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# MASTER-THESIS

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„Protecting Media Pluralism at European Union Level.  
An Assessment from a Human Rights Perspective of  
Most Recent Initiatives and Discussions  
on the Basis of Two Case Studies“

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## Introduction: Research Topic, Research Questions, Sources, Methodology and State of Research

On 19 August 2013 a “European Citizens’ Initiative” (ECI) on the protection of media pluralism at European Union (EU) level, called “European Initiative for Media Pluralism” (EIMP), was registered at the European Commission (EC). According to the EU Regulation on ECIs, the Initiative is allowed to directly present proposals for legal acts to the EC, if it manages to collect one million signatures in at least seven Member States within one year.

The EIMP is one out of a number of significant media pluralism initiatives undertaken in the last four years. These initiatives and discussions bring new dynamics into the around three-decade old media pluralism debate. They reflect the changed framework that affects media pluralism and the need to adjust media pluralism regulatory policies to these new conditions.

The research subject of this thesis consists of assessing the proposals provided by the most recent media pluralism initiatives on the basis of two case studies. Having briefly evaluated the initiatives’ approach and summarized their main proposals, the thesis will provide a two-step analysis:

The first step consists of analysing selected media pluralism concerns in two Member States: Hungary and Romania. The selection of these two countries as cases studies has to do with the fact that there are serious media pluralism concerns in both Hungary and Romania, while there is a significant contrast between the two countries in terms of the range of the concerns as well as actors and conditions which threaten media pluralism.

The second part of the analysis looks at how the selected media pluralism concerns in Hungary and Romania could be tackled under the scope of EU competencies, and more specifically, on the basis of the recommendations expressed in the framework of the most recent initiatives.

The overall goal of the analytical part is to sketch out the range of media pluralism concerns that exists in EU Member States today and the role the EU could and should play to tackle these concerns while making use of the proposals of the most recent initiatives.

The research questions are:

- What approach do most recent media pluralism initiatives employ, and what are the main recommendations regarding tackling media pluralism concerns at EU level?
- To what extent could recommendations, provided by the most recent initiatives, contribute to tackling the media pluralism concerns in Hungary and Romania?

The overall research question is:

- How could and should the EU approach the issue of media pluralism while making use of the recommendations provided by the most recent media pluralism initiatives?

The sources include media laws in Hungary and Romania, EU legal texts, all information and documents published on the respective websites of the media pluralism initiatives, and reports on the media situation in Hungary and Romania.

The methodology used includes legal analysis, document analysis, and literature study.

As will be presented in the thesis' part dedicated to the background of media pluralism, there exist multiple publications in relation to the broad topic "media pluralism and the EU". Concerning the specific media pluralism issues in Hungary and Romania, addressed in this paper, several legal analysis have been conducted on the 2010 version of the Hungarian media legislation and a few reports and journalistic articles have been published on the Romanian media scene.

With regard to the research subject of this thesis, which includes the evaluation of the proposals provided by the most recent media pluralism initiatives, the legal analysis of the 2014 consolidated version of the Hungarian media legislation, and the impact of structural and information distortions on media pluralism in Romania around the 2012 election year, no studies have been conducted yet, except for short remarks and a few journalistic articles.

# 1. Theoretical, Legal, Political and Historical Background: Media Pluralism in Light of Theories, Council of Europe Standards and European Union Regulation

## 1.1. Media Pluralism: Theoretical Debates and Legal Standards

### 1.1.1. Introduction

Media pluralism is an issue of both complex nature and crucial importance. The notion of media pluralism, the appropriate methodologies of measuring and evaluating it, and the effective regulatory instruments to achieve and advance media pluralism belong to much debated issues among scholars and policymakers. This section will briefly and broadly address these issues, mainly drawing on scholarly articles. While publications of the Council of Europe (CoE) and the EU will be used as sources in cases when they make reference to general theoretical debates, their perspective on this matter will be separately discussed in the forthcoming sections.

### 1.1.2. Definition and dimensions of media pluralism

From a theoretical standpoint both terms “media” (and related terms such as “media goods and services” and “media markets”) and “pluralism” are broad and rather loosely defined. Mass media can be generally defined as “organized technologies/institutions that make mass communication possible”<sup>1</sup>. However, as a consequence of technological developments, the emergence of new media and the changing nature of the traditional media, the theoretical foundations of the mass media notion have become object of

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<sup>1</sup> Jakubowicz, 2009, 9.



ambiguities.<sup>2</sup> Furthermore, complexity arises due to the dual nature of media products. They are both cultural/political goods and services as well as economic goods and services.<sup>3</sup> Finally, methodological problems arise in relation to the issue of how to define (and measure) media product markets.<sup>4</sup>

When used in jurisprudence the meaning of the term “pluralism” may significantly vary depending on the context. Aernout Nieuwenhuis has shown the ambivalence of this concept when applied by the European Court of Human Rights (ECtHR) in relation to different fundamental rights.<sup>5</sup> Basically, “pluralism” is considered first, a quality of democratic societies, both a characteristic of and a precondition for democracy, second, an individual human right.<sup>6</sup> The notion has both a passive (recognizing and respecting) and an active (promoting) dimension.<sup>7</sup>

When taken in connection with the notion “media”, pluralism becomes a very vague term out of three main reasons. First, the notion “media pluralism” is very broad, encompassing a number of areas and used as “a proxy for more involved concepts”<sup>8</sup>.

Second, the notion implies an indistinct quantitative concept that can impossibly be determined in terms of setting an objective quantitative level of pluralism sufficiency that would be objectively reasoned as well as valid under all circumstances. According to Ofcom<sup>9</sup>, “it is unrealistic to seek an absolute statutory definition of sufficiency, as the market is dynamic and unpredictable. What is considered sufficient or not will vary with time and needs to be considered in reference to the broad market and political context of the times.”<sup>10</sup> Similarly, the Report of the “High Level Group on Media Freedom and

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<sup>2</sup> Cf. Barzanti, 2012, 2; Jakubowicz, 2009.

<sup>3</sup> Gálik, 2010, 229.

<sup>4</sup> Ibidem, 232.

<sup>5</sup> Nieuwenhuis, 2007.

<sup>6</sup> Barzanti, 2012, 2; Haraszti, 2011, 104-105.

<sup>7</sup> Barzanti, 2012, 2.

<sup>8</sup> Picard, 2012.

<sup>9</sup> Office of Communications (called Ofcom) is the regulatory and competition authority for the broadcasting, telecommunications and postal industries of the United Kingdom. It enjoys a high reputation among scholars.

<sup>10</sup> Ofcom, 2012, para 5.118.

Pluralism” (HLG) states that “(t)here are neither objective nor quantifiable criteria for determining just how many different view-points should be represented out there in the public space, in other words - just how much pluralism is enough”<sup>11</sup>.

Third, the notion pluralism when taken in combination to media does not simply refer to quantitative aspects. It is “more than just a number exceeding one. It may carry an implication of range and variety as well”<sup>12</sup>.

Consequently, the notion media pluralism lacks a common accepted definition. Instead, it is defined and perceived very broadly as well as charged with very high, sometimes unrealistic expectations.<sup>13</sup>

Sometimes the term “media pluralism” is replaced by other notions such as “media diversity”, “plurality of media”, “media variety“ and “information pluralism”. Noteworthy, these terms are related, but not identical.<sup>14</sup>

The shorthand term “media pluralism” encompasses all the aspects related to media types, ownership structure, interests and content.<sup>15</sup> It is related to factors of cultural, political, social and economic nature.<sup>16</sup> Based on the review of scholarly articles, the independent policy report “European Union Competencies in Respect of Media Pluralism and Media Freedom”, written at the request of the European Commission, presents following aspects as key elements of the media pluralism notion:

“(1) diversity, variety and plurality of media supply; (2) the public sphere, the general public or the audience; it is (3) provided by free, independent and autonomous media

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<sup>11</sup> HLG, 2013, 37.

<sup>12</sup> Paragraph 90 of the UK Court of Appeal Judgment, cited in: Ofcom, 2012, para.3.9..

<sup>13</sup> CMPF, 2013, 11.

<sup>14</sup> Barzanti, 2012, 3.

<sup>15</sup> Haraszi, 2011, 119-120.

<sup>16</sup> Barzanti, 2012, 4.

sources, and (4) results in both access and a choice of opinions and representations which reflect the citizens of the State in question”<sup>17</sup>.

The Ofcom report on measuring media pluralism lists following features that would characterize an ideal media pluralism environment: “

- There is a diverse range of independent news media voices across all platforms.
- Overall reach and consumption is relatively high among all consumer demographics and across all (...) regions.
- Consumers actively multisource - such that the large majority of individuals consume a range of different news sources.
- Sufficiently low barriers to entry and competition between providers spurs quality and innovation in the gathering and dissemination of news.
- Overall investment and commercial returns are sufficiently high to ensure sustainability, and guarantee high quality coverage, extensive newsgathering and investigative journalism.
- No organisation or news source has a share of consumption that is so high as to create a risk that consumers are exposed to a narrow set of viewpoints.”<sup>18</sup>

Media pluralism has a range of dimensions (as presented in figure 1). The external and the internal dimension belong to the most important ones and are considered to be particularly relevant in policymaking. Internal pluralism can be defined as pluralism within/in every single media, while external pluralism refers to diversity across/between media enterprises.<sup>19</sup> Defined through its internal and external dimension, media pluralism is the “diversity of viewpoints available and consumed across and within media enterprises”<sup>20</sup>.

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<sup>17</sup> CMPF, 2013, 12.

<sup>18</sup> Ofcom, 2012, para 3.22.

<sup>19</sup> CMPF, 2013, 13.

<sup>20</sup> Ofcom, 2012, para 1.3.

**Figure 1: Definitions and dimensions of media pluralism** (Source: Klimkiewicz 2009, 47)

External	<ul style="list-style-type: none"> <li>■ plurality of independent and autonomous media outlets and providers.</li> <li>■ multiple centres of ownership, production, performance and distribution control.</li> </ul>
Organized	<ul style="list-style-type: none"> <li>■ media pluralism is organized in a segmented structure of media outlets and providers representing different social groups, cultural communities and political orientations.</li> <li>■ a strong link to institutions representing these groups and interests.</li> </ul>
Internal	<ul style="list-style-type: none"> <li>■ diversity of media contents, services and sources reflecting and generating a broad variety of opinions, views, representations and values of social, ethical, political and cultural nature.</li> </ul>
Spontaneous	<ul style="list-style-type: none"> <li>■ media system is structured more spontaneously.</li> <li>■ media representation of a multiplicity of competing interests and values is individualized.</li> </ul>
Proportional (Representative)	<ul style="list-style-type: none"> <li>■ media pluralism proportionally reflects existing population's preferences; political and cultural division in a society; ethnic, linguistic and religious population's structure.</li> </ul>
Polarized	<ul style="list-style-type: none"> <li>■ media are identified with ideologically opposed tendencies; distinct cultural, ethnic, religious traditions (ethnic, cultural, religious cleavages are deep).</li> <li>■ advocacy and commentary-oriented journalism.</li> </ul>
Open	<ul style="list-style-type: none"> <li>■ media pluralism equally or openly reflects population's preferences; political and cultural division in a society; population's ethnic, linguistic and religious structure.</li> </ul>
Moderate	<ul style="list-style-type: none"> <li>■ ideological distance represented by the various media is narrow, tendencies toward the centre are stronger.</li> <li>■ cultural, ethnic, linguistic differences are not projected into the media structure.</li> </ul>
Descriptive	<ul style="list-style-type: none"> <li>■ describes media pluralism conceptual and factual features, indicators, aspects.</li> </ul>
Reactive	<ul style="list-style-type: none"> <li>■ media pluralism reflects diversity of opinions, political views, identity choices, cultural representations among users through media performance, services, content, structural aspects,</li> </ul>
Evaluative	<ul style="list-style-type: none"> <li>■ evaluates descriptively identified features.</li> </ul>
Interactive	<ul style="list-style-type: none"> <li>■ media pluralism results from a variety of interactions between media users and providers.</li> </ul>
Proactive	<ul style="list-style-type: none"> <li>■ media pluralism generates and actively shapes diversity of opinions, political views, identity choices, cultural representations among users through media performance, services, content, structural aspects.</li> </ul>

### 1.1.3. Media pluralism and democracy

Media pluralism is closely interrelated with “media freedom”, “freedom of expression” and “freedom of information”. All these rights constitute a net. They are interdependent and altogether play a crucial role to achieve democracy and make it work.<sup>21</sup>

Media pluralism and media freedom are complementary.<sup>22</sup> The first notion signifies the independence of the media from governmental control, while the latter is about “independence of media from private control and the disproportionate influence of one or a few economic, social and/or political sources of power”<sup>23</sup>. At the same time, media pluralism is deeply interconnected with freedom of expression and freedom of information. A pluralistic media environment both facilitates the exercise of freedom of expression and freedom of information as well as advances their ends. It can be considered the institutional guarantee for the fulfilment of freedom of expression and information, contributing to the development of informed and diverse societies.<sup>24</sup> While “freedom of expression” is considered as “the right to speak”, and “freedom of information” as “the right to know”, “media pluralism” is referred to as “the right to choose”.<sup>25</sup>

The very essence of the term media pluralism is related with the very nature of democracy.<sup>26</sup> Political and cultural elements lie in the very essence of media pluralism. As Fabrizio Barzanti states, media pluralism “is the politically (in a broad) sense and culturally significant diversity and variety of information, contents and events (relevant for the democratic society): a variety and diversity of contents, events and information that should have access to the media and should also be accessible from the media”<sup>27</sup>.

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<sup>21</sup> Haraszti, 2011, 103-104.

<sup>22</sup> CMPF, 2013, 10.

<sup>23</sup> Ibidem, 2013, 11.

<sup>24</sup> Haraszti, 2011, 102-104.

<sup>25</sup> Ibidem, 103-104.

<sup>26</sup> Barzanti, 2012, 3.

<sup>27</sup> Barzanti, 2012, 4.

The democratic theory refers to media pluralism a crucial role in the political and democratic processes. Media is perceived to be to a large extent “the creators” as well as the “editors” of the public sphere.<sup>28</sup> It is expected to provide all societal groups with a platform for free expression, public debate, political engagement and overall to lead all citizens to a high level of political awareness. According to the “rationality- activist model” of citizenship, active, informed and rational citizens are a requisite for a well- functioning and sustainable democracy.<sup>29</sup>

However, scholars criticize the sometimes very high normative expectations referred to media pluralism and the perception that it can solve any shortcomings in the media and political system.

First, there is skepticism even of the potential of media to inform citizens and make them politically aware. The usual reporting in a fragmented, episodically and personalized manner rather prevents people from understanding the underlying roots of structural problems. Furthermore, the large amount of information provided by the unlimited number of media outlets in the digital era prompts many people to use simplified mental models and filter the information on the basis of certain, sometimes, stereotypical criteria, thus, accessing only a limited range of the available information.<sup>30</sup>

Second, competition between different opinions and views does not necessarily lead to a higher quality of political culture, better social orientation and tolerance. Scholars give warning of “meaningless diversity” under circumstances when there is a stock exchange of conflicting opinions, instrumental diversity and journalistic routines. A polarized media environment can lead to polarization and even fragmentation and ghettoization of the society. This is a typical phenomenon in countries with small but overcrowded media markets like in the Balkans. In such cases media content may resort to “utterly partisan, judgmental and contrarian - a constant competition of blistering adjectives, slanted

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<sup>28</sup> HLG, 2013, 10.

<sup>29</sup> CMPF, 2013, 4, 8.

<sup>30</sup> Ibidem, 15-16.

invective and spin wars (...) a type of media pluralism that is reminiscent of the famously confrontational mentality of the pre- 1933 German democracy.”<sup>31</sup> Given these restrictions, scholars have underlined that the availability of pluralistic information alone cannot guarantee that media fulfils its normative expectations. Additional policies targeting media quality, media consumption patterns and demand for pluralistic content, political culture and media literacy skills, first and foremost the ability to critically read media content and identify biased information, are necessary.<sup>32</sup>

Third, media pluralism situation is largely dependent on the political system as well as specific national conditions such as the market size. First and foremost, media pluralism is deeply interconnected with media freedom. Legislative and regulatory measures often need to address both issues together. The emerging and consolidation of a pluralistic media environment requires governmental restraint from exerting control over media, legislation ensuring the political independence of media regulators and operators, legislative and other measures to ensure developing of strong media organizations that can successfully maintain their independence.<sup>33</sup> Despite these measures, under specific circumstances, only a minimum level of media pluralism can be achieved. This is the case for instance in geographically smaller units where the market can only sustain a limited number of media operators. Under such conditions encouraging economically sustainable media organizations and compromises with regard to the level of pluralism accepted are required. Otherwise, “(i)n trying to secure multiple voices, there is a risk of ending up with none, because the market may only sustain one commercial provider and consolidation or exit may be needed to secure that”<sup>34</sup>.

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<sup>31</sup> Haraszti, 2011, 113.

<sup>32</sup> CMPF, 2013, 15, 16; Klimkiewicz, 2009, 49.

<sup>33</sup> Haraszti, 2011, 125-126; CMPF, 2013, 8.

<sup>34</sup> Ofcom, 2012, para. 5.126.

#### **1.1.4. Media pluralism in the context of new media technology**

The development of new media technology has been affecting media pluralism in multiple ways. Media technology shapes media structure and content. It offers increased possibilities to improve media pluralism situation, but at the same time bears new risks to it. In this context, the development of new media technology has prompted debates on media pluralism conceptualization, measurement and governance among both scholars and policymakers. However, there is a clear misbalance between the longstanding and intensive examination of new media by the scholar community on the one side and the large reluctance of policymakers to address this issue on the other side.<sup>35</sup>

Unlike in the “pre-digital” era, the digital switchover can facilitate an unlimited number of available frequencies, thus providing for the achievement of the near-perfect “external-pluralism”.<sup>36</sup> However, in practice, this does not automatically ensure a diverse media structure. Theoretically, a large number of media outlets could be controlled by few or, in extreme case, by one operator. Hence, structural regulation remains highly relevant.<sup>37</sup>

With regard to the impact of new media technology on media diversity scholars are divided into two camps: “media optimists” and “media pessimists”. Media optimists point out that the emergence of new media has increased the competition since the entry barriers for new actors are lower. They perceive no risk of excessive concentration in the context of thousands of operators. On the opposite, the pessimists show skepticism towards the alleged positive impact of new technologies on media pluralism, arguing that the lower initial costs for new operators to enter the market and the availability of new platforms does not lead to more diversity of media outlets. In this context it is important to clarify the

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<sup>35</sup> Article19, 2011.

<sup>36</sup> Haraszti, 2011, 110-111.

<sup>37</sup> Barzanti, 2012, 9.



different reference to diversity by optimists and pessimists. Media optimists refer to “numerical diversity”, while media pessimist to “source diversity”.<sup>38</sup>

In line with the position of media pessimists, a large number of media economists have ascertained the intensification of media ownership concentration in the era of new media technology. Dwayne Winseck has pointed out that “audiences have now more media channels than ever, but source diversity is shrinking”<sup>39</sup>. Similarly, Baker has argued that the “concentration of audiences in the Internet world will be great and likely to be even greater than in the older offline world”<sup>40</sup> because of what he has called the “Hollywood effect”. According to him, in the Internet era the distribution and delivery costs decrease, while the price of producing media products increases. As a consequence, the entry barrier increases significantly and the audience concentrates around a few, high level media products, comparably to Hollywood films which require very high investment to produce the first copy.<sup>41</sup>

Second, the increased number of media outlets in the digital era does not resolve the internal pluralism related concerns. On the one side, the amount and range of information accessible is indeed much larger. New media content can be inexpensively produced and distributed as well as it can be accessed anytime and anywhere.<sup>42</sup> On the other side, exactly because of this large amount and range of content, the information flow is characterized by an excessive level of fragmentation.<sup>43</sup> While all groups are given the opportunity to share their voice, in the context of the unmanageable amount of information the issues of the “share of ear” and the “filter bubble effect” have emerged. Online navigation tools facilitate the pre-selection of information and sources. As a result, new media users run the risk of accessing only information in accordance with their own views or from sources they trust.

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<sup>38</sup> About the „media optimists“ vs. „media pessimists“ debate see: CMPF, 2013, 29.

<sup>39</sup> Dwayne Winseck, cited in: CMPF, 2013, 30.

<sup>40</sup> C. Edwin Baker, cited in: CMPF, 2013, 30.

<sup>41</sup> Ibidem.

<sup>42</sup> Article19, 2011.

<sup>43</sup> Haraszti, 2011, 131.

