>290</sup>

The PSM remit consists of several obligations for the PSM operator, including: the provision of programs of general interest throughout the national territory; the allotment of an adequate number of hours - also during prime time - to education, information, and culture; the provision of programs for linguistic minorities and handicapped people; etc. The PSM remit is detailed in a service contract (*contratto di servizio*)<sup>291</sup> concluded every three years by the Italian Ministry of Economic Development with the PSM operator,<sup>292</sup> in line with the guidelines, jointly issued by the ministry and AGCOM, setting out further PSM obligations.<sup>293</sup> Moreover, prior to each renewal, the service contract is vetted by the Parliamentary Supervision Committee (PSC).<sup>294</sup>

The PSM operator’s compliance with its remit is subject both to internal and external supervision.

Internal supervision is carried out by RAI’s board of directors, which is “responsible for ensuring and guaranteeing correct fulfilment of the aims and obligations of the general public broadcasting service”.<sup>295</sup> To this end, the board of directors enacted RAI’s code of ethics, which includes pluralism and impartiality among RAI’s general ethical principles.<sup>296</sup>

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<sup>287</sup> Article 7, para. 1, AVMS Code.

<sup>288</sup> Article 32-quater, AVMS Code.

<sup>289</sup> Articles 44-44-septies, AVMS Code.

<sup>290</sup> Article 45, para. 5, AVMS Code.

<sup>291</sup> See *Contratto di Servizio RAI 2018-2022*,

[http://www.rai.it/dl/doc/1521036887269\\_Contratto%202018%20testo%20finale.pdf](http://www.rai.it/dl/doc/1521036887269_Contratto%202018%20testo%20finale.pdf)

<sup>292</sup> Article 45, para. 1, AVMS Code.

<sup>293</sup> See <https://www.agcom.it/linee-guida-per-contratto-di-servizio>

<sup>294</sup> See [http://www.parlamento.it/Parlamento/1230?shadow\\_organo=406018](http://www.parlamento.it/Parlamento/1230?shadow_organo=406018)

<sup>295</sup> Article 49, para. 3, AVMS Code.

<sup>296</sup> [https://www.rai.it/dl/doc/1586535485463\\_Codice%20Etico%20\\_%20Marzo%202020.pdf](https://www.rai.it/dl/doc/1586535485463_Codice%20Etico%20_%20Marzo%202020.pdf).

Compliance with the code is ensured by RAI's board of directors and RAI's director-general, who is accountable to the board of directors.

The PSM operator's external supervision is entrusted to AGCOM and the PSC. The PSC may issue directives to the PSM operator as to its investment and expenditure plans, its program schedule, and its advertising policy.<sup>297</sup> The PSC also ensures that its guidelines and directives are complied with by the PSM operator. The AVMS Code expressly entrusts AGCOM with the task of monitoring compliance by the PSM operator with its remit.<sup>298</sup> In case of alleged non-compliance, AGCOM must notify the PSM operator, which has the right to be heard and to submit written observations.<sup>299</sup> Should AGCOM establish a violation of the PSM remit, it sets a deadline not exceeding 30 days for the PSM operator to remedy the infringements.<sup>300</sup> In case of serious infringement, AGCOM may also impose a fine of up to 3% of the PSM operator's annual turnover.<sup>301</sup>

## 5.4.5. Transposition of pluralism-related EU provisions

### 5.4.5.1. Article 61(2)(d) and 114 of the European Electronic Communications Code

Article 114 of the European Electronic Communications Code (Directive 2018/1972) has been transposed by Article 81 of Legislative Decree 1 August 2003, No. 259, the Electronic Communications Code (*Codice delle Comunicazioni Elettroniche*, CCE), as amended by Article 62, para. 1, of Legislative Decree 28 May 2012, No. 70.

### 5.4.5.2. Article 7a and 7b of the Audiovisual Media Services Directive (AVMSD)

The Audiovisual Media Services Directive (Directive (EU) 2018/1808) has not been transposed yet. On 23 January 2020, the Italian government submitted a bill to parliament for legislative delegation to transpose the directive.<sup>302</sup>

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<sup>297</sup> Article 4 of Law 103 of 1975.

<sup>298</sup> Article 48, para. 1, AVMS Code.

<sup>299</sup> Article 48, para. 2, AVMS Code.

<sup>300</sup> Article 48, para. 7, AVMS Code.

<sup>301</sup> Ibid.

<sup>302</sup> <http://www.politicheeuropee.gov.it/it/normativa/legge-di-delegazione-europea/legge-delegazione-ue-2019>.



#### 5.4.5.3. Article 15 and 17 of the Digital Single Market Directive

The Digital Single Market Directive (Directive (EU) 2019/790) has not been transposed yet. On 23 January 2020, the Italian government submitted a bill to parliament for legislative delegation to transpose the directive.<sup>303</sup>

#### 5.4.5.4. Other relevant national implementation measures concerning EU law with an impact on pluralism of the media

On 6 November 2017, with Deliberation No. 423/17/CONS, AGCOM established the workshop for pluralism and truthful information on digital platforms (*tavolo per la garanzia del pluralismo e della correttezza dell'informazione sulle piattaforme digitali*) seeking to promote the self-regulation of digital platforms and the exchange of best practices to fight online disinformation.

### 5.4.6. Funding mechanisms to ensure media diversity

The AVMS Code sets out specific provisions to promote independent producers, i.e. “media operators engaging in the production of audiovisual content that are not controlled or connected to audiovisual media providers subject to Italian jurisdiction”.<sup>304</sup>

The PSM operator, in drafting its program schedule, must take into account European works by independent producers, so as to encourage education, and promote the Italian language, culture and national identity.<sup>305</sup> The PSM operator must devote at least 15% of its annual revenues (from the compulsory licence fee and advertising) to the purchase or pre-purchase of European works by independent producers.<sup>306</sup> Moreover, the PSM operator must devote at least 3.6% of its annual revenues (4% in 2020 and 4.2% as from 2021) to works of original Italian expression by independent producers.<sup>307</sup>

Linear audiovisual media service providers other than the PSM operator must devote at least 10% of their annual revenues (11.5% in 2020 and 12.5% as from 2021) to the purchase or pre-purchase of works by independent producers.<sup>308</sup> Moreover, linear audiovisual media service providers other than the PSM operator must devote at least 3.2% of their annual revenues (3.5% as from 2020) to films of original Italian expression by independent producers.

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<sup>303</sup> Ibid.

<sup>304</sup> Article 2, lit. p), AVMS Code.

<sup>305</sup> Article 7, para 4, AVMS Code.

<sup>306</sup> Article 44-ter, para. 3, AVMS Code.

<sup>307</sup> Ibid.

<sup>308</sup> Article 44-ter, para. 1, AVMS Code.

## 5.4.7. Other developments regarding media pluralism on the national level

The debate on media concentration per se has pretty much faded away, as the situation of conflict of interest that characterised the Italian media landscape for several years resolved itself in 2013,<sup>309</sup> when the owner of approximately half of Italian nationwide broadcasting was expelled from the Italian parliament following a four-year sentence for tax fraud.<sup>310</sup>

The current debate on media pluralism has focused on big data and online platforms, which collect a significant amount of user data and constitute one of the main sources of information for citizens.<sup>311</sup> This situation calls for a balancing exercise between the commercial value of data, the protection of privacy, free competition and pluralism.<sup>312</sup> AGCOM, with its Deliberation No. 309/16/CONS, launched a sector inquiry into digital platforms and information, encompassing the functioning of media outlets, the structure of online platforms, and the features of information demand on the Internet, highlighting a number of criticalities from the perspective of media pluralism. The findings were disclosed in an interim report by AGCOM in November 2018 entitled “News vs fake”.<sup>313</sup>

## 5.5. LV - Latvia

*Andris Mellakauls, Ministry of Culture, Latvia*

### 5.5.1. Introduction

The Latvian constitution (*Satversme*)<sup>314</sup> does not explicitly uphold the need for media pluralism but this is implied in the preamble and in the body of the text. The preamble states: “Latvia as a democratic, socially responsible and national state is based on the rule of law and on respect for human dignity and freedom; it recognises and protects fundamental human rights and respects ethnic minorities.” Article 100 of the constitution guarantees freedom of expression: “Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited.” Minority rights are set out in Article 114 of the

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<sup>309</sup> See Roberto Mastroianni and Amedeo Arena, Media concentration in Italy, in Maja Cappello (ed), Media ownership - Market realities and regulatory responses, IRIS Special 2016-2, p. 83.

<sup>310</sup> <https://www.bbc.com/news/av/world-europe-25132557/silvio-berlusconi-expelled-from-italian-parliament>

<sup>311</sup> AGCOM 2019 Annual Report, pp. 28-29.

<sup>312</sup> Ibid., p. 29.

<sup>313</sup> <https://www.agcom.it/documents/10179/12791486/Pubblicazione+23-11-2018/93869b4f-0a8d-4380-aad2-c10a0e426d83?version=1>.

<sup>314</sup> <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia>.

constitution: “Persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity.”

The three main pieces of legislation covering media pluralism and competition issues are: the Law on the Press and Other Mass Media,<sup>315</sup> the Electronic Mass Media Law,<sup>316</sup> and the Competition Law.<sup>317</sup> Apart from the legal framework regarding competition in general and regulation of the media in particular, there are several policy documents with a direct or indirect bearing on media concentration and diversity.

#### 5.5.1.1. Media Policy Guidelines

The Media Policy Guidelines 2016-2020<sup>318</sup> and their accompanying Implementation Plan are based on five main strands: media diversity; quality and responsible media; professional media; media literacy; and securitability or resilience of the media environment. The guidelines emphasise the contribution of media diversity to the choice of quality content, the pluralism of opinion, and geographical and social accessibility, while providing a forum for debate in a democratic society. They acknowledge the growing convergence of media content but are opposed to such a concentration of media ownership when the diversity of views is threatened. Lines of action to promote diversity include: withdrawal of the public service media from the advertising market to promote the sustainability of the commercial media; establishment of the Media Support Fund to promote the creation of non-commercial, public value content regardless of the platform; and support for the creation of public value content for persons with disabilities. The plan also envisages studies on the internal and external diversity of the media in Latvia using quantitative and qualitative methods.

#### 5.5.1.2. The National Electronic Media Strategy

The National Electronic Mass Media Council (NEMMC)<sup>319</sup> is responsible for drafting the National Electronic Media Strategy. The current document covers 2018-2022 and states that its strategic aim is to promote competition in the electronic media market. The strategy defines the mission of the NEMMC as being “to develop, support and monitor the electronic media sector in Latvia, creating the pre-conditions for the diversity of electronic media, the services they provide and the opinions they reflect, promoting competition in the sector’s

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<sup>315</sup> Likums “Par presi un citiem masu informācijas līdzekļiem”. Available at <https://likumi.lv/ta/id/64879>.

<sup>316</sup> Elektronisko plašsaziņas līdzekļu likums. Available at <https://likumi.lv/ta/id/214039>.

<sup>317</sup> Konkurences likums. Available at <https://likumi.lv/ta/id/54890>.

<sup>318</sup> Ministru kabineta 2016. gada 8. novembra rīkojums Nr. 667 “Par Latvijas mediju politikas pamatnostādņēm 2016.–2020. gadam”. Available at <https://likumi.lv/ta/id/286455> and <https://www.km.gov.lv/en/media-policy/media-policy>.

<sup>319</sup> Nacionālās elektronisko plašsaziņas līdzekļu padomes 2020. gada 8. maija lēmums Nr. 162 “Par grozījumiem Elektronisko plašsaziņas līdzekļu nozares attīstības nacionālajā stratēģijā 2018–2022 gadam”. Available at <https://likumi.lv/ta/id/314591>, and in Latvian only at [https://www.nep.lpadome.lv/lv/assets/documents/Normativie%20Akti/Strategija/EPL%20strate%CC%84g%CC%A7ija\\_konsolid%C4%93ts\\_19122019.pdf](https://www.nep.lpadome.lv/lv/assets/documents/Normativie%20Akti/Strategija/EPL%20strate%CC%84g%CC%A7ija_konsolid%C4%93ts_19122019.pdf).

market, according to the interests and needs of the various groups of society and the preservation and accessibility of high-quality content.”

One of the priority directions of the strategy is to ensure “a competitive, sustainable business environment for the electronic media”. The strategic aim is to create pre-conditions that motivate media companies to conduct business in Latvia, reduce piracy, promote equal competition between technological platforms and provide a favourable environment for investment.

### 5.5.1.3. The National Security Concept

The National Security Concept<sup>320</sup> is drafted by the cabinet and approved by the *Saeima* (parliament) in the first year of each convening, normally every four years.

Section 8 of the concept deals with threats to the information space. It posits that democracy is functional when citizens take decisions based on information provided by pluralistic and diverse media. The Latvian media ecosystem has systematically suffered because of low financing. The small market and insufficient revenue from advertising limit the creation of high-quality content. The concept recognises the danger posed to national security by the reduction of media diversity, particularly in the regions, and the need for action to ensure diversity.

In parallel with the development of public service media, the concept calls for a more diverse offering of commercial and cable television content. The concept emphasises the need to continue and expand the operation of the Media Support Fund enabling commercial media to participate in open tenders for the creation of public interest content.

