

Challenges of Regulating Media Pluralism in the European Union: the Potential of Risk-Based Regulation

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Abstract

The European Commission in its Working Document of 16 January 2007 acknowledged a necessity to closely monitor media pluralism. This article elaborates on the instrument and accompanying methods that have been developed as a starting point for such monitoring exercise: the EU Media Pluralism Monitor. It discusses the monitor's potential and limits in the light of the various politico-cultural, economic, legal and regulatory challenges with which the European Union is faced in the area of media pluralism. It argues that the EU Media Pluralism Monitor can be a first step towards a risk-based regulatory model that would be fit to regulate modern media markets in Europe.

Keywords

Media pluralism, diversity, regulation, monitoring, Europe.

Resum

La Comissió Europea va reconèixer en seu document de treball de 16 de gener de 2007 la necessitat de monitorar de prop el pluralisme als mitjans. Aquest article explica en detall els instruments i els mètodes d'acompanyament que s'han desenvolupat com a punt de partida per exercir aquest monitoratge: el monitor de pluralisme als mitjans de la UE (Media Pluralism Monitor). Analitza el potencial i els límits del monitoratge a la llum dels diferents desafiaments politicoculturals, econòmics, jurídics i normatius amb què s'enfronta la Unió Europea en matèria de pluralisme als mitjans. S'argumenta que el monitor de pluralisme als mitjans de la UE pot convertir-se en un primer pas cap a un model de regulació basat en el risc que s'ajustaria a la regulació dels mercats moderns de mitjans a Europa.

Paraules clau

Pluralisme als mitjans, diversitat, regulació, monitoratge, Europa.

Introduction

While there is broad consensus in Europe about the importance of media pluralism for democracy and identity formation, there are still widely diverging views on how to regulate the issue. The EU Member States have different cultural, political and regulatory traditions, which explain the sometimes contrasting approaches towards media pluralism. But above all, media pluralism itself is a complex and multidimensional concept, which has been interpreted in varying ways in different times, geographies, contexts and policy circles. This “clash of rationalities” – as Klimkiewicz calls it – is further polarised by the ambiguous impact that recent technological and economic developments have on media pluralism. Not surprisingly (especially in the light of the failed attempt to harmonise national media concentration rules in the nineties), the European Commission has taken a prudent stance on media pluralism in recent years. In its Working Document of 16 January 2007, it emphasized that it would not be appropriate to submit a Community initiative on pluralism, but, at the same time, acknowledged a necessity to closely monitor the situation. The first section of this article discusses the various politico-cultural, economic, legal and regulatory

challenges with which the European Union is faced in the area of media pluralism. The second section zooms in on the issue of monitoring and describes the instrument that has been developed as a starting point for such monitoring exercise: the EU Media Pluralism Monitor. The third section formulates some concluding remarks.

1. Challenges to EU Media Pluralism Regulation

a. Diverging Politico-Cultural and Normative Approaches

Policy documents and literature have drawn the attention to different aspects and dimensions of the notion of media pluralism. Not only is media pluralism approached at a number of layers,² it is also interpreted through conceptual dichotomies or alternatives, such as external/internal, proportional/open, organized/spontaneous, polarized/moderate, evaluative/descriptive or reactive/interactive/proactive (Klimkiewicz 2009; McQuail 1992; Van Cuilenburg and Van der Wurff 2000). Most comprehensively, the notion of media pluralism has been elaborated by the Council of Europe and its advisory committees. Recommendation No. R (99) 1 on Measures to Promote Media Pluralism,

which was adopted by the Committee of Ministers in 1999, describes, in its Explanatory Memorandum, the notion of media pluralism “as diversity of media supply, reflected, for example, in the existence of a plurality of independent and autonomous media (generally called structural pluralism) as well as a diversity of media types and contents (views and opinions) made available to the public”. It also stresses that “both the structural/quantitative and qualitative aspects are central to the notion of media pluralism” (Council of Europe 1999).

This frequently drawn distinction between “external ‘plurality of autonomous and independent media’” and “internal ‘diversity of media contents available to the public’” corresponds – to some extent, but not completely – with the two major normative approaches that come to the fore in national and European policy discourses, as well as social science literature: the neo-liberal marketplace of ideas model, on the one hand, and the neo-Habermasian public sphere approach, which contains the notion of unifying public discourse, on the other hand. Both models rely on very different rationalities when interpreting diversity and pluralism as media policy goals. While the former is based on competition and freedom of choice, the latter emphasizes a broader defence of ‘principled pluralism;’ an attempt to serve the society in its entirety with various political views and cultural values (Karppinen 2009: 15).

This dichotomy can also be understood in terms of regulatory approaches to media diversity: the competition or market approach, endorsing economic regulation to prevent market failure, and the interventionist or public regulation approach, involving an active media policy. The first approach equates diversity with freedom of choice and defends the viewpoint that diversity is best achieved when people can freely enter the ‘marketplace of ideas’ without any governmental constraints, a concept based upon classical economic market theory. The second approach relies on a different interpretation of diversity, highlighting the importance of various political views and cultural values, the support of which may require state intervention, but which may also be achieved through a range of complementary regulatory approaches, including co- and self-regulation (Grisold 1996; Karppinen 2006; Puppis 2009).

Klimkiewicz convincingly argues that this regulatory divergence – asymmetry, as she calls it – is not exclusively rooted in a dichotomy between ‘pro-market’ (deregulatory or negative measures) and ‘market-correcting’ (regulatory or positive measures), or a dichotomy between economic and political/cultural objectives. The dividing line stems from two different ways of perceiving and conceptualizing media networks in a context of larger societies or political systems, resulting in two different standards of rationality: one seeing the media as an increasingly politically autonomous and differentiated system, playing a central role in a process of competitive globalization; the second perceiving the media as a part of a deliberative democratic system (Klimkiewicz 2009: 65-66). In their influential work, Hallin and Mancini also identified stable connections between media systems and political systems, showing that politico-cultural

traditions have a major influence on the way media develop and function, and how their role is viewed in society (and vice versa; Hallin and Mancini 2004).

