



# Media Pluralism in the EU – Comparative analysis of measurements systems in Europe and US

Steunpunt Media

Katrien Lefever, Ellen Wauters, Peggy Valcke

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## 1 Introduction

Recently, in Europe and elsewhere, we are witnessing a trend towards more evidence-based regulation. Such an approach ensures that regulation is applied only where it is needed. In order to avoid unnecessary and/or inappropriate regulation, it has increasingly been stressed that, before adopting regulation, the questions ‘whether regulation is necessary’ and ‘what to regulate exactly’ are answered in a carefully considered manner. This is particularly important in a fast changing environment, like the media sector, where the Internet and new technologies are radically changing consumption habits and business models. This has led policy makers to shift their attention from regulating to monitoring. In its Working Document of 16 January 2007, the European Commission 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. It commissioned a study to develop a monitoring tool that could enhance the auditability of media pluralism in the Member States. Also at national level, instruments and methods to measure media pluralism have been developed in the previous years. These instruments are seen as giving policy makers and regulatory authorities the tools to detect and manage societal risks in this area and provide them with a stronger evidentiary basis to define priorities and actions for improving media pluralism.

The aim of this deliverable is to analyse different mechanisms to monitor media pluralism. First, this deliverable will elaborate on the (EU) Media Pluralism Monitor which functions like a barometer and starts from a risk-based approach. In addition, the UK Media Plurality Test will be examined, because this test could also provide concrete evidence which can be useful to improve future media policies. This Media Plurality Test looks at the impact of mergers in the media sector on the public interest. Recently, the Media Plurality Test has been applied in the News Corp/BskyB case. Given that this case has forced Ofcom to approach the Media Plurality Test from a new perspective: a shift from the supply side (traditional ownership regulation) to the consumer side (i.e. the way audiences actually consume content)<sup>1</sup>, the News Corp/BskyB case will be used as a case study. Thirdly, the monitoring systems of the Vlaamse Regulator voor de Media and the Conseil Supérieur de l’Audiovisuel (Belgium) will be touched upon. Also, the Dutch Media Monitor will be briefly analysed. We will analyse the German system based on vorherrschender Meinungsmacht and the Diversity index of the USA. We have chosen these particular countries because they reflect attempts to adapt their monitoring systems to the changed media landscape. Also, in some of these countries, such as Germany and the USA, these attempts have been highly criticised.

Before analysing the different measurement tools, the first section will clarify what is generally understood by the notion ‘media pluralism’ in Europe.

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<sup>1</sup> D. Morisi (2011). Measuring media pluralism in the convergence era: The case of News Corp’s proposed acquisition of BSKyB, <http://www2.lse.ac.uk/media@lse/research/mediaWorkingPapers/MScDissertationSeries/2011/74.pdf>, 4.

## 2 Media pluralism: notion<sup>2</sup>

### 2.1. Introduction

Media pluralism is often used as synonym for media diversity. However, both ‘pluralism’ and ‘diversity’ can relate to different aspects and can have different meanings.

It is generally accepted that ‘media pluralism’ is a multi-dimensional notion. Policy documents of the Council of Europe (COE), the EU and at national level, as well as relevant literature, use terms such as internal and external pluralism, cultural and political pluralism, open and representative pluralism, structural and content pluralism, polarized and moderate pluralism, organised and spontaneous pluralism, reactive, interactive and proactive pluralism, descriptive and evaluative pluralism, etc. Each of these notions emphasises the need for media to reflect the diversity that exists in society, in order to create the so-called ‘public sphere’ which is crucial for democratic debate. According to Gibbons, *“the requirement for diversity is a practical recognition of the way that complex democracies work, with ideas and opinion being channelled into the constitutional process through the media, from discussions taking place in a whole range of overlapping constituencies and representative groups”*.<sup>3</sup> Hitchens formulates this as follows: *“Notwithstanding their entertainment role, particularly obvious in the case of television and radio, the media have an important function providing information, and facilitating and promoting the public debate which is seen as essential to the proper functioning of a democracy. There is an intimate relationship between democratic debate and the media. Governments, politicians, and public figures are rarely able to gain access to citizens in sufficiently large numbers except through the media. The media have become the town square. For citizens, the media are a major source for information and commentary on public issues. To be an effective contributor to this democratic process, the media, as a channel for ideas and information and generator of debate, must be able to offer a variety of voices and views, and operate independently, without undue dominance by public or private power”*.<sup>4</sup>

In the context of its work in the area of media pluralism and concentrations, the Council of Europe has developed comprehensive descriptions of media pluralism. In the Explanatory Memorandum to

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<sup>2</sup> This section is based on ICRI et al. (2009). Indicators for Media Pluralism in the Member States: Towards a Risk-Based Approach - Final Report, [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/study/final\\_report\\_09.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/final_report_09.pdf).

<sup>3</sup> T. Gibbons (1998). *Regulating the Media - 2<sup>nd</sup> edn*. London, Sweet & Maxwell, 31.

<sup>4</sup> L. Hitchens (2006). *Broadcasting Pluralism and Diversity – A Comparative Study of Policy and Regulation*. Oxford and Portland, Hart Publishing, 31.

Recommendation No. R (99) 1 on measures to promote media pluralism, it defines 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”*. In this document, it is stressed that both the structural/quantitative and qualitative aspects are central to the notion of media pluralism and that pluralism is about diversity in the media that is made available to the public, which does not always coincide with what is actually consumed. Two features of media pluralism are explicitly mentioned and clarified as its main components: *“political pluralism, which is about the need, in the interests of democracy, for a wide range of political opinions and viewpoints to be represented in the media. Democracy would be threatened if any single voice within the media, with the power to propagate a single political viewpoint, were to become too dominant”* and *“cultural pluralism, which is about the need for a variety of cultures, as reflects the diversity within society, to find expression in the media”*.

In earlier documents the following ‘check list’ was put forward:

- Diversity of media types and contents available to the public, resulting in a diversity of choice;
- Segments of society capable of addressing the public by means of media owned by, or affiliated to them;
- Diversity of media contents in relation to:
  - o Media functions (information, education, entertainment,...);
  - o Issues covered (spectrum of topics, opinions and ideas covered by and represented in the media);
  - o Audience groups served (internal pluralism).

Given the difficult track record of addressing media pluralism within the framework of the European Union (*infra*), the European Commission launched a three-step approach in 2007 for advancing the debate on media pluralism within the European Union. Step 2 of this approach was an independent study to define and test concrete and objective indicators for assessing media pluralism in the EU Member States (hereinafter: “EC Study on Indicators for Media Pluralism”). The results of this study were presented to the public in June 2009 and are published on the Commission’s website.<sup>5</sup> In this study, a broad working definition of media pluralism was adopted. In construing the definition, the study drew from various documents of the Council of Europe and the European Union as mentioned above. The working definition understands media pluralism as *“the diversity of media supply, use and distribution, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests.”*

This definition consists of three ‘normative’ (cultural media pluralism, political media pluralism and geographical media pluralism) and two ‘operational’ dimensions of media pluralism (pluralism of media ownership and control and pluralism of media types and genres). ‘Normative’ refers to the actual policy goals that media pluralism measures seek to achieve. Guaranteeing access to the media

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<sup>5</sup> ICRI et al. (2009). Independent Study on Indicators for Media Pluralism in the Member States - Towards a Risk-Based Approach, retrieved from [http://ec.europa.eu/information\\_society/media\\_taskforce/pluralism/study/index\\_en.htm](http://ec.europa.eu/information_society/media_taskforce/pluralism/study/index_en.htm).

by the various (cultural/ethnic/religious, political/ideological and geographical) groups in society as well as ensuring fair and diverse representation of their ideas and opinions in the media is what media pluralism is really about. 'Operational' refers to the dimensions of media pluralism that can be seen as means to achieve the aforementioned normative dimensions: pluralism of ownership and control, on the one hand, and a diversity of media types (public, commercial, community media), on the other hand are not pursued as such, but because it is believed that they will help to promote diversity of voice and idea, because of the availability of media outlets which are owned and controlled by different persons, or which have different programme mandates or sources of financing. Although there may be problems with these assumptions in some cases, they are still considered as valid assumptions influencing to a large extent media regulation in EU Member States and underpinning a wide array of measures which are sometimes commonly referred to as 'structural regulation'.<sup>6</sup>

These various dimensions of media pluralism have been defined by the aforementioned EC Study on Indicators for Media Pluralism as follows:

## 2.2. Cultural pluralism in the media

Cultural media pluralism refers to fair and diverse representation of and expression by (*i.e.* passive and active access) the various cultural, linguistic, religious, ethnic groups, disabled people, women and sexual minorities in the media. It comprises plurality and a variety of themes and voices brought to the media, socialisation through multiple forms of media access and participation, choice between different forms of interaction and representation of diverse values, viewpoints and roles, in which citizens belonging to various national, ethnic, cultural, linguistic groups, including women, disabled people and sexual minorities, can recognise themselves.

## 2.3. Political pluralism in the media

Political media pluralism can be described as fair and diverse representation of and expression by (*i.e.* passive and active access) the various political and ideological groups in the media, including minority viewpoints and interests. This definition is thus twofold: on the one hand, it encompasses the capacity and possibility of all social segments having diverse political/ideological forms or interests to address/reach the public by means of media (owned by, or affiliated to them, or owned by third parties) and on the other hand, the spectrum of (political and ideological) viewpoints, opinions and interests covered by and represented in the media.

## 2.4. Geographical / local pluralism in the media

Geographical media pluralism refers to fair and diverse representation of and expression by (*i.e.* passive and active access) local and regional communities and interests in the media. It comprises plurality and variety of themes and voices brought to the media, socialisation through multiple forms of media access and participation, choice between different forms of interaction, and representation of diverse values, viewpoints and roles, in which local and regional communities can be recognised.

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<sup>6</sup> L. Hitchens (2006). *Broadcasting Pluralism and Diversity – A Comparative Study of Policy and Regulation*. Oxford and Portland, Hart Publishing, 65.

Such pluralism may be read through the spatial dimension (media contents are produced and distributed within a local and regional community) or the social/content dimension (media contents and services address unique needs and interests of local and regional communities).<sup>7</sup>

## 2.5. Pluralism of media ownership and control

Pluralism of media ownership and control refers to the existence of media outlets and platforms owned or controlled by a plurality of independent and autonomous actors. It encompasses a plurality of actors at the level of media production, of media supply and of media distribution (*i.e.* variety in media sources, outlets, suppliers and distribution platforms).