## 5.5.2. Control mechanisms under national (media) concentration law

Until 2010, when it was replaced by the Electronic Mass Media Law (EMML),<sup>321</sup> the Radio and Television Law<sup>322</sup> had specific rules on the restriction of concentration and monopolisation of the electronic media. The law prohibited the monopolisation of the electronic media in the interests of a political party, voluntary organisation, undertaking, a group of persons or an individual. It also prohibited the linking together of regional and local broadcasters in networks unless this was foreseen in what was then the national concept of the development of electronic mass media (now the strategy). Apart from the

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<sup>320</sup> Saeimas 2019. gada 26. septembra paziņojums "Par Nacionālās drošības koncepcijas apstiprināšanu". Available at <https://likumi.lv/ta/id/309647>, <https://likumi.lv/ta/en/en/id/309647-on-approval-of-the-national-security-concept>

<sup>321</sup> Elektronisko plašsaziņas līdzekļu likums. Available at <https://likumi.lv/ta/id/214039> and <https://likumi.lv/ta/en/en/id/214039-electronic-mass-media-law>. Unfortunately the English translation does not reflect the most recent amendments.

<sup>322</sup> Radio un televīzijas likums. Available at <https://likumi.lv/ta/id/36673/redakcijas-datums/2010/01/01> and [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Radio\\_and\\_TV\\_law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Radio_and_TV_law.doc).

public service media, broadcasters were limited to operating three services. An owner or someone having control of one broadcaster or the spouse of such a person could not own more than 25% of shares in another broadcaster. The law also provided for divestment and compulsory sale of shares where necessary. There were no restrictions on cross-media ownership.

The EMML, which transposed the AVMSD, has no such provisions regarding media concentration. It does, however, require disclosure of media service providers' beneficial owners. The Law on the Press and Other Mass Media<sup>323</sup> explicitly prohibits the monopolisation of the press or any other mass media.

The Competition Law<sup>324</sup> aims “to protect, maintain and develop free, fair and equal competition *in all sectors of the economy* (emphasis by author) in the public interest, by limiting market concentration [...]” The law establishes a competition council<sup>325</sup> tasked with, inter alia, preventing abuse of dominant positions and limiting market concentration by ruling on acquisitions and mergers. Its decisions are binding and are to be implemented voluntarily. Where necessary, compliance with these decisions can be enforced.

Prior to a merger, market participants must notify the competition council if the total turnover of the merger members in the previous financial year in Latvia was not less than EUR 30 million and the turnover of at least two of the merger members in the previous financial year was not less than EUR 1.5 million each in the territory of Latvia. The competition council can authorise the merger with or without conditions.<sup>326</sup>

### 5.5.3. (Recent) Decisions of national competition and anti-trust authorities regarding media providers or intermediaries/platforms

On 20 February 2020 the competition council decided to allow the telecommunications company Bite Latvija to gain decisive influence over Baltcom, a provider of optical Internet, interactive TV, and fixed telephone and electricity services. The owner of Bite Latvija is Bite Lietuva (Lithuania), which also owns All Media Baltics, which in turn provides television channels such as TV3, LNT, TV6 and Kanals 2, and other wholesale services in Latvia. Market players in the telecommunications sector had expressed concern that the merger would result in the new operator exercising its power in the wholesale television market, and limit the activities of other operators by offering television programmes to the companies of the All Media Latvia on a more favourable basis. The council recalled that binding conditions

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<sup>323</sup> Likums "Par presi un citiem masu informācijas līdzekļiem". Available at <https://likumi.lv/ta/id/64879> and <https://likumi.lv/ta/id/64879-par-presi-un-citiem-masu-informacijas-lidzekliem> (in Latvian).

<sup>324</sup> Konkurences likums. Available at <https://likumi.lv/ta/id/54890> and <https://likumi.lv/ta/en/en/id/54890-competition-law>.

<sup>325</sup> <https://www.kp.gov.lv/en>.

<sup>326</sup> For a concrete example of conditions imposed on a media merger in Latvia see the article “Competition Authority Allows Merger of Commercial TV Broadcasters” in IRIS 2012-7. Available at <http://merlin.obs.coe.int/article/6230>.

were placed on the 2017 merger of Bite Lietuva and MTG Broadcasting AB Group companies in Latvia, now known as All Media Latvia. These conditions remain in force and require the Bite Group to distribute television channels on non-discriminatory terms to all market participants.<sup>327</sup>

#### 5.5.4. Relationship between public service and private/commercial media

In the Latvian media system, there are two public service media: Latvian Television (LTV) with three channels and Latvian Radio (LR) with six stations.<sup>328</sup> The main task of the PSM is the production and distribution of programmes fulfilling the public service remit (PSR). Up to 15% of the PSR funding can be allocated to commercial media via annual tenders, if they perform one of the tasks of the PSR, for example to educate and promote citizens' civic understanding of political, economic, cultural, legal, environmental, security and social issues by ensuring their systematic coverage, providing information, education, culture and entertainment appropriate for minors or creating broadcasts specifically for minority groups and individuals with special needs. The PSR also foresees the fostering of an environment for free and pluralistic discussions on issues of public importance.

The draft Law on Public Electronic Mass Media and their Governance,<sup>329</sup> envisages the creation of a separate regulatory body for the PSMs: the Public Electronic Mass Media Council (PEMMC). The draft law's transitional provisions require the PEMMC to submit a concept for the unification of the PSMs to the parliamentary Human Rights and Public Affairs Committee by 30 September 2020. Opinion is divided on the desirability of such a move, one of the concerns being its possible effect on media pluralism, for example if newsrooms were to be merged.

#### 5.5.5. Transposition of pluralism-related EU provisions

##### 5.5.5.1. EECC, AVMSD and Accessibility Directive

Latvia is in the process of transposing the Accessibility Directive (2019/882), which, like the European Electronic Communications Code (Directive 2018/1972), foresees the provision of physical access to audiovisual media services and electronic programme guides (EPG). The bill transposing the AVMSD strengthens the requirements to provide increasing access to the content of these services for those with disabilities. It requires the regulator to

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<sup>327</sup> More information available (in Latvian) at: <https://www.kp.gov.lv/posts/konkurences-padome-atlauj-sia-bite-latvija-iegadaties-sia-baltcom>.

<sup>328</sup> There is also the joint internet portal LSM.LV providing news in Latvian, English and Russian.

<sup>329</sup> Bill No. 43/Lp13, currently awaiting its second reading: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/802CFF5A1C34C517C225851B00281BE6?OpenDocument>.

collaborate with NGOs representing the interests of persons with disabilities when drafting the required action plan to increase accessibility.

There are detailed “must carry” rules in the EMML that comply with the code and give prominence to general interest channels as foreseen by the AVMSD. Cable operators are required to carry the public service and national commercial channels and the regional or local channels available in the territory of the service. In addition, there must be at least one channel with a minimum daily broadcasting time of 18 hours, and with at least 50% of that time in the official language. There must also be at least one channel in any of the official languages of the European Union produced in one or more member states of the EU in the following genres: news; popular science; and children’s programmes.

#### 5.5.5.2. Digital Single Market Directive (2019/790)

The bill transposing the DSM directive is currently in the drafting phase. It will require amendments to the Copyright Law and possibly also to the Law on Collective Management of Copyright.

#### 5.5.5.3. Other measures

During the negotiations on the revised AVMSD, Latvia took a strong position on the need for rules on transparency of media ownership, envisaged in the EMML. Prospective service providers are required to inform the council with information on their beneficial owners, as are existing service providers with regard to changes of beneficial owners. Applications for broadcasting or re-transmission permits can be rejected if this information is not submitted. The definition of beneficial owner is that used in the anti-money laundering law.<sup>330</sup>

The Law on the Press and Other Mass Media also has a disclosure provision whereby the “founders and owners of mass media, who are capital companies, have a duty to inform the Commercial Register Authority about their true beneficiaries in the cases and procedures specified in the Commercial Law.”<sup>331</sup> That is, they must also identify the natural person(s) behind the legal person.<sup>332</sup>

### 5.5.6. Funding mechanisms to ensure media diversity

There are two main funding mechanisms that ensure media diversity: the public service remit (PSR) and the Media Support Fund (MSF). The MSF has two main types of funding programmes: the regional and local media support programme and the national media

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<sup>330</sup> See: <https://likumi.lv/ta/en/en/id/178987-law-on-the-prevention-of-money-laundering-and-terrorism-and-proliferation-financing>.

<sup>331</sup> Komerclikums. Available at <https://likumi.lv/ta/id/5490>.

<sup>332</sup> The Press Law can be accessed at: <https://likumi.lv/ta/id/64879-par-presi-un-citiem-masu-informacijas-lidzekliem> (in Latvian; an outdated English-language translation is also available at the same site).

programme. Together, they constitute “support for media to create socially significant content and strengthen the national cultural space in the Latvian language”. This also covers diaspora media and programming for the diaspora. Since 2017 MSF funds have been allocated to commercial media through tenders. The 2020 national media support programme has nine categories: media literacy and “deconstruction of lies”; media criticism; investigative and analytical journalism; minorities; analysis of socio-political and cultural processes; diaspora media; Latvian media for the diaspora; persons with disabilities; and Latvian music. The regional media support programme has three categories: analysis of socio-political and cultural processes; investigative and analytical journalism; and analysis of socio-political, socio-economic and cultural processes of the Latgale region in the east of Latvia.

### 5.5.7. Other developments regarding media pluralism on the national level

The Ministry of Culture made several proposals to the government to lessen the impact of the Covid-19 pandemic on media service providers, which could have a detrimental effect on media pluralism:

- Increase the funding of the Media Support Fund (MSF) for the production of public value content as well as provide that MSF tenders can be carried out in a shorter time;
- provide support to cover the costs of delivering print media as well as the costs of broadcasting radio and TV channels;
- grant additional funding to commission commercial broadcasters to provide the public with information on the state of emergency;
- revise advertising restrictions in order to make it easier for the media to generate their own revenue.

The government response was to order the release of some EUR 2 million from the state budget under the “unforeseen events” programme. EUR 1 million has been allocated to the media regulator to enable the public to receive comprehensive information and opinions on the crisis management of Covid-19 and to ensure the security of the national information space in the commercial electronic media. The rest has been allocated to the Ministry of Culture for the MSF. There will be support to cover the costs of delivering the subscribed press and the costs of broadcasting.

On 20 April 2020, the Society Integration Fund, which administers the MSF, published a tender under the programme “Support for the media to mitigate the negative effects of the Covid-19 crisis”. The programme aims to provide support for the continued operation and capacity-building of commercial printed and digital media, as well as for the development of socially important content during the emergency. Thirty-three applications for support to cover the costs of delivering the subscribed press received a total of EUR 168,537 and 16 applications to cover broadcaster transmission costs received a total of EUR 153,165.



A further invitation to tender under the same programme was published on 11 May 2020 with EUR 283,088 of support available. Priority is given to those media producing independent original journalistic content, particularly investigative and analytical journalism. In order to qualify, media outlets must demonstrate at least a 30% decline in revenue compared to the same month in 2019.

## 5.6. PL - Poland

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### 5.6.1. Introduction

Freedom of expression as well as media freedom on the one hand and freedom of economic activity on the other are guaranteed in the Polish constitution.<sup>333</sup> Freedom of expression is understood not only as a personal freedom, but also as a political freedom in the public sphere, and, together with media freedom is seen as a “principle of the state system” that may also constitute the source of positive obligations of the state aimed at ensuring media pluralism. The role of the broadcasting regulatory body – National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji*, KRRiT) is constitutionally guaranteed – to “safeguard freedom of speech and the right to information, as well as the public interest regarding (...) broadcasting (...)”.<sup>334</sup> KRRiT’s role under the Broadcasting Act includes the task to “... protect the independence of media service providers and the interests of the public, as well as ensure the open and pluralistic nature of (...) broadcasting”.<sup>335</sup>

Despite these general provisions, the regulatory framework for media in Poland includes a rather limited set of concrete measures of media concentration control, leaving the field in practice mainly to the application of general competition law. This has not changed despite different political discussions on excessive levels of media concentration and/or foreign ownership in media outlets.

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<sup>333</sup> Konstytucja Rzeczypospolitej Polskiej of 2 April 1997. Available in English at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. See Articles 54 (freedom of expression), 14 (freedom of media), 20 and 22 (freedom of economic activity).

<sup>334</sup> Article 213 para. 1 of the constitution.

<sup>335</sup> Article 6 para. 1 of the Broadcasting Act of 29.12.1992, available in English at [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/angielska/Documents/Regulations/ustawa-o-radiofonii-i-telewizji-2016-eng\\_en.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/Regulations/ustawa-o-radiofonii-i-telewizji-2016-eng_en.pdf).

## 5.6.2. Control mechanisms under national (media) concentration law

There are no media-specific concentration control mechanisms (i.e. beyond general competition law) applicable to all media. Such mechanisms exist, to a limited extent in terms of scope, only in the field of broadcasting - in the context of granting, withdrawing and transferring a broadcasting licence, as regulated in the Broadcasting Act of 1992.