As Klimkiewicz (2009) illustrates, both national and European institutions have pursued different aspects and dimensions of media pluralism over different periods and in different policy settings (for instance, ‘cultural diversity’ through audiovisual policy measures, ‘media plurality’ through ownership and competition rules, ‘internal pluralism’ through public service broadcasting and state aid rules, etc.). Even the European Commission itself has evolved significantly in its approach towards media pluralism, resulting in different centres of gravity in media policy-making at EU level. These different (and in many aspects conflicting) ways of looking at media pluralism problematization led to ‘seesaw’ efforts to introduce and abandon media pluralism regulatory measures at the European level (Klimkiewicz 2009). These will be further discussed in the next section.

b. A Precarious Legal Basis

While the Council of Europe and the European Court of Human Rights have a strong and consistent tradition in the promotion of common standards for media pluralism (which they regard as a prerequisite for the human right of freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights), the attitude of the European Union towards media pluralism has been far more precarious. EU media policy in general has, ever since the late 1980s, when the first Television without Frontiers Directive was adopted, been characterised by a strong tension between the need for harmonisation in certain areas and the subsidiarity principle (Craufurd Smith 2004a: 19; Holmes 2004: 169). For some more culturally and politically sensitive aspects of media regulation, EU Member States have traditionally tried to limit harmonising initiatives by the European legislator, referring to the subsidiarity principle in order to retain maximum powers within the national competence. This has especially been the case in the area of media pluralism.

Whereas the protection of media pluralism has been a recurrent concern of the European Parliament, inviting the Commission on several occasions to propose concrete measures to safeguard media pluralism (European Parliament 1992, 1994, 1995, 2004, 2008a, 2011), the European Commission has taken a much more prudent stance on the issue, especially since the failed attempt to launch a harmonisation directive on pluralism and media ownership in the mid-1990s (European Commission 1992). The matter was so divisive that the Commission never formally adopted a proposal (Hitchens 1994; Iosifides 1997; Doyle 1997 and 1998). This demonstrated the need for a balanced and realistic approach that would take into account the specificities of media markets in the various Member States. The successive enlargements of the European Union, during which Central and Eastern European countries - characterised by relatively young media markets and intense media reforms - have joined, has further diminished the feasibility and appropriateness of a uniform approach to media pluralism.

The Commission itself has emphasised on a number of occasions that “the protection of media pluralism is primarily a task for the Member States” (European Commission 2003). There is, however, considerable potential for the Union to support and, where necessary, supplement the Member State measures regarding media pluralism. Even though the Founding Treaties do not provide expressly for EU action to guarantee media pluralism, there are a number of legal bases on which such action might be founded (Craufurd Smith 2004b). Fundamental rights, including the freedom of expression (to which media pluralism is inherently linked) have been considered by the Court of Justice as core principles of the European legal system; hence, the EU institutions are expected to respect these rights when exercising their powers and competences conferred upon them by the Founding Treaties. In 2000, the European Parliament, Council and Commission explicitly committed to respecting media pluralism via the proclamation of the Charter of Fundamental Rights of the European Union, which states in its article 11, alinea 2 that “the freedom and pluralism of the media shall be respected”. Article 167 (4) Treaty on the Functioning of the European Union (ex-Article 151 (4) EC Treaty) also obliges the Union to “take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.” It should be noted, however, that this provision does not provide a solid basis for EU legislation on media pluralism. Scholars have highlighted its dual nature, at the same time underlining the subsidiary nature of the Union’s role in the area of culture and constituting a potential basis for action (Craufurd Smith 2004: 49-78).

Consequently, when adopting measures that affect the media sector on the basis of, for instance, EU competition and merger control rules, or for the completion of the internal market, the EU institutions should at least take into account media pluralism, but can also directly or indirectly support media pluralism in the Member States. This explains and justifies measures like the cultural quota in the Audiovisual Media Services Directive (Articles 13, 16 and 17),³ the MEDIA programmes, references to media pluralism in internal market instruments and in the Merger Control Regulation,⁴ and cultural considerations under other competition rules. The electronic communications directives, for instance, refer at several instances to media pluralism as a general interest objective that should be taken into account in the context of network regulation in Europe (see, for instance, Articles 8(1), 9 (4) and 18(1) and Recitals 5, 6 and 31 of the Framework Directive).⁵ Article 21(4) of the Merger Control Regulation explicitly refers to the plurality of the media as a legitimate interest that can justify the review by a Member State of a proposed merger, approved by the Commission. Even though the EU competition rules (both the antitrust rules in Articles 101-102 Treaty on the Functioning of the European Union and the merger control rules) leave less and less scope for taking into account non-economic considerations (as was occasionally done in the past; Valcke, 2004; Ariño, 2004), it is usually acknowledged that competition law indirectly contributes to

media pluralism by keeping markets open and competitive, by preventing undue concentration of markets, and by remedying abusive behaviour.

