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Robert Schuman Centre for Advanced Studies
Centre for Media Pluralism and Media Freedom

The Evolving Regulation of the Media in Europe as an
Instrument for Freedom and Pluralism

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Abstract

European regulation of the media is influenced by the economic regulation of networks, contents, and e-commerce, to which it is very close. However, media regulation has one peculiar differentiating characteristic: it cannot concentrate only on market competition, as the rest of modern economic regulation does, but has to pursue other fundamental values. In particular, media pluralism and media freedom emerge as policy goals that are essential for democracy and human rights in Europe. In this paper, we discuss the EU's search for a point of equilibrium in Member States' resistance to the relinquishing of their power in the sector; we describe the current debate, and suggest some possible directions for development.

Keywords

Regulation, media pluralism, media freedom, AVMSD, national regulatory authorities, EU Treaties, single market.

JEL: K20, K23, L50, L82

Introduction

Today, the European Union plays a significant role in the “media sector” in general. The media industry is a significant part of the EU’s comprehensive effort to liberalize and harmonize markets throughout Europe, adopting a modern and pro-competitive economic principle-based form of regulation.

The EU regulates electronic communications (Parcu & Silvestri, 2013), aspects of the audio-visual sector¹, technical aspects of information services and electronic commerce² and, in addition, specific rights’ regulations that are relevant, such as those on data protection and copyright.³

Nonetheless, media are different from other contiguous economic activities, as all communication media, and mass media in particular, are an extremely sensitive topic for political and democratic debate. A consistent stream in theoretical and empirical research on political economy, mostly developed during the last 15 years, has concluded that media scrutiny is important for political accountability, media pluralism is important to avoid media capture and, most importantly, that voting outcomes are significantly affected by the media.⁴ Media health therefore counts for the health of our democracies.

In this paper we examine how European intervention has moved between more consolidated instruments for market harmonization and liberalization and a tension to strengthen the EU’s control over a much more politically delicate and controversial issue, one that is essential for democracy and human rights: the regulation of media pluralism and media freedom.

The paper is organized as follows: following this introduction, Section 1 describes regulatory media intervention based on competition and specific regulatory choices that have previously been developed in Europe. Section 2, reports the present policy debate on media pluralism and media freedom and illustrates approaches to interventions recently put forward by the Commission. Section 3 proposes some ideas and institutional features through which the efforts to ensure a greater presence of the European voice in the evolution of media pluralism and freedom in Member States may be pursued in the future. A brief conclusion follows.

1. Media in Europe between competition and specific regulation. A brief overview

The intervention of the European Union in the media sector has developed in recent decades driven mainly by the need and the aim to foster a single market for media services (Mastroianni, 2011a). The opening of the television market to different operators (with the consequential end of national monopolies), the need to face international competition and to protect consumers throughout Europe in a similar manner, as well as the extraordinary evolution of audio-visual and communication services caused by the spread of the Internet, have laid the foundation for strong European intervention in this field, which is traditionally managed only through national policies.

¹ Directive 2010/13/EU of the European Parliament and of the Council, 10 March, 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-Visual Media Services Directive - AVMSD). See also Valcke & Lefever, 2012.

² Directive 2000/31/EC of the European Parliament and of the Council, 8 June 2000, on certain legal aspects of information society services, in particular, on electronic commerce in the Internal Market.

³ Besides regulation, the European Commission carries out many other interventions to foster the sector (e.g., Media program (see also the “New creative Europe programme 2014-2020), online content and media literacy initiatives, the protection of European cultural interests at the World Trade Organization, etc.).

⁴ See Pratt & Stromberg, 2011, for a thorough review of this literature.

In regard to the specific characteristics of and content delivery by the media industry, the European Commission has had a say in the application of the rules on the financing of public media broadcasting and only recently tried to reopen a new policy perspective on media pluralism and media freedom, although these so far consist mainly of “soft law” interventions, since national governments remain reluctant to fully expand the EU competences on these issues (see *infra* and CMPF Policy Report, 2013).

The European Union’s legislative action in the media sector can be read as a sort of three layered intervention: on network and network services, on content, and, on a complementary basis, on services that are neither electronic communication services, nor audio-visual services. This distinction is a regulatory answer to the development of the technology and is a way to govern and exploit the potentials of the abundance of new communication networks and network services and, finally, to cope with the so called “media convergence” that allows different networks to distribute the same content.

The first layer, certainly the most developed, relates to electronic communication networks. As the “Framework Directive” on electronic communications, Directive 2000/21/EC, explicitly states, one of the rationales of the liberalization, privatization and harmonization of the electronic communication sector is the network’s regulatory neutrality: a concept that can be interpreted as the separation of the regulation of transmission from the regulation of content of any nature.⁵ In this regulatory framework, the “electronic communications package” of 2002, which aimed to realize a competitive market in the telecommunications sector, does not cover content regulation in services delivered over electronic communications networks, such as broadcasting content, financial services and certain information society services, that are covered by other EU “legislation”, *in specie* the Audio-visual Media Service Directive (2010/13/EU) and the Electronic Commerce Directive (2000/31/EC)⁶.

Nonetheless, as mentioned by the “Framework directive”, “[t]he separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection”. However, it is clear, in the intention of the Commission and in agreement with Member States, that the electronic communications package is not the instrument by which to pursue these other goals.

The second layer, and the main “ingredient”, of the overall European media policy is, then, audio-visual media services regulation. Broadcasting has been falling – at least for certain aspects- under the EC Treaty umbrella since a 1974 European Court of Justice judgment (the *Sacchi* case).⁷ According to ECJ case-law, in fact, broadcasting must be interpreted as a “service” covered by the Treaties’ discipline: “*In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. [...] It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.*”⁸.