As per the act, 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>336</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>337</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>338</sup> The licence to broadcast is in principle inalienable, thus 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>339</sup> The Broadcasting Act also includes a limit of 49 % on foreign capital and control in company beneficiaries of broadcasting licences, except for foreign entities established in the European Economic Area (EEA).<sup>340</sup>

The competent body in the field is KRRiT. The administrative decisions, including those concerning broadcasting licences, are issued by the chairperson of KRRiT on the basis of a council resolution, and are subject to an appeal to the administrative court.

The relevant provisions of the Broadcasting Act, designed to control and counteract concentration of broadcasting media, are not entirely coherent in reference to dominant position and methods of its measurement, as they refer to differently defined markets. Another issue often underscored, in particular by the KRRiT itself, is that these competences are limited and insufficient, and hence the main role in controlling concentration of the media belongs to the president of the competition authority – President of UOKiK (*Urząd Ochrony Konkurencji i Konsumentów*).<sup>341</sup>

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<sup>336</sup> Article 36 para.2 point 2 of the Broadcasting Act.

<sup>337</sup> Article 38 para. 2 point 3 of the Broadcasting Act.

<sup>338</sup> Article 38a para. 3 of the Broadcasting Act.

<sup>339</sup> Ibid.

<sup>340</sup> Article 35 para. 2 and Article 40a of the Broadcasting Act.

<sup>341</sup> See for example: KRRiT, *Sprawozdanie z działalności w 2019 roku*, Warsaw, May 2020, pp. 20-22.

Available at [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/sprawozdania/spr-i-inf-2019/sprawozdanie-krrit-z-dzialalnosci-w-2019-r.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/spr-i-inf-2019/sprawozdanie-krrit-z-dzialalnosci-w-2019-r.pdf).

### 5.6.3. (Recent) Decisions of national competition and antitrust authorities regarding media providers or intermediaries/platforms

Recently, the competition authority (President of UOKiK) dealt in particular with mergers of certain media providers and/or intermediaries, including broadcasters, pay TV platform providers, cable operators, telecommunications operators and Internet service providers. Especially in the period 2010-2015, there was already a tendency of the UOKiK to clear major concentrations involving media enterprises.<sup>342</sup> Only in certain cases did the authority impose special conditions on merging entities, like reselling parts of networks or some media outlets.<sup>343</sup>

This rather lenient tendency has continued in more recent cases. In 2018, the President of UOKiK approved the takeover by Cyfrowy Polsat (CP), the leading company in the media/telecom group (CP Group, operator of a major pay TV satellite platform, active in, among other domains, VOD services, mobile telecom services, Internet services and TV broadcasting) of the control over Netia (a provider of landline telecom services, broadband Internet access services and pay TV services). The authority assessed that the merger would have an impact on the national market of mobile telephony services, the national market of mobile Internet services and the market of access to pay TV in 145 cities. In none of these markets, however, would the competition be significantly limited, the competition authority held. It is particularly noteworthy that in the pay TV market, the combined market share of the merger participants exceeded, in 21 cities, the threshold of 40% set for the presumption of a dominant position under the competition act. The authority, however, argued that the pay TV market, although relevant, was diversified with products, and that the products of the merger participants, i.e. on the one hand the services of satellite platform operators, and on the other the services of cable and telecommunications operators using wire technologies, were more distant substitutes, given the different technologies used and the varying potential for market penetration. The authority also assessed the issue of merged spectrum assets, with the effect that such assets of the CP Group would grow from 32.6% to 36.6% of the national spectrum, which could in turn be relevant for implementation of 5G technology. The authority took into account the temporary allocation of parts of the spectrum, as well as the opinion of the telecommunications regulatory body or *Urząd Komunikacji Elektronicznej* (UEK), that competitiveness in the telecom market is developed due to among other things the

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<sup>342</sup> For example: 1) merger of two major audiovisual media groups, Canal+ and ITI/TVN, with the active role of Canal+, approved in two decisions of 14 September 2012, DKK-93/2012, Canal+ Cyfrowy/ITI Neovision and DKK-94/2012, Canal+/N-Vision; 2) acquisition of control over major mobile telephone operator Polkomtel by Spartan Holding, belonging to the capital group controlled by Z. Solorz-Żak; this involved TV stations (Polsat), a satellite TV platform (Cyfrowy Polsat) and VoD services Ipla/Iplex – decision of 24 November 2011, DKK-126/11; 3) takeover of a major Internet portal (Onet) by a major press outlet (Ringier Axel Springer) – decision of 17 September 2012, DKK-95/2012; 4) takeover of G+J companies in Poland by Burda International GmbH – decision of 31 July 2013, DKK-100/2013; 5) takeover of N-Vision (owner of TVN) by Southbank Media Ltd belonging to the group Scripps Networks Interactive – decision of 16 June 2015, DKK-83/2015.

<sup>343</sup> Decision of 5 September 2011, DKK-101/2011, UPC/Aster (merger of major cable operators); decision of 24 October 2013, DKK-135/2013, Polskapresse/Media Regionalne (takeover of regional press outlet).

convergence of telecommunications networks and co-operation in co-sharing, and that synergies allow to lower costs and enhance competitiveness.<sup>344</sup>

A different direction was taken in the merger case concerning the takeover by UPC Polska of Multimedia Polska, both cable operators active in the pay TV and stationary Internet markets. The President of UOKiK held in 2017 that the merger could lead to significant strengthening of the UPC position, restricting competition in the relevant markets in 15 Polish cities, where the combined market share of the companies ranged from over 40% to as high as 80%. The authority issued reservations concerning the transaction, and the proposals submitted by the UPC were seen by UOKiK as failing to mitigate the negative consequences of the merger. In 2018, UPC withdrew the motion for approval of the transaction and the case was closed.<sup>345</sup>

In 2020, the President of UOKiK conditionally approved the takeover of Multimedia by another cable operator, Vectra, imposing two conditions: 1) the sale of the network in eight cities where the market shares of the merger participants were the highest; 2) allowing customers in 13 cities to change operator, by terminating agreements with the merger participants on access to pay TV and/or broadband stationary Internet.<sup>346</sup>

Other important media-related merger cases are pending at the moment of writing. One of them concerns the takeover, by Agora S.A. (active in the field of press, radio and advertising), of Eurozet Group (owner of national commercial radio station Radio Zet and some Internet services).<sup>347</sup> The decision by the President of UOKiK is expected in the second half of 2020. Interestingly, KRRiT has taken an active role in the proceedings, submitting to the UOKiK its critical opinion about the impact of the possible merger on competition in radio and advertising markets, in particular in some cities, where dominant positions may be created.<sup>348</sup> Previously, the role of KRRiT in media merger cases run by the UOKiK was not that active. Moreover, KRRiT presented the case in its yearly report for 2019 as an example of the insufficient competences assigned to it in the Broadcasting Act, related to safeguarding media pluralism.<sup>349</sup>

Another significant merger, announced and notified to the UOKiK in May 2020, concerns the takeover by Telewizja Polsat (a part of the Cyfrowy Polsat Group, active in particular in media and telecom services) of Interia Group (active in the media-tech sector, including the online portal interia.pl).<sup>350</sup>

With regard to intermediaries and/or platforms, it may be noted that the UOKiK joined in 2019 the international call of over 20 consumer protection authorities demanding that Apple and Google make it possible for providers of applications to transparently inform

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<sup>344</sup> Decision of UOKiK of 11.05.2019, DKK-76/2018, takeover by Cyfrowy Polsat S.A. of Netia S.A. Available at [https://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf).

<sup>345</sup> UOKiK, Sprawozdanie z działalności – rok 2018 (report on UOKiK's activities), Warsaw 2019, p. 29-30.

<sup>346</sup> Decision of the President of the UOKiK of 17.01.2020, DKK-25/2020, takeover by Vectra S.A of Multimedia Polska S.A. Available at [https://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf).

<sup>347</sup> Case Nr. DKK-2.421.70.2019.AI. Available at [https://www.uokik.gov.pl/koncentracje.php?news\\_id=15909](https://www.uokik.gov.pl/koncentracje.php?news_id=15909).

<sup>348</sup> KRRiT, Sprawozdanie z działalności w 2019 roku, Warsaw, May 2020, pp. 21-22.

<sup>349</sup> Ibid.

<sup>350</sup> Case DKK-2.421.23.2020.AI. Available at [https://www.uokik.gov.pl/koncentracje.php?news\\_id=16416](https://www.uokik.gov.pl/koncentracje.php?news_id=16416).

users on the rules of their data-processing.<sup>351</sup> The UOKiK also took part in joint actions by the European Commission and national consumer protection authorities that led in 2019 to the updating of Facebook's terms and services, in the interest of transparency on how the company uses its users' data to develop profiling activities and targeted advertising.<sup>352</sup>

#### 5.6.4. Relationship between public service and private/commercial media

The Broadcasting Act of 1992 provides for the co-existence of public service and commercial broadcasting media. The law also distinguishes the category of "social broadcasters": their programming must be of public value (however narrowly or specifically defined);<sup>353</sup> they may not broadcast content harmful for minors or commercial communications; and they may not charge fees.

Public service media are organised in the form of joint stock companies owned solely by the state: separately for national and regional audiovisual media (Telewizja Polska S.A.), national radio (Polskie Radio S.A.) and regional radio (17 radio companies).<sup>354</sup> The broad general statutory definition of the remit of public service media has remained unchanged since 2004.<sup>355</sup> However, in 2018 a significant revision of the Broadcasting Act was adopted<sup>356</sup> aimed at further taking into consideration the European Commission's Broadcasting Communication of 2009.<sup>357</sup> The revision provided for a more precise, detailed and modern definition of specific tasks emanating from the public service remit, including those relating to online activities.<sup>358</sup> Also, a new regulatory instrument was introduced: a charter of duties for each public service media organisation, in the form of an administrative agreement between the broadcaster and the chair of KRRiT.<sup>359</sup> The agreements on the first charters for the period of 2020-2024 were recently concluded. Should a new, significant service materialise, an amendment to the relevant charter is required, based in part on

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<sup>351</sup> [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=15326](https://www.uokik.gov.pl/aktualnosci.php?news_id=15326).

<sup>352</sup> European Commission Press Release IP/19/2048. Available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2048](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048); UOKiK press release. Available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2048](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048).

<sup>353</sup> According to Article 4.10 of the BA social broadcasters are defined as those whose programme services "propagate learning and educational activities, promote charitable deeds, respects the Christian system of values guided by the universal principles of ethics, and strive to preserve national identity". In consequence, mainly radio religious stations are social broadcasters.

<sup>354</sup> Article 26 of the Broadcasting Act.

<sup>355</sup> Article 21 para. 1 of the Broadcasting Act: "(...) providing, on terms laid down in this Act, all of society, and individual groups thereof, with diversified programme services and other services in the area of information, journalism, culture, entertainment, education and sports. These will be pluralistic, impartial, well-balanced, independent and innovative, marked by the high quality and integrity of broadcast."

<sup>356</sup> The act of 20.07.2018 amending the Broadcasting Act (ustawa o zmianie ustawy o radiofonii i telewizji), Official Journal item 1717.

<sup>357</sup> Communication from the European Commission on the application of state aid rules to public service broadcasting, OJ C 257, 27.10.2009, p. 1.

<sup>358</sup> Article 21 para. 1a, 1b and 2 of the Broadcasting Act.

<sup>359</sup> Article 21a of the Broadcasting Act.

public value tests.<sup>360</sup> The revision of 2018 also introduced more specific provisions designed to ensure proportionality of public funding, in particular introducing an explicit net-cost principle.<sup>361</sup> It also provided for yearly reporting of each public broadcaster to be evaluated by KRRiT.<sup>362</sup>

In 2016, the system of appointment of the boards of public service broadcasters was changed, with the competences transferred from KRRiT to initially the Minister of Treasury of the State, and subsequently to the newly established Council of National Media (*Rada Mediów Narodowych*, RMN), with a prevailing impact for the current political majority. The Constitutional Court in December 2016 assessed that granting the minister competences to appoint boards in public service broadcasters was not compliant with the constitutional role of KRRiT, which should have a decisive role in such appointments.<sup>363</sup> The judgment, which did not formally concern RMN (although the recognition of the role of KRRiT in the statement of reasons appears universal), should result in the rendering of decisive competences in appointments of boards to KRRiT again. The authority suggested such a change in its last yearly report.<sup>364</sup>

Public service media are funded in a mixed manner through public sources and commercial revenues, in particular advertising. Public funding is based on the broadcasting licence fee model, but, due to its ineffective collection (massive evasion and very broad social exemptions), the system is unsatisfactory and does not guarantee adequate and stable funding. Despite different ideas and proposals for a new model (including payments with electricity bills or contributions linked to income tax and/or social security payments), such a holistic reform has not been adopted. Instead compensation for exemptions from the licence fee for certain years was granted by the state, causing political controversies.

### 5.6.5. Transposition of pluralism-related EU provisions

Due to the coronavirus crisis, work on implementation of recently-adopted EU directives has significantly slowed.