## 2.6. Pluralism of media types and genres

Pluralism of media types refers to the co-existence of media with different mandates and sources of financing (commercial media, community or alternative media, public service media) within and across media sectors (print, television, radio, internet). Pluralism of media genres refers to diversity in the media in relation to media functions (including information, education, and entertainment).

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<sup>7</sup> P. DiCola (2007). Employment and Wage Effects of Radio Consolidation. in P. M. Napoli (ed.), *Media Diversity and Localism: Meaning and Metrics*, LEA Publishers, NJ: Mawhaw and London, 62, referring to P. M. Napoli (2001). *Foundations of communication policy: Principles and process in the regulation of electronic media*, Cresskill, NJ: Hampton, 210 and 217.



### 3. EU: Media Pluralism Monitor<sup>8</sup>

#### 3.1. Introduction

The protection of media pluralism has been a recurrent concern of the European Parliament, inviting the Commission on several occasions since the 1990s to propose concrete measures to safeguard media pluralism.<sup>9</sup> However, the various consultations held by the Commission in the last fifteen years have led to the conclusion that it would be inappropriate to submit a Community initiative on pluralism. The failed attempt to launch a harmonisation Directive on pluralism and media ownership in the mid 1990s<sup>10</sup> demonstrated the political sensitivities surrounding the subject and the need for a balanced and realistic approach which took into account the specificities of media markets in the various Member States. The successive enlargements of the European Union, with Central and Eastern European countries – characterised by relatively young media markets and intense media reforms – joining, has further diminished the feasibility and appropriateness of a uniform approach when it comes to media concentration.

But, as it was rightly pointed out at the Liverpool Audiovisual Conference<sup>11</sup> and in the Commission Staff Working Document of January 2007<sup>12</sup>, media pluralism is a concept which goes far beyond media ownership (*supra*). In its Staff Working Document, the European Commission acknowledged that media pluralism “embraces many aspects, ranging from, for example, merger control rules to content requirements in broadcasting licensing systems, the establishment of editorial freedoms, the independence and status of public service broadcasters, the professional situation of journalists, the relationship between media and political actors, etc. It encompasses all measures that ensure citizens’ access to a variety of information sources and voices, allowing them to form opinions without the undue influence of one dominant opinion forming power.”<sup>13</sup>

It is argued that, according to the subsidiarity principle<sup>14</sup>, most of these measures fall within the competence of the Member States. The Commission itself has taken a cautionary viewpoint and

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<sup>8</sup> This section is based on ICRI et al. (2009). Indicators for Media Pluralism in the Member States: Towards a Risk-Based Approach - Final Report, retrieved from [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/study/final\\_report\\_09.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/final_report_09.pdf).

<sup>9</sup> See recently: European Parliament (2008). Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union.

<sup>10</sup> European Commission (1992). Green Paper on Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action, Commission Green Paper, COM (92) 480 final.

<sup>11</sup> Liverpool Audiovisual Conference (2005). Between Culture and Commerce, retrieved from [http://ec.europa.eu/avpolicy/reg/history/consult/liverpool\\_2005/index\\_en.htm#finalreport](http://ec.europa.eu/avpolicy/reg/history/consult/liverpool_2005/index_en.htm#finalreport).

<sup>12</sup> European Commission (2007). Commission Staff Working Paper: Media Pluralism in the Member States of the European Union, SEC (2007) 32.

<sup>13</sup> *Ibid.*, 5.

<sup>14</sup> The principle of subsidiarity regulates the exercise of powers. It is intended to determine whether the Union can intervene or should let the Member States take action. In accordance with this principle, the Union may intervene in areas which do not fall within its exclusive competence only insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

stated on several occasions that protection of media pluralism is primarily a task for the Member States.<sup>15</sup>

This does not mean that the EU cannot support and, where necessary, supplement the measures that Member States have taken towards media pluralism. The Founding Treaties do not expressly refer to safeguarding media pluralism as a one of the tasks, but there are a number of legal bases on which such action can be justified.<sup>16</sup>

Article 11(2) of the Charter of Fundamental Rights of the European Union stipulates that “*the freedom and pluralism of the media shall be respected*”. The Charter was formally proclaimed in Nice in December 2000 by the European Parliament, Council and Commission. In December 2009, with the entry into force of the Lisbon Treaty, the charter was given binding legal effect equal to the Treaties. Thus, when EU institutions want to adopt measures that have an effect on the media sector, they should at least take into account media pluralism and Member States have to respect media pluralism when implementing EU law.

A number of measures that relate directly or indirectly to media diversity have been adopted on the basis of the rules on the completion of the Internal Market (Art. 34, 49 and 56 TFEU on freedom of movement of goods and services, and freedom of establishment). Examples include rules on cultural quota in the Audiovisual Media Services Directive<sup>17</sup> and references to media pluralism in the electronic communications directives, the Merger Control Regulation<sup>18</sup> and cultural considerations under other competition rules (*infra*).<sup>19</sup>

## 3.2. Media Pluralism Monitor (MPM)

### 3.2.1. Introduction

Nevertheless, even though many different measures are already in place, concerns about media pluralism in the EU continue to surface at regular intervals. 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 matter. The Member States of the EU have different cultural, political, and regulatory traditions – which explains their sometimes contrasting approaches towards media pluralism. Not surprisingly, the European Commission has taken a prudent stance on media pluralism in recent years and shifted its strategy for media pluralism from regulating to monitoring.<sup>20</sup>

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<sup>15</sup> See, for instance: European Commission (2003). Green Paper on Services of General Economic Interest, COM(2003) 270 final, para. 74.

<sup>16</sup> For a detailed discussion, see: R. Craufurd Smith (2004). Rethinking European Union Competence in the Field of Media Ownership: The Internal Market, Fundamental Rights and European Citizenship. *European Law Review*, 29(5), 652-672.

<sup>17</sup> 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). *OJ* (2010) L 95/1.

<sup>18</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). *OJ* (2004) L 24/1.

<sup>19</sup> VALCKE, Peggy, ICRI Working Paper 02/2011, Risk-Based Regulation in the Media Sector: The Way Forward to Advance the Media Pluralism Debate in Europe?, 15 July 2011, retrieved from [https://www.law.kuleuven.be/icri/ssrn timers/30ICRI\\_Working\\_Paper\\_2.pdf](https://www.law.kuleuven.be/icri/ssrn timers/30ICRI_Working_Paper_2.pdf) (on 16.04.2012), 5.

<sup>20</sup> P. Valcke (2011). A European Risk Barometer for Media Pluralism: why assess damage when you can map risk? *Journal of Information Policy*, vol. 1, 188.

In its Working Document on media pluralism, for example, the European Commission emphasized that it would not be appropriate to submit a European Community initiative on pluralism, but at the same time acknowledged a need to closely monitor the situation.<sup>21</sup> As a result, one area in which EU action is feasible and provides additional value, is the development of a neutral and objective monitoring mechanism, which could enhance the auditability of media pluralism. This instrument would equip policy makers and regulatory authorities with the tools to detect and manage societal risks in this area and provide them with a stronger evidentiary basis to define priorities and actions for improving media pluralism within the EU. This would ensure a uniform basis for dealing with pluralism issues and provide a more objective basis for the often heated political and economic arguments.

In response to continuing concerns from the European Parliament and non-governmental organizations, during the Barroso I mandate, Commissioner Reding, responsible for Information Society and Media, and Vice-President Wallström, responsible for Institutional Relations and Communication Strategy, launched their “three-step approach” for advancing the debate on media pluralism across the European Union.<sup>22</sup> Step 1 was the publication of a Commission Staff Working Paper on Media Pluralism in the Member States of the European Union on 16 January 2007. In this document, the European Commission has emphasized that it would not be appropriate to submit a European Community initiative on pluralism, but at the same time acknowledged a need to closely monitor the situation.<sup>23</sup> Step 2 was an independent study to define and test concrete and objective indicators for assessing media pluralism in the EU Member States. The objective was to create 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 this instrument is not to regulate, but rather to monitor and collect data in a more systematic way offering 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 overregulation. The results of this study, including a prototype for a MPM, were presented to the public in June 2009 and are published on the Commission’s website. Step 3 envisaged the adoption of a soft law instrument, a Commission Communication on indicators for media pluralism in EU Member States, and a follow up study which would systematically apply the media pluralism indicators to all EU Member States in order to measure the health of Europe’s media pluralism. With the change of the Commission’s mandate mid-2009, the operationalization of the third step is currently still under consideration.<sup>24</sup>

The aim of the study was to develop a tool for the ‘measuring’ and ‘evaluation’ of media pluralism in each Member State, based on a methodology for risk assessment, in order to identify, measure and/or evaluate in an objective way the trends and developments in the media sector and to define priorities and actions for improving media pluralism within each Member State and within the EU. In other words, the focus of the measuring instrument

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<sup>21</sup> European Commission (2007). Commission Staff Working Paper: Media Pluralism in the Member States of the European Union, SEC (2007) 32, 4.

<sup>22</sup> Rapid Press Releases, Media pluralism: Commission stresses need for transparency, freedom and diversity in Europe's media landscape, IP/07/52, 16 January 2007.

<sup>23</sup> European Commission (2007). Commission Staff Working Paper: Media Pluralism in the Member States of the European Union, SEC (2007) 32.

<sup>24</sup> P. Valcke (2011). A European Risk Barometer for Media Pluralism: why assess damage when you can map risk? Journal of Information Policy, vol. 1, 188.

must be on its 'signalling' function. It should provide a snapshot of a situation at a given moment in time, not solve threats within a given timeframe. This does not mean that the instrument should not allow Member States to use it as a tool – voluntary, if the Member State wants to use it in that way – that allows indicating possible 'remedies', i.e. actions that the Member State might take in order to mitigate or neutralize the identified risk.

The MPM facilitates the collection of empirical data on various risks for media pluralism given the particular economic, socio-demographic and legal situation in each Member State. In other words, the MPM 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 MPM 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. 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. Member States that are prepared to accept a higher level of risk, will favour minimal regulation or reliance on the market, while those with a very low, or zero, tolerance risk appetite will favour a more extensive regulatory response. Despite being cast in dichotomous terms, policy makers tend to use both types of approaches simultaneously depending upon the type of media involved, their relationships to government, and the degree to which regulation is appropriate and effective in pursuing media and pluralism goals.