⁵ Whereas 5 of Directive 2000/21/EC: “The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework”.

⁶ Whereas 9 and 10 of directive 2002/21/EC. Information society services are covered by Directive 2000/31/EC on certain legal aspects of information society services, in particular, electronic commerce in the internal market. Most of the information society services are not covered under the scope of the “framework” directive because “*they do not consist wholly or mainly in the conveyance of signals on electronic communications networks...The same undertaking, for example, an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.*”.

⁷ European Court of Justice, Case 155-73, *Giuseppe Sacchi*, 30 April 1974.

⁸ For a more detailed analysis see CMPF Policy Report, 2013)

The Television without Frontiers Directive (TWFD) of 1989 relied on this definition and aimed to create a common market in broadcasting, a sector that was (and still is) crucial for national political equilibria and was therefore reluctantly delegated by the Member States to European regulation. The Directive intervened in many aspects of broadcasting services regulation, introducing the important country of origin principle, namely, that broadcasters can only be regulated in the country of transmission and not in the country or countries of reception. It also introduced a minimum standard of harmonization by imposing some obligations on broadcasters, such as the promotion of production and distribution of European works, quantitative and qualitative limits on the transmission of advertising and sponsoring, the protection of minors and public order, and the establishment of a right of reply. The Directive did not regulate media pluralism as such, a competence that the Member States still prefer to maintain at the national level (CMPF, Policy Report 2013).

To date, after two revisions of the TVWF Directive (in 1997, Directive n. 36, and, in 2007, Directive n. 65) aiming to tailor new rules for novel forms of technology for video services, the European Union has developed a new specific regulatory policy on “television and television-like contents”: Directive 2010/13/EU, the so-called Audio-Visual Media Service Directive (AVMSD).

This Directive, however, is simply a straightforward evolution of the previous regulation on broadcasting services and tries to take into account the different and new ways by which audio-visual contents are available to the general public, harmonizing some aspects of the regulation of both traditional (linear) and non linear (on-demand) audio-visual services.

The path that led to the approval of this directive has not been smooth, as the distinction between linear and non-linear audio-visual service was (and still is) quite debatable. It was difficult to assess common criteria to define when a service is similar to broadcasting and when it is, instead, closer to an information society service, for instance. A European Court of Justice case in 2005, *Mediakabel*, provides an example of the subtle difference between broadcasting and general information society services’ regulation and clarifies the terms of the debate that led to the second revision of the TVWF Directive. Asked whether a near video-on-demand was a broadcasting or an information society service, the Court held that “*a service comes within the concept of “television broadcasting” if it consists of the initial transmission of television programs intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment*”.⁹

The AVMSD adopts the technology neutral approach of the Court of Justice - the same rationale as the Electronic communication package mentioned above - and goes even farther in respect of the case law of the Court, as it assumes that most on-demand services (broadcasting-like non-linear services) fall under the scope of the Directive itself.¹⁰ The assumption of the Directive is that linear and non linear audio-visual media services need a common core regulation because they compete for the same audience, and the nature and the means of access to non-linear services would reasonably lead the user to expect regulatory protection within the scope of the Directive. “*In the light of this and in order to prevent disparities as regards free movement and competition, the concept of “program” should be interpreted in a dynamic way taking into account developments in television broadcasting*”.¹¹

⁹ European Court of Justice, case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, 2 June 2005.

¹⁰ Article 1 of the Directive defines the characteristics of AVMS: a service, defined according to article 56 and 57 of the TFEU, which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audio-visual media service is either a television broadcast or an on-demand audio-visual media service. An audio-visual commercial communication is an AVMS.

¹¹ Whereas 24 of Directive 2010/13.

The Directive enshrines basic principles of the internal market, such as free competition and equal treatment, to ensure transparency and predictability in markets for audio-visual media services and to achieve low barriers to entry.

At the same time, acknowledging that audio-visual media services are as much cultural services as economic services, the AVMSD lays down harmonized rules to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, the protection of minors, and consumer protection, and to enhance public awareness and media literacy (which are considered to be core principles of European regulatory audio-visual policy). The latter rules are considered to be justified in the light of the growing importance of audio-visual media services for society, democracy - in particular, by ensuring freedom of information, diversity of opinion and media pluralism - education and culture (see AVMSD, Recital 5 and CMPF, Policy Report 2013).

Finally, a sort of third layer of European media regulatory policy can be found in the Directive on Electronic Commerce, Directive (2000/31/EC), particularly in the articles on the liability of the Internet's intermediaries that can be seen to be completing the rules set by other Directives. This directive helps in understanding how the services, similar to television-like services, but not falling under the AVMS Directive, are regulated. Notwithstanding that it was drafted to cope with the need to regulate the responsibility of intermediaries for basic Internet services (those that are merely conduit, caching and hosting services), the Directive, in fact, can be applied to "hybrid situations", as are user generated content, e.g., videos offered by on-line versions of newspapers, and those related to Internet intermediaries, aggregators and other platforms that enable the diffusion of (frequently audio-visual) contents, but do not have any editorial responsibility for the content transmitted and that fall neither under the scope of the AVMS Directive nor under the Electronic Communications Framework¹².

In fact, if the application of the AVMSD covers mass media-like services, it "*...should exclude [. ..] all services the principal purpose of which is not the provision of programmes, i.e., where any audio-visual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audio-visual elements only in an ancillary manner, such as animated graphical elements, short advertisements or information related to a product or a non-audio-visual service*".¹³

A review of the EU's policy intervention in the media industry would be incomplete without at least a mention of the role played regarding the "regulation" of public service broadcasting (PSB) and, nowadays, by public service media (PSM). Public service broadcasting has been a particularly central feature of Member States broadcasting systems: at least in the Western States of the European Union. The PSB model has functioned as a safeguard for pluralism, both during the monopoly period and also after, during the liberalization of the broadcasting market.