The European Electronic Communications Code (EECC) is to be transposed in the new Act on the Electronic Communication Law (*ustawa Prawo komunikacji elektronicznej*) replacing the existing Telecommunications Law of 2004.<sup>365</sup> The preliminary draft of the new law was published in March 2020 and made the subject of public consultations and workshops. The draft of the new law proposes to implement Article 61(2)(d) of the EECC in

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<sup>360</sup> Article 21b of the Broadcasting Act.

<sup>361</sup> Article 31 of the Broadcasting Act.

<sup>362</sup> Article 31b of the Broadcasting Act.

<sup>363</sup> Judgment of the Constitutional Court of 13.12.2016, K 13/16. Available at <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/9507-ustawa-o-zmianie-ustawy-o-radiofonii-i-telewizji>. Available in English at <https://trybunal.gov.pl/en/hearings/judgments/art/10625-ustawa-o-zmianie-ustawy-o-radiofonii-i-telewizji>.

<sup>364</sup> KRRiT, *Sprawozdanie z działalności w 2019 roku*, Warsaw, May 2020, p. 28.

<sup>365</sup> The Act of 16.07.2004 - Telecommunications Law (*ustawa Prawo telekomunikacyjne*).

Article 355 worded almost identically to existing Article. 136 of the Telecommunications Law. The latter reads:

*Article 136. 1. The President of UKE [Urząd Komunikacji Elektronicznej – Office of Electronic Communications] may, by means of an administrative decision, impose an obligation on telecommunications undertakings to provide access to the following associated facilities:*

- 1) an application program interface,*
- 2) an electronic programme guide*

*- in order to ensure access to digital radio and TV transmissions for end users.*

*2. The provisions on consultation and consolidation proceedings shall apply to a decision referred to in paragraph 1.*

*3. The President of the UKE shall issue a decision referred to in paragraph 1, guided by the principle of equality and non-discrimination.*

Must-carry rules, in implementation of Article 31 of the Universal Services Directive, are provided for by Article 43 of the Broadcasting Act. The draft Electronic Communications Law as the instrument of transposition of the EEC does not include proposals for changes in this field. Such proposals would be more suitable as part of a review of the broadcasting law. The existing model of must-carry rules was shaped in 2011 in conjunction with the implementation of DVB-T. The rules apply to all operators retransmitting programmes on their networks, except terrestrial multiplexes, including cable and satellite platforms. Must-carry concerns only TV channels: TVP1; TVP2; TVP's regional channels (in case of regional/local retransmissions – relevant for a given area); and channels transmitted in August 2011 on the basis of a licence for analogue terrestrial broadcasting by the listed companies (Polsat, TVN, TV4 and TV Puls). Must-carry rules are accompanied by the must-offer mechanism (Article 43a of the Broadcasting Act).

Assessment of the rules by KRRiT in 2012 shows that they unnecessarily applied must-carry status to the channels, and set in stone the oligopolistic structure of the television market. KRRiT also noted the lack of an obligation on the part of operators to offer must-carry channels in every package, including basic ones. In 2015, the Ministry of Culture published a draft revision of the Broadcasting Act including the new must-carry provision.<sup>366</sup> However, the draft, which proposed a significant change to the must-carry rules, was not submitted to parliament due to elections. The statutory list of must-carry channels would have included only the main public service TV programmes. The supplementary list would have needed to be established through a regulation by KRRiT on the grounds of criteria based on public value, media pluralism and cultural diversity considerations. The KRRiT regulation would also determine, on the basis of the same criteria, the way must-carry channels should be located in the electronic programme guide (EPG). Thus, the proposed solution would include a due prominence element.

The future of must-carry was also raised by KRRiT in its Regulatory Strategy for 2017-2022 which said access to channels available in DVB-T should be guaranteed for customers of pay TV platforms in the same order as that offered in terrestrial multiplexes.

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<sup>366</sup> <http://www.prawoautorskie.gov.pl/pages/posts/rozpoczely-sie-konsultacje-publiczne-dotyczace-projektu-ustawy-o-zmianie-ustawy-o-radiofonii-i-telewizji-731.php>.

Moreover, KRRiT proposed supplementing must-carry/must-offer rules with a findability rule, through due prominence in the EPG and search tools on Internet pages. The regulator also saw a need for a more precise definition of telecommunication operators retransmitting channels subject to must-carry rules.<sup>367</sup>

The transposition of the revised AVMS directive is subject to work conducted by the Ministry of Culture and KRRiT. The public consultations were held in 2019. The publication of the draft revision of the Broadcasting Act was postponed due to coronavirus, and is expected in 2020. Hence, at the moment of writing, it is yet unknown how Articles 7a and 7b of the AVMSD will be implemented.

With regard to the Directive on Copyright on the Digital Single Market, work on transposition belongs to the competences of the Ministry of Culture. So far, no draft revision of the Copyright Act aimed at implementing the Directive has been presented. It should be noted that the Polish authorities brought action on 24 May 2019 before the Court of Justice claiming the annulment of Article 17(4)(b) and Article 17(4)(c) *in fine* of the directive as disproportionately limiting freedom of expression.<sup>368</sup>

### 5.6.6. Funding mechanisms to ensure media diversity

Besides the system of public funding of public service media, there is no systematic funding mechanism to support media, but rather dedicated financial measures. For example, the Ministry of Culture grants financial subsidies to some periodic press. The most recent financial scheme via the Book Institute (*Instytut Książki*) was laid out by the ministry for 2019-2021 with amounts to be distributed at the level of roughly PLN 3 million (approx. EUR 700 000).<sup>369</sup>

There also exist financial support mechanisms for the production of cinematographic films<sup>370</sup> and – more recently adopted - audiovisual works.<sup>371</sup>

### 5.6.7. Other developments regarding media pluralism on the national level

Some general proposals for strengthening specific safeguards against media concentration were formulated by KRRiT in its Regulatory Strategy for 2017-2022. The regulator proposed introduction of the new category of “significant position in the media field”, achieved if the

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<sup>367</sup> KRRiT, Strategia regulacyjna na lata 2017-2022, Warsaw 1.03.2018, p. 20. Available at: [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/publikacje/strategie/strategia\\_27\\_03.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/publikacje/strategie/strategia_27_03.pdf).

<sup>368</sup> Case C-401/19.

<sup>369</sup> <https://www.wirtualnemedial.pl/artykul/mkidn-dotacje-dla-czasopism-wiez-jazz-forum-kurier-wnet-wpis-i-magazyn-sdp-bez-srodkow-dla-pisma-i-tygodnika-powszechnego>.

<sup>370</sup> The act of 30.06.2005 on cinematography (ustawa o kinematografii).

<sup>371</sup> The act of 9.11.2018 on financial support for audiovisual productions (ustawa o finansowym wspieraniu produkcji audiowizualnej).



share of an entity or financial group exceeds 30% in one of the following markets: advertising revenue; pay TV revenue; TV audience; radio audience; or users of online audiovisual services. In such a case, the next step would be an assessment of the position in remaining audiovisual media markets and then in other media segments: press; cinema; outdoor advertising; Internet; and mobile services. According to KRRiT, it is also possible to apply criteria such as: the number of programme services broadcast by a given entity of the same territory; the joint function of a broadcaster and advertising broker; vertical concentration (controlling of all stages of production and delivery of a service); and cross-concentration. KRRiT believes there should be a systematic review of the media market, which it could potentially handle, as a competent body. KRRiT also suggested closer cooperation with the president of the UOKiK and the president of the UKE.<sup>372</sup> These proposals, however, have not been put into a concrete published draft. KRRiT returned to the concepts in its yearly report for 2019, made available at the end of May 2020, and in which the regulator raises the point that its existing anti-concentration competences, related to granting or withdrawal of broadcasting licences, are insufficient and allow mainly for ex-post interventions, which do not promote certainty in the market. The authority sees the need for changes in the media law, including the granting to the authority of the competence to consent to the transfer of shares in entities that exercise a broadcasting licence, depending on the market position acquired through such a transaction.<sup>373</sup>

## 5.7. SE - Sweden

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### 5.7.1. Introduction

A report<sup>374</sup> on the transposition of the revised Audiovisual Media Services Directive (AVMSD) reviewed the Swedish Radio and Television Act<sup>375</sup> on the basis of a new security situation, and in that context found reasons to consider introducing requirements for media service providers to provide information regarding their ownership structure. The report considered how national security interests can be safeguarded in matters related to broadcasting licences for TV, teletext and radio (i.e. in the allocation, transfer or revocation of licences to broadcast in the terrestrial network) and suggested that a new basis for revocation should

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<sup>372</sup> KRRiT, Strategia regulacyjna na lata 2017-2022, Warsaw 1.03.2018, pp. 18-19. Available at [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/publikacje/strategie/strategia\\_27\\_03.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/publikacje/strategie/strategia_27_03.pdf).

<sup>373</sup> KRRiT, Sprawozdanie z działalności w 2019 roku, Warsaw, May 2020, pp. 20-22, 27.

<sup>374</sup> *En moderniserad radio- och tv-lag – genomförande av ändringar i AV-direktivet*, SOU 2019:39, <https://www.regeringen.se/4adae9/contentassets/705b556627d643d3983a823d008ac5dd/en-moderniserad-radio--och-tv-lag-sou-201939.pdf>.

<sup>375</sup> Radio and Television Act, SFS 2010:696, English version available at <http://www.mprt.se/documents/styrdokument/radio%20and%20television%20act.pdf>.

be introduced in the Radio and Television Act, entailing that a licence may be revoked if the licence holder carries out broadcasts that constitute a danger to Sweden's security. The report also found benefits associated with increased transparency regarding the ownership structures behind media service providers, since it can help consumers assess the contents of a media service. The report suggested further investigation (in particular in relation to the Swedish Fundamental Law on Freedom of Expression<sup>376</sup>) of the possibility of introducing a requirement in Swedish law with the purpose of increasing transparency regarding ownership in the media market.<sup>377</sup>

## 5.7.2. Control mechanisms under national (media) concentration law

In Sweden, a broadcasting licence is only required to broadcast in the terrestrial network. No licence (only registration) is needed in order to broadcast via satellite or cable for example. Conditions regarding ownership may only be stipulated in broadcasting licences.

### 5.7.2.1. Analogue commercial radio

Licences to broadcast analogue commercial radio in the terrestrial network are granted by the Swedish Press and Broadcasting Authority (SPBA).<sup>378</sup> A licence may only be granted to a natural or legal person with adequate financial and technical resources to broadcast during the entire term of the licence.<sup>379</sup> The licence should be granted to the applicant who meets these requirements and has offered the highest broadcast fee.<sup>380</sup>

A natural or legal person may not have more than one licence within a transmission area, if there is reason to believe that this may adversely affect competition.<sup>381</sup> In other words, it is possible for a licence holder to have several broadcasting licences within a transmission area as long as competition is not affected in a negative way, as determined by the SPBA. In the assessment, the SPBA may, in addition to direct and indirect (through subsidiaries) licence holding, consider far-reaching cooperation between licencees. The degree of independence enjoyed by a cooperating licencee may be of importance in such an assessment. This can concern for example independence in editorial and business matters and also the viability of acting as an independent enterprise.<sup>382</sup>

The reasoning behind this regulation is that diversity in radio is promoted if independent parties can operate on the radio market in competition for listeners and

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<sup>376</sup> Enshrined in the Constitution of Sweden, English version available at <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>.

<sup>377</sup> Cf. article 5.2 of the AVMSD.

<sup>378</sup> The Radio and Television Act, Chapter 13 Section 1.

<sup>379</sup> The Radio and Television Act, Chapter 13 Section 4.

<sup>380</sup> The Radio and Television Act, Chapter 13 Section 8.

<sup>381</sup> The Radio and Television Act, Chapter 13 Section 5.

<sup>382</sup> Prop. 2016/17:136 p. 22.

advertisers. This mainly concerns the conditions for diversity in structure or ownership. However, diversity in ownership is also important for diversity in content since lack of competition can lead to uniform content. The assessment by the SPBA of the competitive situation in a transmission area is guided by a diversity perspective.<sup>383</sup>

A licence to broadcast analogue commercial radio may be transferred if this is approved by the SPBA. An approval may only be granted if there is no reason to assume that the transfer would adversely affect competition in the transmission area.<sup>384</sup> The Radio and Television Act also contains provisions regarding the revocation of broadcasting licences related to competition.<sup>385</sup>

### 5.7.2.2. TV, teletext and digital commercial radio

The SPBA issues licences to all except public service providers, where the government is responsible for the licensing. In contrast to analogue commercial radio, the granting of licences to broadcast TV, teletext and digital commercial radio in the terrestrial network is carried out through a selection procedure taking into consideration whether the broadcasting frequencies should be able to be utilised: 1) for different media services so that broadcasts will appeal to a variety of interests and tastes; 2) for national as well as local and regional media services; 3) by a number of broadcasters that remain independent of each other.<sup>386</sup> One reason behind these provisions is the need to maintain competition.<sup>387</sup> However, the ownership criterion is only one of several criteria to be considered in an overall assessment.