By bringing together a host of previously disparate concerns to offer a multi-faceted approach to media pluralism, the MPM provides 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.

### **3.2.2. Development and structure of MPM**

The MPM is characterized as a risk-based analytical framework using six 'risk domains', three 'risk areas', and three types of 'indicators' (a total of 166 quantitative and qualitative indicators) that can be used to create a unique, multi-dimensional media pluralism 'risk profile' for each Member State.

## *Indicators*

The MPM's aim is to assess risks for media pluralism in the EU Member States and to identify threats to such pluralism based on a set of indicators, covering pertinent legal, economic and socio-cultural considerations:

- Legal indicators (L): Indicators on the legal and regulatory context, assessing the existence and effective implementation of policies and legal instruments that promote media pluralism; these include a wide range of measures, going beyond the scope of ownership restrictions and ranging from state regulations and state policy measures toward co-regulation to self-regulatory instruments (at both the sector and company level);
- Socio-demographic indicators (S): Indicators on the socio-demographic situation, assessing the range of media available to citizens in different Member States and the socio-demographic factors having an impact on that range (including, for instance, geographic factors or the existence of professional associations of media workers/journalists);
- Economic indicators (E): Indicators on the economics of the media, assessing the number of media companies in a particular Member State (or within a linguistic region within a Member State), the number of newspapers and magazines per head of population, comparable indicators in relation to electronic media, together with ratios or other relevant indicators that would convey an understanding of the health of the sector, including profitability.

The three sets of indicators were compiled in a general inventory. On the basis of the general inventory, each individual indicator was subjected to the SMART-test<sup>25</sup>. From the original set of indicators, only 166 remained.

The risk-based approach had a fundamental impact on the design of the MPM by shaping the reflection on 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). 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.

## *Risk Areas*

In order to facilitate the integration of the various indicators in the risk framework, a common structure for the development of the respective sets of indicators was agreed upon. This common

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<sup>25</sup> The SMART (which is the abbreviation of Specific, Measurable, Achievable/Attainable, Result-oriented and Time-bound) test assesses whether indicators are specific (indicators have a sufficiently precise meaning and direct link with the objective), measurable (they can be expressed in a quantitative or qualitative score), achievable/attainable (data can be obtained at reasonable cost and within reasonable time), result-oriented (reliable border values can be defined on which there is broad consensus) and time-bound (data can be collected frequently enough to inform the progress and influence the decisions).

structure was based on three areas of risk assessment corresponding with the following levels of the media value chain:

- Supply (S): The structures, processes, and outcomes of the production and packaging of content for various media types;
- Distribution (D): Any mechanism, means or network used for distributing media content to the public, such as, in the case of print media, individual distribution systems, retail points and postal services, or in the case of electronic media, electronic communication networks, services and associated facilities;
- Use (U): The abilities and skills of citizens that allow them to access and actually consume or actively use media, taking into account the notion of accessibility to the media by all segments of society and looking at issues such as media literacy and digital skills, and the availability of subtitling and audio-description services, etc.

### *Border values*

For each individual indicator, border values have been defined. These border values are measurement units and are expressed quantitatively (numbers, percentages, fractions, etc.) or qualitatively (assessments). Based on an analysis of national and European policy documents and academic literature to determine what is commonly perceived as a positive or negative situation for media pluralism, border values have been divided into three ranges or zones, reflecting high risk, moderate risk, or low risk. These three ranges are associated with the colors red, orange, and green respectively (these colours will be displayed automatically), to produce the effect of a traffic light.

Each indicator has different, individually defined border values. This is necessary as not every level of measurement of the indicator corresponds with the same risk level (high, moderate or low): For a certain indicator, a score in the range of 0-20% could correspond with a high risk level while, for another indicator, it could correspond with a low risk level.

- High risk (associated with the color red in the MPM): Threats to media pluralism occur and immediate actions or measures are required in the short term.
- Moderate risk (associated with the color orange in the MPM): Immediate follow-up is necessary, actions or measures are possibly required, depending on the range between the orange and the red zone.
- Low risk (associated with the color green in the MPM): Safe zone, no immediate follow-up is required, no immediate actions are required.

Please note that if data cannot be obtained, the user of the MPM can leave the score at the default result 'data not available', and the color next to the score will remain blue.

The legal indicators have the following border values:

- Green/Safe zone = 'Existing' (i.e. regulatory safeguards exist and are effectively implemented);

- Orange/Follow up-zone = 'Existing, non-effectively implemented' (i.e. regulatory safeguards exist, but there are major implementation problems);
- Red/Trouble zone = 'Non-existing' (i.e. regulatory safeguards are not in place).

The economic and socio-demographic indicators have a variety of border values, either of a qualitative or of a quantitative nature.

### *Risk domains*

The 166 indicators used to assess risks for media pluralism in a Member State are grouped into the following risk domains: pluralism of media ownership and/or control; pluralism of types and genres; cultural diversity in the media; political pluralism in the media; and diversity of local and regional interests or geographical pluralism. These domains refer to those dimensions of media pluralism that are most commonly accepted as its constituting elements in policy documents and in the academic literature. A sixth risk domain, the basic domain, consists of indicators assessing general factors that have an important impact on pluralism and that are not confined to a single aspect of media pluralism, notably freedom of expression, independent supervision and media literacy (*supra*).

As indicated in Table 1, within every risk domain, relevant risks were selected on the basis of a combination of traditional methods of risk identification (objectives-based) and risk assessment (educated opinions and literature review) with sector-specific methods:

	<b>Risks</b>
	<b>Basic Domain</b>
B1	Freedom of speech and related rights and freedoms are not sufficiently protected
B2	Insufficiently independent supervision in media sector
B3	Insufficient media (including digital) literacy
	<b>Pluralism of Media Ownership &amp; Control</b>
O1	High ownership concentration in terrestrial television
O2	High ownership concentration in radio
O3	High ownership concentration in newspapers
O4	High ownership concentration in Cable/Sat/ADSL/TV
O5	High ownership concentration in magazines
O6	High ownership concentration in internet content provision
O7	High ownership concentration in book publishing
O8	High concentration of cross-media ownership
O9	High vertical concentration
O10	Lack of transparency in ownership structures
	<b>Pluralism of Media Types &amp; Genres</b>
T1	Lack of/under-representation of/dominance of media types

T2	Lack of/under-representation of/dominance of media genres
T3	Lack of sufficient market resources to support range of media
T4	Lack of sufficient resources to support public service media
T5	Insufficient engagement of PSM in new media
T6	Insufficient attention paid to public participation
	<b>Political Pluralism in the Media</b>
P1	Political bias in the media
P2	Political bias in the media during election periods campaigns
P3	Excessive politicisation of media ownership/control
P4	Insufficient editorial independence
P5	Insufficient independence of PSM
P6	Insufficient pluralism of news agencies
P7	Insufficient pluralism of distribution systems
P8	Insufficient citizen activity and political impact in online media
	<b>Cultural Pluralism in the Media</b>
C1	Insufficient media representation of European cultures
C2	Insufficient media representation of national culture
C3	Insufficient proportion of independent production
C4	Insufficient proportion of in-house production
C5	Insufficient representation of world cultures
C6	Insufficient representation of the various cultural and social groups in mainstream media content and services
C7	Insufficient representation of the various cultural and social groups in PSM
C8	Insufficient system of minority and community media
C9	Insufficient representation of different cultural and social groups in HR in the media sector
C10	Limited accessibility by disabled people
	<b>Geographic Pluralism in the Media</b>
G1	High centralisation of the national media system
G2	Insufficient system of regional and local media
G3	Insufficient representation of regional and local communities in media content and services
G4	Insufficient representation of regional and local communities in HR in the media sector
G5	Dominance of a limited number of information sources for local issues
G6	Insufficient access to media and distribution systems due to geographic factors



**Table 1.** Inventory of Risks

In the end, all the indicators have been connected with one of the identified risks. Every indicator was linked to one risk only (to avoid double measurements, which would blur results). For each risk, at least one indicator was identified (although most risks have been combined with a cluster of economic, socio-demographic and legal indicators).

To illustrate this, table 2 contains an overview of the risks and corresponding indicators for the risk domain 'pluralism of types and genres'.<sup>26</sup>

N°	ID	RISK	TYPE INDICATOR	AREA	KEY INDICATOR
145	T1.1	T1 Lack of/under-representation of/dominance of media types	E	D	Audience parity between the TV channels of commercial broadcasters and of PSM
146	T1.2	T1 Lack of/under-representation of/dominance of media types	E	S	Financial parity between the TV channels of commercial broadcasters and of PSM
147	T1.3	T1 Lack of/under-representation of/dominance of media types	E	D	Audience parity between the radio channels of commercial broadcasters and of PSM
148	T1.4	T1 Lack of/under-representation of/dominance of media types	E	S	Financial parity between the radio channels of commercial broadcasters and of PSM
149	T1.5	T1 Lack of/under-representation of/dominance of media types	E	U	Percent of GDP per capita required for an individual to obtain TV and radio reception, newspaper subscription, magazine subscription, or Internet Service
150	T1.6	T1 Lack of/under-representation of/dominance of media types	L	D	Regulatory safeguards for the distribution of public interest channels on cable, DSL and/or satellite platforms
151	T2.1	T2 Lack of/under-representation of/dominance of media genres	E	S	Ratio of news/public affairs, education and entertainment programmes on terrestrial TV to total programmes on terrestrial TV
152	T2.2	T2 Lack of/under-representation of/dominance of media genres	E	S	Ratio of news/public affairs, education and entertainment programmes on radio to total programmes radio
153	T2.3	T2 Lack of/under-representation of/dominance of media genres	E	S	Ratio of news/public affairs, education and entertainment magazines to total number of magazines
154	T2.4	T2 Lack of/under-representation of/dominance	E	S	Ratio of Cab/Sat/ADSL-TV channels dedicated to

<sup>26</sup> N: Number of the line where the indicator is listed in the 'basic data sheet'. ID: Unique ID-number for the indicator, consisting of the combination of a letter (referring to the risk domain) and two numbers, the first of which refers to the risk number (within the risk domain) and the second to the indicator number (within that risk). Type: Type of indicator, which can be legal (L), socio-demographic (S) or economic (E). (Risk) Area: Supply (S), distribution (D), use (U). Key indicator: Description of the indicator.