In Europe, even if it is a national regulatory choice, the role of PSB has been stressed on many occasions¹⁴. As a service of economic general interest, it is covered by Article 106 (2) of the TFEU, as interpreted by the 1997 Amsterdam Protocol on Public Service Broadcasting. The Protocol, having defined the system of public broadcasting in the Member States as "*directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism*", states that the

¹² See, for instance, the recent European Court of Justice, case C 360/10, Sabam vs Netlog, where the Court takes for granted that a social network platform, such as Netlog, that stores information provided by the users of that platform, relating to their profile, on its servers, is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31. According to EU legislation (*in specie* e-commerce directive, directives 2001/29 and 2004/48 on copyright read together), an injunction made against a hosting service provider which requires it to install the contested filtering system is precluded.

¹³ Whereas 22 of the AVMSD. Clearly, the definition also excludes any form of private correspondence, such as e-mails sent to a limited number of recipients, since this cannot be compared to a mass media communication.

¹⁴ For a detailed list of documents and acts, see CMPF, Policy Report 2013.

European Treaty will not prejudice the competence of Member States to provide for PBS funding “insofar as such funding is granted to broadcasting organizations for the fulfillment of the public service remit as conferred, defined and organized by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account.” So, while recognizing the pro-pluralistic role of the national systems of public-service broadcasting and while stressing the national competence in regulating its organization and funding, the Protocol imposes some limits on the national-funding system, according to European rules.

As a consequence, the European Commission has played an important role in interpreting the Protocol. With two principal Communications (2001 and 2009), the Commission has defined a set of guidelines and rules which it follows while deciding state-aid cases in the public-service broadcasting domain. The guidelines of the two principal Communications and “case law”, developed over more than 10 years, are the way in which the Commission transparently expresses its reasoning while assessing the previous criteria of judgment, it is a matter of fact that the Commission has provided useful and, *latu sensu*, binding guidance for the Member States while they are planning and shaping their public-service broadcasting systems (see Donders & Pauwels, 2008, and CMPF Policy Report, 2013).

More recently, the Commission has devoted a particular interest to public service in the new media and its financing. As many public-service operators have developed Internet services and platforms, the Commission has stated that public service broadcasters should be able to take advantage of the opportunities offered by digitization and Internet-based services to benefit society by offering services on all platforms, although it must not distort competition or disproportionately affect the market. The Member States must consider whether significant new audio-visual services provided by public service media fulfill the conditions of the Amsterdam Protocol in serving the democratic, social and cultural needs of society, without having disproportionate effects on trading conditions and competition in these new markets.¹⁵

In synthesis, the EU has regulated, through a very detailed framework, the working of its electronic communications networks, while it has been obliged to reach a compromise with Member States’ prerogatives in the scope of its intervention in respect of content regulation. It has addressed, by a series of Directives, some aspects of video services and electronic commerce, influencing also the development and reach of public broadcasting services, but had to abstain from a more pervasive and systematic intervention. In particular, pluralism and media freedom have essentially remained a national issue to be entrusted to the constitutional traditions of single countries. However, as we will see in the next section, the debate on this compromise result has not stopped.

2. Media pluralism and media freedom: from the “three step approach” to the current policy debate

As mentioned above, the media sector is politically very sensitive as it involves several issues that relate to fundamental freedoms including, listing the most important, freedom of expression, freedom of information, access to information, privacy, and, of course, pluralism. The specific regulatory policies aimed at creating harmonized European markets, and their influence on the protection of media pluralism and media freedom in single countries, have also been a highly debated topic at the European level, as it has been a recurrent concern of the European Parliament, of interest groups, professional institutions and civil society.

The main claims, mostly addressed to the European Commission, that ask for European intervention on these issues, are related to the need to fight processes of media concentration and to

¹⁵ See CMPF Policy Report, 2013 and the literature quoted therein.

foster the right of citizens to receive information from diverse and independent sources, to re-affirm the role of PSBs, to impede the unequal representation of minorities in the media and excessive pressure from advertisers, and also to foster journalistic independence against political influence (Klimkiewicz, 2009).

The European Parliament has been, and is, the most active forum in drawing attention to the issue of media pluralism at the level of European institutions, but it cannot act directly to start a legislative initiative. In recent decades, and on many occasions, the Parliament has invited the Commission to take action and to promote clear measures to foster media pluralism, to initiate legislative acts on media freedom, on media ownership, on pluralism and independent governance of the sector, both at national and European level, in order to stress the democratic nature of both the European Union and the European media landscape, and to intervene in problematic cases that interest individual Member States.

In 2007, the European Commission tried to answer the requests posed by the European Parliament initiating what was called “*a three step approach*” on media pluralism, proposed by Commissioner Reding and Vice-President Wallström.

As a first step, the European Commission published a Staff Working Document (SEC(2007)32, 16 January) on “Media Pluralism in the Member States of the European Union”. The document provides an overview of the meaning of media pluralism, and underlines the different levels of commitment – from the EU and the Council of Europe - to preserve and foster it, but argues against a European legislative initiative on pluralism, as the various consultations undertaken have led to the conclusion that it would be inappropriate. However, in the same document, the Commission stressed the need to monitor media pluralism in Member States.

The second step in the approach was a study launched by DG INFSO (now DG CONNECT) with the aim of clarifying and advancing the debate on pluralism. This study, carried out in 2009 by the University of Leuven, the Central European University, Jönköping International Business School, Ernst & Young Consultancy, Belgium, and subcontractors in all Member States, aimed to define a set of indicators and a monitoring tool that could be useful in “measuring” threats to pluralism in the Member States¹⁶.