A licence to broadcast TV, teletext and digital commercial radio may be made subject to an obligation not to change ownership or influence structures within the enterprise beyond a limited extent.<sup>388</sup> The licence may be transferred if this is approved by the SPBA. One of the pre-conditions for approval is that the transfer will not increase the concentration of ownership among those with such broadcasting licences beyond a limited extent.<sup>389</sup>

### 5.7.2.3. The Swedish Competition Act

The Competition Act<sup>390</sup> contains prohibitions against anti-competitive cooperation and abuse of a dominant position. The act also contains general rules regarding control of mergers and acquisitions (concentrations between undertakings) above certain turnover

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<sup>383</sup> Prop. 2016/17:136 p. 24.

<sup>384</sup> The Radio and Television Act, Chapter 13 Section 18.

<sup>385</sup> The Radio and Television Act, Chapter 18 Sections 5 and 7.

<sup>386</sup> The Radio and Television Act, Chapter 4 Section 6 and Chapter 13 Section 26.

<sup>387</sup> Prop. 2007/08:8 p. 45 and 2009/10:115 p. 231.

<sup>388</sup> The Radio and Television Act, Chapter 4 Section 11 and Chapter 13 Section 27.

<sup>389</sup> The Radio and Television Act, Chapter 4 Section 15 and Chapter 13 Section 28.

<sup>390</sup> *Konkurrenslag* SFS 2008:579 t.o.m. SFS 2019:933, [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurrenslag-2008579\\_sfs-2008-579](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurrenslag-2008579_sfs-2008-579).

thresholds. There are no specific control mechanisms in the act pertaining to mergers in the media sector or any other sector.

### 5.7.3. (Recent) Decisions of national competition and antitrust authorities regarding media providers or intermediaries/platforms

The Swedish Competition Authority (SCA) has investigated several mergers connected to the media sector. Here are some examples:

In 2011, the SCA found that Com Hem's intended acquisition of Canal Digital Kabel-TV (CDK) would significantly impede effective competition concerning cable TV networks and cable TV distribution (retail TV services) offered to multi-dwelling units, where Com Hem already held a very strong position and CDK was a competitor. The transaction was abandoned by the parties shortly after the SCA filed a summons application to block the merger.<sup>391</sup>

In 2016, after an in-depth investigation, the SCA cleared Com Hem's acquisition of Boxer. Boxer primarily focused on retail TV services for single-dwelling units via the terrestrial network, and the merging parties were not regarded as close competitors. The companies offered the same services (TV, broadband and fixed telephony) but their respective core businesses were based on different distribution platforms.<sup>392</sup> In 2019, NEP Sweden AB notified the SCA of its intended acquisition of HDR Sweden AB. NEP and HDR were the two dominant suppliers in Sweden for, in particular, technical services for large and complex outside broadcasting productions. After an in-depth investigation, underscoring a number of elements countervailing potential negative effects on competition after the merger, the transaction was cleared by the SCA.<sup>393</sup>

In the printed media sector, there have been a number of mergers in the latest years related to local newspapers, free newspapers, and the advertising sector, for example Sydsvenskan/Helsingborgs Dagblad<sup>394</sup> and Bonnier/Mittmedia.<sup>395</sup> All cases were cleared by the SCA in the initial investigation phase. In 2016, Blocket AB, controlled by the media group Schibsted, intended to acquire Hemnet Sverige AB. Both parties were active on the market for online housing ads. Hemnet, owned by real estate agents, was the dominant player and Blocket Bostad the only credible challenger and competitor. The merger would have resulted in a monopoly. After the SCA informed the parties that it intended to file a summons application for prohibition, the parties abandoned the transaction.<sup>396</sup>

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<sup>391</sup> Case No. 758/2011, [http://www.konkurrensverket.se/globalassets/konkurrens/stamningsansokan/11-0758\\_stamningsansokan.pdf](http://www.konkurrensverket.se/globalassets/konkurrens/stamningsansokan/11-0758_stamningsansokan.pdf).

<sup>392</sup> Case No. 411/2016, <http://www.konkurrensverket.se/globalassets/aktuellt/16-0411.pdf>.

<sup>393</sup> Case No. 435/2019, <http://www.konkurrensverket.se/globalassets/konkurrens/beslut/19-0435.pdf>.

<sup>394</sup> Case No. 388/2014, <http://www.konkurrensverket.se/Diariet/arende.asp?id=25060&b=1>.

<sup>395</sup> Case No. 169/2019, <http://www.konkurrensverket.se/globalassets/konkurrens/beslut/19-169.pdf>.

<sup>396</sup> Case No. 84/2016, <http://www.konkurrensverket.se/Diariet/arende.asp?id=26781>.

The SCA has also investigated other matters connected to the media sector, such as one concerning a cooperation between radio companies SBS Radio and RBS Broadcasting, which the SCA approved subject to commitments to allow competition in radio advertisements.<sup>397</sup> During an investigation into the online travel agency (OTA) sector, the intermediary Booking.com made commitments that included not requiring hotels to observe price parity between OTAs.<sup>398</sup> In another investigation concerning used car advertising platform Blocket, part of the media group Schibsted was suspected of using anti-competitive bundling between two platform products, but the SCA closed the case after Blocket committed to unbundle its offering.<sup>399</sup>

The markets for telecom, distribution and TV are consolidating. Since October 2018, two acquisitions and one joint venture on the Swedish market have been granted regulatory approval by the EU Commission: in October 2018, the Commission approved Tele2's acquisition of Com Hem unconditionally. The companies' activities and assets were found to be largely complementary. Tele2 and Com Hem both provide telecommunications services in Sweden. Com Hem's main activities are related to fixed telecommunications and TV, while Tele2 is mainly active in mobile telecommunications.<sup>400</sup> In November 2019, the Commission approved the acquisition by the Swedish telecommunications operator Telia Company of the Swedish TV company Bonnier Broadcasting Holding, on certain conditions.<sup>401</sup> Telia's largest shareholder is the Swedish state. Bonnier Broadcasting owns the biggest commercial TV channel in Sweden (TV4). Telia/TV4 is the first vertically integrated media company in Sweden. In April 2020, the Commission announced its approval of a joint venture between Canal Digital (owned by Norwegian telecommunications company Telenor) and Viasat Consumer (part of the Swedish media company Nordic Entertainment Group). The new company will combine satellite pay TV from Canal Digital and satellite pay tv and broadband tv operations from Viasat Digital.<sup>402</sup>

#### 5.7.4. Relationship between public service and private/commercial media

In Sweden, there are public service and private companies, but no mixed forms. Sweden has three public service broadcasters (PSBs): Sveriges Television AB (SVT), Sveriges Radio AB (SR) and Sveriges Utbildningsradio AB (UR). The broadcasting licences for the PSBs are issued by the government. The current broadcasting licences have been issued for the period 2020–2025. PSB operations are to be characterised by independence and strong integrity, and to be conducted independently in relation to the state as well as different economic, political, or other interests and spheres of power in society. For SVT and SR, it is

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<sup>397</sup> Case No. 174/2012, <http://www.konkurrensverket.se/Diariet/arende.asp?id=22256>.

<sup>398</sup> Case No. 596/2013, <http://www.konkurrensverket.se/beslut/13-0596.pdf>.

<sup>399</sup> Case No. 601/2015, <http://www.konkurrensverket.se/beslut/15-0601.pdf>.

<sup>400</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_6065](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6065).

<sup>401</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_6271](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6271).

<sup>402</sup> <https://www.telenor.com/media/press-release/canal-digital-and-viasat-consumer-venture-approved>.

especially important to promote programme areas of importance for the general interest. UR shall conduct program activities in the field of education in the public service.

The broadcasting licences of the PSBs include provisions stating for example that the companies should offer a diverse range of programmes and that diversity in programme operations should be promoted through a variety in production methods. The overarching remit is to disseminate a broad and varied range of programmes that reflect the whole of Sweden and the variation in the population. The PSBs are mandated to in particular meet the needs of certain target groups, namely children and minors, people with disabilities and minority language groups. The public service broadcasting right must be exercised objectively, impartially and with regards to the privacy of the individual and the impact of TV and radio. In 2019, the financing of the PSBs was changed from a radio and television licence fee, paid by all households that have a TV, to an individual public service fee, collected via the tax system.

In 2015, the SPBA published a report which examined how the PSBs affect the media market.<sup>403</sup> In the report, the SPBA stated that the greatest influence over the media market consisted of ongoing digitalisation and globalisation. The SPBA opined that the activities of the PSBs had both a positive and a negative influence on the media market. The SPBA's overall conception of the activities of the PSBs was that they have a fundamentally positive influence on the media market in that they offer a broad - as well as a niche - output to Swedish media consumers, both on traditional and new platforms. However, they also have a negative influence on parts of the surrounding media market, primarily because their operations compete for consumers with the actors that conduct commercial media operations. Despite the negative influence, it was the overall assessment of the SPBA that the PSBs, based on their commissions, could not be seen to act in a manner that obviously prevented competing actors from establishing, operating and developing their media activities.

## 5.7.5. Transposition of pluralism-related EU provisions

### 5.7.5.1. Article 61(2)(d) and 114 of the European Electronic Communications Code

The Radio and Television Act contains provisions regarding cable network re-transmissions and an obligation to re-transmit a maximum of four programme services broadcast simultaneously by the public service companies ("must carry").<sup>404</sup> It has been assessed that Article 114 of the code requires no further implementation measures.<sup>405</sup>

The present Swedish must-carry obligation is limited to cable networks and covers only channels and not complementary services. Currently, an operator can fulfil the

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<sup>403</sup> Utveckling och påverkan i allmänhetens tjänst, dnr 13/03001 och 14/01248, <http://www.mprt.se/sv/nyhetsrum/pressmeddelanden/2015/en-rapport-om-hur-public-service-bolagen-paverkar-mediemarknaden-och-en-oversyn-av-systemet-med-forhandsprovning-/>.

<sup>404</sup> The Radio and Television Act, Chapter 9.

<sup>405</sup> Promemoria: Genomförande av direktivet om inrättande av en kodex för elektronisk kommunikation, p. 392.

obligation by broadcasting two channels in standard definition and two channels with the same content in high definition. The government has proposed that the four channels covered by the must carry obligation should have different content. Such a requirement would meet the public need for balanced information and thus fulfil the purpose of the must carry obligation. Furthermore, the government has proposed that searchable teletext should be included in the must carry obligation, provided that the broadcasts are carried out under conditions reflecting impartiality and objectivity. It has been proposed that the provisions enter into force on 1 December 2020.<sup>406</sup> The question of must carry obligations for accessibility services for people with disabilities is being investigated by a committee. The committee's task is to analyse, among other things, if the Swedish Fundamental Law on Freedom of Expression permits a statutory requirement to re-transmit technical supplementary services and, if not, to propose constitutional amendments in order to permit such requirements as regards accessibility services for people with disabilities. The assignment is due to be reported on 26 August 2020.<sup>407</sup>

As regards Article 61(2)(d) of the code, the government sees no need to introduce specific legislation in Sweden regarding access to application programme interfaces (APIs) and electronic programme guides (EPGs).<sup>408</sup> Further, the government sees no reason to make any other assessment now and therefore no provisions regarding access to APIs and EPGs have been suggested for inclusion in the new law regarding electronic communication.<sup>409</sup>

#### 5.7.5.2. Article 7a and 7b of the Audiovisual Media Services Directive (AVMSD)

The provision on the appropriate prominence of audiovisual media services of general interest is voluntary. Sweden has until now not introduced any rules regarding prominence. However, the government has suggested that the question of introducing rules on findability in an online environment should be investigated further, preferably in conjunction with a review of the rules regarding must carry.<sup>410</sup>

As regards Article 7b of the revised AVMSD, the government has suggested that a provision should be introduced in the Radio and Television Act stating that TV broadcasts and on-demand TV may not be overlaid for commercial purposes or modified without consent from the media service provider. The government has also suggested that it, or an authority designated by it, may issue provisions regarding exemptions from the requirement of consent. The provision is supposed to enter into force on 1 December 2020.<sup>411</sup>

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<sup>406</sup> Lagrådsremiss, En moderniserad radio- och tv-lag, Stockholm den 16 April 2020, p. 142.

<sup>407</sup> 2018 års tryck- och yttrandefrihetskommitté (2018:01).

<sup>408</sup> Prop. 2002/03:110 p. 316-321.

<sup>409</sup> Promemoria: Genomförande av direktivet om inrättande av en kodex för elektronisk kommunikation, p. 385.

<sup>410</sup> SOU 2019:39 p. 457.

<sup>411</sup> Lagrådsremiss, En moderniserad radio- och tv-lag, Stockholm den 16 April 2020, p. 100.

### 5.7.5.3. Article 15 and 17 of the Digital Single Market Directive

The Swedish Ministry of Justice is working on a memorandum regarding the implementation of the Digital Single Market Directive. Publication is anticipated in late 2020.

## 5.7.6. Funding mechanisms to ensure media diversity

### 5.7.6.1. Press and media subsidies

Press and media subsidies are allocated by the Swedish Media Subsidies Council to promote opportunities for diversity within the daily press and to strengthen democracy by promoting public access to independent news throughout the country. The Media Subsidies Council is an independent decision-making body within the SPBA composed of a chairman, a vice chairman and a maximum of 12 other members, all of whom are appointed by the government. The chairman and vice chairman of the council must be – or have been – a permanent judge.