During the preparatory work on the Audiovisual Media Services Directive, which was adopted in 2007, the issue of media pluralism came again to the fore. In the consultation process leading to the directive, a workshop session on media pluralism was organised at the Liverpool Audiovisual Conference.⁶ The idea of increased monitoring sprang out of this session, giving birth to the so-called “Three-step approach for advancing the debate on media pluralism across the European Union”, which was announced by the then Commissioner Viviane Reding and Vice-President Margot Wallström in January 2007.⁷ The approach, of which the first two steps (a Commission Staff Working Paper and an independent study on indicators for media pluralism) were completed by the end of 2009, focused not on regulating, but on monitoring, as a means to enhance transparency and to enable a more concrete and rationalised debate on media pluralism. Towards the end of her previous mandate, Commissioner Reding made it very clear that she considered a harmonising directive on ownership inappropriate in a period of structural change (Reding 2009). A number of economic and technological developments indeed lead to a radical restructuring of the media sector and challenge traditional state measures. As will be discussed in the next section, the impact of these developments on media pluralism is often ambiguous. According to the Commission, this necessitates a solid analysis of the situation before adopting any measures (that might otherwise stifle innovation), explaining the need for a monitoring tool that does not exclusively focus on ownership, but also covers combinations of political and media power. The second part of this article will further elaborate on this monitoring tool.

c. Ambiguous Impact of Economic and Technological Developments

It is a truism to say that technological innovations are reshaping the media landscape at great pace. The rise of the Internet, the emergence of wireless technologies, the arrival of digital convergence, the proliferation of devices to access and consume media content, as well as the unprecedented lowering of the threshold to media content production, promise bright prospects for a free and unhampered flow of diverse and pluralistic information around the globe. Internet-based technologies widen participation in the public sphere, involving citizens not only as consumers but also as producers of media content. Such forms of participative media, citizens’ journalism or user-generated content provide alternative public fora for (and often a counterbalance to) the vested media. Both academic and non-academic works refer to the “blogosphere” as a gauge of public opinion. At the same time, new intermediaries (such as Internet search engines) unlock vast amounts of information to which citizens would never have had access in the analogue world. But, these new technologies and the media transformations they produce have also triggered renewed concerns over media

pluralism. An increasing number of scholars are exposing the ambiguous impact of new media and new actors on the free flow of diverse information. In that sense, the changes we are currently witnessing in the domain of the media, are not different from most other technological changes sweeping through our economic, social, and political landscape: they present not only opportunities but also challenges (Verhulst 2007), and promises for enhanced media pluralism are coupled with perils. Concerns over spectrum scarcity are replaced by concerns over digital gateways (Helberger 2005), Internet filtering (especially triggered by massive Internet censorship in some parts of the world, think of the “Great Firewall of China”) and (often hidden) manipulation by search engines (van Eijk 2006). Technologies may increase the ability of individuals to look for and acquire content of their choice (and even to contribute themselves), but provide no guarantee that they will actually choose to select and consume pluralistic content (Helberger et al. 2010). A steady stream of jeremiads about individualization and fragmentation of the public sphere, the potential of the Internet to promote “cybercascades” of like-minded opinions that foster and enflame anti-democratic discourse (Sunstein 2001), and recently also about the detrimental impact of user-generated content on professional journalism (attacking the rise of the “amateur”, see for instance Keen 2007) urge caution in revising media policies. Observers of media markets see the mavericks of yesterday turning into the dinosaurs of tomorrow, engaging in similar monopolistic behaviour as the traditional media players (Google/YouTube serving as a paragon in this regard).

This explains (at least partly) why states and regulators are reluctant to loosen the regulatory reigns. In its Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, the European Parliament urged for caution in revising media policies in the light of new technologies:

“whereas new technologies, and in particular the shift to digital technology for the production and dissemination of audiovisual content and the entry on the market of new communications and information services have significantly influenced the quantity of available products and means of dissemination; whereas, however, a quantitative increase in media and services does not automatically guarantee content diversity; whereas new updated means of ensuring media pluralism and cultural diversity and the provision of prompt and objective information to the public are therefore necessary; [...] whereas, however, respect for pluralism of information and diversity of content is not automatically guaranteed by technological advances, but must come about through an active, consistent and vigilant policy on the part of the national and European public authorities; whereas, while the internet has greatly increased access to various sources of information, views and opinions, it has not yet replaced traditional media as a decisive public opinion former.”

In the United Kingdom, for instance, the House of Lords in 2008 clearly expressed its resistance to give up regulation of media ownership (“We do not accept that the increase of news

sources invalidates the case for special treatment of the media through ownership regulation”; House of Lords 2008). More recently, Ofcom found that the acquisition of BskyB by News Corp would operate against the public interest and advised the Secretary of State to refer the case to the Competition Commission for a full second stage review.⁸ Based on a static analysis of the effects of the proposed acquisition, Ofcom concluded that the takeover would negatively affect the existence of a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences. The loss of plurality that would result from the transaction could not be compensated, according to Ofcom, by an increase in multi-sourcing (or the use by consumers of multiple sources of news) and the use of online sources of news. It found that, today, online news tends to extend the reach of established news providers as opposed to favouring the use of new outlets that are not present on traditional media (Ofcom 2010).

Since the line between “creative destruction” (Schumpeter 1975) and “disruption” (Christensen 1997) is often a fine one (Verhulst 2007), decision-makers tend to settle with the old solutions, rather than experiment with new regulatory tools. The following section looks at a number of alternative regulatory models that have been described in the literature or that have been introduced in other sectors.

d. Regulatory Trends

To address concerns over commercialisation of the media, concentration of media ownership and strong links between politics and media, a set of regulatory safeguards has been adopted over time to preserve media pluralism. Regulatory attention has traditionally focused on threats arising from media ownership, resulting in narrowly tailored anti-concentration rules, in combination with specific content obligations and safeguards for editorial independence. These rules are criticized for being an anomaly in an era of media abundance (where basically every citizen can become a media supplier) – they are being called a legacy from the past which should not spill over to the new media context, but to the contrary be lifted as soon as possible. Although media pluralism, as a normative goal, remains unaffected by the recent technological and economic evolutions in the media sector, the regulatory tools with which this goal is pursued, will necessarily have to adapt. Existing legal instruments to promote and safeguard media pluralism are perceived as being rigid and creating an unlevel playing field by solely targeting traditional media players. They are said to erect disproportionate barriers to expansion and hinder undertakings to fully reap the benefits of economies of scale and scope, to the detriment of economic efficiency and consumer welfare. Many of the rules currently in place still tend to probe in a sometimes relatively simplistic way into concentration of ownership or audience shares.⁹ Not only structural, but also behavioural rules usually focus on single media categories such as linear television – if only for reasons such as that they can be easily monitored or that everybody is used to them. As the boundaries

between print and audiovisual media, and between media, telecommunications and information technology are blurring, the one-dimensional pluralism regulations of today no longer seem to be apt for the dynamic and converging media sector and may even run counter of the public interest reason for which they were once imposed (in casu, preserving media pluralism).