In such cases, they “encapsulate” themselves in their own “bubble”, accessing only a limited range of the available information and reinforcing their past habits.<sup>44</sup>

In addition, two interconnected trends related to new media have a negative impact on content diversity as well as well ultimately lead to more media concentration. First, media operators traditionally rely on popular brands and themes. The possibility in the internet era to exploit these brands and themes on many platforms leads to a larger concentration on such content, thus, reducing quality and diversity of content. Given the fact that traditional operators play an important role on new media platforms, this trend largely affects the entire media scene. Second, while media provide a sheer amount of information, a considerable part of it consists of recycled content. The continuous re-use of information, typical in the internet era, reduces content diversity. Furthermore, it benefits the pre-existing leading operators who can exploit sizeable economies of scale, while it makes it more difficult for new operators to compete in the multi- platform market. As a result, new players can easily enter the market, but in the long term they are marginalized or cannot even survive since only economies of scale can afford to keep the prices low.<sup>45</sup>

The tendency towards high concentration is particularly evident in the internet economy, resulting in the phenomenon “the-winner-takes-all”. The market is concentrated around a few very powerful operators such as Google, Yahoo!, Microsoft, Facebook and Twitter. Notably, these Internet operators are primarily not producing content. However, they still play a relevant role with regard to media pluralism. Scholars have raised attention to some intransparent practices and algorithms exercised by “intermediaries” that distort the flow of information and consequently harm media pluralism.<sup>46</sup>

To conclude, media pluralism regulation remains in the digital era highly relevant. However, it needs to be revised, taking into consideration both the opportunities offered by

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<sup>44</sup> CMPF, 2013, 16; Picard, 2012.

<sup>45</sup> CMPF, 2013, 31.

<sup>46</sup> Cf. Picard, 2012; CMPF, 2013, 36; Ofcom, 2012, para. 5.44.; Article19, 2011.

new media as well as (new) challenges for media pluralism posed by it. In addition, having in mind the significance of new media, policies targeting new media education and internet literacy should be adopted.<sup>47</sup>

### **1.1.5. Measurement and regulatory policy approaches**

Having in mind the very broad and contested definition of media pluralism, it is not surprising that the methodologies on measuring the degree of media pluralism are subject of big ambiguity and scholarly debates, too. Like media pluralism consists of many aspects and has different dimensions, media pluralism evaluation methodologies are large in number and different in their techniques depending on which element or dimension they refer to as well as reflecting different approaches. Overall, there is no consensus in the scientific community on the most appropriate methods to measure media pluralism.<sup>48</sup>

The “Centre for Media Pluralism and Media Freedom” (CMPF) policy report summarizes following major structural elements to be taken into account when measuring media pluralism: “sources (the diverse range of independent news media voices across all platforms), distribution (high overall reach and consumption among all consumer demographics and regions), demand and consumption culture, market players (barriers to entry and competition amongst providers), market sustainability, guarantee of high-quality coverage, extensive newsgathering and investigative journalism, and political representation. The quality, independence and transparency of the relevant regulator also influence the overall perception of media freedom and pluralism”<sup>49</sup>.

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<sup>47</sup> Barzanti, 2012, 9; Article 19, 2011.

<sup>48</sup> CMPF, 2013, 17.

<sup>49</sup> Ibidem, 11.

The Ofcom report counts three categories of quantitative metrics relevant to measuring media pluralism across platforms: availability, consumption and impact. In addition, it emphasizes the important role of a number of contextual, non-quantitative factors such as governance models, internal pluralism, editorial policies etc.<sup>50</sup> Notably, according to Ofcom, the consumption metrics are the most useful indicators when measuring media pluralism. While it regards availability metrics as relevant but on their own insufficient and it argues that impact metrics are difficult to measure, the report considers especially two categories of consumption metrics, “share of consumption” and “reach”, as “the foundation of a plurality assessment”<sup>51</sup>. This approach corresponds to the view that media pluralism cannot be guaranteed alone by access or exposure to pluralist media.<sup>52</sup>

Media pluralism can be approached at three different levels: The macro level of media systems encompasses ownership and service structures, entry costs and conditions. The meso level comprises media performance, user’s access to and interaction with content. The micro level refers to media content.<sup>53</sup>

Concerning the kind of media programs that should be taken into account when evaluating media pluralism, there are two major approaches. The broad and more culturally-based approach requires the evaluation of all media information. The narrow and more policy-based approach focuses only on news and current affairs. The latter approach can be justified with practical reasons as well as with the argument that news and current affairs programs are the most significant media content in terms of their impact on political public opinion.<sup>54</sup>

With regard to the methodology used, media pluralism measurement techniques can be divided into two major categories: cross-national and comparative studies using

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<sup>50</sup> Ofcom, 2012, paras 5.3.-5.33.

<sup>51</sup> Ibidem, para.5.20 .

<sup>52</sup> CMPF, 2013, 15, 16.

<sup>53</sup> Klimkiewicz, 2009, 46.

<sup>54</sup> CMPF, 2013, 13; Ofcom, 2012, paras 3.11-3.16.

quantitative methods and case studies using the qualitative approach. This division typically reflects the dichotomy between qualitative and quantitative methods in the social sciences. Characteristically, scholars applying quantitative methods highlight the importance of clear, neutral and standard measures as necessary precondition for running cross-national research, while supporters of qualitative approach argue that the embedding of the complex media system into the socio-political and economic national context is necessary in order to explore in-depth the media pluralism situation in a given country. Depending on the objectives of the study, sometimes one or the other approach, other times the combination of both of them is needed.<sup>55</sup> In any case, however, regulators should take into account that “media pluralism is something more than the mere quantitative multiplicity of viewpoints/voices. It is rather their actual qualitative variety and diversity”.<sup>56</sup>

In terms of normative regulatory policy approaches one can distinguish between the neo-liberal “marketplace of ideas” model on the one side and the “public sphere media” model on the other side. The first model is based on the idea of competition and freedom of choice. It employs a business perspective regarding the public as an audience. The second one follows Jürgen Habermas’ notion of the public sphere as “a societal space open to everyone, in which public opinion and political will are formed, based upon the free exchange of the relevant information and opinions”<sup>57</sup>. It requires a unifying, rational public discourse that includes diverse political and cultural viewpoints as well as serves the entire society.<sup>58</sup>

Scholars highlight that regulatory policies should strike a balance between the two models, since both the normative public sphere and the economic sustainability of media are important. Depending on specificities of the media scene in the respective country, one or

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<sup>55</sup> About the debates on qualitative and quantitative methodology in media pluralism measurement see: CMPF, 2013, 17-20.

<sup>56</sup> Barzanti, 2012, 4.

<sup>57</sup> CMPF, 2013, 13.

<sup>58</sup> Haraszti, 2011, 119-120; Independent Study on Indicators for Media Pluralism, 2009, 5-6.

the other model could be stressed.<sup>59</sup> In any case, setting absolute limits is considered to be inappropriate and the interventionist approach is required to “only be applied in a targeted manner, to those issues of greatest concern”<sup>60</sup>.

Second, regulatory instruments could be divided into two major categories depending on whether they focus on internal or external media pluralism. Internal pluralism measures fall into the category of content regulation instruments. They aim at “achieving the broader political and cultural diversity of content starting from each individual media outlet”<sup>61</sup>. Traditionally, the notion has been relating to the Public Service Broadcasting (PSB) which is required to provide neutral unbiased information of major relevance for the public, broadcast content generated by diverse and independent producers as well as grant access to different political and religious groups.<sup>62</sup>

External pluralism measures are related to structural regulation of the overall media environment. Their goal is to “structure the overall media market so that this could offer to citizens the fullest range of cultural and political views expressed in society (...) to spread variety across the diversity of several, independent and autonomous media outlets, and, thus, to consign to viewers an overall pluralistic media system”.<sup>63</sup> Characteristically, external pluralism measures have been tackling issues of media ownership concentration, limits on advertising shares and revenues, and were originally designed to target private broadcasters<sup>64</sup>.

Regulatory approaches should take both dimensions, internal and external pluralism, into consideration. Accordingly, the European-type “dual broadcasting system” is designed to

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<sup>59</sup> CMPF, 2013, 13; Haraszti, 2011, 120.

<sup>60</sup> Ofcom, 2012, para. 5.39.

<sup>61</sup> Barzanti, 2012, 6.

<sup>62</sup> Barzanti, 2012, 6, Picard, 2012.

<sup>63</sup> Barzanti, 2012, 6.

<sup>64</sup> Ibidem.

ideally combine both internal and external dimension. It encompasses a publicly founded PSB and commercial, privately owned broadcasting.<sup>65</sup>

Third, in the context of the theory of “functional differentiation” (Luhmann, 2000) two approaches concerning media pluralism conceptualization and media policy can be distinguished: the inclusive approach and the autonomous approach. The inclusive approach regards media as institutionally connected to political, social and cultural formations. According to it, a pluralistic media scene is ideally characterized by the existence of a range of media organizations reflecting the major political, social and cultural division of the society. The function of the media is to identify and expose problems as well as offer possible solutions. Media pluralism is regulated at the level of media system as a whole. The emphasis is put on external pluralism and the desired outcome is a high level of political and cultural parallelism.

On the contrary, the autonomous approach regards media as “functionally differentiated from other systems within a society” and “in a process of becoming autonomous systems and networks due to functional differentiation”<sup>66</sup>. The function of the media is to organize and shape relations between the different political, social and cultural formations. In this context, a high degree of professional norms, self-regulation, universalism and neutrality is crucial. Thus, the autonomy approach puts the emphasis on internal pluralism. It aims at achieving a pluralistic media environment characterized by a high level of universal provision and neutrality of media outlets.<sup>67</sup>

Fourth, regulatory measures can be broadly divided into positive mechanisms that promote media pluralism and preventive measures that aim at protecting media pluralism. A traditional positive measure is the PSB, while typical preventive instruments are largely identical to the afore-mentioned external pluralism measures.<sup>68</sup>

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<sup>65</sup> Haraszti, 2011,128.

<sup>66</sup> Klimkiewicz, 2009, 50.

<sup>67</sup> For the controversy between the inclusive and autonomous approach see: Klimkiewicz, 2009, 50-51.

<sup>68</sup> Ofcom, 2012, para.4.9.

### 1.1.6. Media pluralism as a legal principle

The origins of media pluralism as a legal principle can be traced back to the case-law of constitutional courts of several EU Member States, mainly Italy, France and Germany, starting from the early 1960s. From these constitutional traditions the notion of media pluralism emerged as an integral part of freedom of expression as well as a positive obligation implying State regulatory interventions if necessary.<sup>69</sup>

In most national constitutions of European countries and international human rights treaties media pluralism is not enshrined as a distinct legal concept.<sup>70</sup> However, reference to the idea of media pluralism can be found in all major human rights treaties:

In the Universal Declaration of Human Rights (UDHR) 1948 reference to the idea of media pluralism can be found in the wording “through any media” of Article 19:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*<sup>71</sup>

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) further elaborates the principle of free access to diverse media:

*“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*<sup>72</sup>

Specific reference to media pluralism and media ownership concentration is made in the General Comment No. 34 on Article 19 of the Covenant, adopted by the United Nations

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<sup>69</sup> Barzanti, 2012, 4.

<sup>70</sup> Valcke, 2011, 288.

<sup>71</sup> UDHR, Article 19.

<sup>72</sup> ICCPR, Article 19(2).



(UN) Human Rights Committee at his 102<sup>nd</sup> session on 21 July 2011. The comment reads as follows:

*“The State should not have monopoly control over the media and should promote plurality of the media. 99 Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”*<sup>73</sup>

In the UN treaties media pluralism is recognized by the Convention of the Rights of the Child (CRC). Article 17 makes reference to diversity of sources and reads as follows:

*“States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.*

*To this end, States Parties shall:*

*(...) (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources; (...)*<sup>74</sup>.

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<sup>73</sup> UN, HRC, General Comment No. 34 - Article 19, para 40. For a short description of the Comment see: IRIS 2011-10:1/1.

<sup>74</sup> CRC, Article 17.

## 1.2. Council of Europe standards on media pluralism

### 1.2.1. Interpreting Article 10 in light of the positive action approach

Within the framework of the CoE freedom of expression and information is codified in Article 10 of the European Convention on Human Rights (ECHR) which reads as follows:

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”<sup>75</sup>*

This provision addresses three main components of freedom of expression: the right to hold opinions, the right to receive information and ideas, and the right to impart information and ideas. It includes no reference to media pluralism. Instead, it stresses that States are allowed to restrict broadcasting. The missing reference to media pluralism ties to the fact that this was not a relevant issue when the Convention was drafted.<sup>76</sup> However, over the years, various mechanisms of the CoE engaged with the issue of media pluralism, elaborating the notion in a detailed manner as well as setting very high standards for its protection. These

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<sup>75</sup> ECHR, Art.10.

<sup>76</sup> Haraszti, 2011, 108.

definitions and standards reflect to a large extent the historical circumstances under which they were drafted.<sup>77</sup>

The following three CoE institutions have played a central role in respect of media pluralism standard-setting: the ECtHR through its case law, the Committee of Ministers (CM) through recommendations, and the Parliamentary Assembly through resolutions. Notably, the recommendations and resolutions are not legally binding. However they do set standards suggested to Member States.<sup>78</sup>

First of all, the standard setting of the CoE in the domain of media pluralism is marked through the positive action approach with regard to the interpretation of Article 10. This approach was developed over the years and can be found in numerous resolutions, recommendations and declarations adopted by the Committee of Ministers and the Parliamentary Assembly as well as in the ECtHR case law. It is based on the idea that achieving and safeguarding media pluralism may need proactive measures by the State.<sup>79</sup>

Already in 1977 the predecessor institution of the ECtHR, the European Court and Commission of Human Rights, underlined the responsibility of Member States to take action in order to safeguard Article 10 of the ECHR.<sup>80</sup> In the 1993 *Lentia case* the Court established “the principle of pluralism, of which the State is the ultimate guarantor.”<sup>81</sup> Recommendation (99)1 encourages Member States “to consider possible measures to ensure that a variety of media content reflecting different political and cultural views is made available to the public, bearing in mind the importance of guaranteeing the editorial independence of the media and the value which measures adopted on a voluntary basis by the media themselves may also have.”<sup>82</sup> In one of the most recent judgements, *Centro*

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<sup>77</sup> Klimkiewicz, 2009, 61.

<sup>78</sup> Ibidem.

<sup>79</sup> Ibidem, 60-61; Haraszti, 2011, 118; Valcke 2011, 296.

<sup>80</sup> *De Geillustreerde Pers v. the Netherlands*, Committee of Ministers DH (77) 1, 17 February 1977. See: Haraszti, 2011, 118.

<sup>81</sup> *Informationsverein Lentia v. Austria* (ECtHR, 1993), para. 38.

<sup>82</sup> CoE, Recommendation No. R (99)1, Appendix, III1.

*Europa 7 SRL and Di Stefano v. Italy* (2012), the ECtHR confirmed its pro-active approach, stating that governments have “a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism”<sup>83</sup>.

The very active role of the CoE in the domain of media pluralism and its positive action approach can be explained through the fundamental importance this institution has attributed to media in connection to democratic processes. In the ECtHR case law media is referred the function of a “public watchdog” that monitors governments, reveals wrongdoings as well as has the ability to enhance the public’s “right to know”.<sup>84</sup> The “right to information” has been indeed the link through which the ECtHR interpreted media pluralism as part of Article 10. In the *Sunday Time case* the Court stated that “Article 10 (art. 10) guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed”<sup>85</sup>.

The 2002 report of the Advisory Panel on Media Diversity (AP-MD), “Media Diversity in Europe”, has noted an “increasing weight to the social, cultural, political and democratic role of the media”<sup>86</sup> in recent ECtHR judgments. According to the report, “Article 10 of the Convention accordingly not only enshrines an individual right to media freedom, but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy.”<sup>87</sup>

A number of CoE documents have underlined the paramount role of media pluralism in democratic processes and for the upholding of freedom of expression and information. According to the CM, “media pluralism and diversity of media content are essential for the functioning of a democratic society and are the corollaries of the fundamental right to

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<sup>83</sup> *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (ECtHR, 2012), para. 134.

<sup>84</sup> *MEDIADEM*, 2010a, 19.

<sup>85</sup> *Sunday Times v. United Kingdom*, (ECtHR, 1979), para. 66.

<sup>86</sup> CoE, AP-MD, 2002, para.10.

<sup>87</sup> *Ibidem*.

freedom of expression and information.”<sup>88</sup> In the *Lentia* case the ECtHR underlined “the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (...) Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism (...)”<sup>89</sup>. Similarly, the CM Recommendation (2007)2 states that “the demands which result from Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms will be fully satisfied only if each person is given the possibility to form his or her own opinion from diverse sources of information”<sup>90</sup>.

CM Recommendation (99)1 refers to media pluralism the function of “a catalyser of democratic participation, which is manifested in three principal normative aspects: individuals should have access to pluralistic media content; the media should enable different groups and interests in the society - including minorities - to express themselves; and democracy should be enhanced and consolidated by the existence of a multiplicity of autonomous and independent media outlets at the national, regional and local levels”<sup>91</sup>.

Finally, the “Declaration on Cultural Diversity” has characterised media pluralism (and media freedom) in the preamble as “a basic precondition for cultural exchange” and “essential for democracy and cultural diversity”<sup>92</sup>.

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<sup>88</sup> CoE, CM/Rec(2007) 2.

<sup>89</sup> ECtHR, *Informationsverein Lentia v. Austria*, 1993, para. 38.

<sup>90</sup> CM/Rec(2007)2.

<sup>91</sup> Klimkiewicz, 2009, 61, 64.

<sup>92</sup> CoE, Declaration on Cultural Diversity, 2000.

### 1.2.2. Structural regulation related standards

The CoE has a long tradition in dealing with the issue of structural regulation and in particular media ownership concentration. The most important CoE (non-binding) standards in relation to structural regulation and media pluralism are included in “CM Recommendation (99)1 on Measures to Promote Media Pluralism”, updated by the “CM Recommendation (2007)2 on Media Pluralism and Diversity of Media Content”, and in the “Declaration of the Committee of Ministers on Protecting the Role of the Media in Democracy in the Context of Media Concentration”, adopted on 31 January 2007.

Paragraph I of the Appendix to Recommendation (99) 1, entitled “Regulation of ownership: broadcasting and the press”, provides a list of recommendations to Member States how to tackle the issue of media ownership concentration.<sup>93</sup> These provisions have been amended and enlarged by CM Recommendation (2007)2. The document calls on Member States to “seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public, taking into account the characteristics of the media market, notably the specific commercial and competition aspects”<sup>94</sup> and to adopt “specific measures”<sup>95</sup> if needed. With regard to ownership regulation the document urges “the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets”<sup>96</sup> as well as the use of “thresholds based on objective and realistic criteria, such as the audience share, circulation, turnover/revenue, the share capital or voting rights.”<sup>97</sup> Furthermore, the document lists a number of recommended measures to promote structural pluralism of the media. These recommendation are related to public service media (PSM); other media contributing to pluralism and diversity such as community, local, minority and social media; access

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<sup>93</sup> CM/Rec(99) 1, Appendix, para. I.

<sup>94</sup> CM/Rec(2007)2, para I.1.1.

<sup>95</sup> Ibidem, para I.1.2.

<sup>96</sup> Ibidem, para. I.2.1.

<sup>97</sup> Ibidem, para. I 2.3.

regulation and interoperability; other support measures of financial and regulatory nature such as facilitation of the digital switchover.<sup>98</sup>

The “Declaration of the Committee of Ministers on Protecting the Role of the Media in Democracy in the Context of Media Concentration” provides first, a relatively detailed explanation of various challenges posed by media concentration on media pluralism, political pluralism and democratic processes, second, a few recommendations how to tackle this issue. According to this document, media concentration and the growth of multinational media and communication groups “pose challenges in particular as regards preserving diversity of media outlets in small markets, but also in respect of the existence of a multiplicity of channels for the expression of plurality of ideas and opinions and to the existence of adequate spaces for public debate in the context of democratic processes (...) can place a single or a few media owners or groups in a position of considerable power to separately or jointly set the agenda of public debate and significantly influence or shape public opinion, and thus also exert influence on the government and other state bodies and agencies (...) can entail conflicts of interest, which could compromise editorial independence and the media’s important role as public watchdog, and noting the importance of editorial statutes in this respect”<sup>99</sup>.

Though very general and theoretical, the recommendations listed in the second part of the declaration provide an important framework for improving the quality of democratic processes through transparency and pluralism in the media sector.<sup>100</sup> The document requires “separation between the exercise of control of media and decision making as regards media content and the exercise of political authority or influence (...) having regulatory measures in place with a view to guaranteeing full transparency of media ownership and adopting regulatory measures, if appropriate and having regard to the characteristics of each media market, with a view to preventing such a level of media concentration as could pose a risk

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<sup>98</sup> CM/Rec(2007)2, para I.3-I. 6.2.

<sup>99</sup> CoE, Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, 2007.

<sup>100</sup> MEDIADDEM, 2010a, 22.

to democracy or the role of the media in democratic processes (...) regulatory and/or co-regulatory mechanisms for monitoring media markets and media concentration which, inter alia, permit the competent authorities to keep abreast of developments and to assess risks, and which could permit them to identify suitable preventive or remedial action (...) adequately equipped and financed PSM, in particular PSB, enjoying genuine editorial independence and institutional autonomy (...) policies designed to encourage the development of not-for-profit media”<sup>101</sup>.