The third step should have been a Communication of the Commission based upon the outcome of the Media Monitor indicators study. However, the Media Monitor was not tested in practice and the Communication was never issued.

The Commission’s strategy changed under the new Commissioner and Vice-President Kroes: in October, 2011, she appointed a High Level Group (HLG) of experts on Media Pluralism and Freedom, with the mission of analyzing and providing recommendations on the main issues around the topic. In December, 2011, she established the EU Media Futures Forum, chaired by Christian van Thillo, CEO of the De Persgroep, to reflect on the impact of the digital revolution on the European media industries and on ways in which the policy framework for European media industries could be improved. In the meantime, she initiated the Centre for Media Pluralism and Media Freedom (CMPF) at the Robert Schuman Centre for Advanced Studies at the European University Institute of Florence, with the long-term mission of accompanying the process of European integration on media pluralism and freedom, and the short-term mission of developing a policy report on European Union competences on media freedom and media pluralism.

¹⁶ “Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach”, April 2009. Available at: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/pfr_report.pdf

The Media Futures Forum, which could be interpreted as a voice for the European media industry on the needs for reform, was the first to deliver a report in September, 2012¹⁷ providing the industry's perspective on the situation in the media market. According to this, the media industry needs more competition, but there are at least eight bottlenecks that hamper the effective development of a digital market in Europe. The Report's list of the bottlenecks to be overcome included: the incomplete digital, internal, single market in Europe, barriers to developing new business models (i.e., especially on the different limits among EU and US companies for the collection and processing of personal data), disagreement on ways to share remuneration (i.e., in the treatment of copyright), fragmented support policies in the audio-visual sector, the lack of a level playing field, barriers to entry into new markets (calling for a redefinition of the relevant markets), consumers' unequal access to content and under investment in infrastructures.

Specifically, the industry lamented the disparity between players in the European and the global markets and between companies in the electronic communications, audio-visual and print sectors; but also between similar services, depending on whether they operate online or offline. These differences result from "*the existence of different rules and regulatory asymmetry, and the different enforcement of existing legislation related to advertising, taxes, copyright, competition and privacy in various countries and sectors*". Between the two scenarios of policy suggested by the report to the Commission, the one the Forum prefers is the "pro-active" one, *vis-à-vis* the "wait and see" attitude to market developments. The Forum calls the EU and the Member States to develop and implement an ambitious strategy to foster a true single market in the media sector.

The report of the High Level Group, issued in January, 2013¹⁸, is more focused on a strategy to foster media pluralism and media freedom in the EU. It gives a list of recommendations, some strictly linked to internal market functioning (from harmonization of media legislation to the establishment of independent authorities); some related more to the role of journalists and policies on media literacy that the European Union should enact in order to foster media pluralism.

On the instruments to use to reach the suggested improvements, the report affirmed that the EU should be considered competent¹⁹ to act to protect media freedom and pluralism so as to guarantee the substance of EU Citizens' rights granted by the Treaties, in particular, the rights to free movement and to representative democracy.²⁰

European competences on media freedom and media pluralism are the focus of the CMPF Policy Report, issued at the beginning of February, 2013 (see CMPF Policy Report, 2013). The report highlights the importance of media freedom and pluralism in the functioning and legitimacy of a democratic regime, then offers an updated review on the media pluralism debate measurement and also analyses the major aspects of media economics and ownership. The report's legal core examines the debate on the legal basis for a EU intervention, concluding that, according to the Treaties, the EU does not have an explicit competence on media pluralism and media freedom, but only a scattered residual one, and aims to suggest how the legislation in force could be used or improved in order to foster media freedom and pluralism more efficiently..

¹⁷ "Fast Forward Europe – 8 solutions to thrive in the digital word", September 2012. Available at: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/forum/report.pdf.

¹⁸ "A free and pluralistic media to sustain European democracy", January 2013. Available at: http://ec.europa.eu/information_society/media_taskforce/pluralism/hlg/index_en.htm.

¹⁹ In this regard, see also the CMPF Policy Report, 2013.

²⁰ Two consultations on the report were opened by the Commission from 22/03/2013 to 14/06/2013: one on the independence of the audio-visual regulatory bodies, and another on the Independent Report of the High Level Group on Media Freedom and Pluralism.

The debate on media pluralism was recently re-activated by the European Parliament with the Resolution 21 May 2013 on the EU Charter: the standard settings for media freedom across the EU²¹. This resolution, while underlining the importance and urgency of annually monitoring media freedom and pluralism in all Member States and reporting on a yearly basis on the matter, suggests “*that the Commission, the Fundamental Rights Agency and/or the EUI Centre for Media Pluralism and Media Freedom must carry out this task and publish an annual report with the results of the monitoring*” and that the Commission itself should present that report to Parliament and the Council, making proposals for any actions and measures arising from its own conclusions on the report²².

3. Moving forward: a regulation for an evolving environment

3.1 Harmonization and completion of legislation

The search for regulation suitable to the present converging environment, in which the distinction between network regulation and content regulation is becoming everyday less clear, has been conducted by the Commission in parallel to the search for its space of intervention in the presence of a strong resistance from Member States to losing sovereignty in an area traditionally reserved for national policies. In this section, we explore the most interesting prospects for finding robust solutions and we discuss some of the options that are available.

The development of new media services, mostly those provided via the Internet, poses new immediate regulatory challenges because its influence is ubiquitous and it is changing the electronic communications and media industry in profound ways.²³ The Internet world is impacting not only on the present “network” regulation (i.e., policies on bandwidth, on Next Generation Networks, on network neutrality, on universal service definition and scope) but also on the “content” regulation (editorial responsibility among Internet operators, which subject can be assimilated to an audio-visual operator, how to cope with hybrid situations, how to gauge the level and measure of concentration on media markets).