Moreover, there is a broad consensus over the idea that traditional state regulation is losing its grip on cross-border communication networks (not just in the area of pluralism, but also for other policy goals like protection of minors). Shortcomings of such “command-and-control” regulation have been identified also outside the media sector and include instrument failures, information and knowledge failures, implementation failures, motivation failures and capture (Black 2002). This has initiated a quest for alternative regulatory solutions under the form of more decentred co- and self-regulatory instruments (Schulz & Held 2001) or technical solutions (Lessig 2003). The growing complexity of modern society demands for new analytical approaches that can help to improve legal quality and to prevent overregulation that would stifle economic growth and innovation. A number of innovative techniques for law-making and regulation have been suggested (and to some extent explored) over the past years.

In market regulation, evidence-based approaches have been promoted, forcing regulators to consider carefully whether there is a market failure that needs to be addressed and, if so, whether a regulatory intervention is the most appropriate solution. Many European and national decision-makers are now required to underpin their actions on the basis of so-called “impact assessments”, in which they examine the potentials costs and benefits of regulatory options. A second trend is the shift to a more principles-based (instead of rules-based) approach to regulation, i.e. moving away – where possible – from dictating through detailed, prescriptive rules and supervisory actions how firms should operate their business. Thirdly, risk-based regulation – which is about prioritizing activities according to the impact and probability of societal risks, whether for standard-setting or compliance purposes (Rothstein et al. 2006a) – has received growing attention in recent years, with proponents arguing that it facilitates robust governance, contributing to efficient and effective use of regulatory resources and delivering interventions in proportion to risk (hence, maximizing the benefits of regulation while minimizing the burdens on regulatees by offering ‘targeted’ and ‘proportionate’ interventions).

These new regulatory models have been described and critically analysed in academic literature (Rothstein et al. 2006a and 2006b; Black 2008), but usually focus on financial and insurance sectors, health care and safety, and environmental policy (where these models first emerged). The electronic communications sector in Europe has some experience with a market / evidence-based approach since the adoption of the 2002 regulatory package, while risk-based approaches to decision-making are currently being promoted more widely in a number of countries to help improve regulatory efficiency across policy

domains (e.g. in the United Kingdom, but also in Australia, New Zealand and Canada).

Although the exploration of risk strategies in the domain of media is still premature, there are some good reasons to consider risk-based regulation in media as a means to overcome the shortcomings of existing regulatory models and processes which triggered “Better Regulation” or “Modernising Government” agendas. This will be further elaborated in the next section.

2. Addressing the Challenges

a. Risk and Regulation

Risk is increasingly emerging as a key organizing concept for regulatory regimes and extended governance systems within a wide range of policy domains and institutional settings (Beck 1992; Rothstein et al. 2006b). While risk science has produced significant results in determining criteria and strategies for managing dangers and hazards in the domains of finance, insurance, technology (e.g. nanotechnology), natural science and medicine (i.e. areas where risks can be measured in quantitative terms like financial figures or physical performance), its application to societal problems (e.g. ageing societies, terrorism, extreme weather conditions) is still in its infancy. It requires substantial interdisciplinary efforts to understand and assess ‘systemic risks’ in their full complexity (OECD, 2003) and researchers are often confronted with ethical dilemmas that necessitate a broad public discussion. This is equally valid for the use of risk as a method for organizing regulatory activity in the contemporary media sector, which is characterized by its dynamic and global nature and constantly conflicting values (individual freedom of expression versus the public interest in diversity; free speech versus protection of minors; quality standards versus commercial freedom; public service versus undistorted competition; consumer protection versus freedom of commercial communication; artistic freedom versus human dignity; right to information versus privacy...).

Applying risk management to media regulation may at first sight seem like an unorthodox idea, but it can bring the following benefits: regulation would remain open for new developments and innovative solutions in spite of its fundamentally normative character; it has the potential to adapt itself to very different sets of circumstances (like the media landscapes of the 27 EU Member States) and it can take into account the complexity of factors contributing to or undermining media policy goals (in our case media pluralism). As Karstens (2008) stated:

“Risk-based regulation might well turn out to be very appropriate in order to assist with the integration of diverging political philosophies within the EU. This rather open approach raises much more complicated issues with auditability – i.e. checking on whether the agreed-upon standards are, indeed, met – than the classical, deterministic way of regulation. While the conventional approach, which in its core is designed to reduce uncertainty, lends itself to relatively simple control measurements

[...], risk-based regulation requires a much more differentiated set of criteria to be applied. [...] Rather than merely containing hazards, flexible risk-based regulation aims for sustainability and self-healing powers in the complex structures of civil society.”