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<sup>101</sup> CoE, Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration (2007).



### 1.2.3. Approaching media pluralism from a broad perspective

The CoE has been approaching the issue of media pluralism from a very broad perspective. In addition to ownership concentration, various bodies of the CoE have tackled a range of aspects and dimensions of media pluralism. The Activity Report of the Committee of experts on media concentration and pluralism (1994) defined media pluralism as “internal in nature, with a wide range of social, political and cultural values, opinions, information and interests finding expression within one media organisation, or external in nature, through a number of such organisations, each expressing a particular point of view.”<sup>102</sup>

According to CoE standards, a media structure can be defined as a pluralistic one if it is: “

- comprised of competing media outlets which are independent from each other or a central owner;
- diversified on separate but overlapping planes of ownership, political views, cultural outlooks and regional interests;
- able to communicate to all corners of society;
- capable of conveying a great variety of information and opinion;
- designed to draw information from a wealth of different sources.”<sup>103</sup>

CM Recommendation (99)1 lists measures in six areas in respect of media pluralism: regulation of ownership, new communication technologies and services (namely, on digital broadcasting), media content, editorial responsibility, PSB, and support measures for the media. Referring to the important and much debated issue of the relationship between diversity of ownership and content, the documents states that “it can not be assumed that ownership restrictions will be sufficient to guarantee diversity of output. Other policy

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<sup>102</sup> MM-CM, Council of Europe’s Committee of Experts on Media Concentrations and Pluralism, 1994, cited in: Klimkiewicz, 2009, 46.

<sup>103</sup> Haraszti, 2011, 104.

instruments should be used in conjunction with ownership restrictions to encourage plurality within the supply of media. Therefore, as a general principle the Recommendation encourages member States to consider a range of other possible measures to promote a variety of media content”<sup>104</sup>.

The AP-MD has also approached media diversity from a wider perspective. This approach is reflected in the two Panel’s reports “Media Diversity in Europe” (2002) and “Transnational Media Concentrations in Europe” (2004).<sup>105</sup>

A 2005 publication of the Venice Commission lists following criteria established by the CoE to safeguard media pluralism:

“A legislative framework establishing limits for media concentration;

- An adequate monitoring system (circulation or revenues);
- An adequate system for enforcement;
- Pro-active measures that positively support media pluralism e.g. encouraging the production of diverse content and granting financial support to increase pluralism;
- Self regulatory instruments such as editorial guidelines and statutes setting out editorial independence;
- Transparency;
- Independence of regulatory authorities.”<sup>106</sup>

A significant volume of documents have approached media pluralism in the context of new media technology. In 2000 the Group of Specialists on Media Pluralism (MM-S-PL) published the “Report on Media Pluralism in the Digital Environment”. The document raises a number of media pluralism concerns in the new media context, but it does not provide suggestions about new regulatory measures. The Group of Specialist on Media

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<sup>104</sup> CM Rec(99)1, Explanatory Memorandum, para. 27.

<sup>105</sup> Klimkiewicz, 2009, 64.

<sup>106</sup> Ward, 2005, 2.

Diversity (MC-S-MD) has assessed and monitored conditions affecting media pluralism particularly in the context of digital technology. In 2007, the CM adopted three new documents which revised the already existing instruments related to media pluralism taking into account new technological environment and implementation difficulties: Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, adopted on 31 January 2007; Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, adopted on 31 January 2007; Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, adopted on 31 January 2007.<sup>107</sup>

The independence of media regulatory authorities from both political and economic forces has a key role in achieving and safeguarding media pluralism. On this issue the CM has adopted a declaration in 2008.<sup>108</sup> Furthermore, the Parliamentary Assembly of the CoE (PACE) has raised the issue of arbitrary exclusion of opposition periodicals from governmental aid programmes. This issue is particularly important in small-size media markets that cannot sustain economically strong media organizations. While the PACE has encouraged member States to provide subsidies for media, it has also stressed that such aid should administered only by independent bodies.<sup>109</sup>

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<sup>107</sup> For the CoE standard setting work in the area of media pluralism in the new technology environment see: Klimkiewicz, 2009, 64-65.

<sup>108</sup> Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 26 March 2008.

<sup>109</sup> Haraszti, 2011, 126-127.

## **1.3. Media pluralism in the EU regulatory policies**

### **1.3.1. Introduction**

The protection of media pluralism at EU level has been a highly debated issue among policymakers, scholars, interest groups, professional bodies and civil society for decades now. Concentration of media ownership, pressure from advertisers, the role of PSB to foster media pluralism, the so-called subsidiarity principle on the one side and the obligation of EU to safeguard citizens' right to receive information from diverse and independent sources belong to the main topics. This section will provide an overview of these debates as well as of the EU competencies in this field. The first part presents a chronological overview of the most relevant debates and decisions until the dropping of the so-called "three-step approach", while the second part summarizes the references made to media pluralism in EU legal documents.

### **1.3.2. From the *Sacchi* case to the *three-step approach* - A historical overview of media pluralism debates and relevant decisions**

The Court of Justice of the European Union (CJEU) dealt with a media- relevant case first time in 1974, in the so-called *Sacchi* case. In this judgment the CJEU applied the principle of "free movement of goods" to television signals, defining them as an economic activity, thus, falling under the scope of the Treaty of Rome. In 1980, the CJEU confirmed in the *Debauve* case that television signals are services.<sup>110</sup>

In 1984, the EC presented the „Green Paper on the establishment of a common market in broadcasting, especially by Satellite and Cable“ which referred to trans-border provision of television services and the need for legal harmonization in certain sectors such as

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<sup>110</sup> CMPF, 2013, 44.

advertising. This document led up to the landmark „Television without Frontiers“ Directive (TWFD) of 1989, revised in 1997 (and in 2007 radically revised and re-named) which aimed at creating a common market in broadcasting. The document referred only to traditional linear broadcasting services, while information society services and other messages on individual demand were covered by the Electronic Commerce Directive.<sup>111</sup>

While the directive was mainly driven by economic considerations, aiming at harmonizing the free circulation of television programmes and the advertising rules, it also included non-economic elements such as obligation to broadcasters to promote the production and distribution of European works, the protection of minors and public order, introduction of the right to reply. However, TWFD lacked measures related to the regulation of ownership, which was a very pressing issue in the 1990s.<sup>112</sup>

In the first half of the 1990s, the European Parliament (EP) adopted a series of resolutions calling for anti-concentration measures: Resolution on Media Takeovers and Mergers (1990), Resolution on Media Concentration and Diversity of Opinions (1992), Resolution on the Commission Green Paper “Pluralism and Media Concentration in the Internal Market” (1993), Resolution on Concentration of the Media and Pluralism (1994), Resolution on Pluralism and Media Concentration (1995). It urged the EC “to submit, after consultation with the parties concerned, a proposal for effective measures to combat or restrict concentration in the media, if necessary in the form of an anti-concentration directive”<sup>113</sup>.

In 1992, in response to the concerns raised by the EP, Directorate-General (DG) III (Industry) of the EC presented in the Green Paper on “Pluralism and Media Concentration in the Internal Market” three different possible options for the EC with regard to ownership regulation at Community level: no specific action, transparency measures, and action

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<sup>111</sup> CMPF, 2013, 44

<sup>112</sup> CMPF, 2013, 45, MEDIADEM, 2010a, 8, 14; Barzanti, 2012, 17-18.

<sup>113</sup> EP, Resolution on media concentration and diversity of opinions, 16 September 1992, cited in: CMPF, 2013, 46.

related to harmonization of national laws. The document employed an internal-market and industrial-policy approach, calling for harmonization of national-ownership regulations and liberalisation of the market for the purpose of ensuring competitiveness on the global scene. This approach was opposed by the EP which followed a pluralism approach. Furthermore, no internal agreement at the Commission could be reached on how to legislate on media ownership.<sup>114</sup>

In absence of a decision, public consultations were initiated. The consultations demonstrated sharp contradictions between different interest groups, especially between the EP urging for harmonization in order to tackle media concentration and media companies calling for harmonization in terms of liberalization of media ownership policy and cross-border investments.<sup>115</sup>

In 1994, DG XV (Internal market), which covered since 1993 the domain “media ownership”, released the “Communication on Pluralism and Media Concentration in the Internal Market - an Assessment of the Need for Community Action”. The document “introduced three main changes: it focused more on harmonisation than on liberalisation; it angled also towards information society matters; and it adopted the audience share (and not market share) as a criteria for measuring concentration.”<sup>116</sup> In response, the EP adopted “Resolution on the Commission Green Paper Pluralism and Media Concentration in the Internal Market”, calling for strong regulation of media ownership. However, most of the European Member States and a large number of media industry players expressed again disagreement to the idea of a harmonized media policy regime, pointing out at the enormous discrepancies across Europe in terms of national media market sizes which made setting Europe-wide harmonized thresholds practically impossible.<sup>117</sup>

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<sup>114</sup> CMPF, 2013, 46.

<sup>115</sup> Doyle, 2007, 144.

<sup>116</sup> CMPF, 2013, 46.

<sup>117</sup> Ibidem; Doyle, 2007, 145,

Following the appointment of the new Commission in 1995, a third consultation was launched. In July 1996, the new Commissioner of DG XV Mario Monti submitted a draft directive mainly based upon the internal market argument. After the first draft was objected by other Commissioners, a second one was re-submitted in March 1997. The new draft referred to all the Internet, telecommunications and broadcaster sectors and introduced the limit of 30% market share concerning ownership. Although the second draft obtained the necessary majority, Monti decided to withdraw it.<sup>118</sup>

This action completed the first phase of the debates with regard to regulation of media pluralism at EU Community level. Overall, despite large debates and very active involvement of the EP, the EC did not adopt a new legal instrument on media pluralism in the 1990s. At this stage, a “uniform set of media ownership restrictions imposed rigidly throughout all European markets seemed unfeasible, both economically and politically”<sup>119</sup>. It lacked a legal basis and was firmly contested by most of the Member States and industry players.<sup>120</sup>

In absence of a directive, the EC has addressed media pluralism concerns through competition law. Competition law “is applicable when the behaviour of a company or an agreement between companies enters into conflict with the Single Market principles”<sup>121</sup>. It is based upon economic considerations with regard to the functioning of the internal market. However, non-economic considerations have also been accepted in a few cases. While some scholars regard competition law as an instrument to tackle media pluralism in absence of a directive, others have pointed out that it does not constitute a sufficient legal basis, since cultural/democratic aspects are not necessarily included in the scope of competition law.<sup>122</sup> Indeed, in its “Communication to the Council and European Parliament on Audiovisual Policy” (1990) the EC acknowledged that “(n)or is the application of

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<sup>118</sup> CMPF, 2013, 46-47; Doyle, 2007, 149-151.

<sup>119</sup> Doyle, 2007, 150.

<sup>120</sup> See: MEDIADEM, 2010a, 15; Gálik, 2010, 238.

<sup>121</sup> CMPF, 2013, 47,

<sup>122</sup> CMPF, 2013, 48. Concerning the limits of competition law to address media pluralism concerns see also: Barzanti, 2012, 14-15.

Community Competition law, in particular Articles 85 and 86 of the Treaty, able to cover all situations in which a threat to pluralism is posed, notably in the case of multimedia ownership.”<sup>123</sup>

In 2002, the EC adopted the “Electronic Communications Regulatory Framework” (so-called “electronic communications package”), consisting of a general “Framework Directive” and four more specific directives. The Directive aimed at establishing a harmonised framework for the regulation of electronic communications networks, associated facilities and services. It covers all electronic communications networks and services including mobile and broadband communications as well as cable and satellite television, while it excludes services providing or exercising editorial control over content transmitted using electronic communications networks and services.<sup>124</sup>

The Directive does also make reference to cultural elements, fundamental rights and media pluralism. According to Article 8(1), “(n)ational regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.”<sup>125</sup> Article 18 counts several measures that Member States shall take “in order to promote the free flow of information, media pluralism and cultural diversity”<sup>126</sup>. Furthermore, the so-called “Access Directive” part of the four specific directives of the “Electronic Communications Regulatory Framework” states in its Article 10 that “(c)ompetition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television”<sup>127</sup>. The same article also makes reference to the obligation of Member States “to

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<sup>123</sup> COM (90) 78 final, para. 2. 2.3.

<sup>124</sup> Directive 2002/21/EC (Framework Directive). For a summary of the Directive see the website: [http://europa.eu/legislation\\_summaries/information\\_society/legislative\\_framework/124216a\\_en.htm](http://europa.eu/legislation_summaries/information_society/legislative_framework/124216a_en.htm) (consulted on 30 July 2014).

<sup>125</sup> Directive 2002/21/EC (Framework Directive), Art. 8(1).

<sup>126</sup> Ibidem, Art. 18.

<sup>127</sup> Directive 2002/19/EC (Access Directive), Art.10.



provide conditional access on fair, reasonable and non-discriminatory terms, in order to make sure that a wide variety of programming and services is available.”<sup>128</sup>

However, all in all, the references to media pluralism in the “electronic communications package” are not sufficient to safeguard media pluralism and the documents were obviously not designed to primarily pursue media pluralism goals.<sup>129</sup>

In the Liverpool Conference<sup>130</sup> (2005) media pluralism was again part of the agenda. A working group on media pluralism submitted a final report, calling for a clear definition of media pluralism, supporting the idea of a ‘European observatory’, clarification and publication of the criteria the EC used to assess the impact of its instruments on media pluralism, and finally a stronger role for the EP as well as “a more relevant role for all the European institutions on the basis of the European Treaties”<sup>131</sup>.

In 2007, the TWFD was secondly and radically revised as well as re-named into the “Audiovisual Media Services Directive” (AVMSD). The revision broadened the scope of application covering beside the linear services also non-linear services (new television-like services such as on-demand services). Following the principle of proportionality the latter services are regulated in a less intrusive manner than the former ones.<sup>132</sup>

The AVMSD makes no specific reference to media pluralism in its text, but in the preamble. Recitals 5, 8, 12, 34, 48 and 94 refer to media pluralism a crucial importance. The document acknowledges that “media services are as much cultural services as they are economic services” as well as underlines their “growing importance for societies, democracy (...) education and culture”<sup>133</sup>. It stresses the necessity “to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television

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<sup>128</sup> Ibidem.

<sup>129</sup> Cf. Brogi & Parcu, 2014, 2.

<sup>130</sup> Liverpool Audiovisual Conference, 2005.

<sup>131</sup> Ibid, 26.

<sup>132</sup> For an overview of the AVMSD content, reforms in comparison to TWFD and potential gaps see: Valcke, 2008.

<sup>133</sup> AVMSD, Recital 5.

programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole”<sup>134</sup> as well as “to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection, and to enhance public awareness and media literacy, now and in the future.”<sup>135</sup>

Although the text of Directive does not specifically mention media pluralism, it promotes it. According to the MEDIADEM report, “(i)t is precisely freedom of expression and media pluralism that the measures (...) aim at achieving”<sup>136</sup>.

The AVMSD does not cover a range of services. Personal websites and non-commercial blogs as well as intermediaries, aggregators and other platforms without editorial responsibility are excluded from its scope of application. Moreover, they are excluded from the Electronic Communications Framework, too. Having in mind the growing importance of these services, the legal uncertainty surrounding their regulation has a negative impact on media pluralism.<sup>137</sup>

The launch of the se-called “three-step-approach” by the EC in 2007 marked the start of a second stage in the EU attempts to address media pluralism at Community level. The plan consisted of three steps. The first step was already completed in 2007 with the publication of a Staff Working Document on “Media Pluralism in the Member States of the European Union”<sup>138</sup>. The document provides an overview on the meaning of media pluralism, media pluralism commitments within the EU and CoE framework as well as threats to media pluralism in Member States. The outcome of the report was disappointing for those interest groups hoping for the adoption of a harmonizing directive.<sup>139</sup> The only conclusion of the report was the necessity of monitoring media pluralism closely, which, in fact, was already

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<sup>134</sup> Ibidem , Recital 8.

<sup>135</sup> Ibidem , Recital 12.

<sup>136</sup> MEDIADEM, 2010a, 14.

<sup>137</sup> CMPF, 2013, 59-60.

<sup>138</sup> SEC(2007)32.

<sup>139</sup> Komorek, 2009.

suggested during the Liverpool Conference. Following the conclusion of the report, the EC commissioned an “Independent Study on Indicators for Media Pluralism”<sup>140</sup> which was carried out in 2009 by the University of Leuven, Central European University, Jönköping International Business School, Ernst & Young Consultancy Belgium and subcontractors in all member States. The objective of the study was to develop “a monitoring tool for assessing risks for media pluralism in the EU Member States and identifying threats to such pluralism based on a set of indicators, covering pertinent legal, economic and socio-cultural considerations.”<sup>141</sup> This instrument, called Media Pluralism Monitor (MPM), was designed as a diagnostic, not a prescriptive tool. The executive summary explicitly states that while the MPM “urges the application of the same analytical framework in all Member States to ensure comparability of the results obtained, it is not a call for harmonisation of policies in this area. Given the far-reaching socio-cultural, economic and political importance of the media for the functioning of European democracies, the sensitive matter of how to protect media pluralism is ultimately left to the discretion of Member States and their authorities who, in defining their nation’s risk appetite, are free to consider market-based, as well as regulatory, approaches to diversity.”<sup>142</sup>

The three-step-approach was planned to be completed with a Commission Communication on media pluralism at the end of 2009 or beginning of 2010 based upon the outcome of “Indicators study”. However, this step was not materialised. Overall, the three-step-approach did not result in any concrete legislative or policymaking steps. The MPM was not implemented by the Member States and finally the whole initiative was abandoned.<sup>143</sup>

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<sup>140</sup> All information on this study at the EU website: <http://ec.europa.eu/digital-agenda/en/independent-study-indicators-media-pluralism>

<sup>141</sup> Ibid.

<sup>142</sup> Independent Study on Indicators for Media Pluralism, 2009, viii.

<sup>143</sup> Bania, 2013; CMPF, 62.

### **1.3.3. Reference to media pluralism in the Charter of Fundamental Rights of the EU, CJEU case law and EP Parliament Resolutions**

Article 11(2) of the Charter of Fundamental Rights of the EU (CFREU) explicitly states that “freedom and pluralism of the media shall be respected”<sup>144</sup>. With the entering into force of the Treaty of Lisbon on 1 December 2009, the Charter was introduced into EU primary law. Thus, the Charter is enforceable by the EU and national courts.<sup>145</sup> However, because of the “subsidiarity principle” the EU and CJEU have limited power to use this provision as a legal basis.<sup>146</sup>

The wording of article 11(2) reflects the EC’s stance towards media pluralism. While for instance the verb “guaranteed” would have indicated a proactive/promotion-driven approach, the chosen verb “respected” shows a prevailing negative/non-interference-driven approach.<sup>147</sup>

Three EU institutions have predominantly dealt with media pluralism: the EC, EP and CJEU. While the EP has been the most active body in raising attention to media pluralism threats and calling for legislative measures, the CJEU has played the most significant role in progressively expanding EU competencies in respect of media pluralism. In doing so the CJEU employed an economics based approach towards media pluralism which was then used by the EC to push for and adopt regulatory measures.<sup>148</sup> The EC’s approach focused predominantly on media ownership concentration and external pluralism. By contrast, the EP referred in its resolutions larger attention to the cultural dimension of media pluralism and to the positive obligations like promotion of a variety of content.<sup>149</sup>

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<sup>144</sup> CFREU, Article 11(2).

<sup>145</sup> CMPF, 2013, 53.

<sup>146</sup> Ibidem.

<sup>147</sup> Barzanti, 2012, 11; MEDIADEM, 2010a, 11.

<sup>148</sup> MEDIADEM, 2010a, 6.

<sup>149</sup> Ibidem, 10; Barzanti, 2012, 8.

As previously mentioned, the CJEU has considered broadcasting as an economic service. Since its first media-relevant judgment in 1974 the CJEU has dealt in numerous cases with media pluralism within the context of freedom to provide services. In these judgments the CJEU did not explicitly defined media pluralism, but made reference to it.<sup>150</sup>

Two main approaches can be found in CJEU case law related to media pluralism. First, the CJEU has recognized media pluralism as a part of cultural policy and, thus, considered it as a justified ground for national regulators to restrict the free movement of goods. While recognizing media pluralism as a competence of member States, the CJEU has nevertheless actively interfered with national regulations in a number of cases. However, in doing so, the CJEU has been applying the principle of strict necessity and proportionality. As a result, in some cases the Court found the measures not justifiable. Second, the CJEU has elaborated media pluralism in connection with freedom of expression as defined and protected in Article 10 of ECHR.<sup>151</sup>

The notion of media pluralism has been most comprehensively elaborated by the EP resolutions. On many occasions the EP has invited the EC to take measures to protect and promote media pluralism, tackle the issues of media concentration and political influence over media as well intervene in individual cases such as in Italy and Hungary. Among the most comprehensive resolutions belong the 2004 “Resolution on the Risks of Violation, in the EU and Especially in Italy, of Freedom of Expression and Information (Article 11(2) of the Charter of Fundamental Rights)”<sup>152</sup> and the 2008 “Resolution on Concentration and Pluralism in the Media in the European Union”<sup>153</sup>.