Moreover, even the boundaries between regulations are blurred and affected in the debate on the right to access to information, as questions like the introduction of broadband within the universal service obligations, in the electronic communications framework, or the recognition of access to Internet as a new fundamental right.

Considering the type and the strength of the economic subjects that characterize the new media industry, the rise of giant companies that operate in a *quasi* monopolistic situation in some segments of the Internet, poses new and old problems: a) the correct definition of the relevant markets on the Internet; b) the need to preserve or restore effective competition on these Internet markets; and, insofar as these companies affect media and information, c) the need to re-open discussion on how to cope with potential threats to media pluralism. While the conflict among traditional telecommunication operators and media from one side, and the new large Internet native companies, ranges around many issues, the most heated at present are the financing of network investments and a level playing field on privacy data for advertising. It is clear that the “*winner take all*” model that prevails in several Internet segments creates serious and specific concerns for pluralism in all areas where the mass media are involved (CMPF Policy Report, 2013).

²¹ Renate Weber rapporteur: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0203&language=EN&ring=A7-2013-0117>.

²² In September 2013, the Commission awarded a grant to the CMPF to conduct a pilot-implementation of the 2009 Media Pluralism Monitor <http://cmpf.eu.eu/News/All/131015MediaPluralismMonitor.aspx>

²³ See Parcu & Silvestri, 2013.

As mentioned in the previous section, European Institutions have, in the past, developed a specific regulatory and only partially market-oriented policy on the audio-visual sector. This policy is today showing clear signs of age, as it is already out of date vis-à-vis media convergence and the development of new hybrid audio-visual services and, as a consequence, it is no longer effective in coping with those legitimate exigencies that relate both to the better functioning of the single market and to the “constitutional” respect for freedom of expression and pluralism.

In fact, the literature notes that a great number of services now “fall outside of the scope of the AVMS Directive: personal websites or non-commercial blogs are excluded, as the concept is confined to economic activities.” This potentially creates different treatments between similar services, such as, “online editions of newspapers or magazines, radio services [which are] are not targeted”. “Nevertheless, they determine the growing extent to which information will reach the end-user [...] (we can, for instance, think about the growing concern for the hidden manipulation exercised by certain search engines)” (Valcke et al. 2008).

Finally, the development of these new platforms, applications and technologies opens new perspectives in assessing the definitions of audio-visual media themselves and the threats to media freedom and media pluralism: from the responsibilities of intermediaries to the regulation of “content blocking” procedures, which brings us back to the role of major global Internet companies in respect of the fundamental rights of European citizens (CMPF Policy Report 2013).

The urgent need for a forward looking policy in the media sector was also recently acknowledged by the Green Paper “*Preparing for a Fully Converged Audio-visual World: Growth, Creation and Values*”, issued by the Commission.²⁴ The green paper opened a consultation for all kinds of digital stakeholders in order to start a broad, public discussion on the implications of the on-going transformation of the audio-visual landscape and media convergence, in particular on market conditions, interoperability and infrastructure, and their implications for EU rules.

In regard to the regulatory assets of media policy, many commentators have recently stressed that, in the digital sector, a true single market is still very distant, since there are too many internal barriers that hamper its effective creation.²⁵ Probably the first reform that the EU media regulatory policy will face in the near future is a profound revision of the AVMS Directive, which has not only been surpassed by the technological developments in audio-visual services in the Internet era, as discussed above, but this appears to be largely incomplete in its coverage of issues.²⁶

It is probably that a first implication will be the need to harmonize many more rules in the media market than happens today. This has been asked for, for instance, by the conclusions of the Media Futures Forum’s Report, which calls for the establishment of a true single market, at least around taxation, personal data and copyright regulation. The idea of the report is that regulation must be updated to create a harmonized situation in Europe, but with the view of creating a level playing field for operators, not only for EU companies, but also to face competition from non-EU operators. The question of how a change in regulation alone can supply at a delayed innovation of business models, from traditional EU companies remains to be seen, however.

More specifically, in regard to media pluralism, European regulatory policy has been, and continues to be, closely related to media freedom and media pluralism’s major issues. Member States

²⁴ COM (2013) 231 final <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>.

²⁵ In fields that are strictly related to the audio-visual sector, as well as to media freedom and pluralism, such as electronic communications, harmonization based on the internal market arguments is pushing on the respect for common rules through the establishment of *ad hoc* authorities shaped by European directives and forming a sort of multi-level European administration. On this point, see both the Van Thillo report and the HLG report.

²⁶ A recent study demonstrates how the application and the interpretation of the criteria that assess the definition of AVMS is getting difficult and similar cases are treated in different manner by the national regulatory bodies that are asked to implement the Directive (Valcke et Al., 2014).

have recently, albeit reluctantly, agreed in some limited cases to relinquish part of their “sovereignty” on specific topics in order to embrace a European regulation as they have faced the internationalization of markets, privatization of broadcasting and the need to safeguard the citizens-users of television services. The application of the rules of the EC Treaty on the free circulation of goods and services and the principle of mutual recognition have first opened the broadcasting systems to competition; then harmonization of legislation has brought a European legislation that in many cases involves the regulation of topics that, as already mentioned, were originally jealously kept in the national legal realm: beside the television services, commercial advertising, protection of minors, the right of reply, copyright and electronic communications can be listed (Mastroianni 2011a).

Again, from a *de iure condendo* perspective, the European Union could act incisively on the regulation of fields where media freedom and media pluralism are involved by setting a level playing field for market operators and common standards for the circulation of goods and services in the single market by harmonizing the relevant national rules.²⁷ As has previously been mentioned, the audiovisual sector has already been partially harmonized through the argument of the internal market in Directive 89/552/EEC and its revisions. Within its limited application in the media sector so far, the harmonization approach has operated in a positive way, as it has widened the possibility of access to different content and to sources of information for the citizens/users and has strengthened the citizens’ rights vis-à-vis media operators.