		of media genres			news/public affairs, education and entertainment to total number of Cab/Sat/ADSL-TV channels
155	T2.5	T2 Lack of/under-representation of/dominance of media genres	L	S	Regulatory safeguards for the presence of a diversity of media genres on the channels and services of private (commercial and non-profit) audiovisual media
156	T2.6	T2 Lack of/under-representation of/dominance of media genres	L	S	Regulatory safeguards for the public's access to major events on free television
157	T2.7	T2 Lack of/under-representation of/dominance of media genres	L	S	Regulatory safeguards for short news reporting on events of high interest in case of exclusive broadcast rights
158	T2.8	T2 Lack of/under-representation of/dominance of media genres	L	S	Regulatory safeguards for a varied and pluralistic offer on PSM channels and services
159	T3.1	T3 Lack of sufficient market resources to support range of media	E	U	Ratio of consumer spending on different media per capita to GDP per capita
160	T3.2	T3 Lack of sufficient market resources to support range of media	E	U	Ratio of advertising expenditures per capita to GDP per capita
161	T4.1	T4 Lack of sufficient resources to support public service media	L	S	Regulatory safeguards for the objective and independent allocation of (adequate, consistent and sufficient) resources to PSM
162	T5.1	T5 Insufficient engagement of PSM in new media	L	S	Regulatory safeguards for the engagement/presence of PSM in/on new media
163	T5.2	T5 Insufficient engagement of PSM in new media	S	S	Proportion of employees dedicated to new media services
164	T5.3	T5 Insufficient engagement of PSM in new media	S	S	Amount of financing invested in new media by the PSM
165	T6.1	T6 Insufficient attention paid to public participation	S	S	Proportion of online media offering space for publicly available comments and complaints

**Table 2.** Overview of the risks and corresponding indicators for the risk domain 'pluralism of types and genres'

### 3.2.3. Interpretation of the results

When the different indicators in the six risk domains have been scored, the results will be represented in a report that looks like a 'barometer' and which shows a country's risk assessment profile for a particular risk domain (see figure 1).

1	A	B	C	D	E	F	G	H	I
	RISK		INDICATOR	TYP	ARE		SCORE	Comment	
2	01 High ownership concentration in terrestrial television	Orange	01.1	Ownership concentration in terrestrial television (horizontal)	E	S	3%		
3			01.2	Audience concentration in terrestrial television	E	D	5%		
4			01.3	Regulatory safeguards against high concentration of ownership and/or control in television (horizontal)	L	S	existing, non effective		
5	02 High ownership concentration in radio	Green	02.1	Ownership concentration in radio (horizontal)	E	S	4%		
6			02.2	Audience concentration in radio	E	D	5%		
7			02.3	Regulatory safeguards against high concentration of ownership and/or control in radio (horizontal)	L	S	existing and effective		
8	03 High ownership concentration in newspapers	Orange	03.1	Ownership concentration in newspapers (horizontal)	E	S	3%		
9			03.2	Readership concentration in newspapers	E	D	5%		
10			03.3	Regulatory safeguards against high concentration of ownership and/or control in newspapers (horizontal)	L	S	existing, non effective		
11	04 High ownership concentration in Cable/Sat/ADSL-TV	Blue	04.1	Ownership concentration in Cable/Sat/ADSL-TV (horizontal)	E	S	existing and effective		

Fig.3. Example of score sheet

These results have to be interpreted with great care. For example, it is important to note that the indicator type should be considered carefully before drawing conclusions from negative (red) scores for individual indicators. This is especially relevant for the legal indicators: a critical score on a legal indicator assumes particular relevance in those situations where the corresponding economic and/or socio-demographic indicators for the same risk have also received a negative score (as a rule of thumb we suggest at least 50% red or 75% orange). In short, users of the MPM should not infer an inevitable need for regulatory intervention on the basis of the red score of a single legal indicator alone. Drawing such a conclusion prematurely in a situation where the economic and/or socio-demographic context is not problematic from the perspective of media pluralism, indicated by a majority of positive (green) scores obtained for the corresponding indicators, may lead to overregulation. In other words, the legal indicators fulfill a 'serving role' in the sense that the absence or non-effectiveness of regulatory safeguards for media pluralism should be considered most significant if they occur in conjunction with actual or imminent risks caused by economic or socio-demographic factors. Hence, users should contrast the scores for legal indicators with those of related economic and/or socio-demographic indicators, before drawing conclusions. They should keep in mind that the absence of regulatory safeguards should not necessarily be remedied by the adoption of state regulations, when related economic and/or socio-demographic indicators give no reason to do so, i.e. in case the scores for the latter indicators display only low (or even medium) risks. Moreover, they should be aware that the presence of regulatory safeguards does not automatically 'release' the Member State from taking a closer look at medium or high risks in relation to economic and/or socio-demographic indicators. The combination of medium or high risks for economic and/or socio-demographic indicators with low risks for legal indicators may be a sign that the regulatory safeguards in place do not address the appropriate problems or do not address these problems in the most effective or adequate way. It could also mean that the indicators

in question effectively address different problems. This is what the study calls the ex post interpretation or profiling.

In addition, it should be noted that the MPM offers the possibility to do an ex ante profiling before starting the actual scoring of indicators with regard to the population size and GDP/capita. Given the important impact of the size and wealth of a nation on its media market structures and regulatory possibilities to protect and promote media diversity, the MPM offers the possibility to account for the population size of the country concerned (large versus small) and its GDP/capita (high versus low) before starting the actual scoring of indicators. This will result in an automatic adjustment of border values for a number of (predominantly economic) indicators of risks of concentration and limitations to the range of media types for these nations. When a nation is, for instance, designated as small and low GDP/capita, the border values of the indicators of concentration and media range threats should be increased by one-third (thus accounting for the fact that their small size and low GDP/capita would be expected to produce a greater level of concentration and a lower range of media). Thus, the value should be multiplied by 1.33 (increasing the border values for green, yellow, red).

#### 3.2.4. Evaluation of the MPM

Considerations of practicability, transparency and user-friendliness led to the decision to give equal weight to all 166 indicators when calculating average scores. First of all, giving more weight to certain indicators would lead to complex discussions about the selection of the indicators that should be given more weight in the calculation of average scores. Second, such a selection would have to be done at Member State level since the situation may differ from Member State to Member State. The latter would undermine the objective of having a common monitoring tool for the EU and would also open the door for manipulation. A system of equal weight for all indicators ensured, in the view of the study team, the largest possible degree of transparency and, ultimately, comparability of scores, at the stage of measuring the indicators. However, this equal weight approach has been criticised by the sector.

In order to deal with this criticism, mathematical modeling could be applied. Mathematical modeling would allow to differentiate between and to attribute a different weight to the 166 indicators. A mathematical model would determine which indicator or combination of indicators would be more important for the safeguard of media pluralism. Or, in other words, the model could indicate which indicator or set of indicators would represent more risks or threats to media pluralism than others. For example, in the MPM, legal indicators were given the same weight as the economic and socio-demographic indicators (*supra*). Consequently, when no regulatory safeguards exist, this may cause a negative ('high risk') average score, even though the related economic and/or socio-demographic indicator(s) display only low or medium risks. In some cases, this could wrongly send out the signal that regulation is required under all circumstances and could possibly result in rewarding states simply for having regulation in place even if this regulation is disproportionate to the problem, no

longer adequate and perhaps even stifling innovation. When the MPM was developed, a technical solution to overcome this problem was explored; taking into account the type of indicator in the calculation of average scores, in such a way that medium or high risk scores for legal indicators would only be integrated in the calculation in cases where the related economic and/or socio-demographic indicator(s) were also displaying a medium or high risk score. Unfortunately, such encoding turned out to be technically unfeasible. Moreover, it seemed doubtful whether the exclusion of negative scores for legal indicators from the calculation of average scores would be appropriate in all circumstances, as this would demand a precise match between the problems addressed by the regulatory safeguards under scrutiny, on the one hand, and those assessed by the economic and/or socio-demographic indicators, on the other hand; which often cannot be assumed. It was therefore decided to stick to the system of equal weight for all indicators, and instead put up a warning sign for users, urging prudence when drawing conclusions from negative scores for legal indicators. Research into whether mathematical modeling could be a potential remedy would be valuable in this context

## 4. UK: Media Plurality Test

### 4.1. The UK regulatory framework for media mergers

Like any other industry sector in the UK, media mergers fall within the standard merger regime.<sup>27</sup> According to the UK Government, competition law could be relied on to prevent undue media consolidation at the national level.<sup>28</sup> However, because of the special position of the media, media mergers and acquisitions should be subject to an additional level of scrutiny that looks at their impact on the public interest.<sup>29</sup> In this regard, it was strongly argued for the Competition Commission to be given new powers to consider not only the potential for a merger to result in a substantial lessening of competition, the test applied in competition law, but also its implications for media plurality.<sup>30</sup> The Enterprise Act 2002 was amended (by the Communications Act 2003) to incorporate a number of ‘media public interest considerations’. The relevant Minister at that time said “[media] plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda”.<sup>31</sup>

Section 58 of the Enterprise Act includes the public interest consideration. The considerations differ depending on whether the merger involves just newspaper publishers or broadcasters.<sup>32</sup> In relation to newspaper mergers, the media public interest considerations are expressed as follows: “The need for: (a) accurate presentation of news; and (b) free expression of opinion”<sup>33</sup> and “The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom”<sup>34</sup> In relation to broadcasting and newspaper/broadcast cross-media mergers the considerations are the following: “(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience; (b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to

<sup>27</sup> D. Morisi (2011). Measuring media pluralism in the convergence era: The case of News Corp’s proposed acquisition of BSkyB, <http://www2.lse.ac.uk/media@lse/research/mediaWorkingPapers/MScDissertationSeries/2011/74.pdf>, 20.

<sup>28</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>29</sup> House of Lords (2008). The ownership of the news. Select Committee on Communications. 1st Report of Session 2007–08, <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/122i.pdf>, para. 232.

<sup>30</sup> *Ibid.*

<sup>31</sup> Ofcom (2010). Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation, <http://stakeholders.ofcom.org.uk/binaries/consultations/public-interest-test-nov2010/statement/public-interest-test-report.pdf>, para. 2.9 (hereafter: Ofcom (2010)).