The 2004 EP resolution comprehensively elaborates the notion of media pluralism, threats at national and Community level to media pluralism as well as provides a large set of

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<sup>150</sup> Barzanti, 2012, 12.

<sup>151</sup> See: Barzanti, 2012, 12-13; MEDIADEM, 2010a, 12-13; CMPF, 2013, 54-55.

<sup>152</sup> EP Resolution 2003/2237(INI).

<sup>153</sup> EP Resolution 2007/2253(INI).

recommendations on how to tackle these issues. The resolution stresses the link between “free and pluralistic media” and “democracy” (letter D). It “(e)mphasises the importance of media pluralism for promoting cultural, social and political diversity” (para.25). While regretting the fragmentation of the EU regulatory situation (para. 2), the Resolution points out that “where the Member States fail, either because they are not able, or are not willing, to take adequate measures, the EU has a political, moral and legal obligation to ensure within its fields of competence that the rights of EU citizens to a free and pluralist media are respected, in particular, due to the lack of recourse of the Community courts by individuals in the case of an absence of pluralism in the media” (para. 1).

The Resolution addresses both structural and content pluralism as well as issues of political interference and dependence of media from financial sources. Concerning structural pluralism, the document expresses concerns on concentration of the media, the effect of merger on media pluralism, the “gate-keeper position” of operators in some Member States, vertical and horizontal cross-border concentration in the field of internet operators, increasing influence of electronic programme guides, equal and non-discriminatory access to media by all social, cultural and political players (para. 30, 31, 34, 38, 39).

With regard to the pluralism of media content, the document states that “the question of media pluralism involves, in addition to matters relating to ownership, matters relating to content and the public's right to receive objective and comprehensive information” (para. 39) and that “diversity of media ownership and competition between operators is not sufficient to ensure pluralism of media content” (para 15). Particularly in the context of digital media the document stresses that “consumer choice and pluralism of content is the key issue, more so than pluralism of ownership or supply” (para 6). In this regard, the document points out that new media technology does not necessarily enhance content pluralism (para 7). Therefore, the document declares the promotion of digital and technical literacy to “strategic issues for the development of lasting media pluralism” (para.7).

The 2008 EP Resolution confirms that free market competition approach and EU competition law alone are not sufficient to safeguard media pluralism (letters N, Z). Highlighting the important role of media as a “watchdog of democracy”, the resolution calls that “the custody of media pluralism should not be left purely to market mechanisms” (letter V).

In comparison to Resolution 2004, the 2008 Resolution further elaborates the limits of new media technology in respect of enhancing media pluralism. It points out that significant quantitative increase of media products and services does not automatically lead to an increase of content diversity (letters Q, S). The document calls for “an active, consistent and vigilant policy on the part of the national and European public authorities” (letter S).

## 2. Most Recent Initiatives and Discussions

### 2.1. Introduction: Context and aim of the chapter

The almost spectacular failure of the “three-step-approach” constituted a deep disappointment for those interest groups pushing for more EU action in respect of media freedom and pluralism.<sup>154</sup> Despite an ambitious plan and two comprehensive steps, the initiative was abandoned at its final stage, and, thus, failed to make any significant contribution. Overall, at the end of the 2000s, the EU competencies in respect of media freedom and media pluralism were still very limited. The state of the art could be best summarized using the words of one of the most distinguished scholars in the field of media pluralism, Beata Klimkiewicz: “The policy concerning media pluralism has been seen as one of the biggest failures of EU institutions (both the Commission and Parliament). Despite the increasing need for harmonized European rules on media pluralism, the European union still lacks the formal powers (especially if member states’ interests strongly diverge) and the institutional capacities necessary to enforce the compliance with the rules and their transposition in the member states. The most important regulatory instrument continues to be competition law, which, while strong and intrusive, is limited in scope and is a poor substitute for other regulatory powers and capacities”<sup>155</sup>.

Despite the failure of the three-step-approach or eventually because of it, the debate on media pluralism has significantly enhanced in the last few years. A “European Citizens’ Initiative” (ECI) called “European Initiative for Media Pluralism” (EIMP) was launched in 2012. In 2013, the EP approved a “Motion for a European Parliament Resolution on the EU Charter: Standard settings for media freedom across the EU (2011/2246(INI))”<sup>156</sup>. In the

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<sup>154</sup> Cf. Komorek 2009.

<sup>155</sup> Klimkiewicz, 2009, 68.

<sup>156</sup> P7\_TA(2013)0203.



very same year, the CMPF published the policy report “European Union competencies in respect of media pluralism and media freedom”.

The CMPF was initiated by Vice-President of the EC responsible for the Digital Agenda for Europe Neelie Kroes who took over this position in 2010. Meanwhile, Kroes has launched a number of initiatives to address the issue of media pluralism and media freedom. In 2011, she appointed the HLG and established the “EU Media Futures Forum”.

In 2013, two public consultations on the independence of the audio-visual regulatory bodies and the “Independent Report from the High Level Group on Media Freedom and Pluralism” were conducted as well as two according reports were published.

Finally, in the very same year, the Council of the EU and the representatives of Member States adopted conclusions on media freedom and pluralism in the digital environment.<sup>157</sup>

The initiatives and discussions in the early 2010s bring new dynamics in the around three-decade old media pluralism debate. They reflect the changing conditions and the need to adjust media pluralism debates and regulation to these conditions and trends.

The aim of this section is first, to briefly assess the approach taken towards media pluralism during the recent discussions and, second, to summarize the main relevant recommendations, which will later serve as a basis for the second step of the analysis.

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<sup>157</sup> Information on all afore-mentioned initiatives is available on the EC Website „Digital Agenda for Europe. A 2020 Initiative“: <http://ec.europa.eu/digital-agenda/en/media-freedom-and-pluralism>.

## **2.2. The CMPF policy report “European Union competencies in respect of media pluralism and media freedom” (2013)<sup>158</sup>**

The report frames and defines the concepts media pluralism and media freedom, summarizes the state of art concerning measurement and evaluation of media pluralism, and finally discusses legal instruments that could be used to safeguard and foster media pluralism and media freedom at EU level.

The contribution of the report is two-fold: First, it provides a basis for understanding media pluralism under the current conditions which is a necessary step for addressing media pluralism challenges, proposing new legislation and regulatory models.

Second, it explores EU’s legal competencies in respect of media freedom and media pluralism, which are unclearly defined, and provides a set of recommendations how to expand these competencies.

Examining scientific literature and major scholarly debates, the report comprehensively explores the concept media pluralism. It includes a large variety of dimensions and elements, taking into consideration the complexity of the phenomenon, looking at media pluralism in close relation to its importance for the functioning and legitimacy of modern liberal democracy as well as in context of political, economic and social aspects.

With regard to the issue of adequately measuring and evaluating media pluralism, the report argues for a combination of qualitative and quantitative methodologies which ensures both measuring the phenomenon in a neutral manner and taking consideration of the national, political and social specificities.<sup>159</sup>

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<sup>158</sup> CMPF, 2013.

<sup>159</sup> Ibidem, 20-21.

In respect of EU competencies the report, identifies legal sources that both oblige and enable the EU to take action in order to guarantee and foster media pluralism. The recommendations provided by the report can be summarized as listed below:

- 1) The CJEU has potential to foster media pluralism. Through a case by case process the CJEU could establish a common EU jurisprudence on media pluralism based on principles enshrined in the ECHR, ECtHR case law, Charter and constitutional traditions of the Member States. This would allow to assess cases, apply and interpret EU law in a harmonized and media pluralism-friendly manner.<sup>160</sup>
- 2) There is some room for incorporating pluralism-specific considerations into competition analysis. Because of the EC's pure economic-based approach and exclusive focus on diversity of suppliers while neglecting content and exposure diversity, competition law has so far contributed only to a limited extent and rather coincidentally to protect media pluralism. However, the EC could assess non-price elements such as quality and diversity of media products in the framework of its competition policy on the legal basis of: Article 167(4) of the Treaty on the Functioning of the European Union (TFEU) which enshrines EC's obligation to take cultural aspects into account in the framework of competition policy, Articles 11(2) and 51(1) of the Charter which lay down EC's obligation to respect and promote media pluralism, Recital 23 of the "Merger Regulation" which obliges the EC to place the appraisal of concentration cases within the general framework of the objectives enshrined in the Treaties, Article 2(1) of the "Merger Regulation" which obliges the EC to take into account the interests of the intermediate and ultimate consumers, and finally the EC's "Guidelines on the assessment of horizontal and non-horizontal mergers" which acknowledge the non-price dimensions of competition.<sup>161</sup>

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<sup>160</sup> Ibidem, 66-67.

<sup>161</sup> Ibidem, 68-71

- 3) The EU could re-construct its indirect competence on media pluralism and media freedom based on the “internal market” and the “Citizenship” arguments. The internal market argument is related to Articles 114 and 50 TFEU and based on the rationale that the lack of harmonisation between national legislations hampers the functioning of the internal market and goes against the principle of free movement of goods and services and the right to establishment. The EU could use the internal market argument to push for and adopt relevant measures, including directives, aiming at harmonizing the legislation on media ownership concentration and transparency, but also libel and copyright. The “citizenship argument” could be used to introduce provisions on media ownership transparency into article 20(2) TFEU which relates to the rights EU citizens have because of their European citizenship. While Article 25 TFEU provides the legal basis for such an action, invoking the citizenship argument would be very difficult to achieve in practice due to the requirement of Council unanimity.<sup>162</sup>
- 4) Although in practice very difficult to achieve because of the need of unanimity of the Council, another option to foster media pluralism at EU level would be adopting measures on the basis of Article 352 TFEU which allows taking action to attain one of the objectives set out in the Treaties, while the Treaties do not provide the necessary powers, and, in extreme case, the revision of the TFEU in line with the procedures enshrined in Article 48 TFEU. The suggested principles should be: “it is forbidden to create or maintain a dominant position in media markets”<sup>163</sup> and “governments and economic forces cannot exercise any undue influence on media undertakings”<sup>164</sup>.
- 5) The reform of AVMSD on the model of the “electronic communications regulatory framework” would allow for the establishment of a network of independent National Regulatory Agencies (NRAs) and, thus, would make a significant

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<sup>162</sup> Ibidem, 71-75.

<sup>163</sup> Ibidem, 75

<sup>164</sup> Ibidem, 75.

contribution to foster media freedom and media pluralism in the EU. In this regard, particularly relevant would be those institutional requirements that relate to Member States' obligation to protect NRAs against external intervention and political pressure, to adopt rules concerning the grounds for the dismissal of the head of NRA, and to guarantee that NRAs have an own and sufficient budget.<sup>165</sup>

- 6) EU could mandate the EU Agency for Fundamental Rights (FRA) or establish a new agency to monitor media pluralism and media freedom in the EU, which would constitute an important soft-law instrument. Through the publication of periodic country-specific reports as well as guidelines and other reports on media freedom and pluralism principles to be respected across the EU, this institution would have a monitoring, naming and shaming, promoting and awareness-raising function.<sup>166</sup>

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<sup>165</sup> Ibidem, 76-77.

<sup>166</sup> Ibidem, 77-78.

### **2.3. The Report of the High Level Group on Media Freedom and Pluralism (2013)<sup>167</sup>**

The report presents findings and recommendations concerning the protection and promotion of media pluralism and media freedom in the EU. It frames the concepts media pluralism and media freedom, provides a valuable assessment of the current situation and challenges as well as provides a comprehensive set of recommendations how to develop an overall EU framework which tackles these issues in a long-term and effective manner.

First of all, the report employs a broad understanding of media pluralism including “many aspects, ranging from, for example, merger control rules to content requirements in broadcasting licensing systems, the establishment of editorial freedoms, the independence and status of PSBs, the professional situation of journalists, the relationship between media and political actors, etc. It encompasses all measures that ensure citizens’ access to a variety of information sources and voices, allowing them to form opinions without the undue influence of one dominant opinion forming power.”<sup>168</sup> Similarly to the CMPF report, the HLG report frames media pluralism and media freedom in close relation to their role in democracies. It argues that this link “justifies a more extensive competence of the EU with respect to these fundamental rights than to others enshrined in the Charter of Fundamental Rights.”<sup>169</sup> Overall, the report urges for a “bigger role”<sup>170</sup> of the EU with due regard to national specificities<sup>171</sup>, while it considers that the main responsibility in respect of media pluralism and media freedom lies with the member States.<sup>172</sup>

The assessment of the current situation puts particular emphasis on the changing media landscape which significantly affects journalistic profession, media business model, media

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<sup>167</sup> HLG 2013.

<sup>168</sup> Ibidem, 13.

<sup>169</sup> Ibidem, 3.

<sup>170</sup> Ibidem, 8.

<sup>171</sup> Ibidem, 14-15.

<sup>172</sup> Ibidem, 3.

content nature, media consumption patterns, and, overall, media pluralism conditions.<sup>173</sup> Beside this, the report presents a variety of threats to media pluralism.<sup>174</sup> The contribution of the report lies in looking at media pluralism from a broad perspective and taking into consideration a comprehensive set of factors that affect media pluralism in a direct or indirect manner.

With regard to EU' competencies, the report presents a few principles and legal sources which constitute ground for EU action such as Article 7 TFEU, the right of free movement, the right of establishment and European citizenship rights.<sup>175</sup> However, in order to tackle media pluralism threats at EU level and in an effective and long-term perspective, the report suggest the following steps:<sup>176</sup>

- 1) Adopting minimum harmonisation rules across EU especially in respect of cross-border media activities as well as composition, role, independence and appointments procedures of NRAs
- 2) Establishing a network of NRAs on the model of the one created by the “electronic communications network”
- 3) Setting EU-wide standards for media councils to be monitored by the EC and vesting these bodies with a broad mandate and real enforcement powers
- 4) Provision of state funding for public media which is of fundamental importance for media pluralism and application of strict rules concerning its independence and provision of pluralistic content
- 5) Establishing an independent monitoring centre or mandating FRA with a monitoring role in respect of national-level freedom and pluralism of media
- 6) Pro-active regular assessments of media environment and markets by national competition authorities and the EU

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<sup>173</sup> Ibidem, 26-31.

<sup>174</sup> Ibidem, 15-16.

<sup>175</sup> Ibidem, 19-20.

<sup>176</sup> For a summary of the recommendations (and key findings) see: Ibidem, 3-8.

- 7) Implementing concrete measures to enhance media literacy such as introducing media literacy in school curricula
- 8) Allocation of sustainable funding for academic research which would provide a solid basis for policy initiatives
- 9) Coordination of support and funding for quality and investigative journalism as well as for cross-border European media networks



## **2.4. The European Parliament Resolution on the EU Charter: Standard Settings for Media Freedom across the EU (2013)<sup>177</sup>**

The Resolution, adopted on 21 May 2013, calls for setting minimum essential standards for media freedom and pluralism across the EU as well as urges the EC and Member States to ensure better monitoring and enforcement of such standards. The document frames the concept of media pluralism in line with recent scholar findings, presents an overview of the currently most pressing threats to media pluralism, and provides a set of concrete recommendations.

While paying particular attention to internal pluralism of PSM and ownership diversity in the private media sector as key elements for ensuring the diversity of media landscape, the Resolution underlines that “the concept of media pluralism covers a wider spectrum of issues, such as prohibition of censorship, protection of sources and whistleblowers, issues related to pressure from political actors and market forces, transparency, working conditions of journalists, media control authorities, cultural diversity, the development of new technologies, unrestricted access to information and communication, uncensored access to the internet, and the digital divide”<sup>178</sup>.

Significantly, the document addresses among other threats to media pluralism the impact of the following three factors: the recent economic crisis, the technological changes and excessive political influence. Looking at these issues is of fundamental importance, as they considerably affect media pluralism, but have been barely addressed yet.

The Resolution points at increasing vulnerability and fragility of the media, precarious employment conditions, and budgets cuts for PSM as a result of the economic crisis.<sup>179</sup>

With regard to the impact of technological changes, it raises the issue of changing business

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<sup>177</sup> P7\_TA(2013)0203

<sup>178</sup> Ibidem, para 15.

<sup>179</sup> Ibidem, letter AC.

conditions which jeopardize the existence of those media outlets that play a significant contribution in terms of proving the public with high quality and pluralistic content.<sup>180</sup> Finally, the Resolution highlights that “some of the most striking threats to media freedom in some Member States come from newly adopted legislation”<sup>181</sup> as well as raises the issues of “political influence leading to regulatory capture, making dominant positions more difficult to dismantle once they are established”<sup>182</sup>, abuses with broadcast licensing and authorising procedures<sup>183</sup>, state advertising and sponsoring allocation<sup>184</sup>.

The most relevant recommendations in respect of media pluralism are:

- 1) Activation of Article 7 of the Treaty on European Union (TEU) in response to grave non-compliance of Member States<sup>185</sup>
- 2) Revision of AVMSD: First, extension of its scope to “minimum standards for the respect, protection and promotion of the fundamental right to freedom of expression and information, media freedom and pluralism, and to ensure the full application of the Charter of Fundamental Rights, of the ECHR and of the related jurisprudence on positive obligations in the field of media, since the directive’s objective is to create an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, such as putting in place an appropriate legislative and administrative framework to guarantee effective pluralism”<sup>186</sup>.

Second, inclusion of provisions on: independence, impartiality and transparency of NRAs concerning their decision-making, status, role, exercise of duties, powers, monitoring processes, and appropriate funding; media ownership transparency,

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<sup>180</sup> Ibidem, letter AB.

<sup>181</sup> Ibidem, para 33.

<sup>182</sup> Ibidem, para.18.

<sup>183</sup> Ibidem, para.13.

<sup>184</sup> Ibidem, para.16.

<sup>185</sup> Ibidem, para. 33.

<sup>186</sup> Ibidem, para. 34.

media concentration, conflict of interests, and independence of media supervisory bodies; non-discrimination of content and non-distortion of source selection<sup>187</sup>

- 3) Institutionalisation of EU-level cooperation and coordination on media and establishment of a European regulators' group for audio-visual media services charged with the duty to harmonize the status of NRAs, to ensure their independence, impartiality and transparency as well as to provide them with appropriate powers<sup>188</sup>
- 4) Launch of the EC' Communication on implementing the Media Pluralism Monitoring Tool indicators for media pluralism, as already developed in the study 'The indicators for media pluralism in the Member States - Towards a risk-based approach and foreseen by the EC's "three-step approach"; followed by broad public consultations, and the drafting of a proposal for EU Guidelines on Media Freedom and Pluralism<sup>189</sup>
- 5) Non-legislative initiatives related to monitoring, self-regulation and code of conducts: Setting up media self-regulatory bodies, complaints commissions, ombudspersons, independent media regulatory authorities; adoption of a EC legal instrument such as a recommendation on ethical journalism; support and promotion of investigative journalism<sup>190</sup>
- 6) Introducing a requirement for media service providers to submit company registers and accurate ownership information to NRAs, and creation of a "Single European Register" on media ownership (extension of the "Mavise" database); EC monitoring and facilitation of exchange of information on media ownership<sup>191</sup>
- 7) Annually monitoring of media freedom and media pluralism in all Member States including monitoring and supervision of media legislation amendments and their

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<sup>187</sup> Ibidem, paras: 29, 34, 35, 37.

<sup>188</sup> Ibidem, paras 34, 37.

<sup>189</sup> Ibidem, para. 35.

<sup>190</sup> Ibidem, paras. 20, 21, 24, 26.

<sup>191</sup> Ibidem, para. 41.

impact; publication of monitoring reports and good practices by the EC, FRA or CMPF<sup>192</sup>

- 8) EC monitoring of transparency and compliance of public funds allocation to PSM with Protocol 29 to the Treaties<sup>193</sup>
- 9) EC monitoring of the “effective implementation of clear rules to ensure transparent and fair procedures for media funding and state advertising and sponsoring allocation, so as to guarantee that these do not cause interference with freedom of information and expression, pluralism or the editorial line of media”<sup>194</sup>
- 10) EC scrutiny of broadcasting licenses allocation criteria and processes in all Member States<sup>195</sup>
- 11) Conducting of assessment studies such as studies on the consequences of technological change, changing business models, economic crisis and precarious employment conditions on media freedom and media pluralism<sup>196</sup>
- 12) EC media literacy programmes to provide citizens with “critical interpretation skills and the ability to sift through the ever-growing volume of information”<sup>197</sup>

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<sup>192</sup> Ibidem, para 32.

<sup>193</sup> Ibidem, para. 41.

<sup>194</sup> Ibidem, para 16.

<sup>195</sup> Ibidem, para. 31

<sup>196</sup> Ibidem, letters AB, AC

<sup>197</sup> Ibidem, para 30.