Recently, the High Level Group on Media Freedom and Pluralism have acknowledged that, “*ever since the creation of the Single Market, the EU has been legislating on all aspects of cross-border trade in services and goods, including media products*” and it proposes that “*common and uniformly-enforced rules*” for instance, on libel, as a harmonized framework could prevent phenomena like “*libel tourism*”. It is clear how the single market approach can be used, where it is not explicitly excluded by the Treaties, in all cases where differences between Member States can be demonstrated to hamper the proper functioning of the common internal market.²⁸

In this field, there are different cases of EU intervention that address limits to the internal market due to the lack of harmonization in national legislation relating to cultural and constitutional issues, rather than only to the economic ones.²⁹ According to this line of reasoning, a possibility for European Union intervention could be the harmonization of different legislation at the national level that deals with media pluralism, for instance, regulating media ownership and media ownership transparency in the broadcasting sector.³⁰

More generally, however, the issue of media concentration should be seen in the light of technological developments, the definition of the Internet’s relevant Internet markets and the debate on how the new abundance of (distribution of) content sources is effectively countering media concentration. Recently, some trends towards concentration can be observed in the new media markets also and thus the issue of introducing ownership thresholds is clearly still at stake. Eventually, thresholds should take into consideration the substitutability of traditional and new markets (CMPF, 2013), and consequently the clear definition of relevant markets that is based on robust antitrust principles, which is at present lacking, seems to be a most urgent task. Probably, as has already happened in the area of network regulation, the conclusion of some important anti-trust interventions

²⁷ Some authors affirm that the cases where they were applied, gives evidence that the approximation of legislation (Articles 53(1) and 114 TFUE (former Article 47(1) and 95)) was used to intervene on sensitive sectors, (see Mastroianni, 2011a).

²⁸ See HLG on media freedom and pluralism, 2013 par. 2.3: besides libel law, taxation, financial subsidies, data protection, see also Media Future Forum Report.

²⁹ An example is the AVMS Directive intervention with regard to the protection of minors, the right of reply, and the promotion of EU productions, see Mastroianni, 2011a.

³⁰ Such action was recently requested by the European Citizens’ Initiative and was proposed by the coalition “European Initiative for Media Pluralism”.

related to major Internet companies' market behaviors may lead to the elaboration of new principles and provide a track for the shaping of future regulation in the media sector.³¹

3.2 Principles-based regulation as an instrument for freedom and pluralism

It has now been widely recognized, and recalled above, that the co-existence of different and unharmonized national legislation is often quoted as an obstacle to the creation of the internal single market in the field of media also. However, in the field of media regulation, it may be suggested that the internal market argument, even if sufficient, may not constitute the best legal basis for the EU's pervasive intervention.

If this is the case, EU action may be considered to be based on Article 352 TFEU that says : "*If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers*" the Council acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures." In media regulation, among other relevant objectives set out in the Treaties, one might think of the protection of human rights ex Article 6 TUE and, even more closely, of the active and informed participation of EU citizens in the European elections ex Article 22 TFUE. This kind of intervention, however, would require a unanimous vote from the Council, implying the agreement of all Member States.

Another solution, although certainly not one that is easier to implement, is the amendment of the Treaties in order to deal with the lack of direct and explicit competencies that is also indicated by the CMPF report as a limit to effective possibilities for action. Article 48 of the Treaty of the European Union introduces different revision procedures for the Treaties. As we are dealing here with the competencies of the European Union, the ordinary procedure would apply (Paragraphs 2 to 5 of the Article). Although it is well known that, due to the strict conditions foreseen, a revision of the Treaties would be difficult to implement, this possibility cannot be excluded *a priori*.

This idea, to introduce two very 'high' principles into the Treaties, one principle being directly related and finalized to protecting media pluralism against political intromission, and the second finalized to intervene on the configuration of the media enterprise, with the aim of protecting media freedom against unacceptable economic influences, can be derived from the example of the historical success of competition protection through very general principles included in the Treaties. In the case of competition, the affirmation of high principles in the fundamental law of the Union, leaving practical actions for protection to *ex-post* interventions of the Commission and NCAs, under the guidance and control of the European Court of Justice and the other Courts, has worked so well as to mean that the EU is recognized to be at the world's forefront for the openness of its markets.

In regard to the possible content of a Treaty revision, it is clear that the major threats to media pluralism and freedom, even in the era of the Internet, can arise from two sources: the intromission of political power and/or that of private economic power. A significant proposal would therefore be to add two new general principles to the Treaties - in particular to the Treaty on the Functioning of the European Union – to introduce the protection of media pluralism and media freedom precisely against the two identified threats.³²

A first principle could affirm that: "*It is forbidden to create or maintain a dominant position in media markets*". The introduction of a similar norm would express a much more restrictive approach to dominant positions in the case of the media industry and markets than the TFUE imposes for all other economic markets. Indeed, the general principle, contained in Art 102 of the TFEU, is that the

³¹ See the Commission's ongoing proceedings on the "Google case".

³² Similar general principles were hinted at in the CMPF Policy report.

EU allows dominant positions, except when acquired through mergers, and only forbids their abuse. In relation to the specific case of the media, the proposed norm would be more severe in prohibiting any dominant position, independently of how it was reached, thus preserving the pluralism of the media in every circumstance. In the case of dominant positions already existing at the time of adoption, a truly protective principle, in its practical implementation, would require timely dismantling.