An important prerequisite for the adoption of a risk-based regulatory approach towards media pluralism is the existence of a wide and strong evidentiary basis for defining priorities and actions. Enhancing the auditability or ‘quantifiability’ of media pluralism requires a uniform, robust and holistic monitoring mechanism, which is currently lacking in Europe. As stated earlier, the European Commission has paid increasing attention in recent years to monitoring systems as a solution to the growing need for more transparency and concrete data in a fast developing media landscape. With monitoring, it intends to ensure a more substantive, evidence-driven debate, able to pinpoint real concerns and lay to rest misplaced fears (de Cockborne 2009). This involves the development of new measurement tools, enabling decision makers to detect risks to a diverse and pluralistic media offer in a more objective and concrete way. As part of its aforementioned three-step approach to media pluralism, the Commission ordered a major study on “Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach”, with the aim of developing a risk-based monitoring tool for media pluralism.

b. The EU Media Pluralism Monitor

The Media Pluralism Monitor that was developed throughout this study is described in detail in the report and its annexes (ICRI et al. 2009), and has also been presented in our article in *Journal of Media Law* (Valcke et al. 2010). The following sections will therefore focus on those aspects which are of particular relevance in the light of the challenges which were discussed in the first part of this article, and will explain how the monitor’s design and functionality attempt to address those challenges.

i. Risk Assessment

A specific feature of the EU Media Pluralism Monitor (MPM), that distinguishes it from existing monitoring mechanisms,¹⁰ is that it adopts a risk-based approach for assessing pluralism across the Member States. The preference for such approach over alternative systems based on, for instance, achievements, objectives, best practices or benchmarks, has to do with the purpose for which the MPM is developed, namely – quoting the Terms of Reference for the study – to find approaches that will “define and help manage the societal threat to pluralism”. The MPM is consequently built as an instrument that detects risks to pluralism and shows the underlying causes, so that policy makers can take informed decisions when setting priorities and shaping policies. The goal of the MPM is not to regulate (*supra*), but to collect data in a more systematic way; it offers a powerful instrument for guiding policy initiatives towards a more evidence-based and risk-based approach, ensuring that regulation is applied only where it is needed, hence, avoiding over-

regulation. A risk-based approach was also considered more appropriate to capture the breadth of issues relating to media pluralism, and more suited for an application of the MPM at the level of individual Member States. In contrast to a benchmarking approach, the MPM does not require a simultaneous EU-wide implementation.

Consequently, the MPM attempts to incorporate strategies for risk detection and management. It places the identified indicators (which will be described further) in a risk-analytical framework, with values indicating more or less endangerment of pluralism. This approach had a fundamental impact on the design of the MPM by shaping the reflection on and the formulation of indicators. The ways in which indicators are formulated, measured and evaluated, always start from the question: What situation could possibly represent risks or threats to media pluralism?

This does not imply that opportunities for enhanced media pluralism, resulting, for instance, from new technologies, have been disregarded. The MPM includes indicators on, for example, broadband coverage (which can be seen as offering a new distribution channel) and on-demand services (which increase the scope for diversity and narrow-interest content). In line with the methodology and format used for the other indicators, these indicators have also been formulated in terms of threats – low broadband coverage representing high risk, for instance, which in this case is synonymous to a lost opportunity. This approach is fully compatible with the acknowledgment of the positive contribution that may derive from new media technologies and platforms. Given the need for sufficient evidentiary means to properly assess their role, the MPM takes a cautious, rather than a conjectural approach to their inclusion. Prudence in this respect, which is predicated on the volatility of these market and the lack of adequate data, both of which make an assessment of their contribution to pluralism difficult, does not imply ignorance, however. To the contrary, in order to safeguard robustness and completeness of the MPM, regular updates are necessary and must be taken into account in designing the MPM. This will allow for the introduction of appropriate measures as these become available.

ii. Holistic Diagnosis of Media Pluralism

Developing a monitoring tool for media pluralism implies that there is a minimum level of common understanding about the notion of media pluralism itself. Does the aforementioned “clash of rationalities” render a standardised monitoring tool for EU Member States an illusion? According to some scholars, who view the concept of media pluralism in itself as an object of political contestation, subject to continuous processes of social negotiation, any attempt to reach ‘pluralistic consensus’ within the EU should be regarded as suspicious and undesirable (Karpinen 2009).

However, the Media Pluralism Monitor starts from the hypothesis that it is feasible to search for general and substantive criteria to measure risks to media pluralism (hence, not the actual

level of media pluralism) and to develop tools for the empirical assessment of diversity in the media sector, without jeopardising the multi-faceted and normative character of media pluralism. In order to be compatible with the varying approaches towards media pluralism in Europe, the monitor fulfils two important conditions. The first is that the tool offers a sufficient degree of sophistication and does not exclude relevant dimensions or aspects of media pluralism. Restricting the tool to only ownership issues, or limiting the analysis of content diversity to political viewpoints only, or leaving out certain media types, would skew the assessment of media pluralism. The second is that the tool is confined to providing a diagnosis of the situation, but does not attempt to prescribe any specific remedies.

Comprehensiveness

While an analysis based on one particular aspect of media pluralism, or limited to a specific category of media products, may be appropriate in the context of the assessment of an individual case under competition law or sector regulation,¹¹ the general audit that the MPM aims for should be based on differentiated sets of criteria. In its three-step approach towards media pluralism, the European Commission itself describes media pluralism as a concept that embraces a number of aspects, such as diversity of ownership, variety in the sources of information and in the range of contents available in the different Member States. It advocates an approach which takes into account a wide range of factors and which combines indicators covering pertinent legal, economic and socio-cultural considerations (European Commission 2007).

Starting from the observation that there are also fundamental similarities in media pluralism standards put forward especially by the European Parliament and the Council of Europe, the Media Pluralism Monitor adopts a broad notion of media pluralism which is inspired by policy documents of those institutions. Following those documents, it takes the viewpoint that, in mature democracies, media pluralism encompasses political, cultural, geographical, structural and content related dimensions. It also recognises that media of all types – public service, commercial and community media – play important roles in creating pluralism and that a range of media types and channels (or titles) are a prerequisite for providing pluralism. Hence, it distinguishes the following risk domains: media ownership and/or control, media types and genres, political pluralism, cultural pluralism, geographic pluralism and a basic domain which assesses general factors that have an important impact on pluralism, notably freedom of expression, independent supervision and media literacy. In each of these risk domains, a number of risks have been identified which are assessed through one or more of the following indicators:

- (1) legal indicators to measure the presence and effectiveness of policies and legal instruments that support pluralism in Member States;
- (2) socio-demographic indicators to measure the range of media available to citizens in different Member States in the

light of socio-demographic factors, like geographic location, social class, age and gender, and to define different types of media markets from an end-user perspective;

- (3) economic indicators to assess the range and diversity of media, looking at the supply side and economic performance of the media, such as the number of media companies and concentration and profitability ratios.