## 2.5. The European Initiative for Media Pluralism<sup>198</sup>

The EIMP is an ECI established according to EU Regulation No 211/2011<sup>199</sup> which allows at least 1 million citizens from at least one quarter of the EU Member States to present directly to the EC proposals for legal acts.

The Initiative requires “partial harmonisation of national rules on media ownership and transparency, conflicts of interest with political office and independence of media supervisory bodies”<sup>200</sup> through the amendment of AVMSD or the adoption of a new Directive. It considers as a legal basis in particular the right of establishment (Art. 49 TFEU), right to free movement of services (Art. 56 TFEU), Article 11 of CFREU on freedom of expression and information and CJEU case law<sup>201</sup>. In concrete, the Initiative makes the following demands:<sup>202</sup>

- 1) Adoption of minimally, but sufficiently harmonized rules that effectively prevent media ownership concentration and advertising control
- 2) Guaranteeing of the independence of national media supervisory authorities from economic and political influence following the model of the “Electronic Communication Directive” and vesting them with necessary powers
- 3) Definition of conflict of interests and introduction of a clear rule on incompatibility between media sector and political activities
- 4) Establishing a European monitoring system
- 5) Publication of guidelines and best practices as an instrument to support journalists and guarantee journalistic quality

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<sup>198</sup> For information on EIMP see: EIMP homepage (<http://www.mediainitiative.eu/>) and its EC official registration website at the homepage of the EC :

<http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000007>

<sup>199</sup> Regulation (EU) No 211/2011

<sup>200</sup> EIMP’s official registration website at the Homepage of the EC: <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000007>

<sup>201</sup> The relevant cases are presented in: EIMP, Annex I.

<sup>202</sup> The requirements are presented at EIMP website “What we do” ( <http://www.mediainitiative.eu/what-we-do/>) and: EIMP, Annex I.

### 3. Case Study 1: Obstacles to Media Pluralism in Hungary Posed by the Amendment of the Media Legislation

#### 3.1. Context

The parliamentary elections of April 2010 brought the victory of the conservative alliance between “Young Democrats’ Alliance-Hungarian Civic Union” (Fidesz) and “Christian Democratic People’s Party” (KDNP). Having a supermajority in the unicameral “National Assembly”, the Fidesz-KDNP government headed by Prime Minister Viktor Orbán started working on the amendment of the constitution and major laws, among others the media legislation.<sup>203</sup>

The Parliament of Hungary reformed the media legislation in the second half of 2010. It adopted the “Act CIV of 9 November 2010 on the freedom of the press and the fundamental rules on media content” and “Act CLXXXV of 30 December 2010 on media services and on the mass media” (together called “Media Acts”). Act CIV regulates media content as well as rights and duties of the media, while Act CLXXXV deals with media regulatory bodies.

The amendments were adopted in a „fast-track procedure“ without public consultations and input by professional stakeholders.<sup>204</sup> The process attracted wide-spread criticism. A large number of both domestic and international organisations including the CoE Commissioner for Human Rights, the OSCE Representative on Freedom of the Media (OSCE RFOM), EC, EP, academic institutions and media representatives expressed serious concerns.<sup>205</sup>

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<sup>203</sup> FH, 2011.

<sup>204</sup> See the criticism expressed by OSCE RFOM (OSCE RFOM, PR, 24 June 2010) and CoE Commissioner for Human Rights (CommDH(2011)10, para.4).

<sup>205</sup> CoE Expertise, 2012, 4.

In response to the criticism, the media legislation was partly revised in March 2011. However, domestic and international actors criticized the amendments as not sufficient.<sup>206</sup> In December 2011, the Constitutional Court (CC) issued decision “1746/B/2010” which annulled some provisions adopted in 2010.<sup>207</sup> Following this decision, the Parliament of Hungary again amended the “Media acts” in May 2012. International organisations criticized that the “(r)evised Hungarian media legislation continues to severely limit media pluralism”.<sup>208</sup>

### **3.2. Scope of the analysis**

The “Media Acts” include provisions which do not comply with international media pluralism and media freedom standards. Addressing all these issues would go beyond the scope of this paper. Instead, this analysis will focus only on provisions that directly or indirectly affect media pluralism. However, as media pluralism and media freedom are deeply interconnected and curbing media freedom inevitably harms media pluralism, certain concerns related to media freedom will also be addressed in a compromised form.

The analysis will exclude the assessment of the provisions on PSM. Despite the fundamental importance PSM plays in respect of media pluralism, dealing with this complex issue and in particular searching for EU instruments to tackle concerns related to it, goes beyond the scope of this paper.

The “Media Acts” have been amended several times. This paper assesses the consolidated version of “Media Acts” effective from 15 March 2014 (and the text of the Constitution, in force as of 25 April 2011). However, in relation to specific provisions, the paper will make reference also to older versions of the “Media Acts”, especially to the 2010 version.

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<sup>206</sup> See among others the criticism expressed by the OSCE RFOM: OSCE RFOM, PR, 8 March 2011.

<sup>207</sup> IRIS 2012-2:1/25

<sup>208</sup> OSCE RFOM, PR, 25 May 2012.

### 3.3. Analysis of the Hungarian media legislation

#### 3.3.1. General reference to media pluralism and provisions on media ownership

The 2010 amendment to Article 61 of the Constitution of Hungary removed the provision obliging the Parliament to pass a law to preclude information monopolies, and introduced the terms “proper” and “adequate” in relation to the right to information.<sup>209</sup>

The 2011 amendment which is effective until today stipulates a stronger commitment to freedom of information, while excluding diversity of information and making reference only to pluralism of the press:

*“Hungary shall recognise and protect the freedom and pluralism of the press, and ensure the conditions for freedom of information necessary for the formation of democratic public opinion.”*<sup>210</sup>

The amendments weaken the constitutional guarantees for media pluralism. The 2010 amendment fails to provide a clear constitutional guarantee in this respect, while it uses the terms “proper” and “adequate” which are less specific and less accurate than common international notions such as “range of opinion” and “diversity”.<sup>211</sup> The constitutional guarantee provided in the 2011 amendment is very limited in its scope, since it covers only the press. Overall, the 2010 and 2011 amendments run contrary to the ECtHR case law which places a positive obligation on States to guarantee media pluralism.<sup>212</sup>

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<sup>209</sup> CommDH(2011)10, paras. 34,35.

<sup>210</sup> The Fundamental Law of Hungary, Text in force as of 25 April 2011, Article IX(2).

<sup>211</sup> CommDH(2011)10, paras.34, 35.

<sup>212</sup> Informationsverein Lentia v. Austria (ECtHR,1993), para. 38; Centro Europa 7 S.R.L. and Di Stefano v. Italy (ECtHR, 2012), para. 134.



Article 4 of Act CLXXXV refers to diversity a “*particularly important value*”<sup>213</sup>. However, it makes explicit reference only to diversity of ownership, while neglecting many other aspects which are necessary to safeguard media pluralism.

Articles 67-70 of Act CLXXXV lay down rules on the prevention of media market concentration. According to the 2011 OSCE legal analysis, these rules are “extremely complicated and appear to offer various possibilities for the regulator to interpret what limiting rules to apply. This is not good from the viewpoint of legal certainty and transparency and it is questionable if it will be effective.”<sup>214</sup> This finding is for the 2014 version valid, too.

Article 37 of Act CLXXXV lists the information media providers should make available to the public. In contrast to the extensive registration procedures, the provision related to media ownership transparency include only few elements, while excluding many important ones.<sup>215</sup> Such a legislative shortcoming represents a serious obstacle to media pluralism, as media ownership transparency has been acknowledged as a key tool for fostering media pluralism.

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<sup>213</sup> Act CLXXXV, Article 4, consolidated version, effective from 15 March 2014.

<sup>214</sup> OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 14.

<sup>215</sup> CoE, Exertise, 2012, 14-15.

### 3.3.2. Content pluralism

The provisions stipulating broad and subjective requirements in respect of media content belong to the main contested parts of the legislation reform and are of particular relevance for media pluralism, since they directly and largely affect content pluralism. After widespread criticism, the 2010 extensive content requirements were partly revised. However, the provisions which are effective today still include many issues of serious concern.

First of all, Article 10 of Act CIV stipulates the right to information using a number of contested terms such as “proper”, “authentic”, “rapid” and “accurate”. It reads:

*“All persons shall have the right to receive **proper** information on public affairs at local, national and European level, as well as on any event bearing relevance to the citizens of Hungary and the members of the Hungarian nation. The media system as a whole shall have the task to provide **authentic, rapid and accurate** information on these affairs and events.”*<sup>216</sup>

Article 13 of Act CIV prescribes certain criteria concerning the kind of content media should disseminate. The 2010 version prescribed excessive content requirements that applied to all media providers without differentiating between print, audio-visual, online, public and private media. It read:

*“(1) **All media content providers** shall provide **authentic, rapid and accurate** information on local, national and EU affairs and on any event that bears relevance to the citizens of the Republic of Hungary and members of the Hungarian nation.*

*(2) Linear and on-demand media content providers engaged in news coverage operations shall provide **comprehensive, factual, up-to-date, objective and balanced** coverage on local, national and European issues that may be of interest for the general public and on*

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<sup>216</sup> Act CIV, Article 10, consolidated version, effective from 15 March 2014, bold letters by the author.

*any event bearing relevance to the citizens of the Republic of Hungary and members of the Hungarian nation.”*<sup>217</sup>

After the 2011 CC’s ruling which stated that certain content requirements should not apply to print and online media, Article 13 was partly revised, referring only to linear media.<sup>218</sup> However, the afore-cited Article 10 still remains in force.

Article 12(4) of Act CLXXXV imposes a controversial obligation on all media to clearly differentiate between information and opinion. It reads:

*“Any opinion or evaluative explanation added to the news provided in a programme shall be made in a form distinguishing it from the news themselves, indicating its nature as such and identifying its author.”*<sup>219</sup>

Article 16 of Act CIV enshrines an ambiguous restraint on media content referring to constitutional order. It reads:

*“Media contents shall not violate the constitutional order.”*<sup>220</sup>

Article 17(2) of the Act CIV introduces an “extremely vague and subjective limitation”<sup>221</sup> to media content in the framework of anti-discrimination rules. It reads:

*“The media content may not exclude any nation, community, national, ethnic, linguistic and other minority or any majority as well as any church or religious group.”*<sup>222</sup>

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<sup>217</sup> Act CIV, Article 13, 2010, cited in: CommDH(2011)10, 4.

<sup>218</sup> Act CIV, Article 13, consolidated version, effective from 15 March 2014.

<sup>219</sup> Act CLXXXV, Article 12(4), consolidated version, effective from 15 March 2014.

<sup>220</sup> Act CIV, Article 16, consolidated version, effective from 15 March 2014.

<sup>221</sup> CoE Exertise, 2012, 19.

<sup>222</sup> Act CIV, Article 17(2), consolidated version, effective from 15 March 2014.

Article 20(5) of Act CIV includes the unclear term “ideological conviction” in relation to commercial communication. It reads:

*“No such commercial communication can be presented in media content that offends religious or ideological convictions.”*<sup>223</sup>

Finally, Article 38 of Act CLXXXV aims at safeguarding content pluralism in the context of significant/dominant media players. However, the terms it uses and the rules it prescribes with regard to content regulation are problematic.

The provision uses the term “linear audiovisual media service providers with significant market power” which is similar to the concept “significant market power” used in competition law, but of vaguer nature. The legal basis for the special programming requirements imposed to “dominant broadcasters” is unclear.<sup>224</sup> Moreover, the provision lays down the obligation that *“(n)ews content or reports of a criminal nature taken over from other media service providers, or the news content or reports of a criminal nature which do not qualify as information serving the democratic public opinion, shall not be longer in duration on an annual average than twenty percent of the duration of the news programme.”*<sup>225</sup> This requirement may lead to the limitation of the amount of international news reported by Hungarian media outlets due to the high costs of having an own international news service, which according to the 2012 CoE expertise “is not reasonable to expect (from) every significant Hungarian media service provider”<sup>226</sup>.

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<sup>223</sup> Ibidem, Article 20(5).

<sup>224</sup> OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 9.

<sup>225</sup> Act CLXXXV, Article 38 (1), consolidated version, effective from 15 March 2014.

<sup>226</sup> CoE Expertise, 2012, 22.

The afore-cited provisions provide for undue interference in media content. Prescribing subjective criteria with regard to media content as in Articles 10 and 13 of Act CIV is irreconcilable with right to freedom of expression and information.<sup>227</sup> In a democratic society and pluralistic media environment the full range of information, opinion and ideas including "those that offend, shock or disturb the State or any sector of the population"<sup>228</sup> should be protected. The content requirements may grant "excessive discretion to authorities to punish information providers who give particular relevance or coverage to issues that are not in line with the majority political mainstream, or media outlets that legitimately construct and conduct their informative agenda according to their own editorial perspective."<sup>229</sup>

Imposing the obligation to strictly differentiate between information and opinion constitute a disproportionate measure which is impossible to be fully applied, especially by the new media, and may have a chilling effect on editorially independent media providers.<sup>230</sup>

Imposing general prohibitions like in Articles 16, 17(2) and 20(5) of Act CIV may be used by the authorities to punish or silence editorial criticism.<sup>231</sup>

Regulation on media content exists only with regard to PSM which is encouraged to provide diverse and inclusive content that reflect the interests and views of all society groups. In addition, in certain cases, the category of programmes is taken as criteria for granting frequency licences. However, private media outlets and specifically print and online media providers should not be subject to excessive criteria which constitute interference in editorial orientation.<sup>232</sup>

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<sup>227</sup> See: CommDH(2011)10, paras. 11-15.

<sup>228</sup> Handyside v. the United Kingdom (ECtHR, 1976), para. 49.

<sup>229</sup> CoE Exertise, 2012, 16.

<sup>230</sup> Ibidem, 17.

<sup>231</sup> Ibidem, 18-19.

<sup>232</sup> OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 8.

Freedom of expression may be restricted only in special cases (such as state secrets, personal information) which are prescribed by law in precise wording, are in line with well-known international standards, and in accordance with the principle of “strict proportionality”. Terms such as “balanced”, “objective”, “proper”, “authentic” and “factual” are formulated imprecisely and leave room for different interpretation. According to the 2012 CoE expertize, such a “situation of intolerable uncertainty (...) clearly open(s) the door to subjective interpretations in which reports on complex or controversial matters (especially regarding politics) might be seen as “inappropriate”, “unauthentic” on not completely “factual””<sup>233</sup>.

The content requirements have a potentially high chilling effect on media as they are linked with a complaint system which foresees sanctions for non-compliance.<sup>234</sup> According to the ECtHR case law, the threat of conviction may have a chilling effect on journalists even if the penalty is of minor nature.<sup>235</sup> In case of the Hungarian legislation, the sanctions may even take form of severe penalties or deletion of the media service provider from the register.<sup>236</sup>

In addition, the chilling effect increases because of the absence of effective domestic remedies to Media Council decisions. According to the Articles 163-165 of Act CLXXXV, Media Council decisions may only be appealed to administrative courts.<sup>237</sup> However, administrative courts have no competence to make assessment in light of other (international) standards than the media laws itself.<sup>238</sup> As a consequence, there is the risk that media outlets resolve to self-censorship in order to avoid Media Council sanctions which in practice cannot be successfully appealed.

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<sup>233</sup> CoE Expertize, 2012, 16. Furthermore, see: OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 7.

<sup>234</sup> The sanctions are laid down in: Chapter V “Legal Sanctions applicable in case of infringement” of Act CLXXXV, consolidated version, effective from 15 March 2014.

<sup>235</sup> See CommDH(2011)10, paras. 17-19 and the ECtHR case law cited there.

<sup>236</sup> See provisions 187(1) and 187(3e) (Act CLXXXV, consolidated version, effective from 15 March 2014) which deal with sanctions for repeated infringements.

<sup>237</sup> Ibidem, Articles 163-165.

<sup>238</sup> CommDH(2011)10, para. 52.

Overall, the provisions on media content pose a threat to both media freedom and media pluralism. They may severely hamper content pluralism as they restrict the range of media content by broadly prescribing the type of information, opinion and idea media should disseminate or should not be allowed to disseminate. In doing so, the provisions prevent citizens from receiving the full range of information, opinion and ideas necessary to form opinions and make informed choices. Furthermore, the vague and imprecise wording of the provisions, the introduction of sanctions for non-compliance with content requirements and the lack of effective domestic remedies for sanctions imposed to media may lead to self-censorship. In other words, journalists may be discouraged to disseminate the full range of information, especially the content that is perceived to be unpopular or critical.

### 3.3.3. Media regulation

Act CLXXXV establishes a number of media regulatory authorities including “National Media and Infocommunications Authority” (hereinafter as: Authority), “Media Council”, “Institute of Media Sciences at the Media Council”, “National Council for Communications and Information Technology”, “Media Service Promotion and Asset Management Fund”, “Public Administration Frequency Management Authority” and the “Competition Authority”. Act CLXXXV sets out the rules for the appointment, composition and functioning of media regulatory authorities. Three concerns emerge looking at these provisions:<sup>239</sup>

- 1) Media regulatory bodies have very broad competences and regulate all media including print and online media
- 2) Regulatory bodies are largely interrelated and dependent from the Authority
- 3) The provisions do not sufficiently provide for the political independence of the regulatory bodies

The net of media regulatory bodies is organized in a form of a pyramid having the President of the Authority on the top of it. He is appointed by the President of the Republic for a period of nine years, on the recommendation of the Prime Minister.<sup>240</sup> The President is entitled to appoint, dismiss, remove as well as exercise the employer’s rights over the Vice-Presidents, the Director General of the Office, the Deputy Directors General, and the Media and Communications Commissioner.<sup>241</sup> Concerning the two Vice-Presidents, the President of the Authority elects them directly, without any prescribed selection procedure, on the basis of a few general professional requirements and for an indefinite term,<sup>242</sup> while he is entitled to remove them without justification.<sup>243</sup>

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<sup>239</sup> Cf. OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 11-12.

<sup>240</sup> Act CLXXXV, Article 111/A (1), consolidated version, effective from 15 March 2014.

<sup>241</sup> Ibidem, Article 111.

<sup>242</sup> Ibidem, Article 112.

<sup>243</sup> Ibidem, Article 113(6).



The regulation of the appointment procedure for the President of the Authority and the excessive scope of power the provisions grant him make the institution of the Authority vulnerable to political interference and arbitrary decisions as well as undermine its professionalism.

The President of the Authority becomes “by virtue and from the moment of appointment”<sup>244</sup> also candidate for the President of the Media Council. Media Council is the body responsible for the regulation of media content.<sup>245</sup> However, despite having such important competencies, the Media Council is not a fully independent institution. According to Article 123(1), the Media Council is a “*body of the Authority with independent powers under the supervision of the Parliament*”<sup>246</sup>. The President and the four members of the Media Council are elected by the Parliament with the two-thirds majority.<sup>247</sup> Given the current political landscape in Hungary, this provision runs contrary to the genuine purpose of introducing a qualified majority: cross-party consensus.<sup>248</sup> Overall, the legal framework concerning the appointment procedures for the President and members of the Authority and the Media Council as well as the organization structure of these two bodies undermine their professional autonomy and political independence.

Summing up, despite a large net of media regulatory bodies, media regulation is excessively concentrated in the hands of one person, the President of the Authority, who is exclusively supported by the governing party and appointed for the overly long term of nine years. Such a system creates unhealthy conditions for a pluralistic media environment. It opens the door to political interference in media regulatory processes. As a consequence, media outlets that not support governmental policies may become subject to politically motivated arbitrary decisions by regulatory authorities. Even if regulatory authorities are not biased, the lack of legal guarantees for their full political independence may have a

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<sup>244</sup> Ibidem, Article 125 (1).

<sup>245</sup> The responsibilities of Media Council are stipulated in: Ibidem, Article 132.

<sup>246</sup> Ibidem, Article 123(1).

<sup>247</sup> Ibidem, Article 124 (1).

<sup>248</sup> CoE Exertise, 2012, 37.

chilling effect on media freedom and pluralism. As the 2011 OSCE legal analysis indicates, even “a perception of bias will anyway contribute to a chilling effect”<sup>249</sup> among media providers.

Articles 41-46 of Act CLXXXV regulate registration and notification procedures for media service providers. The 2010 version was heavily criticized for not making any differentiation between broadcast, print and online media. According to CoE standards, registration requirements may apply to audio-visual broadcasters, television and cinema enterprises, but not to print media and internet-based media. The latter may be required to possess only a mere business or tax registration document.<sup>250</sup> The different regulation between audio-visual media and print and online media has to do with the fact that licensing of all available audio-visual media may be in some cases not possible due to the limited frequency spectrum, while for printed or online media there is no objective need to restrict the number of the outlets.<sup>251</sup>

The registration requirements stipulated in the Hungarian legislation may have a chilling effect on media freedom and could curb media pluralism. Applying registration requirements to print and online media constitutes an unnecessary burden as well as allows the State to impose prior restraints and potentially block media providers. Article 46(5) lists a number of reasons for refusing the registration of a media provider. As the opinion of CoE Commissioner for Human Rights indicates, the wording of article 46(5)a) stating that “*(th)e Authority shall only deny the application to register a media product in the event that a) a conflict of interest exists vis-à-vis the applicant*” is not precise and leaves room for different interpretations.<sup>252</sup>

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<sup>249</sup> OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 14.