The second principle could intervene directly on the economic organization and distribution of the rights of the ownership and/or of the governance of the media enterprise, foreseeing some special safeguards. The principle could simply establish that “*Governments and economic forces cannot exercise any undue influence on media undertakings*”. This statement would require the statute of any media company to protect its capacity to choose an editorial line independently from the indications of politics or of the economic interests, even of the owners. This could really constitute a general principle that could later be developed and defined by the Courts, and finally by the CJEU, through a progressive development of case law that would indicate which institutional assets and practical behaviours are considered acceptable, and which are not.

On both high principles, the Courts’ interpretations would be built and refined on the basis of the general principles governing the European Union, the general principles of the Treaties, the Charter of Fundamental Rights, the European Convention on Human Rights, the activities of the Council of Europe, and the already existing case law of the European Court of Human Rights, over time.

3.3 Institutional independence and the role of peer review

In the previous paragraphs we have affirmed that the regulation of the media sector appears obsolete and in need of major repair and significant integration. We then hinted of the eventuality, specifically for the needs of protection of media pluralism and freedom, that the present instruments be strengthened by the introduction of some high principles in the European Treaties as a general guidance for Member States’ behavior.

In this section we will briefly examine the role of the National Regulatory Authorities and the Courts today and, in the eventuality of a regulatory and legal change such as the one we are suggesting. In fact, rules and even laws are never sufficient to themselves, as one has always to consider which instruments are available in order to foster their effective implementation and enforcement.³³ Possible organizational models of integration of NRAs can be found in the multilevel governance of the national independent authorities, linked to the Commission, or to another *ad hoc* body, but this would require the establishment of a harmonized framework for NRAs in the audio-visual sector.

If a role in shaping European media policy is to be played by national regulatory authorities (Barzanti, 2012)³⁴ the first problem is: how is their effective independence from internal political and economic powers and their co-ordination within the EU ensured. Excluding the full delegation of operational powers to a supranational body, like the Commission, there appear to be two decisive elements to pursuing this goal: a) strong institutional independence of the national authorities in their own country, and b) peer review among Member States with oversight from the Commission. Both these ingredients are necessary in order to have a system of NRAs that can be trusted with the governance of fundamental rights, like the ones under analysis.

³³ This possibility is also indicated in the HLG report: “*Another area where there is a need for some degree of harmonisation is in defining the composition and role of regulators*”. The HLG continues by underlining that “*It should be noted that regulators exist only for audio-visual media, but not for the press sector, which is subject to self-regulation. If a regulator were to cover all media, it should be specified that its role has to be different according to each kind of media.*” HLG report, 2013, sect. 2.3.

³⁴ On this issue, see Barzanti, 2012.

In addition, the AVMS Directive does not ensure an instrument for the audio-visual environment³⁵. The Directive simply acknowledges the existence and role of national independent regulatory bodies and asks them to co-operate amongst themselves and with the Commission.³⁶ This means that, beside the need to deeply revise and enlarge the Directive that we discussed above, better co-ordination and exchange of ‘case-regulation’ should be fostered between the national audio-visual governing bodies in order to develop common-standard interpretations and ensure consistent enforcement of present or future Directives.

The lack of harmonization between regulatory bodies in the media sector is particularly blatant if compared to the closely related intervention on networks, where the Electronic Communications Package, according to the provisions of the Framework Directive of 2002, as amended in 2009 by Directive 140/2009, establishes that all relevant national regulatory authorities must own a number of strong institutional requirements that are finalized to affirm and protect their independence and effectiveness. The most important ones relate to independence vis-à-vis market players and the obligation for NRAs to take all reasonable measures to achieve certain policy objectives and regulatory principles.³⁷ These institutional requirements include that Member States protect NRAs against external intervention or political pressure that may be liable to jeopardize their independent assessment of cases.³⁸

The AVMS Directive, on the contrary, does not introduce any specific obligation for Member States, nor does it provide any firm guidelines on the structure, functioning or role of those national bodies or about the relationship between them. This *lacuna* appears particularly evident, and even surprising, when we consider that the AVMS Directive regulates issues which are very sensitive in the

³⁵ The comparative analysis developed by the MEDIADEM project “highlighted a significant degree of fragmentation in the formulation and implementation of media policies, including where common rules are available through EU legislation or the case law of the CJEU and ECtHR.” The project calls for a better “Pan-European co-ordination of regulatory approaches, use of soft law and exchange of best practices as a key to a more integrated Single Market for media services”

³⁶ Article 30 “Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.” However, see also Art.29 that establishes a Contact Committee under the aegis of the Commission. On this point, the MEDIADEM report policy recommends: “The full potential of the existing public regulatory authorities is not yet exploited as co-ordination among them and also between the supranational and national level is limited, or in few cases completely lacking. One of the Comparative Reports analyses this issue in depth and suggests that this goal could and should be achieved through a stronger role of the European Platform of Regulatory Authorities (EPRA), which could play a pivotal role in co-ordinating horizontally with the Contact Committee established under the Audio-visual Media Services (AVMS) Directive and the Body of European Regulators on Electronic Communications (BEREC).” Available at: http://www.mediadem.eliamep.gr/wp-content/uploads/2012/11/EU_CoE_matrix.pdf.

³⁷ The NRAs that controls the networks must also comply with a number of specific requirements, such as the transparency of their competencies, budgetary independence and adequacy, the ability to resolve disputes, the availability of a sufficient level of enforcement for their decisions and a right of appeal against them. A number of these requirements were reinforced by the 2009 Directives, which *inter alia* aim to eliminate any possibility of political interference with NRA’s day to day duties, as well as offering protection against arbitrary dismissal for the head of an NRA. See, INDIREG report 2011, p.334.