Subsidies to the press have been granted since the 1970s and were introduced to preserve diversity and competition amongst the daily press. Today, the grants are divided into four different forms of subsidies to news media, supporting both traditional newspapers and newer forms of digital news journalism. In recent years, subsidies to help the transition from print to digital publishing and to help sustain journalistic coverage throughout the country, have been instated.

*Operational subsidies* are granted to printed newspapers, or newspapers published in a digital format, for operational expenses. The newspaper must be published under a specific name and its own editorial content must constitute at least 55 percent of the total editorial content. Furthermore, the newspaper must have a subscription ratio of less than 30 percent of the households in its main coverage area in order to qualify. The subsidies are based on circulation and how frequently the newspaper is published.<sup>412</sup> *Distribution subsidies* are granted for each distributed, subscribed copy of a newspaper that participates in joint distribution.<sup>413</sup> *Media subsidies* can be granted to a wider range of news media, including audio- and video-based media and media available to the public free of charge. Media subsidies are granted for *local journalism* and for *innovation and development*. Subsidies for local journalism may be granted for initiatives relating to journalistic coverage of poorly covered areas. Innovation and development subsidies may be granted for projects concerning digital news journalism, digital publishing and dissemination or digital business models.<sup>414</sup>

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<sup>412</sup> Following the Swedish Press Subsidies Ordinance (1990:524).

<sup>413</sup> Following the Swedish Press Subsidies Ordinance (1990:524).

<sup>414</sup> Following the Swedish Media Subsidy Ordinance (2018:2053).



### 5.7.6.2. Other funding mechanisms and miscellaneous

The Swedish Film Institute is tasked with encouraging Swedish film in a broad context. One of the ways in which this takes place is through support funding. The Institute distributes support funding for development and production of Swedish feature films, short films and documentaries. Production support is aimed at the production of a variety of stories and a broad repertoire of Swedish film – of high quality, attractiveness, and relevance to the audience. Development support gives producers, directors, and screenwriters the possibility to develop projects from idea to production.

Culture magazines can apply for grants from the Swedish Arts Council. The Arts Council can grant production subsidies and distribution subsidies with the purpose of making it possible for many different kinds of cultural magazines of high quality to be published and read in Sweden. Research and innovation projects may seek funding from Sweden's innovation agency Vinnova. One example of an initiative that has received part of its funding from Vinnova is Medier & Demokrati (Media & Democracy), which describes itself as a national collaboration platform for media innovation and social research, one of whose goals is to strengthen media innovation - with media-related AI innovation a priority.

Since 1 July 2019, VAT for certain electronic publications has been reduced from 25 to 6 percent. The purpose of the reduced tax rate is that books and newspapers for example should be taxed in the same way, regardless of whether they are published in electronic or physical form.<sup>415</sup> This has been considered an important modernisation of the VAT rules making things easier for the newspaper industry, since digitalisation is a crucial issue for the daily press.

### 5.7.7. Other developments regarding media plurality on the national level

The Swedish media landscape has been characterised by a large number of local and regional newspapers, most of which are subscription-based, and strong public service radio and TV. Almost all social groups read newspapers. Commercial radio and TV started in the early 1990s. The local commercial radio stations faced financial problems during the 1990s and 2000s and the market has changed as a result of collaborations and acquisitions. The Swedish radio market now consists of a public service and two major networks which have three nationwide licences and 35 regional licences to broadcast commercial radio. Public service radio is the market leader. The Swedish TV market consists of public service and three commercial TV companies, with public service and the biggest commercial TV company TV4 accounting for approximately 70 % of all viewing.

The business models for legacy media are under severe pressure. Consequently, there have been some important corporate changes and acquisitions in recent years.<sup>416</sup> The

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<sup>415</sup> Following the Council Directive (EU) 2018/1713 of 6 November 2018 amending Directive 2006/112/EC as regards rates of value added tax applied to books, newspapers and periodicals.

<sup>416</sup> See paragraph 5.7.3.

Swedish radio and television markets have been characterised by a few owners for several years and now the ownership structure of the newspaper market is developing in the same direction.<sup>417</sup> Covid-19 is expected to have a negative impact on advertising spending during 2020. All this indicates that we will see continued consolidation in the Swedish media market in the coming years.

## 5.8. SI - Slovenia

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### 5.8.1. Introduction

The forming of the commercial media sector in the 1990s in Slovenia was accompanied by the belief that legislation regulating the media was not needed. The state, it was felt, should use the constitution to guarantee freedom of expression and freedom of the press, while the rest should be left up to the (free) market. This line of thought is well spread among the newly established elites of the post-socialist states. The ideologists who defend this belief assert that freedom of the media can only be misused or limited by the state, and for that reason they believe there is no need for any kind of safeguards to protect against other forms of abuse – the commercial, political or ideological interests of private owners as well as economic demands of the industry of commercial media. The consequence was that the state left the media sector without effective safeguards that would protect the interests of citizens. At the same time, it has not succeeded in producing a strategic document clearly defining the development objectives of the media sphere. Instead, media legislation was passed too late and without consideration of the consequences that specific policies will have in practice, and without any real commitment to implementing them.<sup>418</sup>

The concentration of media in Slovenia is strongly connected to the very specific privatisation of the media. The beginning of the process of privatising the media in Slovenia followed a different path than that of other former socialist and communist states, which, for the most part, chose to immediately sell the media to foreign investors. Slovenia had a specific model of privatisation with certificates that partitioned media ownership among para-state funds, employees, and former employees and their family members. Journalists effectively became, at some point in the 1990s, (co-)owners of the media they worked for. They were majority, 60 percent shareholders in their media, but they lacked the ambition or knowledge to organise as stockholders and actually begin to manage the companies.

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<sup>417</sup> Mediemångfald 2019, SPBA.

<sup>418</sup> Bašić Hrvatin S. and Lenart J. Kučič. 2019. »Slovenska medijska politika in njene posledice (Slovenian Media Policy and its Consequences), <http://www.lenartkucic.net/slovenska-medijska-politika-in-njene-posledice/>.

This meant that later they took part in capitalism-transition where the values of their stocks grew disproportionately due to the media-advertising bubble.<sup>419</sup>

The financial crisis of 2008 marked the beginning of the systematic deterioration of the media sphere in Slovenia. The circulation of the main printed newspapers has since fallen by half. When the Slovenian Advertising Chamber began to monitor the circulation of printed media during the summer of 2004, the three daily newspapers (Delo, Dnevnik and Večer) sold an average of approximately 176 000 printed copies daily. Experts estimate that their joint circulation has dropped to 60 000. This was followed by the reduction of editorial offices, the laying off of journalists and the employment of a new media workforce using flexible working contracts. Numerous journalists became private entrepreneurs who had to make sure they earned a wage. According to the media registry, run by the Ministry for Culture, there are 2 036 active media outlets in Slovenia – almost one media outlet per 10 000 inhabitants (as of 20 May 2020).<sup>420</sup> But this high number does not guarantee a diverse and pluralistic offering of content.

As per the statutory provisions of the Mass Media Act of 2006<sup>421</sup> (Article 12), publishers are required to include their media outlet in the registry before publication. However, the registry does not appear to be very reliable as it also contains erroneous or incomplete information.

One key requirement for registration is information about persons holding at least five percent of the ownership or managing share, as well as of the share of voting rights, in the assets of the publisher of general informative printed newspapers, weekly periodicals and radio and television channels. Inspection of the registry reveals insufficient or, in some cases, no information of this type due to a lack of verification of the information provided by Ministry officials.

## 5.8.2. Control mechanisms under national (media) concentration law

Section 9 of the Mass Media Act on the protection of media pluralism and diversity includes provisions referring to restrictions on ownership, restrictions on concentration, and restrictions on associated persons. It also includes restrictions relating to incompatibility in the performance of radio and television activities, incompatibility in the performance of advertising activities and radio and television activities, and incompatibility in the performance of telecommunications activities and radio and television activities.

The act also clearly states that publishers and operators fall under the regulations of competition protection. The procedures of authorities, competent for competition protection, referring to the concentration of media publishers and operators involve the

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<sup>419</sup> Ibid.

<sup>420</sup> Ministry for Culture: Media Registry. Available at <https://rmsn.ekultura.gov.si/razvid/mediji>.

<sup>421</sup> Legal Information System: Mass Media Act. Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1608#>.

Ministry for Culture, while those referring to the publishers of radio and television programs involve the Agency for Communication Networks and Services of the Republic of Slovenia. The act provides numerous mechanisms enabling the state to prevent illicit concentration while simultaneously including mechanisms allowing for proactive measures to finance content in the public's interest. The responsibility is de facto distributed among various agents participating in the procedures, meaning that regularly the accountability for decision-making is avoided by all involved.

### 5.8.3. (Recent) Decisions of national competition and antitrust authorities regarding media providers or intermediaries/platforms

During the summer of 2018, the United Group declared it had bought shares in television stations in Slovenia and Croatia (POP TV, Kanal A and Nova TV) worth EUR 230 million from the American company CME.

Following this announcement, the Luxembourg-based company Slovenia Broadband (SBB) applied for approval of a takeover offer to the Ministry for Culture of Slovenia and the Slovenian Competition Protection Agency. During the take-over process, Slovenia was visited by the president of the KKR Global Institute who engaged in talks with the government at the highest level.

The owners of the United Group were at that time the American investment fund KKR and the European Bank for Reconstruction and Development. United Group already owned, at the time, the telecommunication company Telemach in Slovenia, the third-largest mobile phone provider and a significant provider of broadband Internet access, as well as a TV package provider, through the Luxembourg-based company SBB.

A merger of the above-mentioned companies represented the creation of the biggest media-telecommunication conglomerate in the country, since the owners of Telemach were acquiring, by buying ProPlus (the publisher of POP TV and Kanal A), television channels with average yearly ratings of almost 40 percent as well as three quarters of all advertising income in the domestic media market. The Ministry for Culture of Slovenia – the media-regulating institution of Slovenia – nevertheless decided that it did not have jurisdiction to provide this kind of concession and therefore could not oppose the takeover or even pass a judgment in regard to it. The Ministry stated that ProPlus was not inscribed in the media registry as a television channel broadcaster, meaning that SBB did not require the approval of the Ministry for Culture. ProPlus, POP TV and Kanal A could be considered as linked according to Article 57 Mass Media Act, but the Ministry for Culture stated it had no legal grounds to broaden the decision-making referring to approval of the inclusion of liaisons.

This explanation paved the way for the market regulator, the Competition Protection Agency. The unresponsiveness of the Ministry for Culture was handled by a special parliamentary committee for media before which the acting minister defended the position that he did not have jurisdiction to take action, while the MPs of the coalition

government (of which the minister was a part) proved the opposite. The case was not closed with the decision of the Competition Protection Agency but rather because the buyer withdrew from the deal.<sup>422</sup>

#### 5.8.4. Relationship between public service and private/commercial media

RTV Slovenia is a public institution with cultural and national significance which provides a public service in the field of radio and television activities aiming to support the democratic, social and cultural needs of the citizens of the Republic of Slovenia and Slovenians abroad, Slovenian minority members in Italy, Austria and Hungary, and the Italian and Hungarian minority in Slovenia, as well as pursue other activities in accordance with the Radio and Television of Slovenia Act.<sup>423</sup>

Together with regional centres, RTV Slovenia broadcasts five television channels and eight radio channels. Additionally, RTV Slovenia must provide a special national television channel, intended for direct broadcasting and replaying of the sessions of the National Assembly and its working bodies. The reality of the programme outline of the third television channel has long ceased to be in accordance with its original purpose and definition. According to the Mass Media Act, RTV Slovenia must respect the principles of reality, impartiality and integrity of information, human personality and dignity, political balance and the pluralism of viewpoints. It must respect the principles of constitutionality and lawfulness when designing the programming content, including the prohibition of instigation of cultural, religious, gender, racial, ethnic or any kind of bigotry. As an institution of public service it must provide integral and impartial information and freedom of opinion-making, while respecting the principle of political independence and journalistic autonomy, assert the professional ethics of its reporters, consistently separate between information and commentary in media reports and, lastly, protect children and youth from content that could have a harmful effect on their mental and physical development.

Article 4 of the Radio and Television of Slovenia Act, which defines the responsibilities of RTV, is detailed and seemingly appropriate, as it refers to pluralism, the protection of interests of specific sections of the public and respect for basic principles like credibility, impartiality and quality. There are, however, no analysis assessing citizen confidence in, and satisfaction with, the public service of RTV Slovenia. Ratings are data monitored by advertisers, whereas it ought to be confidence in RTV programmes and satisfaction with the public service that serve as credible indicators of the adequacy of a public service.

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<sup>422</sup> Hrvatin SB and Kučić (L 2019) *Medijska regulacija za telebane (Media regulation for dummies)*. Available at [www.lenartkucic.net/medijska-regulacija-za-telebane/](http://www.lenartkucic.net/medijska-regulacija-za-telebane/).

<sup>423</sup> Legal Information System: Radio and Television of Slovenia Act. Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4461>.

Slovenia introduced, with the Mass Media Act of 2001, the category of channels of special importance (local, regional, student, non-profit) whose status and mode of financing should guarantee their work in the public interest.