<sup>250</sup> CommDH(2011)10, paras. 23-26.

<sup>251</sup> OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 6; CoE Exertise, 2012,13.

<sup>252</sup> CommDH(2011)10, para 28.

In response to wide-spread criticism the Hungarian Parliament revised the provisions on registration requirements. The amended provisions replaced the registration requirement for print and online media with a notification requirement. The latter does not represent a disproportionate burden for the media, provided that it is applied only as a simple notification.<sup>253</sup>

However, with regard to registration procedures for linear media services and notification procedures for on-demand media services there are still serious concerns. The 2012 CoE Legal Expertise considers two of the reasons for refusing the registration listed in Article 42(6) of Act CLXXXV and all reasons listed in Article 45 of the same act except for one as “excessive”, since it is “obvious that the law and the administrative authority could use several instruments to correct and to redress such failures”<sup>254</sup>.

With regard to the authorization of the provision of community media services, Act CLXXXV lays down separate procedures. Article 66 which deals with this issue raise several concerns. The authorization criteria are stipulated in vague terms. Media Council is vested with extensive powers including the entitlement to refuse or withdraw the recognition as community media service only based on its “opinion”, while media services are not specifically granted the possibility to judicially review such a decision and, moreover, are specifically not allowed to initiate proceedings within a half-year period following the Media Council decision.<sup>255</sup> Overall, the provision does not provide for a transparent and fair regulation of community media services. Given the importance of community media services for a pluralistic media landscape, such legal shortcomings may have a considerable negative impact on media pluralism.

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<sup>253</sup> OSCE RFOM, Analysis of the Hungarian Media Legislation, 2011, 13.

<sup>254</sup> CoE Expertise, 2012, 14.

<sup>255</sup> Act CLXXXV, Article 66, consolidated version, effective from 15 March 2014. Cf. CoE Expertise, 2012, 45-46.

Finally, Articles 48-65 deal with tenders procedures. A number of provisions raise concern as they do not guarantee the conduct of the tender procedures on a transparent, competitive and pluralistic basis, but open the door for arbitrarily privileging certain media service providers. Article 48 (4) allows for an exceptional regime based only on wide and subjective criteria. Article 53(1) entitles the Media Council to amend the invitation to tender without specifying the basis for these amendments. Article 64 entitles Media Council to decide on networking, expansion of the area of transmission and contract amendment without setting up clear and strict criteria.<sup>256</sup> The OSCE RFOM has noted that the legislation on frequency tendering does not clearly oblige the Media Council to sign the contract with the winning candidate, even in case the winner is confirmed by a court decision. This shortcoming may negatively affect broadcast pluralism.<sup>257</sup>

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<sup>256</sup> Act CLXXXV, Articles 48 (4), 53(1) and 64, consolidated version, effective from 15 March 2014; For a detailed analysis of the provisions see: CoE Exertise, 2012, 39-41.

<sup>257</sup> OSCE RFOM, PR, 25 May 2012.

### **3.4. Summary: Media pluralism concerns in Hungary**

- 1) The legislation provides a weak and limited constitutional guarantee for media pluralism. It does not clearly guarantee an effective framework for preventing media market concentration and it largely lacks comprehensive regulation to ensure ownership transparency. Media market concentration and lack of ownership transparency constitute two of the most severe threats to structural pluralism. Failing to adequately address these issues through the legislative framework may severely harm media pluralism.
- 2) The broad and subjective prescriptions in relation to media content, the introduction of sanctions for non-compliance, and the vagueness of key legal terms may have a chilling effect on editorial independence and free public debate, which are essential elements for upholding freedom of expression, freedom of information, and media pluralism. The legislation could be misused to curb alternative and critical voices. Thus, it may lead to a significant restriction of the range of media content, which constitutes a direct and severe violation of content pluralism.
- 3) A pluralistic media governance system, political and financial independence of media regulatory bodies from external powers, appointing media regulatory bodies based on political pluralism and professionalism criteria, fair and transparent regulation of the media regulatory system constitute prerequisite elements for a pluralistic media landscape. The Hungarian legislation guarantees none of these elements in full manner and clear terms. Instead, it opens the door to governmental control of media regulatory bodies which are vested with unduly broad powers and may apply the existing framework in an arbitrary manner. As a consequence, the Hungarian legislation may be misused to disadvantage, silence and block critical media outlets. Therefore, it may decisively restrict media pluralism.

### 3.5. EU action in relation to new media legislation in Hungary

The new Hungarian media legislation entered into force as from 1 January 2011. On 17 January, the European Parliament's Civil Liberties, Justice and Home Affairs Committee discussed in an extraordinary meeting the state of play of the Commission's examination of new Hungarian Media Law. Vice-President of the European Commission responsible for the Digital Agenda Neelie Kroes addressed the Committee with a speech.

Commissioner Kroes raised three concerns: the infringement of the AVMSD "country of origin" principle by the new law, the application of the "balanced information requirement" also on on-demand audio-visual media services, and the over-extensive media registration rules. In addition, she stated that the EC is "also continuing to look at the difficult issue of criteria for media authority independence"<sup>258</sup>.

Concerning the legal basis for EC' action, Commissioner Kroes, while highlighting that "the **legal** enforcement powers of the Commission regarding fundamental rights are limited to cases where the Member States act in the sphere of European Union law, specifically when they are implementing European Union law"<sup>259</sup>, made reference to the AVMSD. In addition, she mentioned ECHR, "general Treaty rules on establishment and provision of services", "European values on media freedom and relevant EU legislation"<sup>260</sup>.

Commissioner Kroes's speech demonstrates the limited scope of EC competencies in respect of media pluralism and media freedom. Kroes made reference to only one single EU law instrument, the AVMSD which can tackle the infringement of the "country of origin principle". The legal basis for tackling the other concerns remains unspecified. Concerning the very important issue of media authority independence, Kroes' wording "**also** continuing to **look** at the **difficult** issue"<sup>261</sup> clearly demonstrates the aforementioned

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<sup>258</sup> Kroes, Speech/11/22.

<sup>259</sup> Ibidem.

<sup>260</sup> Ibidem.

<sup>261</sup> Ibidem, Bold letters by the author.

limited competencies and the EC' narrow approach. Despite the clear infringement of media authority independence by the Hungarian law and the central significance media authority independence has for safeguarding media freedom and media pluralism, this issue is very hard to tackle under the scope of EU competencies, and, thus, the EC action restricts itself to only "looking" at it.

Nevertheless, following discussions between the EC and the Hungarian government an agreement to amend the provisions related to the following four issues was announced on 16 February 2011:<sup>262</sup>

- 1) Non-linear audiovisual services were removed from the balanced coverage obligation, while concerning the application of this requirement to linear audiovisual services taking account of the principle of proportionality was added.
- 2) Taking account of the AVMSD "country of origin" principle, fines for audiovisual media service providers legally established and authorised in other Member States for breaching provisions on incitement to hatred were removed.
- 3) Registration requirements for on-demand media services, press products and ancillary media services before starting their services was replaced by register requirement within 60 days after services start.
- 4) In relation to the provision on offensive media content, some clarifications and limitations were introduced.

Listing the AVMSD, freedom of establishment and the freedom to provide services as enshrined respectively in Articles 49 and 56 of the TFEU, and Article 11 on freedom of expression of the CFREU as legal basis and arguing that the new amendments brought the Hungarian legislation in line with these instruments, Commissioner Kroes accepted the changes as sufficient.<sup>263</sup> This step again demonstrated EC' limited competencies and narrow approach. Despite achieving considerable improvements, the new amendments still

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<sup>262</sup> IRIS 2011-3:1/24; Kroes, MEMO/11/89.

<sup>263</sup> Kroes, MEMO/11/89.

included a large number of provisions in breach of international media freedom and media pluralism standards, as the analysis in this paper has shown.

In contrast to the EC, the EP employed a much more comprehensive approach, addressing in its “Resolution of 10 March 2011 on Media Law in Hungary”<sup>264</sup> a large range of concerns and providing a list of provisions that could serve as a legal basis to tackle them. In particular, the EP explicitly deplored “the Commission's decision to target only three points in connection with the implementation of the *acquis communautaire* by Hungary and the lack of any reference to Article 30 of the AVMSD, which has the effect of limiting the Commission's own competence to scrutinise Hungary's compliance with the Charter of Fundamental Rights when implementing EU law”<sup>265</sup>.

On 9 February 2012 Commissioner Kroes addressed the EP on the issue of media legislation in Hungary again.<sup>266</sup> This time she raised “grave concerns”. Despite the use of a strong imperative language, Commissioner Kroes admitted that the “limited EU rules” and only the “technically correct application of EU and national law”<sup>267</sup> do not provide a sufficient basis to effectively tackle the full range of media freedom and pluralism concerns in Hungary. Thus, she delegated the matter to the CoE. In concrete, Kroes urged the Hungarian Government to “explicitly and transparently ask the Council of Europe for a comprehensive opinion on the compliance of the media legislation, and its application in practice, with fundamental values as enshrined in benchmark texts such as the European Convention on Human Rights (...) and just as importantly (...) accept and implement any concrete recommendations that would be made by the Council of Europe.”<sup>268</sup>

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<sup>264</sup> P7\_TA(2011)0094.

<sup>265</sup> Ibidem, para.3.

<sup>266</sup> Kroes, Speech/12/80.

<sup>267</sup> Ibidem.

<sup>268</sup> Ibidem.



Similarly to the concerns raised by Commissioner Kroes, the EP “Resolution of 16 February 2012 on the Recent Political Developments in Hungary”<sup>269</sup> underlined the necessity that both the letter and the implementation of the Hungarian media legislation comply with both the letter and spirit of the European Treaties. The Resolution called on the EC to monitor this issue and conduct a thorough study on it.<sup>270</sup>

Prior to the adoption of the resolution, during the discussions at the “Committee on Civil Liberties, Justice and Home Affairs”, some Members of the European Parliament (MEPs) had also called for considering the activation of Article 7 TEU dealing with the sanctioning procedure in case of serious breach of EU law.<sup>271</sup> However, at the end no sanctioning procedure was undertaken and, moreover, the Resolution did not offer any concrete instrument that could effectively tackle under the scope of EU law the concerns posed by the Hungarian legislation. Instead, the Resolution only called on Hungary to comply with the recommendations made by the EC, CoE, and the Venice Commission<sup>272</sup> as well as reminded the need for “follow-up to the 2003 Communication on Article 7 of the Treaty on European Union to define a transparent and coherent way to address possible violations of human rights and make relevant use of Article 7 TEU on the basis of the new fundamental-rights architecture”<sup>273</sup>.

On 11 February 2012, József Szájer, MEP for the Hungarian Fidesz Party, wrote Commissioner Kroes an open letter, accusing her of having overstepped the boundaries of her EU mandate by urging Hungary to commit itself to comply with CoE recommendations. According to Szájer, obliging a Member State to comply a priori with proposals from a non-EU body constituted a “completely unprecedented” act in contradiction to Article 4 TFEU. Furthermore, he pointed out that Commissioner Kroes

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<sup>269</sup> P7\_TA(2012)0053.

<sup>270</sup> Ibidem, para 4.

<sup>271</sup> EP, PR, 10 February 2012.

<sup>272</sup> P7\_TA(2012)0053, para. 2.

<sup>273</sup> Ibidem, letter p.

herself had found earlier in 2011 only three provisions at variance with EU law, which were subsequently amended by the Hungarian government.<sup>274</sup>

Commissioner Kroes replied on 2 March, rejecting the accusations. However, the legal basis she provided for her action was very scarce and vague. Kroes referred to Article 11 CFREU as well as stated that “full compliance with fundamental rights’ norms of the Council of Europe should be self-evident for all EU Member States”<sup>275</sup>.

Following the recommendations by the 2012 CoE expertize, the Hungarian government amended the media legislation two times, in early summer 2012 and in February 2013. These amendments again took the CoE recommendations only to a limited extent into account. Overall, no substantial changes were adopted.<sup>276</sup> On 25 June 2013, the Parliamentary Assembly of PACE adopted Resolution 1941 (2013) entitled “Request for the opening of a monitoring procedure in respect of Hungary”, which among others urged Hungary to further amend its media laws.<sup>277</sup>

Overall, the EC’s actions in respond to the Hungarian media laws, Commissioner Kroes’ statements and her controversy with Hungarian authorities, and finally the EP resolutions demonstrate that EU lacks effective instruments and sufficient legal basis to adequately ensure the safeguarding of media freedom and media pluralism. Despite the strong personal engagement of Commisioner Kroes, the EU was able to achieve only a limited revision of the Hungarian media laws, while urging Hungary to amend a number of other provisions in clear breach of international human rights standards and inconsistent with practices and norms in other EU countries lacked the legal basis. Because of the principle of subsidiarity and the general wording, making reference to Article 11 CFREU alone without specifying other legal sources does not constitute a sufficient basis to initiate action in respect of

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<sup>274</sup> Hungarian Digest, 11 February 2012.

<sup>275</sup> Kroes, Letter, 2 March 2012.

<sup>276</sup> IRIS 2013-4:1/17; Mertek Media Monitor, 2013

<sup>277</sup> IRIS 2013-8:1/5; PACE, Resolution 1941 (2013) Final version.

media pluralism. In the case of Hungary, the AVMSD was the only legal basis for urging amendments. However, this document does by far not provide a basis to sufficiently cover all issues related to the broad field of media pluralism.

### **3.6. How to tackle the media pluralism concerns under the scope of EU competences?**

With regard to tackling the first group of concerns (listed in section “Summary: Media Pluralism Concerns in Hungary”), the most recent initiatives provide a number of relevant recommendations: CMPF 1-4; HLG 6; EP Resolution 2 and 6; EIMP 1.

The most realistic and effective instrument to tackle similar concerns in future would be the amendment of the AVMSD and the introduction of clear provisions on the obligation of Member States to guarantee media pluralism in their constitutional order, to prevent dominant positions in the media market and to ensure transparency of ownership.

The legal basis for the AVMSD amendment would be the “internal market argument”, more specifically the right of establishment (Art. 49 TFEU) and right to free movement of services (Art. 56 TFEU), Article 11(2) of EUCFR, as well as additionally: CJEU case law, Article 167(4) TFEU which enshrines EC’s obligation to take cultural aspects into account in the framework of competition policy, Article 2(1) of the Merger Regulation which obliges the EC to take into account the interests of the intermediate and ultimate consumers, and Article 20(2) TFEU which relates to the rights EU citizens have because of their European citizenship.

Alternative, less effective, but still important instruments would be: further developing of the Mavise database into a Single European Register containing sufficient and accurate information on ownership and management of broadcast, print and similar media; setting EU guidelines on Media Freedom and Pluralism.

Concerning the issue of content requirements, the media pluralism initiatives do not provide any adequate recommendation how to effectively tackle it. One option, very difficult to apply in practice though, would be invoking Art.7 TFEU arguing that Article 11 CFREU has been violated. A more effective instrument, although soft-law, would be mandating an independent institution with the task to monitor and supervise law

amendments (as well as the general media freedom and pluralism situation) in all Member States.

With regard to concern 3, following recommendations are relevant: CMPF 5 and 6, HLG 1-3, EP Resolution 2, 3, 7 and 10, EIMP 2.

In line with these recommendations the EU should: amend the AVMSD on the model of the “electronic communications regulatory framework”, establish a network of NRAs or a similar body such as a “European Regulators’ Association for Audio-visual Media Services”, introduce into the AMVSD clear provisions on independence and protection against external interference, availability of own and sufficient budget, transparent appointment, functioning and role, balanced and diverse composition of NRAs. NRAs would be obliged to comply with a set of institutional requirements laid down in the amended version of AVMSD. The NRAs network would enable sharing of good practices.

Given that similar provisions do already exist for the “electronic communications regulatory framework” and that the AVMSD does already include some harmonized rules mainly concerning advertising and promotion of European work, the amendment of AVMSD as described above or at least the introduction of a minimum set of the above listed standards constitutes a realistic option. The amended AMVSD would provide an effective instrument to sufficiently tackle similar cases in future without the direct involvement of the EC.

An additional soft law instrument would be the tasking of an independent institution by the EC to regularly monitor media freedom and media pluralism situation in all Member States.

## 4. Case Study 2: Structural Distortions of the Romanian Media Market, Content Quality Concerns and Their Impact on Media Pluralism

### 4.1. Introduction: Context of the case and scope of the analysis

The troubled political and economic transition over the past 25 years since the overthrowing of the communist regime has significantly shaped the media landscape.

Romania is considered today to be a “free”<sup>278</sup> democratic country, but takes the bottom ranks among EU member States in terms of quality of democracy.<sup>279</sup> Deep political polarization, political and institutional instability, corruption and inefficient implementation of laws have been repeatedly raised as serious concerns by the EC.<sup>280</sup> Over the last years the political scene has been dominated by the “political war” between President Traian Băsescu and the Social Liberal Union (USL) consisting of an alliance between Social Democratic Party (PSD) and Conservative Party (PC). The conflict reached its peak in 2012 when Prime Minister Victor Ponta called a referendum to impeach Băsescu which at the end failed due to low turnout. In the same year, joint parliamentary and local elections were held, too.<sup>281</sup>

Press and generally media are considered as “partly free”<sup>282</sup>. Independent reports consistently draw attention to a number of issues of deep concern such as polarization of the media scene alongside the two political factions, domination of the media market by powerful “media moguls”, low professional and ethical standards, wide-spread self-

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<sup>278</sup> FH, 2013a

<sup>279</sup> SGI, 2014

<sup>280</sup> For instance, in July 2012, EU justice commissioner Viviane Reding stated that she and the Commission are „still very much worried about the state of democracy in Romania“. (Pop, 2014b)

<sup>281</sup> Cf. FH, 2013a; Active Watch 2013, 6.

<sup>282</sup> FH, 2013b

censorship among journalists due to interference of media owners and political and financial pressure.<sup>283</sup>

This chapter will focus on two aspects: structural distortions of the media market and concerns in relation to the quality of media content. It will analyse their significance as well as impact on media pluralism around the election year 2012.

## **4.2. The distortion of the media market**

In July 2010 the German media company WAZ announced the withdrawal from the Romanian market which it claimed to be “distorted” by the “massive investment made by people who make their money in other industries and invest million of euros in mechanisms that artificially increase the audience”<sup>284</sup>. WAZ was the last foreign media company owning a mainstream quality media in Romania. Its withdrawal marked the beginning of a new period in the history of Romanian media market: the total domination by local “media moguls”. The emergence of this development had already started in the second half of the 2000s, when powerful Western media investors started retreating because of the structural problems of the Romanian market and the incapacity of the State to enforce effective regulation.<sup>285</sup> The afore-cited statement made by WAZ Company reveals one of the key factors for the distortion of the Romanian media market: massive investments of businessmen primarily involved in other sectors. This chapter will presents the underlying reasons behind this development as well as its impact on media market and media pluralism.

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<sup>283</sup> See the sources cited in the forthcoming analytical part.

<sup>284</sup> Bodo Hombach, Manager of WAZ media company, cited in: MEDIADEM, 2010b, 5.

<sup>285</sup> Cf. Ibidem.

The Romanian media market is rich of numerous outlets. As of Mai 2012, there were 750 television stations, 633 radio stations, and 3,727 distribution networks.<sup>286</sup> Concerning the press, as of August 2010, there were 14 national newspapers, 65 local and regional dailies, and 15 weekly and monthly publications.<sup>287</sup> However, a closer look shows that the market is severely distorted as a result of three major factors.

First, the media market is excessively concentrated around big media conglomerates controlled by “media moguls” following the model: “media-owner - cum businessman - cum politician”<sup>288</sup>. Four of the five big media owners are highly controversial persons who built their fortune during the privatisations in the 1990s and operate the media business in addition to their other core businesses. Three of the five big media owners have been prosecuted for criminal behaviour. All five have shown political ambitions.

One of the most controversial media owners is Sorin Ovidiu Vantu. Benefiting from state protection, he organized in the late 1990s a Ponzi scheme operation with about 300,000 customers who at the end lost their money. Nevertheless, Vantu was never prosecuted for that. He entered the media business after buying the news television station “Realitatea TV” through an off-shore entity registered in Cyprus. From 2006 to 2009, Vantu built a media empire consisting of 14 print outlets, three television stations and a radio network. During the 2009 presidential campaign, Vantu openly and actively attacked Traian Băsescu. In 2010, Vantu’s media empire collapsed. He sold or closed all his media outlets except for the “Realitatea TV” which still continues to be one of the most influential outlets.