Furthermore, those indicators cover the various stages of the media value chain, in particular supply, distribution and use.

In other words, the monitor takes a holistic approach, not only measuring ownership and concentration, but also other restrictive forces, and examining not only external pluralism but also aspects of internal pluralism. While ensuring that indicators provide the most objective basis possible, it endeavours to combine quantitative and qualitative indicators in order to account for the various aspects of media pluralism. In response to the criticism – voiced especially in the United States, following the FCC's proposal for a diversity index (Howley 2005) – that reducing pluralism to quantitative measurements fails to account for the complexities of the media landscape and substitutes mechanical devices for serious analysis of media power, it also leaves scope for qualitative analysis of results.

Diagnosis, No Therapy

The results obtained via the scoring of the different indicators – 166 in total – need careful interpretation for which the User Guide, accompanying the MPM, offers some guidelines. The Monitor deliberately offers a diagnostic, not a prescriptive tool on the basis of established risk management strategies. Its purpose is to facilitate the collection of empirical data on various risks for media pluralism given the particular economic, socio-demographic and legal situation in each Member State. Although producing useful pointers towards the areas in which action is needed, the tool as such does not prescribe specific remedies or actions for particular risk profiles. Thus, while it 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. The study throughout which the monitor was developed clearly had not as its objective to propose a harmonised definition of media pluralism, nor to formulate a specific normative approach. 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.

It should be stressed that the monitor also offers a realistic solution to the problem of reconciling the demands of comparability between Member States with the need to take national specificities into account: while applying an identical set of indicators to all countries, it is at the same time designed to accommodate

the diverging profiles of media landscapes throughout the EU by considering differences in market size, media development, and cultural and regulatory traditions. It includes a so-called 'ex-ante profiling' functionality, through which it can account for the impact that underlying realities such as population size and average income levels have on the level of media pluralism sustainable by commercial means (Valcke et al. 2010).

3. Concluding remarks

Skeptics have criticised the Commission's three-step approach for being a very (too) soft approach to the issue of media pluralism and have called it a means to quiet the demands of the European Parliament and the likes of the European Federation of Journalists who continue to call on the Commission to take action on the issue of media pluralism (Komorek 2009). One cannot deny that indeed, so far, the three-step plan has not yielded any concrete results. Despite great anticipation and much hope about the third step – a Commission Communication on concrete indicators and a possible follow up study that would systematically apply the indicators to all EU Member States – the new Commissioner for the Digital Agenda, Mrs. Neelie Kroes, has not yet announced any initiative going in that direction. Not surprisingly, in its recent Resolution of 10 March 2011 on the media law in Hungary, the European Parliament has, once more, called on the Commission to take action against worrying developments regarding media freedom and pluralism in a number of Member States. It urges the Commission: "to act, on the basis of Article 265 TFEU, by proposing a legislative initiative pursuant to Article 225 TFEU on media freedom, pluralism and independent governance before the end of the year, thereby overcoming the inadequacies of the EU's legislative framework on the media, making use of its competences in the fields of the internal market, audiovisual policy, competition, telecommunications, State subsidies, the public-service obligation and the fundamental rights of every person resident on EU territory, with a view to defining at least the minimum essential standards that all Member States must meet and respect in national legislation in order to ensure, guarantee and promote freedom of information and an adequate level of media pluralism and independent media governance."

It is highly unlikely that the Commission will respond to this call with a legislative initiative for a directive on media freedom and pluralism. As discussed in this article, there are a number of challenges, such as diverging normative approaches and regulatory cultures, lack of a solid legal basis, or fast technological and economic developments, which may be (too) difficult to overcome.

A more realistic approach could be the implementation – with the support of the European Union, possibly coordinated by the European Audiovisual Observatory, and in cooperation with the national media regulators – of the Media Pluralism Monitor. As

argued in this article, the monitor provides a tool for auditing media pluralism that highlights areas of current and potential risk and allows for the comparison of situations and responses adopted. It is designed to accommodate the diverging profiles of media landscapes throughout the EU by considering differences in market size, media development, cultural and regulatory traditions, and takes into account the impact that underlying realities such as population size and average income levels have on the level of media pluralism sustainable by commercial means. The Media Pluralism Monitor can improve the auditability of media pluralism across the Member States and provide decision-makers both in policy and in industry with the means to develop a wider and stronger evidentiary basis for defining priorities and actions in this important area.

As Klimkiewicz (2009) noted, "the fact that media pluralism is rationalized in different ways, and that tension exists between these ways, does not decrease its potential or block the chance for vital policy-making. The important question is, however, whether 'policy bridges' are built between divergent practices rooted in different standards of rationality, and whether they, in consequence, activate media pluralism potential." Being the first instrument that brings together a host of previously disparate concerns to offer a multi-faceted approach to media pluralism, the Media Pluralism Monitor constitutes, in our view, a powerful tool to build such policy bridges...

The text was closed on 1st May 2011

Notes

1. Prof. Dr. Peggy Valcke is full time research professor at KU Leuven, lecturer in media law at Hogeschool - Universiteit Brussel and at the European University Institute (Florence School of Regulation), and visiting professor at the University of Tilburg. She is the current director of the Interdisciplinary Centre for Law & ICT (www.icri.be), which she joined in 1996. In 2006, she was visiting professor at Central European University in Budapest, Hungary, and lecturer in the Oxford/Annenberg Summer School. She is a member of the Flemish Media Regulator and part-time councilor at the Belgian Competition Authority.
2. At the macro level of media systems (media ownership and service structures, entry costs and conditions), at meso level of media institutions (media performance, professional practices, user access and the way the user interacts with the content and services), and at micro level of media contents (Klimkiewicz 2009: 46).
3. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual

media services (Audiovisual Media Services Directive), O.J. [2010] L 95/1. This Directive coordinates Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (O.J. [1989] L 298/23), as amended by Directive 97/36/EC (O.J. [1997] L 202/60) and Directive 2007/65/EC (O.J. [2007] L 332 /27).

4. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. [2004] L24/1.
5. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. [2002] L 108/33, as amended by Directive 2009/140/EC (O.J. [2009] L 337/37) and Regulation 544/2009 (O.J. [2009] L 167/12).
6. Liverpool Audiovisual Conference, 'Between Culture and Commerce', 20–22 September 2005, Working Group 5. <http://ec.europa.eu/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.pdf>.
7. <http://ec.europa.eu/information_society/media_taskforce/pluralism/index_en.htm>
8. Note that Jeremy Hunt, Secretary of State for Culture, did not follow Ofcom's advice. In March of this year, he approved the merger on the condition that Sky News would be spun off into a new company that will remain 39% controlled by News Corporation, but will have a board made up of a majority of independent directors "to ensure editorial independence and integrity in news reporting".
9. An overview of the different criteria and systems that are used to regulate media ownership throughout Europe is given by Valcke (2009).
10. For instance the IREX Media Sustainability Index (<<http://www.irex.org/msi/>>) or the Dutch Media Monitor (<<http://www.mediamonitor.nl>>), see ICRI et al., 2009: 14.
11. Such as the News Corp/BSkyB merger in the UK, which was mentioned earlier, where Ofcom concentrated its analysis of the merger's impact on plurality on news media.

References

ARIÑO, M. "Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps". *Communications & Strategies*, 54, 2004, p. 97-128.

BECK, U. *Risk Society: Towards a New Modernity*. Londres: Sage, 1992.

BLACK, J. *Critical Reflections on Regulation*. Document de reflexió del Centre for the Analysis of Risk and Regulation, LSE DP 4, 2002.

<<http://www.lse.ac.uk/collections/CARR/pdf/DPs/Disspaper4.pdf>> (published in *Australian Journal of Legal Philosophy*, 27, p. 1-35).

BLACK, J. "Forms and paradoxes of principles-based regulation". *Capital Markets Law Journal*, 3, 2008, p. 425-457.

CHRISTENSEN, C. *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*. Cambridge, MA: Harvard Business School Press, 1997.

COUNCIL OF EUROPE (Committee of Ministers). Recommendation No. R (99) 1 on Measures to Promote Media Pluralism (and Explanatory Memorandum), 1999.

<<https://wcd.coe.int/ViewDoc.jsp?id=399303&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>>

CRAUFURD SMITH, R. (ed.) *Culture and European Union Law*. Oxford: Oxford University Press, 2004a.

CRAUFURD SMITH, R. "Rethinking European Union Competence in the Field of Media Ownership: The Internal Market, Fundamental Rights and European Citizenship". *European Law Review*, 29(5), 2004b, p. 652-672.

DE COCKBORNE, J.E. Opening Remarks at the Stakeholder Workshop of the *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*. Brussels, 8 June 2009.

DOYLE, G. "From "Pluralism" to "Ownership": Europe's Emergent Policy on Media Concentrations Navigates the Doldrums". *Journal of Information, Law & Technology (JILT)*, 3, 1997.

<http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_3/doyle>

DOYLE, G. "Towards a Pan-European Directive? From "Concentrations and Pluralism" to "Media Ownership"". *Communications Law*, 1, 11, 1998.