<sup>32</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>33</sup> Enterprise Act 2002, Section 58 (2A).

<sup>34</sup> Enterprise Act 2002, Section 58 (2B).

*the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003”.*<sup>35</sup>

In a document of DTI containing guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, the following was stated: This public interest consideration “*is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality*”.<sup>36</sup>

In practice, the Secretary of State can issue an intervention notice when a merger could raise media pluralism concerns.<sup>37</sup> Application of the Enterprise Act 2002 requires the company being taken over to have a turnover in excess of £70 million or for the merger to result in a 25% share of supply of goods or services across the UK or a substantial part of it.<sup>38</sup> In addition, a special intervention notice can be issued where the merger creates or enhances a 25% share of the supply of ‘any description’ of broadcasting services or newspapers in a ‘substantial part’ of the UK, or for one of the merging parties to already hold such a share.<sup>39</sup> A ‘European intervention notice’ should be issued when a concentration has a Community dimension of which the competition questions are to be addressed by the European Commission.<sup>40</sup> In this context, the EU and the UK engage in complementary but distinct investigations within the terms of article 21(4) of the EU Merger Regulation.<sup>41</sup> This Article explicitly leaves scope for Member States to review a merger, which is approved by the European Commission, for reasons of plurality of the media. In the News Corp / BSkyB case, this provision was invoked by the UK. The European Commission approved the transaction in December 2010, but the UK carried out its own media plurality review (*infra*).<sup>42</sup>

The intervention notice triggers an initial investigation by the OFT (Office of Fair Trading) into any competition aspects and by Ofcom (independent regulator for the communications industries and the competition authority for the UK communications industries) into the stated media plurality concerns.<sup>43</sup> In other words, if an intervention notice is issued, Ofcom has a duty to advise the Secretary of State on the media public interest aspects of the case, while the OFT reports on any

<sup>35</sup> Enterprise Act 2002, Section 58 (2C).

<sup>36</sup> Ofcom (2010), para. 2.8; DTI (2004). Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, <http://www.bis.gov.uk/files/file14331.pdf>, para. 7.7.

<sup>37</sup> Enterprise Act 2002, Section 59.

<sup>38</sup> Enterprise Act 2002, Section 23; Ofcom (2004). Ofcom guidance for the public interest test for media mergers, [http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/pi\\_test.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/pi_test.pdf), para. 9 (hereafter: Ofcom (2004)).

<sup>39</sup> Enterprise Act 2002, Section 59; Ofcom (2004), para. 9; R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>40</sup> Enterprise Act 2002, Section 67-68.

<sup>41</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, the ‘Merger Regulation’, (2004) OJ L24/1.

<sup>42</sup> European Commission (2010). Non-opposition to a notified concentration (Case COMP/M.5932 — News Corp/BSkyB). OJ (2011) C 37/5; P. Valcke (2011). Looking for the user in media pluralism regulation: unraveling the traditional diversity chain and recent trends of user empowerment in European media regulation. *Journal of Information Policy*, vol. 1, 292.

<sup>43</sup> Enterprise Act 2002, Section 59.

competition issues. On the basis of the OFT and Ofcom reports, the Secretary of State will decide whether to refer the matter to the Competition Commission for a more detailed examination; to accept behavioural or other modifications designed to address any concerns raised; or to allow the merger to proceed. Where the matter is referred on to the Competition Commission, the Secretary of State will consider the Commission's report and any further representations before deciding whether or not to allow the merger and, if to allow it, on what terms. He or she is under no obligation to follow the Competition Commission's advice on the plurality issues, though is so bound regarding any competition points.<sup>44</sup>

## 4.2. BskyB – News Corp case

Until now, only two interventions notices on media plurality grounds have been issued. In this deliverable, we will take a closer look at the notice issued in the recent BskyB – News Corporation (News Corp) case dealing with the bid by News Corp to purchase 60,9 % of the shares in Sky. In June 2010, Rupert Murdoch announced that News Corp sought to take full control of BskyB, by acquiring the 60.9% of the shares it did not already own.<sup>45</sup> This take-over would increase its holding from 39.1% to 100%.<sup>46</sup>

Why did this sale matter? News Corp is the UK's largest newspaper publisher and Sky is the largest broadcaster. According to News Corp, this merger would make good financial sense, but critics said it would create a media group of unprecedented power, in which newspapers could be bundled with a Sky subscription, or Sky sports content could be shown exclusively on Times and Sun websites.<sup>47</sup> On 4 November 2011, the Secretary of State issued a European intervention notice in relation to the proposed acquisition.<sup>48</sup>

In December 2010, the European Commission cleared News Corp's proposed acquisition of BskyB under EU merger rules.<sup>49</sup> According to the European Commission, this transaction would not significantly impede effective competition. The European Commission stressed that this decision was without prejudice to the on-going investigation by the competent UK authorities whether the proposed transaction is compatible with the UK interest in media plurality, which is different from the Commission's competition assessment.<sup>50</sup> The Commissioner for Competition Joaquin Almunia formulated it as follows: "*I am confident that this merger will not weaken competition in the UK. The effects on media plurality are a matter for the UK authorities*".<sup>51</sup>

<sup>44</sup> DTI (2004). Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, <http://www.bis.gov.uk/files/file14331.pdf>, paras. 4.12-4.17.

<sup>45</sup> BBC News (2010). Murdoch's News Corporation in BskyB takeover bid, <http://www.bbc.co.uk/news/10316087>.

<sup>46</sup> Ofcom (2010), para. 2.1.

<sup>47</sup> LSE (2011). Dossier: Media Plurality & NewsCorp's Bid for BskyB, <http://blogs.lse.ac.uk/mediapolicyproject/resources/dossier-media-plurality/>.

<sup>48</sup> Ofcom (2010), para. 2.2.

<sup>49</sup> European Commission (2010). Non-opposition to a notified concentration (Case COMP/M.5932 — News Corp/BskyB). *OJ* (2011) C 37/5.

<sup>50</sup> Rapid Press Releases (2010). Mergers: Commission clears News Corp's proposed acquisition of BskyB under EU merger rules, IP/10/1767; S. Moonen (2011). News Corp/BskyB and the boundaries of merger review. *Journal of European Competition Law & Practice*, vol. 2, no. 4, 350-352.

<sup>51</sup> *Ibid.*



Although News Corp and BSkyB are mainly active in different markets (audiovisual sector and newspaper publishing sector) and, thus, the merger would rarely trigger competition law concerns, Ofcom had to answer the question whether the number of independent voices in media would be reduced as a result of a super-Murdoch company.<sup>52</sup> In its report, Ofcom concluded that *“it may be the case that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences”*.<sup>53</sup> As a result, Ofcom ruled that the Competition Commission, in a second stage review, should assess the extent to which the concentration in media ownership may act against the public interest.<sup>54</sup> In response to Ofcom’s concerns, News Corp proposed to spin-off of Sky’s dedicated news service, Sky News, into a separate company.<sup>55</sup> However, in July 2011, Rupert Murdoch announced that he dropped its planned bid to take full ownership of satellite broadcaster BSkyB following a scandal over phone hacking at News Corp’s UK newspaper group.<sup>56</sup>

Although there had been no definitive ruling in the case, Ofcom had completed its provisional report on the proposed acquisition and the Secretary of State was in the process of examining whether News Corp’s proposed would address the plurality concerns raised by Ofcom.<sup>57</sup> In the following section, we will analyse how Ofcom applied the media plurality test in this case. In particular, it will be examined how Ofcom tried to measure the level of media pluralism in the UK. In doing so, it will be also described how Ofcom tried to adapt the media plurality test to the changed media landscape.

### 4.3. Ofcom and the media plurality test

#### 4.3.1. Relevant market: cross-media news and current affairs

In considering plurality and the need for there to be sufficient plurality, Ofcom indicated that it considered the range and number of persons having control of media enterprises in the context of their ability to influence opinions and control the political agenda.<sup>58</sup> Therefore, when defining the relevant market, Ofcom focused on UK-wide audiences for cross-media news and current affairs including TV, radio, newspapers and the internet.<sup>59</sup> In other words, Ofcom’s analysis covered both content and medium.

<sup>52</sup> Rapid Press Releases (2010). Mergers: Commission clears News Corp’s proposed acquisition of BSkyB under EU merger rules, 21 December 2010, IP/10/1767; Ofcom (2010), para. 1.2, 2.3 & 3.14; The London School of Economics and Political Science, Media Plurality Dossier: The case of NewsCorp’s Bid for BSkyB, <http://blogs.lse.ac.uk/mediapolicyproject/2011/01/12/media-plurality-dossier-the-case-of-newscorps-bid-for-bskyb/>.

<sup>53</sup> Ofcom (2010), para. 7.1.

<sup>54</sup> *Ibid.*, para. 7.2.

<sup>55</sup> BBC News (2011). News Corp withdraws bid for BSkyB, <http://www.bbc.co.uk/news/business-14142307>; D. Morisi (2011). Measuring media pluralism in the convergence era: The case of News Corp’s proposed acquisition of BSkyB, <http://www2.lse.ac.uk/media@lse/research/mediaWorkingPapers/MScDissertationSeries/2011/74.pdf>, 20.

<sup>56</sup> News Corp (2011). News Corporation Withdraws Proposed Offer for British Sky Broadcasting Group PLC, [http://www.newscorp.com/news/news\\_494.html](http://www.newscorp.com/news/news_494.html).

<sup>57</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>58</sup> Ofcom (2010), para. 1.10.

<sup>59</sup> *Ibid.*, para. 3.1.