According to data of the Agency for Communication Networks and Services of the Republic of Slovenia (gathered up to May 2020),<sup>424</sup> there are 98 radio and 94 television channels active in Slovenia. Among the radio channels, there are 28 of special importance (seven broadcast by RTV Slovenia, eight regional, nine local, two student and two radio network channels) while among television channels, there are 13 of special importance (six broadcast by RTV Slovenia, two regional, four local and one with the status of a non-profit channel). In an annual public tender operated by the Ministry for Culture these channels are granted, based solely on their specific status, a certain amount of resources determined by law, aimed at the (co-)financing of programme content – this represents a substantial share of income for many of these channels.

### 5.8.5. Transposition of pluralism-related EU provisions

The last systematic transformation of media legislation occurred in the years before Slovenia entered the EU. Changes to the media acts have since been mostly motivated by a political interests seeking for greater control over public radio and television and by the lobbying of media owners against changes in legislation that would affect their non-regulated position.<sup>425</sup> Seventy-seven individuals are inscribed in the registry of lobbyists run by the Commission for the Prevention of Corruption, and more than half of them are registered in the fields of audiovisual politics and media.<sup>426</sup> The Audiovisual Media Services Directive [Directive (EU) 2018/1808] has not yet been implemented in the national legislation.

### 5.8.6. Funding mechanisms to ensure media diversity

Given the lack of systematic discussions and research on the question of the degree of media pluralism, the mechanisms of the state for media market regulation accordingly follow the politics of co-financing media program content.

The Mass Media Act defines the public interest in the domain of the media (Article 4) and this becomes the basis of shaping the requirements for the financing of media content intended to represent the public interest (Article 4a). Although the majority of the media outlets are supposed to draw financing from their sales on the market of

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<sup>424</sup> Communications Networks and Services Agency of the Republic of Slovenia: TV and Radio Registry. Available at <https://www.akos-rs.si/registri/seznam-registrov/ra-in-tv-programi>.

<sup>425</sup> SB Hrvatin and LJ Kučić (2019) Slovenska medijska politika in njene posledice (Slovenian media policy and its consequences). Available at <http://www.lenartkucic.net/slovenska-medijska-politika-in-njene-posledice/>.

<sup>426</sup> The Commission for the Prevention of Corruption: Register of Lobbyists. Available at <https://www.kpk-rs.si/nadzor-in-preiskave-2/lobiranje-2/register-lobistov/>.

readers/listeners/viewers and the advertising market, the state allocates an additional share of public funds that the media receive through various tenders or directly from the numerous budgetary users, as has briefly been mentioned above.

Funds of the Ministry for Culture designed to ensure media pluralism are apportioned by an expert committee appointed by the minister. The role of the expert committee is not to redirect funds towards certain media based on establishing compliance with tender requirements but rather to expertly estimate (through research into existing situations and possible needs) the efficiency of state aid in terms of promotion of the public interest - something that has to date never been carried out.

The co-financing of media programme content as defined by the Mass Media Act covers only a small proportion of the supply of content, seemingly serving the public interest, but ultimately fulfils the needs of the public in a very limited capacity, and its contribution to greater media pluralism is very limited.

After 2006, when the law was implemented, annual in-depth research should have been conducted into the situation of the media market, as well as assessments of the effectiveness of the tenders carried out in accordance with the act. However, no such analysis has been performed. This was also the position of the expert committee for the evaluation of projects of 2017,<sup>427</sup> which stated: “Between 2006 and 2015, projects pertaining to the media have received almost EUR 22 million in support and we must pose the question whether this money has actually contributed to the attainment of the tender goals.”

The committee added in conclusion that the goals of the tenders were not attained, nor were the citizens better or more integrally informed and there was no greater plurality or cultural creativity present in the domain of the media.

In addition to the sums disbursed through the yearly tender operated by the Ministry for Culture, the media receive supplementary co-financing from various other budgetary sources, making the total sum of state funds allocated to the media sector even bigger. It should be increased by the funds, which are intended to inform at the municipal level through the direct funding of municipal newsletters, whether or not they are listed in the registry, and whose activities in the vast majority of cases do not comply with minimum standards of professionalism of journalism, according to reporting by the independent investigative medium Pod črto. There are 212 municipalities in Slovenia and almost 159 of them have their own “media”, often misused to attack political opponents or for electoral propaganda, our research has shown.<sup>428</sup>

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<sup>427</sup> Ministry for Culture: Evaluation of the yearly project tender for co-financing media content. Available at [https://www.gov.si/assets/ministrstva/MK/Raziskave/6fd59f5017/1\\_Evaluacija-medijskega-razpisa-2017\\_KONCNA.pdf](https://www.gov.si/assets/ministrstva/MK/Raziskave/6fd59f5017/1_Evaluacija-medijskega-razpisa-2017_KONCNA.pdf).

<sup>428</sup> Kučič LJ (2019) Občinska glasila: milijoni evrov javnega denarja za promocijo županov (Municipality media: millions of euros of public money used for self-promotion of mayors). Available at <https://podcrto.si/obcinska-glasila-milijoni-evrov-javnega-denarja-za-promocijo-zupanov/>.

### 5.8.7. Other developments regarding media plurality on the national level

The Ministry for Culture launched the process of updating the entire package of laws related to the media in July 2020: The Mass Media Act; The Slovenian Press Agency Act; and the Radio and Television of Slovenia Act. However, as the public consultation period was very short (only five days), it was later extended until September 2020, following protests from the political opposition, and journalist and civil society organisations.

The Slovenian Association of Journalists wrote in a statement<sup>429</sup> that the suggested changes would degrade the autonomy of Slovenian media companies and journalists. Slovenian public broadcaster RTV Slovenia, they warned, would lose a significant part of its funding (around EUR 14 million every year); the Slovenian Press Agency would not remain independent; and the government would establish a new media fund that would be used to finance TV production (the Ministry for Culture would distribute the money). Such measures would harm the public broadcaster and increase the influence of the state (and of politicians) over media companies, according to the statement. Many international journalist and civil society organisations also expressed strong concerns<sup>430</sup> regarding the Slovenian media package.

Furthermore, the government did not address any systemic problems of the Slovenian media environment in the legislative package: the consequences of the COVID-19 crisis; the survival of independent and non-profit media companies; the working conditions of journalists etc. Instead, the Ministry for Culture shrank the existing media pluralism fund by 60 percent, a move expected to also negatively impact many Slovenian independent, student, and non-profit media institutions that rely heavily on the fund.<sup>431</sup>

Media pluralism, variety and diversity (the terms being used synonymously) have too often been decreased by Slovenian politicians to increase the influence of political parties over the media. This influence is either direct - when political parties are also (co-)founders or (co-)owners of certain media,<sup>432</sup> or indirect. When forming a government, political parties have the possibility to affect staffing in media companies (appointing of the board of editors and editor-in-chief etc.) or to influence the allocation of advertising funds in state or state-linked companies.<sup>433</sup> This is of even greater significance in light of

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<sup>429</sup> Slovenian Association of Journalists: Skupni poziv k umiku trojčka medijskih zakonov (A joint call for removal of the media legislation triplet). Available at <https://novinar.com/novica/skupni-poziv-k-umiku-trojcka-medijskih-zakonov/>.

<sup>430</sup> See for example EFJ: "EFJ and partners concerned over future of public service media in Slovenia". Available at <https://europeanjournalists.org/blog/2020/07/14/efj-and-partners-concerned-for-future-of-public-service-media-in-slovenia/>.

<sup>431</sup> Slovenian Association of Journalists: "Ministrstvo z aneksi le v 30-odstotno izplačilo sredstev iz sklada" (The Ministry will only provide 30 percent to the recipients of media pluralism fund). Available at <https://novinar.com/novica/ministrstvo-z-aneksi-le-v-30-odstotno-izplacilo-sredstev-iz-sklada/>.

<sup>432</sup> Kučič LJ (2019): Povzetek preiskave: medijski sistem SDS (Summary of investigation: media system of the political party SDS). Available at <https://podcrto.si/povzetek-preiskave-medijski-sistem-sds/>.

<sup>433</sup> Lenart J. Kučič (2020): "Dnevni časopisi (2. del): mala šola trgovanja z medijskim vplivom" (Slovenian Daily Newspapers part two: how to trade with media influence), <https://podcrto.si/dnevni-casopisi-2-del-mala-sola-trgovanja-z-medijskim-vplivom/>.



the COVID-19 pandemic, which has caused a drastic decline in advertising income, and a significant drop in print media circulation.

The above-described media and business environment underscores the problematic of financing of certain foreign media. In 2015, the political party SDS announced the creation of a new party television, radio and online media outlet, Nova24TV. Initially, it was financed by members and supporters of the party only to be subsequently recapitalised with several million Euros in 2016 and 2017 by Hungarian companies affiliated with the governing Hungarian political party Fidesz and Prime Minister Viktor Orban, a noted political ally of the SDS party<sup>434</sup>. Funds received from Hungary allegedly financed the establishment of a network of 17 regional Internet media strengthening the reach of the party's media system on social media platforms<sup>435</sup>. Prior to the influx of Hungarian-originating funds, Nova24TV generated a loss of over a million Euros in its first two years of activity, suggesting that Hungarian media businessmen enabled the continued existence of the channel.

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<sup>434</sup> Lenart J. Kučič (2019): "Infografika: madžarski medijski sistem v Sloveniji" (Infographics: Hungarian Media System in Slovenia), <https://podcrto.si/infografika-madzarski-medijski-sistem-v-sloveniji/>.

<sup>435</sup> Lenart J. Kučič (2019): "Infografika: internetni mediji SDS" (Infographics: SDS Internet Media Network), <https://podcrto.si/infografika-internetni-mediji-sds/>.



## 6. Comparative analysis

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When comparing the different aspects of media pluralism described in the country reports, it is clear that, although they are similar, the instruments adopted vary hugely in terms of both form and application. In particular, three classic types of measure to promote pluralism can be identified: media law provisions aimed at combating media concentration and safeguarding media pluralism; general competition law provisions relating to competitive practices that are harmful to media markets; and positive measures designed to promote media pluralism. Furthermore, in particular as EU provisions are transposed into domestic law, we are seeing a steady increase in the number of additional instruments designed, partly in response to potentially restrictive technological developments, to protect media pluralism on the user side and tackle the ever-expanding role of intermediaries.

The balance between measures to promote pluralism on the one hand and those that help media providers offer a diverse range of content on the other differs in each of the countries featured in this report. The focus of these measures depends heavily on individual factors such as the size of the respective media market. Comparisons between them must always therefore be made with these market differences in mind.

In most of the countries investigated, the obligation to create a pluralistic media landscape is directly derived from constitutional provisions. In Germany and Italy in particular, the constitutional courts play a prominent role in determining the scope of this obligation. Poland's media regulation system is also directly based on its constitution, while in the United Kingdom, which does not have a written constitution, the duty to create and safeguard a pluralistic media landscape is derived from quasi-constitutional provisions in the form of the European Convention on Human Rights. Slovenia is the only country whose constitution simply treats freedom of expression and freedom of the press as an individual freedom and does not require the state to create or protect media diversity.

All the countries studied operate control mechanisms that rely on media concentration law as well as competition and cartel law, although their precise form, scope and importance vary hugely. In Germany, Italy and the French-speaking community of Belgium in particular, media concentration law is treated as a concept in its own right. However, even in countries that do not refer to concentration law as such, mechanisms to prevent media concentration are not based purely on competition law. What all these measures have in common is a reference to antitrust control exercised in the field of broadcasting and broadcasting law, where the granting of broadcasting licences is often subject to an examination of the applicant's compliance with concentration law. However,

different countries use different criteria to measure media concentration. Italian broadcasting law, for example, assesses media concentration in terms of “technical”, “economic” and “diagonal” factors, that is to say a company’s share of existing broadcasting services, share of overall media market revenue, and cross-media activities. In Sweden, on the other hand, there is simply a limit on the number of broadcasting licences that a natural or legal entity is allowed to hold, a system that was also initially used to protect pluralism in Germany. In some countries,<sup>436</sup> control mechanisms are focused on cross-media ownership: companies with a certain share of the newspaper market are not allowed to enter the broadcasting market, or only in a limited way. Here, although the measures themselves apply in the broadcasting sector, other media markets are taken into account. Under German media concentration law, however, whether a company holds a ‘dominant influence over public opinion’ is determined narrowly on the basis of a television audience share model.

In several reports, the transparency of ownership structures and media market shareholdings appears as a key element of media concentration law.<sup>437</sup> This is especially true in countries where large media corporations are involved in high levels of cross-market activity, and where efforts are being made to expand transparency and information obligations. Such disclosure requirements are based not only on media concentration considerations, but sometimes on national security concerns as well.<sup>438</sup>

In most of the reporting countries, measures to protect media pluralism are linked to the granting of broadcasting licences, and in some this is the only mechanism used.<sup>439</sup> In all the countries, these measures are implemented by media regulators, whose responsibilities and activities sometimes overlap with those of national competition authorities.<sup>440</sup>

It is interesting to note that the media regulators in several countries complain that the measures available to them under current media concentration laws are inadequate.<sup>441</sup> This criticism, some of which has existed for a number of years,<sup>442</sup> focuses in particular on high thresholds for triggering media concentration controls or the fact that only individual media markets are taken into account. In fact, the examples of recent court decisions show that cartel law controls are becoming increasingly important in the media market.<sup>443</sup> The objective of such provisions is to ensure functional competition rather than maintain a pluralistic media landscape and diversity of opinion, although there is clearly some cross-over between the two. On the whole, the spectrum of activities with potential relevance to competition law is broader than the array of those falling within the scope of media

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<sup>436</sup> See sections on Slovenia and the United Kingdom, in this report.