- EUROPEAN COMMISSION. Green Paper on Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action, COM (92) 480 final, 23 December 1992.
- EUROPEAN COMMISSION. Green Paper on Services of General Economic Interest, COM(2003) 270 final, 2003.
- EUROPEAN COMMISSION. Commission Staff Working Document - Media pluralism in the Member States of the European Union, 16 January 2007, SEC(2007) 32.
<http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf>
- EUROPEAN PARLIAMENT. Resolution on media concentration and diversity of opinions, O.J. [1992] C 284/44, 1992.
- EUROPEAN PARLIAMENT. Resolution on concentration of the media and pluralism, O.J. [1994] C 323/157, 1994.
- EUROPEAN PARLIAMENT. Resolution on pluralism and media concentration, O.J. [1995] C166/133, 1995.
- EUROPEAN PARLIAMENT. Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information, O.J. [2004] C 104 E/1026, 2004.
- EUROPEAN PARLIAMENT. Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, O.J. [2010] C 8 E/85, 2008a.
- EUROPEAN PARLIAMENT. Report on concentration and pluralism in the media in the European Union, 2007/2253(INI), Rapporteur: Marianne Mikko, 10 July 2008. 2008b.
<<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2008-0303&language=EN>>
- EUROPEAN PARLIAMENT. Resolution of 10 March 2011 on media law in Hungary; 2011.
<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN>>
- GRISOLD, A. "Press Concentration and Media Policy in Small Countries: Austria and Ireland Compared". *European Journal of Communication*, 11, 1996, p. 485-509.
- HALLIN, D. C.; MANCINI, P. *Comparing Media Systems: Three Models of Media and Politics*. Cambridge: Cambridge University Press, 2004.
- HELBERGER, N. *Controlling Access to Content – Regulating Conditional Access in Digital Broadcasting*. Information Law Series 15, Den Haag: Kluwer Law International, 2005.
- HELBERGER, N.; LEURDIJK, A.; DE MUNCK, S. "User Generated Diversity – Some Reflections on How to Improve the Quality of Amateur Productions". *Communications & Strategies*, 77, 1, 2010, p. 55-77.
- HITCHENS, L. "Media Ownership and Control: A European Approach". *Modern Law Review*, 57, 1994, p. 585.
- HOLMES, J. "European Community Law and the Cultural Aspect of Television". In: CRAUFURD SMITH, R. (Ed.). *Culture and European Union Law*. Oxford: Oxford University Press, 2004, p. 169.
- HOUSE OF LORDS (UK), "Select Committee on Communications. The Ownership of the News" (First Report of Session 2007-2008), 27 June 2008.
- HOWLEY, K. "Diversity, localism and the public interest: the politics of assessing media performance". *International Journal of Media and Cultural Politics*, 1, 1, 2005, p. 103-106.
- ICRI, JIBS, CEU. Ernst & Young [et al.] *Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach (Final Report and Annexes: User Guide, MPM, Country Reports)*. Brussels: European Commission, July 2009.
<http://ec.europa.eu/information_society/media_taskforce/pluralism/study/index_en.htm>
(on-demand printing via Lulu.com: ISBN 978-1-4452-0769-8; ISBN 978-1-4452-2519-7)
- IOSIFIDES, P. "Pluralism and Media Concentration Policy in the European Union". *Javnost The Public*, Vol. 4, 1, 1997, p. 85-104.
- KARPPINEN, K. "Media Diversity and the Politics of Criteria – Diversity Assessment and Technocratisation of European Media Policy". *Nordicom Review*, 27, 2006, p. 53-68.
- KARPPINEN, K. "Making a Difference to Media Pluralism: A Critique of the Pluralistic Consensus in European Media Policy". In: CAMMAERTS, B.; CARPENTIER, N. (ed.). *Reclaiming the Media - Communication Rights and Democratic Media Roles (ECREA Series)*. Bristol: Intellect, 2009.
- KARSTENS, E. "Risk management in media policy: The challenges of diversity". *Magazine of the European Journalism Centre*, January 11, 2008.
<http://www.ejc.net/magazine/article/risk_management_in_media_policy_the_challenges_of_diversity/>
- KEEN, A. *The Cult of the Amateur: How Today's Internet is Killing Our Culture and Assaulting Our Economy*. London and Boston: Nicholas Brealey Publishing, 2007.
- KLIMKIEWICZ, B. "Is the Clash of Rationalities Leading Nowhere? Media Pluralism in European Regulatory Policies". In: CZEPEK,

- A.; HELLWIG, M.; NOWAK, E. *Press Freedom and Pluralism in Europe: Concepts and Conditions*. Bristol: Intellect, 2009.
- KOMOREK, E. "The European Commission's Three-Step Approach to Media Pluralism – A Conduit for the Protection of Expression in the European Union?". *Amsterdam Law Forum*, 2, 1, 2009. <<http://ojs.ubvu.vu.nl/alf/issue/view/15>>
- LESSIG, L. *Code and other laws of cyberspace*. New York: Basic Books, 1999.
- OFCOM. *Report on Public Interest Test on The Proposed Acquisition of British Sky Broadcasting Group Plc by News Corporation*, 31 December 2010. <<http://www.ofcom.org.uk/>>
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). *Futures Project on Emerging Systemic Risks*, 2003 Report, 2003. <<http://www.oecd.org/dataoecd/23/56/19134071.pdf>>
- PUPPIS, M. "Media Regulation in Small States". *International Communication Gazette*, 71, 1-2, 2009, p. 7-17.
- REDING, V. "Europe's Magazines and the new media – way ahead". Speech delivered at the FAEP Gala Reception 'Empowering citizens – the magazine media', Brussels, 7 October 2009, SPEECH/09/452.
- ROTHSTEIN, H.; HUBER, M.; GASKELL, G. "A theory of risk colonization: the spiraling regulatory logics of societal and institutional risk". *Economy and Society*, 35 (1), 2006a, p. 91-112.
- ROTHSTEIN, H.; IRVING, PH.; WALDEN, T.; YEARSLEY, R. "The risks of risk-based regulation: Insights from the environmental policy domain". *Environment International*, 32, 2006b, p. 1056-1065.
- SCHULZ, W.; HELD, TH. *Regulated Self-regulation as a Form of Modern Government*. Working Paper of the Hans-Bredow-Institute for Media Research, 2001. <http://www.hans-bredow-institut.de/webfm_send/38>.
- SCHUMPETER, J.A. *Capitalism, socialism and democracy*. New York: Harper & Row, 1975.
- SUNSTEIN, C. *Republic.com*. Princeton and Oxford: Princeton University Press, 2001.
- VALCKE, P. *Digitale Diversiteit – Convergentie van Media-, Telecommunicatie- en Mededingingsrecht* [Digital Diversity – Convergence of Media, Telecommunications and Competition Law]. Brussels: Larcier, 2004.
- VALCKE, P. "From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods". *Journal of Media Business Studies*, 6(3), 2009, p. 19-42.
- VALCKE, P.; PICARD, R.; SÜKÖSD, M.; KLIMKIEWICZ, B.; PETKOVIC, B.; DAL ZOTTO, C.; KERREMANS, R. "The European Media Pluralism Monitor: Bridging Law, Economics and Media Studies as a First Step towards Risk-Based Regulation in Media Markets". *Journal of Media Law*, 2, 1, 2010, p. 85-113.
- VAN CUILENBURG, J.; VAN DER WURFF, R. (Eds.) *Media and open societies*. Amsterdam: Het Spinhuis, 2000.
- VAN EIJK, N. "Search engines: Seek and ye shall find? The position of search engines in law". *IRIS plus 2006-7*. Strasbourg: European Audiovisual Observatory, 2006. <http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2_2006.pdf>
- VERHULST, S. "Mediation, Mediators, and New Intermediaries: Implications for the Design of New Communications Policies". In: NAPOLI, P.M. *Media Diversity and Localism – Meaning and Metrics*. Mahwah, New Jersey, London: Lawrence Erlbaum Associates, 2007, p. 113-137.