On content, Ofcom focused only on a small part of the entire media content, in particular news and current affairs.<sup>60</sup> Other media product – such as movies, entertainment, sports, etc. – were left out of the relevant market. Ofcom focused on news and current affairs, because news and current affairs are the most important content type when it comes to influencing opinion and setting the political agenda via news.<sup>61</sup> Ofcom indicated that it uses the term ‘news and current affairs’ to refer to programmes and articles provided across all the relevant media platforms that inform the public and contribute to democracy through the reporting, discussion and commentary of current events.<sup>62</sup> Consumers ranked news highest in terms of both personal and social importance and current affairs also plays an important role in providing consumers with information and analysis and therefore in the development of public opinion.<sup>63</sup> In this regard, Ofcom focused on the main providers of UK national news services and did not take into account minority or international news services such as Al Jazeera and CNN.<sup>64</sup>

In relation to the relevant medium, Ofcom recognised that individuals increasingly draw on a wide range of available media for their news: broadcast television and radio services, printed newspapers (daily and Sunday papers) and internet services. These different media needed to be taken into account when assessing the impact of a merger.<sup>65</sup> In selecting news and current affairs as the relevant market, Ofcom’s approach distinguishes from other regulators. The latter often consider media companies as a whole without making distinctions among different types of content delivered within a single medium.<sup>66</sup>

Furthermore, Ofcom considered not only the ‘retail’ level, but also the ‘wholesale’ level of news provision, given that some UK media indirectly provide news to other outlets.<sup>67</sup>

#### 4.3.2. An audience-based perspective

Traditionally, it was assumed that if a diversity of content is provided to the public that they will consume a diversity of content.<sup>68</sup> Recently, however, authors stress that after the multiplication of channels and increase of content offered by prosumers, audiences become more fragmented.<sup>69</sup> In Keen’s words: “[t]oday’s media is shattering the world into a billion personalized truths each

<sup>60</sup> D. Morisi (2011). Towards a New Approach for Media Plurality: Suggestions for Ofcom’s Consultation, <http://www.medialaws.eu/towards-a-new-approach-for-media-plurality-suggestions-for-ofcom%E2%80%99s-consultation/>.

<sup>61</sup> Ofcom (2010), para. 3.2.

<sup>62</sup> *Ibid.*, para. 3.7.

<sup>63</sup> *Ibid.*, para. 3.1, para. 1.15.

<sup>64</sup> *Ibid.*, para. 4.13; R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1..](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1..)

<sup>65</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1.](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1.;); Ofcom (2010), para. 3.1, para. 2.17-2.22.

<sup>66</sup> D. Morisi (2011). Measuring media pluralism in the convergence era: The case of News Corp’s proposed acquisition of BSkyB, <http://www2.lse.ac.uk/media@lse/research/mediaWorkingPapers/MScDissertationSeries/2011/74.pdf>, 22.

<sup>67</sup> *Ibid.*, 22.

<sup>68</sup> See e.g.: P. Napoli (1997). Rethinking Program Diversity Assessment: An Audience-Centered Approach. *The Journal of Media Economics*, 10(4), 59-74.

<sup>69</sup> J. van Dijk (2006). The network society : social aspects of new media – 2<sup>nd</sup> edition. London: Sage, 171-173; IDATE, TNO, IViR (2008). User-Created-Content: Supporting a participative Information Society, [http://ec.europa.eu/information\\_society/eeurope/i2010/docs/studies/ucc-final\\_report.pdf](http://ec.europa.eu/information_society/eeurope/i2010/docs/studies/ucc-final_report.pdf), 173.

*seemingly equally valid and worthwhile*".<sup>70</sup> As a result, according to some authors, as referred to in the Independent Study on Indicators for Media Pluralism in the Member States, "*new media break down social cohesiveness, result in reduced diversity and plurality as users congregate around content and views with that reinforce their own beliefs, produce Babel, create many speakers with few listeners, [...]*".<sup>71</sup> Or in other words, the public tends to consume only the information and content reflecting their own preferences.<sup>72</sup> In this regard, in its News Corp / BskyB report, Ofcom shifts the focus from content provision to content consumption by relying on an 'audience perspective', where the actual news consumption is taken into account.<sup>73</sup> In other words, the news market should then be assessed within a broader theoretical framework, marked by a shift from the supply side towards the consumer side.

According to Morisi, by focusing on the audience side, this approach necessarily implies going beyond distinctions among traditional media platforms – newspapers, TV, radio and internet – and considering all news providers within one "converged" news market.<sup>74</sup>

### 4.3.3. Measuring the impact of a company's cross-media holdings on public opinion

#### Introduction

According to some stakeholders, after the proposed transaction, there would be sufficient plurality by reference to the total number and range of media enterprises available.<sup>75</sup> However, according to Ofcom, such an approach simply indicates the number and range of persons with control of media enterprises providing news and current affairs without considering use by consumers and not taking into account the ability to influence opinion.<sup>76</sup> Ofcom emphasised the importance of source diversity for 'a healthy and informed democratic society' and the need to prevent undue accumulations of power.<sup>77</sup> Furthermore, Ofcom stressed that "*in assessing sufficient plurality we should look not simply at the number and range of media enterprises, but also at their relative ability to influence and inform public opinion*".<sup>78</sup> Ofcom also emphasised that "[a]t the most extreme, adopting a count of the number and range of owners of media enterprises without taking account of their ability to influence opinion would mean that all news and current affairs providers would be included as contributing to

<sup>70</sup> A. Keen (2007). *The cult of the amateur: how today's internet is killing our culture and assaulting our economy*. New York and London: Doubleday/Currency, [http://www.amazon.com/Cult-Amateur-Internet-Killing-Culture/dp/0385520808#reader\\_0385520808](http://www.amazon.com/Cult-Amateur-Internet-Killing-Culture/dp/0385520808#reader_0385520808), 15.

<sup>71</sup> ICRI et. al. (2009). *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach. Final Report – Annex I: User Guide*, [http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/study/user\\_guide\\_09.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/user_guide_09.pdf), 10.

<sup>72</sup> J. Webster (2005). *Beneath the Veneer of Fragmentation: Television Audience Polarization in a Multichannel World*. *Journal of Communication*, 55(2), 366-382.

<sup>73</sup> D. Morisi (2011). *Measuring media pluralism in the convergence era: The case of News Corp's proposed acquisition of BskyB*, <http://www2.lse.ac.uk/media@lse/research/mediaWorkingPapers/MScDissertationSeries/2011/74.pdf>, 11.

<sup>74</sup> D. Morisi (2011). *Towards a New Approach for Media Plurality: Suggestions for Ofcom's Consultation*, <http://www.medialaws.eu/towards-a-new-approach-for-media-plurality-suggestions-for-ofcom%E2%80%99s-consultation/>.

<sup>75</sup> Ofcom (2010), para. 5.10.

<sup>76</sup> *Ibid.*, para. 5.11.

<sup>77</sup> *Ibid.*, paras.1.5 and 1.11.; R. Craufurd Smith & D. Tambini (2012). *Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge*, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>78</sup> Ofcom (2010), para. 1.20 & 5.8.

plurality simply by being available regardless of whether they were used by several million or zero consumers".<sup>79</sup>

When examining the effects of the proposed transaction on the sufficiency of plurality of persons in control of the media, Ofcom adopted the following approach: *"Whilst recognising that it would not be sufficient for plurality purposes to rely on a single provider (for example, the BBC), we do not consider it necessary to take a view on precisely how many owners would constitute a „sufficient“ level of plurality of persons. Rather, we have looked qualitatively at sufficiency. We have considered sufficiency by reference to the current levels of plurality, having regard to any change in plurality that arises as a result of the acquisition"*.<sup>80</sup>

Ofcom looked at ability to influence and inform opinion by reference to a number of factors since there is no single standard industry measure which can be used consistently across media platforms. These factors were the following:

- Audience share and reach within individual platforms.
- Analysis of consumers' consumption of news - based on minutes of use by a typical consumer in a day.
- Primary research on consumers' claimed use of different media.<sup>81</sup>

Ofcom recognised that comparison of either audience share or reach across platforms is not simple given the different ways this information is collected.<sup>82</sup> Radio statistics, for example, are based on a self-reported diary, whereas television audience measurement is based on remote monitoring of a large sample of the audience. Print data record readership for each issue regardless of time spent in general and the time spent reading news items as opposed to entertainment features or advertisements. There is currently no standard industry measure for audience share of news websites on the Internet.<sup>83</sup> However, Ofcom stressed that a comparison of reach should be helpful in understanding how many consumers may obtain news from News Corp or Sky news content.<sup>84</sup> But, as indicated by Craufurd Smith and Tambini, Ofcom's findings regarding reach and news consumption obtained using the existing data need to be treated with caution.<sup>85</sup>

But even if comparable statistics were to be readily available, one should realise that combining audience share, time-use, reach or revenue figures for all media to assess potential influence will remain a problematic exercise because of the possibility that individuals relate differently to different media.<sup>86</sup> Ofcom rephrased this as follows: *"It should be noted that the share of minutes attributed to Sky could, to some degree, understate its impact on consumers as a TV viewing minute is attributed the same value as a minute spent on other media platforms. In practice, we would expect that a TV*

<sup>79</sup> *Ibid.*, para. 5.14.

<sup>80</sup> *Ibid.*, para. 1.14.

<sup>81</sup> *Ibid.*, para. 5.17.

<sup>82</sup> *Ibid.*, para. 1.23.; para. A1.1.

<sup>83</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>84</sup> Ofcom (2010), para. 1.23.

<sup>85</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>86</sup> *Ibid.*

*news minute would hold greater weight in terms of ability to influence than other media given television's impact as a medium. Specifically, TV news broadcasts are designed to deliver information and messages effectively in a relatively short time period compared to that available to newspapers. This suggests TV news broadcasts may be somewhat underweighted in this analysis. At the same time, newspapers may be overweighted given the time spent on reading".<sup>87</sup>*

To address these concerns, Ofcom developed a novel and audience-based metrics, in particular, Ofcom's 'share of reference' approach. The next section will take a closer look at the 'share of reference' indicator.

### *A new cross-platform indicator: Share of reference*

In the absence of a single metric to measure the consumption of news consistently across platforms, Ofcom commissioned audience research into the claimed consumption patterns of user across TV, radio, press and online. Respondents were asked to name their sources of UK and international news and current affairs from a prompted list. From this data, Ofcom was able to establish a common metric, *i.e.* share of references, to measure cross-media news and current affairs consumption in terms of:

- main source of news: respondents were asked to name their single main source of news that they used regularly (e.g. a specific TV channel, website, newspaper or radio station). This enabled Ofcom to aggregate this data by media owner (retailer) and media provider (wholesaler) to establish the share by media owner or provider based on consumers 'single main source of news';
- all regular sources of news by provider (retailer e.g. title, channel) and wholesaler (media provider). This includes all sources of news and current affairs named by consumers that they used regularly. It therefore includes both the main source of news named and „secondary“ sources named, thereby including the effects of multi-sourcing on the share of media providers.<sup>88</sup>

A 'reference' is a news brand/title that is cited by a consumer as a source of regular (*i.e.* at least once a week for all sources, except for weekly newspapers and magazines where it is defined as at least once a month) UK or international news or current affairs for them. A media provider's total references are calculated as responses for each individual news source across the platforms of TV, radio, newspapers and internet. These are for example, BBC One, Sky News, The Daily Mail, etc. If a respondent uses more than one source from a particular media provider it counts each time. The share of each media provider is then calculated as the aggregated number of references for that media provider, expressed as a proportion of all references.<sup>89</sup>

This research involved a survey of 2,018 adults, who were asked to indicate from a list which news sources they used on a regular basis. They were also asked to indicate which of these sources they

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<sup>87</sup> Ofcom (2010), paras. 5.29-5.30.