Dinu Patriciu is a former politician, oil industry businessman, the richest Romanian and owner of “Adevarul Holding”, a network of print outlets with high circulation rates. He was prosecuted for manipulating the stock exchange during his time as oil businessmen. Patriciu belongs to the fiercest political enemies of Traian Băsescu.

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<sup>286</sup> The data was published by National Audiovisual Council (NAC): Active Watch, 2013, 46.

<sup>287</sup> The data was published by the Audit Bureau of Circulations, cited in: MEDIADEM, 2010b, 10.

<sup>288</sup> MEDIADEM, 2011, 7.



Dan Voiculescu belongs to the most controversial and powerful media moguls. He was an agent of Securitate in communist time and built his fortune in the 1990s through highly controversial deals with the State, first in the foreign trade, later in the energy sector. His media empire consists of five television stations including the very influential outlets “Antena 1” and “Antena 3”, a number of radio stations, and six Bucharest-based publications. Voiculescu is the founder of the Conservative Party which is part of the anti-Bănescu USL. Voiculescu’s media outlets openly and strongly attack Bănescu.

George Constantin Paunescu made his fortune through controversial activities in the 1990s. His family owns the “Curierul National” newspaper, the “B1” television station, and since 2009 the very influential newspaper “Evenimentul Zilei”. During the 2009 presidential election Paunescu’s media supported Bănescu. Paunescu’s family is accused to be intermediaries of Bănescu’s Party.

Adrian Sarbu is the only one big media owner who is involved exclusively in the media sector. He controls five television stations including the leading “Pro TV”, one radio network, a number of Bucharest-based publications and local newspapers, and the main news agency in Romania “Mediafax”. Sarbu was shortly involved in politics during the Adrian Năstase government. After that, Sarbu’s media outlets largely withdrew from reporting politics, focusing on entertainment.<sup>289</sup>

Currently, the Romanian media has entered the “post-moguls era”<sup>290</sup>. Among the aforementioned media moguls only Dan Voiculescu managed it to keep his powerful media empire. The leader of the populist “People’s Party” (PP) Dan Diaconescu, owner of “OTV” television station, and Sebastian Ghiță, owner of news channel “România TV”, other television stations and local press outlets, are still very influential. On the opposite, Dinu Patriciu and Sorin Ovidiu Vintu went bankrupt and sold all their media outlets.

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<sup>289</sup> The information about the profile of the big media owners is based on: MEDIADEM, 2010b, 16-18; MEDIADEM, 2011, 16; Ciobanu, 2013.

<sup>290</sup> The notion was defined by the Romanian media analyst Iulian Comanescu: IREX, 101.

However, these outlets have been largely acquired by alleged intermediaries. Overall, the media sector continues to be dominated by powerful businessmen-politicians.<sup>291</sup>

Second, as the profile of the dominant media owners shows, the media market is highly politicized. The excessive politicisation of the media has both compromised its functioning and damaged its image as independent public watchdog. There are numerous scandals and accusations surrounding politician-media players. For instance, in 2013, National Liberal Party (PNL) senator Sorin Roșca Stănescu, former journalist, owner and shareholder of various media entities and currently a member of the “Culture, Arts and Media” Commission of the Senat, accused PSD deputy Sebastian Ghiță, owner of “România TV” news channel, local press outlets and television stations, of being an undercover agent of the Romanian Intelligence Service (SRI). On the other side, Ghiță reminded Stănescu that he is a former communist secret police collaborator. Both Stănescu and Ghiță linked their accusations directly with the each other’s media activities, compromising the reputation of certain media outlets. Stănescu claimed that Ghiță had built his media empire through the support of SRI, while Ghiță maintained that Stănescu’s accusations were part of a large campaign of former secret police officers carried out in “paid shows”.<sup>292</sup>

Another distinctive example is the conflict between television station “OTV” owned by Dan Diaconescu and the National Council of Broadcasting (NAC). In 2012, NAC decided to halve OTV’s license because of the political publicity made to the “People’s Party - Dan Diaconescu” (PPDD). Diaconescu rejected the accusation claiming that PPDD only bears his name, but he is not its member. Although he admitted the full political affiliation of his channel as a “party channel”, Diaconescu still accused the NAC decision of politically bias stating: “OTV is the television of the People’s Party, but why do they not fine all party televisions, B1, those of UNPR and so on?”<sup>293</sup>

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<sup>291</sup> Cf. IREX, 101; Mogavero, 2014; FH, 2013b.

<sup>292</sup> See: Active Watch, 2013, 11-12.

<sup>293</sup> OTV owner and politician Dan Diaconescu, cited in: Active Watch, 2013, 20. For further information on this case see: Ibidem, 27.

The two cases, and particularly Diaconescu's answer, reveal the strong and opened partisanship as well as the moral bankruptcy of media players. Many of them do not shy away from firmly rejecting accusations, despite the clear compromising factual basis. Moreover, aggressive counteraccusations without any factual basis belong to their standard repertoire of silencing criticism.

The politicization of the media market reached its peak in 2012. In the course of the „political war“ between President Băsescu and the USL, media was largely instrumentalized as a political propaganda instrument. The deep division of the political scene into two hostile camps was reflected in the media scene: “Intact trust” controlled by PC founder Dan Voiculescu, news television station “România TV” owned by PSD senator Sebastian Ghiță, and news television station “Realitatea TV” controlled by Cozmin Gușă, close to the PSD, clearly supported the “anti-Băsescu camp”. On the other side, Băsescu enjoyed the support of “Evenimentul Zilei” daily and the “B1TV” television station.<sup>294</sup>

The active and openly partisan involvement of the media during the “political war” made it vulnerable, since journalists both were intimidated by politicians and lost their credibility in the public opinion. Verbal attacks, threatening and intimidations of critical journalists and media outlets became common practice during this period. For instance, President Traian Băsescu directly attacked during a speech on a TV show the media company “Intact trust” controlled by his political opponent Dan Voiculescu and known for its critical stance towards Băsescu. He accused “Intact trust” of misinforming and manipulating the population, concluding: “From dusk till dawn, these people put lies into people's heads”<sup>295</sup>. On the other side, USL accused Băsescu of manipulating the media and denigrating Romania's image. USL members even submitted a criminal complaint against Băsescu and other members of his “Democratic Liberal Party” (PDL).<sup>296</sup> Furthermore, a number of journalists working as correspondents for high-quality foreign media outlets such as

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<sup>294</sup> Active Watch, 2013, 6; Ciobanu, 2013.

<sup>295</sup> President Traian Băsescu, cited in: Active Watch, 2013, 9.

<sup>296</sup> Ibidem, 11.

“CNN”, “The Economist”, “EU Observer” were mediatically lynched as “press agent(s) of the Băsescu regime” and “anti-Romanian agent(s)” charged with the task to misinform and manipulate both the Romanian and foreign public opinion against UCL and in favour of Băsescu.<sup>297</sup>

In general, journalists are portrayed and slandered as paid mercenaries who lack any professional standard and fuel conflicts within the society. For instance, President Traian Băsescu stated in a television debate: “The people say that politics split the society in two. That is not true. It was the media that split the society in two”<sup>298</sup>. Former Prime Minister Victor Ciorbea called a journalist during a television show “a parrot, paid to shout here” and a “scumbag who talks like a juke box! The owner's just bought him underpants and sent him on television and he must perform his duty”<sup>299</sup>.

In fact, there were already cases of mediatic conflicts prompting political tensions. The most prominent example is the “media war” between the competing news stations “România TV” controlled by PSD deputy Sebastian Ghiță on the one side, and “Antena 3” controlled by Dan Voiculescu (PNL-PC alliance) on the other side. Both Ghiță and Voiculescu belonged to the USL governing coalition. However, even in this case, it is not clear whether in fact political reasons lied behind the media conflict, since Ghiță and Voiculescu belonged to different factions of the governing coalition.<sup>300</sup>

Third, the State has been either a missing actor concerning the regulation of the media market or it has further contributed to the deterioration of the situation. Key distorting factors such as excessive ownership concentration and lack of media business transparency have been left unaddressed by the State. In general, the Romanian governments have been lacking the pursuit of a well-defined media policy approach consisting of a coherent planning, setting of long-term strategic goals, applying targeted measures, regularly

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<sup>297</sup> Ibidem, 19.

<sup>298</sup> President Traian Băsescu, cited in: Ibidem, 17.

<sup>299</sup> Former Prime Minister Victor Ciorbea, cited in: Ibidem, 37.

<sup>300</sup> Cf. Ibidem, 23.

evaluating media policy steps and media market situation. The structure and features of today's media market are rather "the outcome of a balancing game of business interests, political interests, personal emotions and hast responses to crisis."<sup>301</sup>

Political debates on media policy take place mainly in the form of political battles to control media through the appointment of political loyalists into media regulatory bodies, rather than in the form of substantial and constructive discussions on long-term strategies for the systemic development of the media sector.<sup>302</sup>

Procedures for appointing the staff of media regulatory bodies are properly regulated in terms of legislation, but largely lack transparency, professionalism and impartiality in practice. They take place mainly behind closed doors and in the form of "purely political trade off(s)"<sup>303</sup>. Members of such institutions originally designed to be autonomous and professional are usually former politicians and journalists or artists and singers lacking professional knowledge, appointed without any public hearing and acting as "obedient instruments of the party that installed them in those seats"<sup>304</sup>.

Freedom of expression is a constitutional and legal right, but a weak social value. Media freedom and media professionalism are relatively new values. They have emerged only after the communist breakdown and have been internalized so far only to a limited extent.<sup>305</sup> Similarly, fair competition is a relatively new value, too, challenged over the years by the troubled transition from a centralized socialist to a market economy model as well as recently by the economic crisis. Preferential arrangements with the State, avoiding taxation, receiving funds from the owners' other business operations and other controversial business practices such as declaration of insolvency as a tactic to clear debts are widespread in the media scene.<sup>306</sup>

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<sup>301</sup> MEDIADEM, 2011, 7.

<sup>302</sup> Cf. Ibidem, 9.

<sup>303</sup> Ibidem, 10.

<sup>304</sup> Ibidem.

<sup>305</sup> Ibidem, 9; IREX, 95.

<sup>306</sup> MEDIADEM, 2010b, 12; MEDIADEM, 2011, 9, 25; IREX, 93, 97, 101, 102.

With regard to the existing legislative framework, cross-ownership and ownership concentration in the press sector are not regulated, while ownership concentration in the broadcast sector is limited to 30% of the market share. The provision foresees a very complicated procedure for calculating the “market share”, referring to the capacity of media outlets to influence public opinion. The law is almost impossible to be implemented in practice, and, in fact, the body entrusted to enforce the competition legislation, the Competition Council, has so far failed to do so.<sup>307</sup>

Transparency of media business is addressed by Article 30(5) of the Romanian Constitution stating: “*The law may require the media companies to reveal their sources of funding*”<sup>308</sup>. However, since a special law dealing with this issue is missing, the afore-cited constitutional provision remains unimplemented in practice.<sup>309</sup>

NAC periodically publishes some information about the broadcasting outlets it has granted a licence, but the data is based on official information provided the broadcasters themselves. In practice, the media scene is characterized by a large lack of ownership and business transparency. Intermediaries as formal owners are a common practice, the most famous example being media mogul Sorin Ovidiu Vantu who was not the official owner of the media conglomerate he controlled.<sup>310</sup>

Overall, excessive concentration around controversial big media owners, politicisation of the media, incapacity and/or unwillingness of the State to tackle structural distortions, provide conditions for a healthy media market, indiscriminately and effectively implement the existing legislation, and finally limited internalization of the ideas “media freedom”, “media professionalism”, “public interest” and “fair competition” as values have resulted in severe structural distortions of the media market.

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<sup>307</sup> MEDIADEM, 2011, 16, 19-20.

<sup>308</sup> Article 30 (5) of the Romanian Constitution, cited in: Ibidem, 25.

<sup>309</sup> Ibidem.

<sup>310</sup> MEDIADEM, 2010b, 23; IREX, 101.

### **4.3. The erosion of the quality of media content: politicisazion and triviality**

The overall political, social and economic context including political environment, political culture and social values, social status of journalists, media and media owners, distortion of media business, pressure within media entities and direct interference by media owners into editorial content, and finally the economic crisis resulting in precarious working conditions and financial situation in the media sector have largely affected the media content, eroding its quality and its relevance for public interest. As a consequence, media content is characterized by two main features: blatant political bias and triviality, severely infringing ethical standards.

Due to the overall politically charged environment, the media content shows a disproportionately high degree of politicisation. Media campaigns play a central role especially during political campaigns. The election year 2012 saw even the launch of numerous new local, regional and national televisions. This development was paradoxical to the precarious financial situation in the media market. The only credible explanation by experts is that politicians and businessmen fund media outlets not to generate profit out of them, but as propaganda instruments for promoting their own interests.<sup>311</sup>

During the 2012 “political war” the media content was excessively focused on personalized debates and mutual accusations between politicians, first and foremost between President Băsescu and his opponents. A very distinctive example is the statistic provided by the Active Watch report on topics debated during the electoral campaign in television shows. According to it, a “closer look at all debates held between May 11 and June 8, 2012 shows us that the television sets were monopolized by politicians who either discussed the internal political games (statistical weight - 49%), or the progress of the local elections (statistical weight - 28%). The rest of the subjects of public interest, such as education, national

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<sup>311</sup> Cf. Active Watch, 2013, 20, 45.

economy or the health system, benefited from insignificant occurrences, which did not exceed the level of 5%.”<sup>312</sup>

In line with the Active Watch report, the OSCE/ODIHR report on the 2012 Parliamentary elections noted the following: “The lack of political discourse was reflected in the media coverage of the campaign. There were almost no programmes devoted to more serious, policy-based analysis or expert commentaries. The dominant feature was the exchange of personal attacks and criticism among candidates, a tendency often supported by broadcasters themselves to attract higher viewer ratings. (...) In general, most interlocutors noted that although the media provided a variety of information to voters, it could fall short of what was needed for voters to make a truly informed choice”<sup>313</sup>.

Media content is extensively shaped by the respective political affiliation of the media owners. A very striking example is “Antena 3” largely considered as an anti-Băsescu propaganda tool and known for its aggressive rhetoric. Controlled by USL member Dan Voiculescu, “Antena 3” fiercely supports all USL political and lynching campaigns against certain public figures and institutions. Several leading USL politicians including USL’s campaign manager publicly thanked “Antena 3” after the 2012 election. Strong partisanship was also shown by other leading media outlets. The OSCE report on the 2012 Parliamentary Elections noted the “polarization of the media environment and the increasing political affiliation of the major broadcasters”<sup>314</sup>.

Political infotainment is characterized by a highly aggressive rhetoric. Journalists heavily attack the “adversary camp” including both politicians and journalists aligned with them. Mediatic lynching of journalists by their fellows is not rare and according to the 2013 Active Watch report, “the aggressiveness of the language in these cases greatly surpassed that of the politicians”<sup>315</sup>. To take a concrete example, while “România TV” celebrity

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<sup>312</sup> Ibidem, 21.

<sup>313</sup> OSCE/ODIHR, 2012, 17.

<sup>314</sup> Ibidem, 16. Concerning “Antena 3” and general polarization of the media scene see: Active Watch, 2013, 18, 22; MEDIADEM, 2010b, 12, 18.

<sup>315</sup> Active Watch, 2013, 7.



Cătălin Striblea was being hospitalized because of a stroke, his colleague of “Antena 3” Mircea Badea wished him to have a second one.<sup>316</sup> With regard to journalists’ attacks against politicians, the same report concludes: “The mediatic attacks against the politicians often crossed not only the limits of civilized language, but also those of the deontological framework. A series of accusations were made in the absence of any evidence, or without the presentation of the accused party’s opinion.”<sup>317</sup>

Media are widely misused by their owners to lynch public institutions and public figures that are in conflict with their business or political interests. Over the last years, media have been especially misused as instruments to exert pressure on the judiciary and influence the outcome of judicial processes against media owners or their allies.<sup>318</sup> The issue was such particularly worrying, that it was specifically raised by the 2013 “Mechanism for Cooperation and Verification” (MCV) report of the EC. The report noted the trend of “media campaigns amounting to harassment” of members of key judicial and anti-corruption institutions and “numerous examples of the media exercising pressure on the judiciary”<sup>319</sup>. It urged Romania to “(r)evue existing standards to safeguard a free and pluralist media while ensuring effective redress against violation of individuals’ fundamental rights and against undue pressure or intimidation from the media against the judiciary and anti-corruption institutions.”<sup>320</sup>

The media market is dominated by yellow journalism and entertainment television. The publications with by far the highest circulation shares are the dailies “Click” and “Libertatea”, both belonging to the yellow journalism category. The third rank is held by the quality paper “Adevarul” which, however, attracts around half of its sold publications through inserts such as books, movies and DVDs. Yellow publications reach together with

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<sup>316</sup> See: Ibidem, 23.

<sup>317</sup> Ibidem, 22.

<sup>318</sup> Cf. Pop, 2014a.

<sup>319</sup> COM(2013) 47 final, 4; Furthermore, see: Active Watch, 2013, 9-10.

<sup>320</sup> COM(2013) 47 final, 7.

sport newspapers 80% of the total press circulation. The top ten list of television stations includes six generalist outlets, one outlet focusing on “women’s magazines” (third place in the viewers’ ranking), the first channel of public television (fourth place in the viewers’ ranking) and two news channels. Due to mismanagement, lack of investment and political bias in favour of the government/President, the audience share of the public television has been collapsing over the past few years. Mainstream private television stations largely concentrate on infotainment.<sup>321</sup>

The State has been showing a relatively passive attitude and largely ineffective approach towards regulating media content and supporting qualitative journalism.

Special legislation on content regulation exists only with regard to audio-visual media. To print media applies the general legislation (hate speech, child protection, privacy rights, public order and moral), while online media is minimally regulated, mainly concerning cybercrimes.<sup>322</sup>

The existing regulation on audio-visual content was harmonized with the EU acquis during the EU accession negotiations and is fully in line with the AVMSD.<sup>323</sup> A number of provisions of the “Audiovisual Law” adequately regulate media content, while Article 3 specifically refers to content pluralism. It reads:

*“(1) Political and social pluralism, cultural, linguistic and religious diversity, information, education and public entertainment are accomplished and ensured by the broadcasting and the retransmission of program services with the observance of the freedoms and fundamental rights of the person.*

*(2) All audiovisual media services providers must ensure the objective information of the public by correctly presenting the facts and events and they must favor the free formation of opinions.”<sup>324</sup>*

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<sup>321</sup> MEDIADEM, 2010b, 11-13, 20.

<sup>322</sup> MEDIADEM, 2011, 27.

<sup>323</sup> Ibidem, 27-28.

<sup>324</sup> Article 3 of the Audiovisual Law, 504/2002, Text in force as of 28 February 2011, cited in: Ibidem, 27.

The implementation of the “Audiovisual Law” is carried out by the NAC which is a formally autonomous body appointed by the President, the government, and the Parliament. NAC is mandated to monitor the compliance of media outlets with the existing legislation and to apply sanctions for infringements. Beside the Audiovisual Law, the NAC uses as a secondary law source a package of norms called the “Code on the Broadcast Content” which it has negotiated with the broadcasters.<sup>325</sup>

Despite its very limited resources, the NAC is an active body, but the impact of its actions has been almost completely undermined by four major factors:

First, the procedure for appointing NAC members is politicized. Until 2012, the political composition of NAC was relatively balanced, but the appointing of new members in the period 2012-2013 distorted the balance in favour of the parliamentary majority which became over-represented. Since then, NAC is accused to act on the basis of political motivations. According to Adrian Moise, vice-president of the journalists’ trade union “Mediasind”, “different outlets received different fines for the same offences”<sup>326</sup>.

Second, NAC has been very active in fining media outlets for unbalanced coverage of political parties and unfair treatment of political election candidates. However, the fines including those for repeated infringements are very small. They have mostly no deterrent effect and “for some TV stations is more profitable to pay the fine than to comply with the law”<sup>327</sup>. The repeated flagrant violation of the regulation by numerous media outlets despite having been fined several times for the same infringement demonstrates that unbalanced content is not an ‘accidental mistake’, but a “clearly, openly assumed editorial policy”<sup>328</sup>.

Third, the NAC has no legal power to intervene in cases of internal editorial interference which, in fact, is a major concern, leading to the deterioration of media content into propaganda texts dictated by media owners.<sup>329</sup>

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<sup>325</sup> Ibidem, 28; MEDIADEM, 2010b, 20.

<sup>326</sup> Adrian Moise, cited in: IREX, 2014, 96. Furthermore, see: Ibidem, 95-96.

<sup>327</sup> MEDIADEM, 2011, 31.

<sup>328</sup> Ibidem.

<sup>329</sup> Cf. Ibidem, 31-32.