³⁸ However, whereas 13 of Directive 140/2009 states: “The independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework. For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors.”

democratic process and for fundamental human rights, as they deal with audio-visual services and mass media and, therefore, with media freedom and media pluralism.

Furthermore, it must be noted that the importance of having fully independent bodies to regulate the media sector is also growing in line with the economic and legal issues raised by new technologies. For instance, one of the hot topics relating to Internet is finding effective alternative dispute resolution procedures to solve copyright infringements in the online environment. It is clear that only truly independent authorities could be entrusted to decide on cases where important legal rights are at stake.³⁹

If independence is an absolute necessity for regulators entrusted with the protection of fundamental rights, the peer review of decisions and co-ordination among Member States and the Commission appear to be other essential elements that are missing from the present institutional assets of media regulation in Europe. As mentioned above, a structured exchange of information and the practices of the different NRAs could result from a consistent application of the AVMSD all over Europe, considering that in all Member States national regulatory authorities are facing a difficult task in assessing the nature of new media services (Valcke, 2013). A special benefit, from a joined action of the different national authorities in sector, could be represented by the progressive establishment of a common and shared definition of relevant media markets in the on-line environment.

Particularly in an era of convergence, it could be both valuable and reasonable to establish Audio-visual strong institutional requirements for the independence of NRAs, co-ordination with the Commission and peer review of the kind foreseen in the Electronic Communications Package in any future Audio-visual regulation. Such rules, without necessarily requiring *per se* the EU's direct competency in media pluralism and freedom, could help to develop common guidelines and soft regulation on this issue and to shape the regulatory developments in the audio-visual market in a way that is common to all Member States.

However, especially if a set of high principles, as discussed above, were to be introduced into the European Treaties to protect media pluralism and media freedom, one might be able to accept a lighter form of co-ordination among the Member States and with the Commission. For instance, a much leaner model for national authorities' co-ordination, in respect to the very detailed procedures imposed by the Electronic Communications Package, with the presence of an intermediate body, BEREC, interposed between the national regulator and the Commission, can presently be found in European competition law.⁴⁰ In this area, the peer review system is applied through the detailed exchange of information that has been built in the European Competition Network. Within the network, the Commission and all national competition authorities receive detailed information about presumed violations of European competition law, they decide what is the best level of intervention and which is the Authority that is best positioned to cope with the infringement, and, finally, they exchange comments on each other's enforcement initiatives.

The ECN solution works well because the action of all national competition authorities is based on the common principles that are spelled out in Articles 101 and 102 of the TFUE, but also because NCAs have a high degree of independence within their institutional national environment. This last requirement, therefore, appears, in any case, to be necessary to reach a level of protection for media pluralism and media freedom that is sufficiently reliable in all Member States.

Besides direct regulatory action, and also as an instrument of control over it, there is a growing and specific role that could be played for media pluralism and media freedom by the European Court of

³⁹ On this issue it is interesting that the reform of Article 1 of the Framework Directive provides that: "Measures taken by Member States regarding end-users access' to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law."

⁴⁰ See Art.11 of COUNCIL REGULATION (EC), 1/2003, of 16 December 2002.

Justice, jointly with national Courts, and, indirectly, with the European Court for Human Rights of Strasbourg, starting at “case level” and creating a sort of “constitutional basis” for the direct or indirect validity of multilevel scrutiny (CMPF Policy Report 2013). Already today, after the Charter for Fundamental Rights (Art.11) acknowledges media pluralism (CMPF, Policy Report 2013), the European Court of Justice, through a case by case process, could pave a common path in order to try to approach similar cases in a similar manner and, consequently, to interpret the existent legislation through common fundamental principles. This could also be extremely useful, especially in the definition of new media⁴¹: as the case law could favor the diffusion of common standards in interpreting the AVMSD definitions and interpreting media pluralism and media freedom in an evolving environment.

The introduction into the Treaties of the kind of explicit and direct high principles in defence of media pluralism and freedom that we previously discussed, would obviously need a much enhanced role for the Courts in applying, interpreting and filling them with content, always through concrete case law application.

4. Conclusions

The evolution of technology and markets in electronic communications and media is putting pressure on traditional regulation in Europe. Both the sophisticated economic regulation of networks and the more *ad hoc* and partial regulation of content and media, are under pressure, as the era of the Internet is challenging business models and modifying players’ hierarchies. Furthermore, in the regulation of mass media, the presence of other fundamental rights to be protected, besides competition and efficiency, like pluralism and freedom, re-proposes old doubts and conflicts in new forms. In this rapidly evolving contest, the European Commission is trying to find workable solutions in respect of Member States’ long-term resistance to relinquishing sovereignty on media and audio-visual policy.

From the results of a series of recent reports, all edited for the Commission, that we have summarized, the Van Thillo report, the HLG report and the CMPF Policy Report, it is now clear to most scholars and to policy makers that the AVMS Directive is, in several respects, largely obsolete and, in any case, severely incomplete. However, when the issue is not only how to favor markets’ development and competition, but also how to pursue fundamental rights, like pluralism and freedom of the media, the solution probably requires an even deeper reform than the necessary revisions of this Directive.

In this work we have underlined two other directions of change that appear largely interconnected. Firstly, the EU could look for few broad high principles and enshrine them in the Treaties, leaving then to the CJEU and other national courts, as was done with competition law, the duty to fill the gaps through the development of a rich case law. Secondly, whatever improvements are upon for audio-visual and media regulation, they should include a rigorous strengthening of the independence of national administrative bodies and their co-ordination in some form of peer review, among themselves and with the Commission, to ensure a common European implementation of regulation in the drive towards a single common market.

⁴¹ O of the sectors where Courts are currently playing an important role is in the definition and regulation of network intermediaries, see, for instance, European Court of Justice, Case Sabam vs Netlog C-360/10.

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