<sup>88</sup> *Ibid.*, para. 4.39.

<sup>89</sup> *Ibid.*, para. 4.39.

regarded as their 'main source of news'.<sup>90</sup> Respondents were able to name any source of news, including both nation-wide and local or regional news providers as part of this research. In the results, local or regional providers have been aggregated into 'other' but individually accounted for a small share of responses.<sup>91</sup> Afterwards, the share of each news provider cross-platform was analysed, based on the number of times each individual news source is cited by respondents.<sup>92</sup> Each provider's share is based on the total number of responses for each individual source across television, radio, daily and weekly newspapers and the internet. The share of each provider is then calculated as the aggregated number of responses in thousands for that provider, expressed as a proportion of all responses for all news sources measured in the survey.<sup>93</sup> Ofcom's approach consequently enabled it to adopt a cross-platform analysis, without artificial weighting, based on what individuals actually said they consumed. The approach can accommodate new and evolving forms of media use and enabled Ofcom to focus on its target content, news, though other genres could similarly be identified.<sup>94</sup> Furthermore, Ofcom was able to calculate the proportion of people who said that they had used at least one media source by media owner (retailer) and by media provider (wholesaler), in order to produce a cross-media reach metric based on regular news consumers. For example, if a respondent said they had used both a BBC website and BBC One, they counted once in the cross-media reach for the BBC.<sup>95</sup>

This research has enabled Ofcom to examine the relative shares and reach of different news and current affairs providers, in respect of their importance to consumers both as a main source of news, and as a regular source of news more generally.<sup>96</sup> When reviewing this data, Ofcom concluded (as already indicated above) that "*the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences*".<sup>97</sup> In particular, the merged company, though commanding a lesser share of reference than the BBC, would still have had a significantly larger share (22% wholesale/17% retail) than the next provider, ITV (12% wholesale/9% retail). The creation of one company with, in relative terms, a much greater capacity than any other commercial organisation to influence the public was central to Ofcom's conclusion.<sup>98</sup>

#### 4.4. Evaluation

According to Craufurd Smith and Tambini, the public interest test is unsatisfactory.<sup>99</sup> In particular, the test is problematic on four main counts.<sup>100</sup>

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<sup>90</sup> *Ibid.*, paras. A1.18-A1.22; R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>91</sup> Ofcom (2010), para. 4.40.

<sup>92</sup> *Ibid.*, para. A1.19.

<sup>93</sup> *Ibid.*, para. A1.20.

<sup>94</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>95</sup> Ofcom (2010), para. 4.41.

<sup>96</sup> *Ibid.*, para. 4.42.

<sup>97</sup> Ofcom (2010), para. 1.57.

<sup>98</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>99</sup> *Ibid.*

First, this test fails to address endogenous growth and provide for on-going monitor. The media plurality test can be triggered only where there is a merger in the media sector, whereas media companies can gain market share through technological innovation, first mover advantages, control of, and investment in, attractive content, etc. Unfortunately, such endogenous growth cannot be addressed at present on plurality grounds. The Secretary of State Jeremy Hunt rephrased it as follows: *“at the moment it's only possible for a public interest intervention when there is a corporate transaction. This is different to competition law, where the Office of Fair Trading can order an inquiry by the Competition Commission at any stage, for example if they think someone has grown too big organically. That isn't the case for media plurality and I think there is an argument for extending the similar protection that we have in competition law to media plurality law”*.<sup>101</sup>

Secondly, the test fails to establish a coherent approach across all media sectors. As already mentioned above, section 58 of the Enterprise Act 2002 lists distinct media plurality considerations for mergers in the print sector, the broadcasting sector or combined print and broadcast mergers. In relation to mergers in the print sector, the impact of the merger on content diversity, freedom of expression and accuracy will be examined, whereas in relation to broadcasting mergers, the need for source as well as content diversity, high quality content, and a commitment to meeting certain content standards set out in the Communications Act 2003 will be examined. Craufurd Smith wonders why certain criteria have been adopted in one context but not the other: if undue concentration of sources is a concern in the broadcasting sector, why is it not similarly of concern in the print sector?<sup>102</sup> The scope of the test has also been questioned by the Co-ordinating Committee for Media Reform.<sup>103</sup>

Thirdly, the test fails to establish a clear methodology, leading to consequent uncertainty. The Enterprise Act 2002 itself provides little guidance as to how the media plurality considerations should be interpreted. In order to apply the ‘sufficient plurality of persons’ criterion it is, for example, necessary to determine the relevant market or markets and audience, yet resolution of these issues is likely to be controversial. However, according to Craufurd Smith, it is not clear whether the Internet, cable and mobile services should be included in the market definition; whether the media should be weighted depending on their perceived capacity to influence the audience; and whether attention focus should solely be on news and current affairs programmes or scientific and cultural programmes more generally.<sup>104</sup> In the BSkyB/News Corp case, Ofcom developed the ‘share of reference’ approach, based on what consumers stated to be their main regular source of news. Craufurd Smith finds this approach to be a useful starting point for future analysis, in that it does not exclude a priori particular media or services, such as Internet blogs, but instead examines what

<sup>100</sup> R. Craufurd Smith (2011). *Is the UK Media Plurality test fit for purpose?*, <http://www.law.ed.ac.uk/courses/blogs/medialaw/blogentry.aspx?blogentryref=8705>.

<sup>101</sup> J. Hunt (2011). *Boldness be my friend*, [http://www.culture.gov.uk/news/ministers\\_speeches/8428.aspx](http://www.culture.gov.uk/news/ministers_speeches/8428.aspx).

<sup>102</sup> R. Craufurd Smith (2011). *Is the UK Media Plurality test fit for purpose?*, <http://www.law.ed.ac.uk/courses/blogs/medialaw/blogentry.aspx?blogentryref=8705>.

<sup>103</sup> Co-ordinating Committee for Media Reform (2011). *The Media and the Public Interest*, <http://www.mediareform.org.uk/policy-research/plurality/briefing-paper-on-plurality-and-the-public-interest>.

<sup>104</sup> R. Craufurd Smith (2011). *Is the UK Media Plurality test fit for purpose?*, <http://www.law.ed.ac.uk/courses/blogs/medialaw/blogentry.aspx?blogentryref=8705>; R. Craufurd Smith & D. Tambini (2012). *Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge*, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1..](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1..)

consumers themselves consider to be relevant sources and thus potentially influential.<sup>105</sup> Nevertheless, Craufurd Smith and Tambini argued that consumers may have only limited understanding of how they have in fact been influenced by media exposure: they may, for example, over-emphasise the impact of sources with which they agree and downplay those with which they disagree, even though the latter help to shape how they categorise issues or see the world. They also emphasised that Ofcom did not consider the duration of the visits and the attentiveness of the public, but instead focused on the regularity of exposure (loyalty). Regular access certainly suggests that the user considers the source to be useful for his or her information needs but Craufurd Smith and Tambini doubt there is a simple correlation between regular access and influence. A source accessed infrequently but for extended periods could well be more influential than sources accessed regularly but for short durations.<sup>106</sup> Furthermore, Craufurd Smith stressed that there remains considerable uncertainty as to how 'sufficient plurality' should be determined and thus a need for further guidance as to the appropriate methodology to be adopted in such cases. Ofcom concluded that a 22% share of reference in relation to the provision of news and current affairs programming was probably too great (*supra*) – but it is not clear why this was thought to be so.<sup>107</sup> This question was also raised by Morisi.<sup>108</sup>

Fourthly, the test is characterised by procedural failures, in particular regulatory expertise and political influence. The role of Ofcom is limited to give preliminary advice, while it is the Competition Commission which takes the investigation forward if so requested by the Secretary of State. Craufurd Smith doubts whether the involvement of both Ofcom and the Competition Commission constitutes an efficient deployment of resources. Furthermore, she indicates that consideration could be given to entrusting application of the test to Ofcom alone, subject to suitable arrangements for appeal and review. Craufurd Smith's major concern is the role of in the procedure played by the Secretary of State. The Secretary of State is considering whether to initiate the test and whether the matter should be referred to the Competition Commission after receiving Ofcom's advice. Shouldn't it be better if the test should be entrusted entirely to an independent body, such as Ofcom?<sup>109</sup> The Secretary of State Jeremy Hunt agrees with this point: *"I also think we need to look at whether it's appropriate for a politician to have the final say in a highly contentious decision such as the one I nearly had to take on News Corp/BskyB. [...] But in competition law we removed the final decision on big mergers [...] from politicians. And we did so because we thought those kinds of decisions are perhaps better taken by someone who is out of the political fray. So I think it is a legitimate question to ask; if we think that for competition law, should have the same approach on media plurality*

<sup>105</sup> R. Craufurd Smith (2011). *Is the UK Media Plurality test fit for purpose?*, <http://www.law.ed.ac.uk/courses/blogs/medialaw/blogentry.aspx?blogentryref=8705>.

<sup>106</sup> R. Craufurd Smith & D. Tambini (2012). *Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge*, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>107</sup> R. Craufurd Smith (2011). *Is the UK Media Plurality test fit for purpose?*, <http://www.law.ed.ac.uk/courses/blogs/medialaw/blogentry.aspx?blogentryref=8705>.

<sup>108</sup> D Morisi (2011). *Measuring media pluralism in the convergence era: The case of News Corp's proposed acquisition of BSkyB*, <http://www2.lse.ac.uk/media@lse/research/mediaWorkingPapers/MScDissertationSeries/2011/74.pdf>, 37.