Fourth, the trend towards sensationalism and triviality of media content reflects the increasing demand by the public for it.<sup>330</sup> The most distinctive example is “OTV” television station which created the so-called “OTV station trend”. Due to the limited resources to buy or produce own content, OTV transmitted mainly live shows about crimes and news reports about political conspiracies. Persons who wanted to appear in OTV’s live shows used to make unofficial payments to the owner, journalist Dan Diaconescu, who is said to have built a fortune of 30 million euro in this way. During 2011, Diaconescu made a live show of founding his own political party called “Party of the People”.<sup>331</sup>

The continuing infringements of content regulations and repeated fines by NAC did not undermine the popularity of OTV. On the opposite, NAC’s popularity suffered. Similarly, fining popular television host Mircea Badea for using a violent language and threatening with physical violence made NAC unpopular, too, not the journalist.<sup>332</sup>

Due to its success the “OTV style” was copied by other mainstream outlets. On the opposite, media outlets offering qualitative and politically balanced content such as “Digi 24” television station or online news source “HotNews.ro” have much smaller market share.<sup>333</sup>

Several initiatives to amend the broadcast legislation by introducing a cumulative increase of fines for repeated infringements, vesting the NAC with legal powers to intervene in cases of “censorship inside the newsroom” and transposing into law most of the provisions of the “Code on the Broadcast Content” have failed so far to receive broad political support. As a consequence, the extensive regulation and active involvement of NAC are largely ineffective.<sup>334</sup>

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<sup>330</sup> MEDIADEM, 2010b, 20

<sup>331</sup> Ibidem

<sup>332</sup> Ibidem, 21.

<sup>333</sup> BS, 2014, 34.

<sup>334</sup> MEDIADEM, 2011, 32-34.

The economic crisis additionally eroded the quality of media content. According to a research study conducted by the “Faculty of Journalism and Communication Sciences of the Bucharest University” in 2011, journalists considered the “economic pressure” as the main problem which undermines the quality of content and identified “editorial policy” as the factor with the highest impact on the journalists’ behaviour.<sup>335</sup>

The ratings pressure prompted many media outlets to lowering professional and ethical standards. According to the 2013 Active Watch report, “(m)anufactured news, the staging of allegedly authentic televised shows, the ostentatious pursuit of morbid, ridiculous, dirty aspects of certain public persons' lives have all become common practices”<sup>336</sup>. Only 10% of media outlets respect ethical codes<sup>337</sup> and around 50% of the journalists are not aware of the existence of any code of ethics.<sup>338</sup> Concerns about ethical standards are largely considered by media players as “ridiculous” and “irrelevant in times of crisis when “jobs have to be saved””<sup>339</sup>.

Media outlets tend to hire young journalists with limited professional education who are willing to accept low salaries, bad working conditions and interference into editorial work. The journalistic profession is almost not regulated at all. No accreditation or specific qualification is required to entry the profession of journalist. As a result, the number of journalists is unknown, the competition among them very high, but the level of professionalism low.<sup>340</sup> Self-regulation has been attempted on several occasions, but it still largely lacks enforcement and effectiveness.<sup>341</sup>

Investigative reporting and in-depth coverage of issues of public interests are rare, because media outlets largely lack financial means and properly qualified journalists as well as tend

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<sup>335</sup> Active Watch, 2013, 52-53.

<sup>336</sup> Ibidem, 8.

<sup>337</sup> IREX, 2014, 99.

<sup>338</sup> Vasiliu, 2011, 2.

<sup>339</sup> MEDIADEM, 2011, 43.

<sup>340</sup> Ibidem, 7, 40, 42; MEDIADEM, 2010b, 19.

<sup>341</sup> MEDIADEM, 2011, 12-13.

to avoid clashes with the political and business elite. Furthermore, most of the investigative reporting is originally not based on genuine investigations by journalists, but on information leaked by politicians for the purpose of attacking their opponents.<sup>342</sup> In addition, investigative journalism is largely used by media players as a weapon to blackmail public figures, requiring money, advertising or confidential information in exchange for not publishing negative facts. According to President and CEO of “TVR” Alexandru Lăzescu, “(f)or nearly 10 years there has been a phenomenon that is hollow inside and eats away at media credibility. The press blackmails in Romania - though less in Bucharest - are practiced with great skill in this country. There are clear patterns applied. I know people who are exasperated by what is happening. It has grown to a sophisticated, orchestrated attack.”<sup>343</sup>

The economic crisis has increased the vulnerability of the media towards the pressure by political and business actors, leading to wide-spread self-censorship. Experts estimate that self-censorship “is practiced in 90 percent of the cases (...) and the economic crisis has since heightened the problem”<sup>344</sup>. Recently, a case of alleged self-censorship in all mainstream media outlets attracted large public attention: The project of the Canadian company “Rosia Montana Gold Corporation” (RMCG) to explore mineral resources in central Transylvania came under heavy criticism by environmental groups and citizens. In response to this, RMCG launched large advertising campaigns in the mainstream media. Media watchdogs recorded that concurrently with this step, critical reporting on the project disappeared. The allegation that media outlets, in exchange of advertising money, applied self-censorship on a topic of fundamental importance for the public interest, eroded public trust in media.<sup>345</sup>

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<sup>342</sup> IREX, 2014, 99-100.

<sup>343</sup> Alexandru Lăzescu, cited in: Vasiliu, 2011, 2,3.

<sup>344</sup> IREX, 2014, 99.

<sup>345</sup> Cf. Ibidem, 93.

Local media market does not provide the basis for pluralistic media content either. In the overcrowded market, local media outlets find themselves permanently confronted with the battle to survive. They can do so, only if they either become part of the big media networks or are receive support by local businessmen or politicians who use them as an instrument to access public resources and promote themselves.<sup>346</sup>

The economic crisis and the decline of the content quality of traditional media have fuelled the increase of online media consumption, but television still remains by far the main source of information.<sup>347</sup> So far, online media has not shown any significant contribution to improving the quality and diversity of media content. Instead, it has largely reproduced the same problems of the traditional media.<sup>348</sup> Controversial techniques such as “advertorials ‘masked’ as real reporting, teasing campaign masked as real testimonials”<sup>349</sup> are applied by PR and advertising companies to online media in the same way as to tabloid newspapers. Overall, online media is considered as a “no-man’s-land in terms of legislation and editorial responsibility and a free source of information and media materials, where copyrights do not apply.”<sup>350</sup>

Given the low quality of media content and the increasing demand for infotainment, media literacy programmes would be of particular importance. Nevertheless, they are largely ignored in Romania. There are no permanent state-funded media literacy programmes, while media literacy courses are included only as optional or extracurricular activities subject to the approval by education authorities and held on the basis of individual initiatives. Media is generally presented by teachers as a negative model for the young generation. With regard to new media, mainly potential dangers are raised.<sup>351</sup>

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<sup>346</sup> Cf. MEDIADEM, 2011, 7; MEDIADEM, 2010b, 10. Furthermore, see the following study on the political map of local televisions: Active Watch, 2014.

<sup>347</sup> According to the Active Watch report, in 2012, for 94% of the Romanians, the main source of information was television (Active Watch, 2013, 8)

<sup>348</sup> MEDIADEM, 2011, 11.

<sup>349</sup> Ibidem, 44.

<sup>350</sup> Ibidem, 8.

<sup>351</sup> Cf. Ibidem, 46-47.

#### **4.4. Summary: Media pluralism concerns in Romania**

- 1) The market is excessively concentrated around a few media conglomerates controlled by powerful owners directly involved in or tightly linked with other businesses and politics. Owners largely use media as an instrument to promote their vested interests, exert pressure on State institutions and key actors and manipulate public opinion. As a result, media does not function as a critical and analytical watchdog, providing qualitative, impartial and diverse information of public interest. Instead, it openly operates as a propaganda tool, providing content that primarily reflects the narrow interests of their owners and largely ignores public interest. The existing legislative framework on ownership is incomplete and lacks implementation.
- 2) The media market is almost completely non-transparent and severely distorted. Using intermediaries is a common practice, although the public usually knows the real owners. Media companies operate in non-transparent manner and are in their vast majority unhealthy business entities. The Romanian market has faced during 2005-2008 an investment bubble and still confronts artificial investments by owners who enter the market primarily not to generate profit from the media business itself, but through its influence. Media businesses are sustained by the owners' other businesses and operated in order to promote these other businesses. The legislation on media ownership transparency is almost completely non-existent and ineffective.
- 3) The State has shown incapacity and unwillingness to ensure adequate conditions for media pluralism, to effectively implement existing regulation and properly address media pluralism concerns. Media regulatory bodies are subordinated to political parties, have limited power and resources, and overall, are largely incapable to effectively perform their task.
- 4) The economic crisis has increased media's vulnerability to interference by media owners, external political and business actors. The quality of content has been dramatically decreasing. New media has not shown any significant contribution to



improving the quality and diversity of media content. Instead, it has largely reproduced the problems of the traditional media.

- 5) The severe distortion of the media market and the economic crisis have resulted in heavily distorted information characterized by low quality and low relevance for public interest, blatant bias and severe infringement of basic ethical standards. The media scene is dominated by yellow journalism and political infotainment. Stories about rapes, violence and intimate private life of celebrities, mutual accusations and insults among television show guests, personal feuds among politicians and public figures have largely cut off in-depth reporting and expert analysis on events, policies, social, cultural and other issues of public interest.
- 6) Media freedom, media pluralism, responsibility and role of media to provide politically balanced, socially and culturally diverse content of high quality and high relevance for public interest are internalized as social values only to a limited extent. The fundamental importance of media literacy is largely ignored.

#### **4.5. How to tackle the media pluralism concerns under the scope of EU competences?**

Concerns number 1 and number 2 are deeply interrelated. Concentration and lack of transparency in the media sector are the main underlying reasons for the severe structural distortion of the media market. Both concerns could be tackled to a considerable extent through a framework based on the following recommendations: CMPF report 1-3, 6; HLG report 1, 5, 6; EP Resolution 2, 4, 6, 7; EIMP 1, 3, 4.

In concrete, the three following steps would significantly contribute to enhancing structural pluralism:

- amendment of AVMSD and introduction of provisions that restrict excessive ownership concentration and ensure ownership transparency
- creation of a “Single European Register” (extension of the MAVISE database) containing media companies data
- tasking an independent institution to regularly monitor media freedom and media pluralism in all Member States and set EU guidelines on media pluralism and media freedom

Concern number 3 could be tackled at EU level by amending the AVMSD and establishing a network of independent NRAs vested with a clear mandate and strong powers on the model of the electronic communications regulatory framework (CMPF report 5; HLG report 1-3; EP Resolution 2, 3; EIMP 2).

Concerns number 4, 5 and 6 could be tackled at EU level only to a limited extent and only through soft law mechanisms. Nevertheless, such mechanisms could play an important role and have a stimulating effect for countries with a similar national media context like Romania. The most relevant steps would be:

- Establishing a European monitoring system vested with the competencies of naming and shaming, promoting and awareness-raising, publications of guidelines and best practices (CMPF report 6; HLG report 5; EP Resolution 7; EIMP 4)
- Allocation of sustainable funding for academic research in general, and research about the effects of the economic crisis and new media on media pluralism in particular (HLG report 8; EP Resolution 11)
- Allocation of sustainable funding for media literacy programmes as well as for supporting quality and investigative journalism (HLG report 7, 9; EP Resolution 12, EIMP 5)

## Conclusions

The most recent initiatives approach media pluralism from a broad perspective and in close relation to its fundamental importance for the functioning and legitimacy of democracy. They take account of a large variety of dimensions and elements which frame media pluralism. Most notably, the initiatives address the impact of rapidly changing media technology and media business models, the economic crisis, legislation amendments by EU Member States and undue influence by powerful actors.

While acknowledging the difficulty of reconciling EU, national, competition and human rights law, and taking account of the large number of media pluralism relevant issues, the new initiatives consistently stress the fundamental importance of an EU pro-active approach, and more notably, the establishment of an overall EU framework, which goes beyond case-by-case solutions, tackling media pluralism concerns in a long-term and effective manner. Towards this end, the initiatives provide a comprehensive set of recommendations and present some principles and legal sources that constitute ground for EU action in this regard.

Analysing and comparing media pluralism concerns in Hungary and Romania provides a valuable insight into the broad range of actors and conditions that negatively affect media pluralism in the EU today and demonstrates which EU measures are needed to address these issues.

Despite some partial revisions prompted by repeated wide-spread criticism, the Hungarian media legislation still includes several provisions and shortcomings which pose serious threats to media pluralism.

First, the legislation fails to offer a framework that clearly and sufficiently stipulates the cornerstones of an effective media pluralism regulatory system: the constitutional guarantee of media pluralism, the prevention of excessive media market concentration and the provision of media ownership transparency.

Second, the media laws include broad and subjective prescriptions in relation to media content as well as sanctions for non-compliance with the regulation. Such provisions which, moreover, are formulated in vague terms, have a chilling effect on alternative and critical voices. Thus, they may lead to a significant restriction of the range of media content, which constitutes a direct and severe violation of content pluralism.

Third, the legislative framework fails to guarantee in full and clear terms the prerequisite conditions for a pluralistic media landscape: professional autonomy, political and financial independence of media regulatory authorities from external powers, and fair and transparent regulation of the media regulatory system. Instead, it opens the door to governmental control over media regulatory bodies, which are vested with unduly powers and may apply the existing framework in an arbitrary manner. As a consequence, the Hungarian legislation may be misused to disadvantage, silence and block critical media outlets, which constitutes a decisive restriction of the pluralism of the media scene.

In Romania several factors have gradually resulted in severe distortions of both structural and content pluralism. These include the excessive concentration of the media market around a few controversial owners, lack of transparency in the media sector, the State's reluctance to provide adequate conditions for media pluralism, to effectively implement existing regulation and to properly address media pluralism concerns. The economic crisis, the low degree of media literacy, and the limited internalization of "media pluralism" and "media freedom" as social values have also contributed to these distortions. They reached a peak during the 2012 election year, which saw a fierce "political-media war" and the erosion of the quality of media content.

Media companies operate in a non-transparent manner and the vast majority are unhealthy business entities, sustained by the owners' other "core businesses". They are mainly controlled by controversial businessmen whose primary goal is not to establish self-sustaining, profit-generating media business entities, but to use media outlets as an instrument that promotes their business and political activities, exerts pressure on public authorities and manipulates public opinion. Thus, the media does not function as a critical and analytical watchdog, providing high-qualitative, impartial and diverse information of public interest. Instead, it openly operates as a mouthpiece of those who finance it. While blatantly promoting the owners' narrow interests, media largely ignores public interests.

Beside chronic politicisation and blatant partisanship, the media content is characterized by triviality and severe infringements of basic ethical standards. Stories about rape, violence, the private lives of celebrities, conspiracy theories, baseless accusations and mutual insults among television show guests, and reporting about personal feuds between politicians or public figures have largely cut off in-depth reporting and critical analysis on events, policies, social, cultural and other issues of public interest. The public is increasingly attracted by infotainment. The fundamental contribution of media literacy, availability and consumption of a diverse range of political, social and cultural media content of high quality, to form politically aware and thoroughly-informed citizens, are only limitedly acknowledged and internalized as democratic values by both State authorities and public opinion.

Contrasting the Hungarian and Romanian cases demonstrates that the range of media pluralism concerns significantly differs within the EU, and, thus, a comprehensive EU framework on media pluralism is needed. In Hungary media pluralism is restricted by the legislative framework and State pressure. In Romania, meanwhile, the weak and ineffective implementation of laws and the controversial activities of non-State actors are primarily responsible for the erosion of media pluralism.

Hungary represents the case where a Member State severely infringes international media pluralism standards through a single legislative act. In contrast, the Romanian case shows the long-term erosion of media pluralism as a result of a number of complex and interrelated factors, substantially shaped by the country-specific context, but, nonetheless, influenced by major European and global developments such as the economic crisis and the changing media environment.

The Hungarian case study reveals the limited scope of the EU competencies to promptly and effectively respond to single gravely infringing acts by Member States, while the Romanian case demonstrates mainly the shortcomings of EU soft-law, but also hard-law instruments, to support and protect media pluralism.

The second step of the analysis shows that the EU has considerable potential to enhance its role and scope of competencies, in particular, through the implementation of three sets of recommendations provided by the most recent initiatives: the amendment of the AVMSD, the establishment of an EU monitoring system, the coordination of activities and allocation of sustainable funds in relation to academic research on media pluralism, media literacy programmes, professional and investigative journalism programmes.

The amendment of the AVMSD would enable the EU to tackle concerns related to excessive ownership concentration and advertising control, lack of ownership transparency, conflict of interest resulting from concurrent involvement in media business and politics, and political subordination of as well as insufficient power and resources for national regulatory authorities. This set of instruments would sufficiently tackle a considerable range of the media pluralism concerns in Hungary and Romania.

The establishment of an EU monitoring system would ensure a pro-active regular and comprehensive assessment of the media situation across the EU and would provide the EU

and Member States, on the model of the FRA, with independent, professional and evidence-based advice. While this body could not use hard-law to oblige Hungary, Romania or other States raising similar concerns to abide to international media pluralism standards, it would nevertheless significantly contribute to fostering media pluralism and media freedom through a monitoring, promoting, naming and shaming, awareness-raising and assisting function. Furthermore, such a body could play a crucial role to advance the discussion on adopting hard-law and setting EU-wide standards in respect of media pluralism. So far many proposals in this respect have been rejected and discussions have even been stopped or dropped, using the argument that the issue is very complex and further research is needed. The establishment of this institution would largely avoid that similar arguments block or obstruct taking substantial steps to foster media pluralism in future.

Finally, fostering media pluralism needs solid support by the EC in terms of funds and coordination. Media pluralism is indeed a very complex issue. The economic crisis and the changing media environment deeply affect media pluralism, but these issues have not been sufficiently researched yet. Quality and investigative journalism, which provide accurate and diverse information of public interest, need sufficient financial resources, well-trained professional journalists, and a public that is able to critically analyse media content. Particularly in Romania, but also in Hungary, supporting independent, high-quality, investigative journalism and media literacy programmes would be of crucial importance to ensure that diverse content is both available and consumed.



## Abbreviations

AP-MD	Advisory Panel on Media Diversity
AVMSD	Audiovisual Media Services Directive
CC	Constitutional Court
CoE	Council of Europe
CFREU	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the European Union
CM	Committee of Ministers of the Council of Europe
CMPF	Centre for Media Pluralism and Media Freedom
CRC	Convention of the Rights of the Child
DG	Directorate-General
EP	European Parliament
EC	European Commission
ECI	European Citizens' Initiative
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIMP	European Initiative for Media Pluralism
EU	European Union
Fidesz	Young Democrats' Alliance-Hungarian Civic Union (Hungary)
FRA	EU Agency for Fundamental Rights
HLG	High Level Group on Media Freedom and Pluralism
ICCPR	International Covenant on Civil and Political Rights

KDNP	Christian Democratic People's Party (Hungary)
MC-S-MD	Group of Specialist on Media Diversity
MCV	Mechanism for Cooperation and Verification
MEP	Member of the European Parliament
MM-S-PL	Group of Specialists on Media Pluralism
MPM	Media Pluralism Monitor
NAC	National Council of Broadcasting (of Romania)
NRA	National Regulatory Agency
Ofcom	Office of Communications (UK)
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
OSCE RFOM	OSCE Representative on Freedom of the Media
PACE	Parliamentary Assembly of the CoE
PC	Conservative Party (Romania)
PDL	Democratic Liberal Party (Romania)
PNL	National Liberal Party (Romania)
PP	People's Party (Romania)
PPDD	People's Party - Dan Diaconescu (Romania)
PSB	Public Service Broadcasting
PSD	Social Democratic Party (Romania)
PSM	Public Service Media
RMCG	Rosia Montana Gold Corporation
SRI	Romanian Intelligence Service

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TWFD	Television without Frontiers Directive
UDHR	Universal Declaration of Human Rights
UN	United Nations
USL	Social Liberal Union (Romania)

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## Abstract

The last few years have witnessed a number of initiatives presenting recommendations how to tackle media pluralism concerns at the European Union level. The research subject of this thesis consists of assessing these proposals and the potential of the EU to foster media pluralism on the basis of two case studies. Having briefly evaluated the initiatives' approaches and summarized their main proposals, the thesis analyses selected media pluralism concerns in the EU Member States Hungary and Romania. It shows how the EU could address these concerns, by making use of the recommendations expressed by the most recent media pluralism initiatives.

## Abstrakt

Eine Reihe von Initiativen haben in den letzten Jahren Empfehlungen ausgesprochen, wie Medienpluralismus-Bedenken auf der Ebene der Europäischen Union angegangen werden könnten. Die Arbeit untersucht diese Vorschläge sowie das Potenzial der EU zur Förderung des Medienpluralismus anhand von zwei Fallstudien. Nachdem der Ansatz der Initiativen kurz ausgewertet und ihre wichtigsten Vorschläge zusammengefasst werden, analysiert die Arbeit ausgewählte Medienpluralismus-Bedenken in den beiden EU-Mitgliedstaaten Ungarn und Rumänien. Es wird aufgezeigt, wie die EU diese Bedenken durch die Umsetzung der Empfehlungen der jüngsten Initiativen angehen könnte.