<sup>437</sup> See sections on Belgium and Latvia, in this report.

<sup>438</sup> See section on Sweden, in this report.

<sup>439</sup> See sections on Poland and Sweden, in this report. In Sweden, concentration law measures are limited even further, to the granting of licences to terrestrial broadcasters.

<sup>440</sup> See, in particular, sections on Poland, Italy and Germany, in this report, regarding the relationship between media regulators and cartel authorities.

<sup>441</sup> See sections on Germany and Poland, in this report.

<sup>442</sup> Discussed previously in Cappello M. (ed.), *Media ownership – Market realities and regulatory responses*, IRIS Special 2016-2, European Audiovisual Observatory, Strasbourg, 2016, p. 57.

<sup>443</sup> See section on United Kingdom, in this report, regarding the rising number of cases.

concentration law. The reported cases dealt with by national competition and cartel authorities, for example, concern the activities of major investors<sup>444</sup> or of telecommunications or cable network operators in the media market.<sup>445</sup> In Belgium, concerns were raised that the acquisition of the remaining shares in broadcaster De Vijver Media (DVM) by the telecommunications company Telenet would create a fully vertically integrated player from the production of content to the distribution of TV channels through a dominant distribution platform. The competition authority authorised the merger subject to various conditions relating to channel numbering, targeted TV advertising and access to data, for example.

It is rare for takeovers to be prohibited completely, although they can be subject to certain conditions.<sup>446</sup> Media intermediaries are also playing an increasing role in the activity of competition authorities, with data protection aspects also sometimes involved. One example is the dispute between the German *Bundeskartellamt* (Federal Cartels Office) and Facebook over the aggregation of data from different services.

It is interesting to note the overlaps between competition law and media law, including the responsibilities of, and collaboration between, the respective authorities. In some countries, the competition authorities and media regulators act completely independently of each other,<sup>447</sup> while in others they exchange information or even work together under a set of written rules.<sup>448</sup> One potential problem that is not addressed in any of the reports and therefore not examined in any detail here concerns the distribution of legislative competence. In Germany and Belgium, for example, media legislation, unlike competition law, is organised at the federal level, with responsibility held by the *Bundesländer* and regions, respectively. The resulting increase in importance of the competition authorities compared with specialist media regulators can lead to a shift in the allocation of competences. With regard to the relationship between public and private broadcasters, there is, in many of the countries studied, a clear distinction and coexistence between the two, although this does not prevent co-financing of certain major private broadcasting services.<sup>449</sup> Mixed financing of private broadcast content is permitted in Latvia, for example, where up to 15% of public service funding can be distributed to private broadcasters under a tender process,<sup>450</sup> although such schemes are currently prohibited in Germany and Sweden.

The very existence of public service broadcasting has a fundamentally positive effect on pluralism. This effect continues to play a central role in traditional pluralism-related measures designed to create and preserve media pluralism. All public service broadcasting services, however, are subject to certain internal pluralism requirements.

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<sup>444</sup> See section on Slovenia, for example, in this report, regarding the activities of holding company KKR & Co. Inc.

<sup>445</sup> See sections on Poland, Belgium and Latvia, in this report.

<sup>446</sup> See section on Poland, in this report – takeover of cable network operator Multimedia Polska by Vectra.

<sup>447</sup> See section on Italy, in this report.

<sup>448</sup> See sections on Germany and the United Kingdom, in this report.

<sup>449</sup> For more examples of (part-) financing of the content of commercial/private broadcasters and other support mechanisms, see Ukrow J. and Cole M.D. Cole, *Aktive Sicherung lokaler und regionaler Medienvielfalt*, TLM-Schriftenreihe, vol. 25, 2019.

<sup>450</sup> A similar system exists in Slovenia, although co-financing here is rare.

These specific programming rules are sometimes laid down in law,<sup>451</sup> and sometimes in regularly updated agreements with the relevant media regulator or government ministry.<sup>452</sup> One problem that has emerged in Slovenia, for example, is a tendency to limit the requirements on, and reduce the budgets of, public service broadcasters, which can be seen as a politically motivated measure aimed at pressuring media providers into offering particular types of content.<sup>453</sup>

The implementation of current EU legislative instruments relevant to media pluralism is progressing at different speeds in different countries, with delays caused by the COVID-19 crisis in particular. Some countries are planning comprehensive reforms of their individual broadcasting and media laws as part of their efforts to implement the AVMSD. All the countries featured operate “must-carry” rules, which are often accompanied by “must-offer” mechanisms and, occasionally, by “must-be-found” rules.<sup>454</sup> There are no plans to substantially amend these rules in the course of implementing the new European Electronic Communications Code.

As far as the transposition of the AVMSD is concerned, draft laws are currently still being drawn up in most countries. Germany is the only country to have already developed comprehensive legislation, which is likely to come into force before the implementation deadline. The United Kingdom is also planning to implement the AVMSD regardless of Brexit, although it has not yet prepared the necessary draft legislation. Particular efforts are being made to introduce new rules on prominence on user interfaces. According to Germany’s new *Medienstaatsvertrag* (Interstate Media Treaty), public service channels or similar services that especially contribute to diversity of opinion and content must, in future, be “easy to find”. Other countries are also trying to introduce rules on prominence, sometimes in conjunction with “must-carry” provisions or rules on electronic programme guides (EPGs).<sup>455</sup>

No countries have yet tabled any comprehensive legislation to transpose the Digital Single Market Directive, although an initial draft for its partial implementation has been published in Germany. The United Kingdom has announced that it will no longer be transposing this directive on account of Brexit, while an action against some of its provisions submitted to the CJEU by Poland in May 2019 is still pending.<sup>456</sup>

Meanwhile, positive action to safeguard diversity in the form of media aid independent of public service media is growing in importance, although the form it takes varies from country to country. Such aid is particularly important in smaller media markets and local or regional journalism, where it is considered necessary for provision of a service that is sufficiently broad and relevant to the regional or local context. However, in some countries, such support mechanisms cover the media sector as a whole. In Sweden, for example, a broad media aid scheme has been established for the press, local radio and

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<sup>451</sup> See sections on Germany and Slovenia, in this report.

<sup>452</sup> See sections on Italy and Poland, in this report.

<sup>453</sup> See section on Slovenia, in this report.

<sup>454</sup> See sections on Poland and the United Kingdom, in this report.

<sup>455</sup> See section on Sweden, in this report, or the proposals of the KRRiT in Poland regarding EPGs and online search mechanisms.

<sup>456</sup> Case C-401/19 – *Poland v Parliament and Council*.

television, and the film industry. The French-speaking community of Belgium also has a journalism fund that directly supports investigative journalism. Support for the press in the United Kingdom and Germany, however, is limited to a lower rate of VAT. Active support for the film industry, on the other hand, is offered in every country.

As mentioned above, private broadcasting content is actively supported in some countries through tenders for the co-financing of broadcast services of particular importance or through targeted funding of local media.<sup>457</sup> Specific programming requirements may need to be met; for example, services may need to provide cultural content or be aimed at minorities. In the context of the COVID-19 crisis in particular, more extensive and broader support for media content is being discussed and, in some countries, existing support mechanisms have already been expanded.<sup>458</sup>

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<sup>457</sup> See section on Slovenia, in this report.

<sup>458</sup> In Germany or Latvia, for example. A list of COVID-19 measures taken in the audiovisual sector in the European Audiovisual Observatory member states can be found at <https://www.obs.coe.int/de/web/observatoire/covid-19-audiovisual-sector-measures>.





## 7. Conclusions

The fundamental transformation of media markets over the last decade in particular has created new challenges when it comes to safeguarding media pluralism. Media pluralism therefore needs to be viewed from new perspectives. For a long time now, media concentration has not simply been taking place in horizontally distinguishable media markets. The continuing growth of cross-media strategies seen in recent years and transnational opinion-forming processes promoted by online media in particular, the more prominent role being played by platforms and intermediaries in content prominence and selection, and shorter value chains in the advertising market are all becoming increasingly relevant to media pluralism. At the same time, media pluralism is no longer to be viewed only from the provider side, but increasingly from a media usage perspective too, since it is not simply a case of ensuring diverse services are provided by diverse providers, but also of enabling consumers to access the full range of available content.

There is therefore a growing need to shift the current focus away from individual media categories when designing mechanisms to promote media pluralism. This is especially true in countries where media diversity provisions remain narrowly focused on broadcasting and thus only cover one part of the market.

Cartel and competition law are becoming increasingly important tools for preventing distortions of competition in the media market, partly because, while some market definitions are necessary from a competition law perspective, there is no restriction on market power, for example, in certain sectors such as broadcasting. Aimed at creating unimpeded economic competition that fosters the diversity of market players, competition law supports media law objectives and, at least indirectly, promotes the diversity of different, independent media providers, or at least has the potential to maintain such diversity if it already exists. In particular in view of the narrow scope of specific media concentration law and, therefore, of the responsible authorities or institutions in many countries, monitoring by competition and cartel authorities based on competition-related provisions is becoming increasingly important. Many modern challenges for media pluralism already fall within the scope of the competition authorities. However, even the regulatory instruments of competition law are limited, especially in the network industry, if market power is no longer created by mergers but “quasi-monopolies” are formed as a result of network effects and vertical integration. The increasing intertwining of market power and information power, the beginnings of which can already be seen in various countries, must therefore be taken into account. It should also be remembered that protecting and creating media pluralism is not the primary objective of competition law instruments and that cartel law, with its potential to control market power, is therefore a necessary, albeit insufficient, tool for protecting diversity of opinion. This also applies in the context of the platform economy.

Public service broadcasting continues to play a positive role as a key factor in creating democratic media pluralism, and is of paramount importance in most countries. With a specific remit to provide high-quality journalism, cultural and educational content, and programmes for minorities, public service broadcasters and the public service-oriented programmes of certain providers help to offer a sense of direction in an increasingly confusing information world, and promote a better understanding of complex developments. However, two particular dangers are currently posed by the positive effect that public service broadcasting systems have on media pluralism. Firstly, there is a risk that countries will try to increase political influence over the editorial independence of public service broadcasters by narrowing their remit and limiting their financial capacity. Secondly, public service media providers are faced with the challenge of increasingly direct information flows in a connected world, which mean that meticulously prepared journalistic content and media, as information intermediaries, can be more easily bypassed as information is disseminated. This trend could, at least potentially, undermine the ability of public service broadcasting systems to promote a generally pluralistic media landscape. In order to ensure that, amidst changing distribution methods, public service content can still be found and remains in the public consciousness, the measures currently under discussion – including as a result of the amended AVMSD at the EU level – to ensure the prominence of public services, especially on platforms and through intermediaries, are likely to be an important tool that will be used more and more in the future.

In this context, a better understanding of the economics of media algorithms is also necessary. Curation mechanisms, personalisation algorithms and data-based decision-making are becoming increasingly relevant to both user-side media diversity and access to media markets. The optimisation logic of the algorithms that operate in the background of media platforms is not designed to promote broad access to diverse content, but to maximise user engagement or platform usage. At the same time, access to data can have a significant impact on the potential advertising income of market participants. Such processes are not necessarily harmful to media pluralism, but they are dangerous and should therefore be understood and taken into account when designing instruments to promote diversity and teaching digital literacy. This applies not only to end users, but also to the authorities and institutions tasked with monitoring and enforcing media and competition law provisions.

This broader spectrum of factors of media diversity is covered by a larger number of regulatory instruments that have, or can have, an impact in this area. For example, they now play a role not only in traditional media concentration law, but also in data protection law, platform regulation or copyright law, for example. The digitalisation of practically all domains of life is increasing the possible applications of instruments designed to promote diversity, which are described in this publication primarily in the context of the media sector itself. The relevance of the threat posed to media pluralism in virtually all European countries is evident in the recently published Media Pluralism Monitor 2020, which points, for example, to an increasing number of threats against journalists in Europe, a high risk of

commercial and owner interests influencing editorial content in some countries, and possible economic dangers caused by concentrations involving digital intermediaries.<sup>459</sup>

At the same time, the areas of application and relevance of measures designed to promote pluralism are increasing. In the context of the COVID-19 crisis in particular, and the resulting collapse of advertising revenue and heavy income losses suffered by media market participants, the relevance of support and funding programmes as a way of maintaining local, regional and even national services is growing. It can therefore be assumed that, in the future, more measures will be taken than ever before to promote media pluralism – both financially and by creating greater transparency through new regulatory instruments, for example – and to supplement those that are already in place.

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<sup>459</sup> Media Pluralism Monitor 2020 (MPM2020). Centre for Media Pluralism and Media Freedom. Available at <https://cmpf.eui.eu/mpm2020-results/>.





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