<sup>109</sup> R. Craufurd Smith (2011). *Is the UK Media Plurality test fit for purpose?*, <http://www.law.ed.ac.uk/courses/blogs/medialaw/blogentry.aspx?blogentryref=8705>; R. Craufurd Smith & D. Tambini (2012). *Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge*, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).



law?”.<sup>110</sup> However, it should be said that the business Secretary Vince Cable disagrees with him insisting that Ministers should remain in charge of deciding media takeovers.<sup>111</sup>

Morisi added another criticism. He acknowledges that the share of references proves innovative because it overcomes traditional distinctions between media sectors and allows for the actual measuring of cross-platform news consumption. Thus, it also proves extremely suitable for the current new media environment which is increasingly shaped by processes of technological convergence.<sup>112</sup> However, at the same time, he stresses that this indicator does not prove particularly effective in measuring the actual influence of different media platforms on audience. In other words, the share of references does not sufficiently take into account the different impact that is traditionally attached to various media (e.g. the different impact of TV news compared to newspaper articles). Therefore, it needs to be combined with other indicators in order to assess the different relevance that audiences attach to different media (for example by asking consumers which are their most relevant sources of news instead of just their regular sources of news). It is not possible here to define a new set of metrics. Suffice is to say that the share of references represents a crucial step further towards a practical measure of plurality within this new converged and audience-based framework.<sup>113</sup>

Finally, Craufurd Smith and Tabini emphasised that Ofcom did not consider the duration of the visits of the sources and thus attentiveness.<sup>114</sup>

#### 4.5. Invitation to comment on measuring plurality across media

After the publication of Ofcom’s report, Secretary of State Jeremy Hunt stated the following: *“Well the first thing is we need to recognise that we are in a multimedia world in which successful media operators will want to follow their customers from iPad to iPhone to internet to TV. They’ll want to do it seamlessly and we mustn’t stop them doing it because, this is the model for media companies in the future. But by the same merit, as we make it easy for people to operate across platforms, we need to find a way of measuring their influence across platforms and aggregating influence in a way that hasn’t happened before”*.<sup>115</sup> In this regard, he stressed that a more robust methodology should be developed.<sup>116</sup> Likewise, Ofcom suggested in its report that a reform of the current framework around plurality may be required.<sup>117</sup>

In October 2011, Ofcom received a request from the Secretary of State to give an answer to the following questions:

<sup>110</sup> J. Hunt (2011). *Boldness be my friend*, [http://www.culture.gov.uk/news/ministers\\_speeches/8428.aspx](http://www.culture.gov.uk/news/ministers_speeches/8428.aspx).

<sup>111</sup> Guardian (2012). Vince Cable and Jeremy Hunt split over handling of future media takeovers, <http://www.guardian.co.uk/politics/2012/jun/01/cable-hunt-media-takeover-clash?newsfeed=true>.

<sup>112</sup> D. Morisi (2011). Towards a New Approach for Media Plurality: Suggestions for Ofcom’s Consultation, <http://www.medialaws.eu/towards-a-new-approach-for-media-plurality-suggestions-for-ofcom%E2%80%99s-consultation/>.

<sup>113</sup> D. Morisi (2011). Towards a New Approach for Media Plurality: Suggestions for Ofcom’s Consultation, <http://www.medialaws.eu/towards-a-new-approach-for-media-plurality-suggestions-for-ofcom%E2%80%99s-consultation/>.

<sup>114</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1..](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1..)

<sup>115</sup> J. Hunt (2011). *Boldness be my friend*, [http://www.culture.gov.uk/news/ministers\\_speeches/8428.aspx](http://www.culture.gov.uk/news/ministers_speeches/8428.aspx).

<sup>116</sup> *Ibid.*

<sup>117</sup> Ofcom (2010), para. 7.12.

- What are the options for measuring media plurality across platforms? What do you recommend is the best approach?
- Is it practical or advisable to set absolute limits on news market share?
- What could trigger a review of plurality in the absence of a merger, how might this be monitored and by whom?
- Could or should a framework for measuring levels of plurality include websites and if so which ones?
- Whether or how it should include the BBC?<sup>118</sup>

The same month, Ofcom invited stakeholders to provide comments on measuring media plurality.<sup>119</sup>

#### 4.6. Ofcom advice: Measuring Media Plurality

In June 2012 Ofcom published a report on measuring media plurality. In this report it formulated an advice to the Secretary in which it defined media plurality as “a) ensuring there is a diversity of viewpoints available and consumed across and within media enterprises and b) preventing any one media owner or voice having too much influence over public opinion and the political agenda”.<sup>120</sup> Ofcom considered three metrics to be relevant for measuring media plurality: availability, consumption and impact. However, it found the consumption metrics, which includes reach, share and multi-sourcing, the most important.<sup>121</sup> For this advice, Ofcom commissioned qualitative and quantitative consumer research. The qualitative consumer research included the traditional platforms such as TV, radio and newspapers as well as the Internet. Interestingly, the research acknowledged the importance of social media as a valuable source for breaking news in its ‘word-of-mouth’ role and as a space where citizens can contribute to the story or debate with others.<sup>122</sup>

With regard to the metrics, the availability metrics capture the number of providers at the point of consumption. It is concluded that these metrics are relevant in any plurality assessment, but that they offer limited insight and on their own are not sufficient.<sup>123</sup> As for the consumption side, the Ofcom report identifies five categories: volume of consumption, cross-media consumption, revenue, reach and multi-sourcing. According to Ofcom, reach and multi-sourcing offer insights into the degree to which there is potential diversity of viewpoints consumed by the population, where volumes of consumption are a good indicator for the level of influence associated with any provider.

<sup>118</sup> Secretary of State Jeremy Hunt (2011). Ensuring Media Plurality, [http://www.culture.gov.uk/images/publications/CMS\\_188245\\_Ensuring\\_Media\\_Plurality.pdf](http://www.culture.gov.uk/images/publications/CMS_188245_Ensuring_Media_Plurality.pdf).

<sup>119</sup> Ofcom (2011). Ofcom invites comments on measuring media plurality, <http://media.ofcom.org.uk/2011/10/21/ofcom-invites-comments-on-measuring-media-plurality/>.

<sup>120</sup> Ofcom, Measuring media plurality, Ofcom’s advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 1

<sup>121</sup> Ofcom, Measuring media plurality, Ofcom’s advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 1.

<sup>122</sup> Ofcom, Measuring media plurality, Ofcom’s advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 12.

<sup>123</sup> Ofcom, Measuring media plurality, Ofcom’s advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>.

Also, Ofcom suggests reviewing the metrics themselves as a part of each plurality review to take into account other consumption metrics as they become relevant and available.<sup>124</sup> As a third metric, impact is taken into account, which is meant to capture the influence of news content consumption on how people's opinions are formed. The qualitative research commissioned by Ofcom confirmed that individuals can talk about the different sources that may inform their opinions, but that there is no easy way to capture opinion-forming directly. Ofcom recommends that proxies of impact should play a part in assessing plurality (e.g. the importance people attached to particular sources of news, the level of perceived impartiality, and perceptions of impartiality), but that caution is necessary because of their imperfection. Finally, it is also important to consider contextual factors since they are necessary to provide a full picture of plurality. Examples given are regulations, governance models and internal plurality. In sum, Ofcom recommends that measuring media pluralism should consist of a 'basket of measures', placing the most weight on consumption metrics, together with a range of contextual factors. It is also stressed that the metrics framework itself should be assessed during each main plurality review in order to capture what cannot be predicted or measured at this moment.<sup>125</sup>

Ofcom also considers two different approaches for triggering a plurality review: a metric-based trigger and a time-based trigger. The first would require a review when a certain threshold would be reached and the latter would be automatically carried out on a periodic basis.<sup>126</sup> Ofcom weighs the two options against each other and in the end favours the time-based trigger. It is argued that a key concern of the metric-based trigger is that it creates a lack of certainty for market players because *"at any point in time it is possible that a change in market share by one player will trigger a review of the entire market, in a manner that may not be particularly transparent to the market as a whole."*<sup>127</sup> Ofcom also sees two practical limits: agreeing on a simple set of metrics and setting the level of the metrics. It therefore favours a time-based trigger because it provides a high degree of certainty, simplicity and transparency to the market.

The report also focuses on the online environment in a broad manner: internet usage regardless of device (PC, tablet, mobile) and both websites and applications are included. Different types of service are considered for instance websites by existing news providers, stand-alone news sites, and aggregators of online news. App stores, social networks and search engines are also included. Ofcom highlights the opportunities of online content: different online formats allow a range of consumption patterns, low barriers to entry, enabling high levels of participation by online media and social media, rapid innovation in online distribution and devices and new online navigation tools such as search

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<sup>124</sup> Ofcom, Measuring media plurality, Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 21.

<sup>125</sup> Ofcom, Measuring media plurality, Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 23.

<sup>126</sup> Ofcom, Measuring media plurality, Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 28.

<sup>127</sup> Ofcom, Measuring media plurality, Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 28.

and recommendation. However, at the same time there are also potential risks which need to be considered when assessing plurality.

After the report the then Secretary of State asked Ofcom for further advice in the form of seven supplementary questions.<sup>128</sup> They related to further thinking on questions answered in the June 2012 report or to the practical implementation of Ofcom's recommendations. The supplementary advice was copied to the Leveson inquiry.<sup>129 130</sup>

#### 4.7. Guardian Media Group's (GMG) - Global Radio

On 2 August 2012 the then Secretary of State for Culture, Media and Sport issued an intervention notice in relation to the proposed acquisition of Guardian Media Group's (GMG) radio stations (Real and Smooth) by Global Radio.<sup>131</sup> It was an opportunity for Ofcom to apply the methodology it had set out in its advice on Measuring Media Plurality.

In its advice on the acquisition, Ofcom looked at the ability of news media companies to influence and inform opinion. It does this by reference to a number of factors since "*there is no single standard industry measure which can be used consistently across-media platforms*".<sup>132</sup> The factors used are availability, consumption and impact.<sup>133</sup> As for scope, Ofcom considered several questions: (1) What content genres are important for plurality?; (2) What geographic audiences should we consider?; (3) Should our analysis focus solely on radio, or should it take a cross-media approach?<sup>134</sup>

The analysis of content genres is limited to news and current affairs because Ofcom believes that the underlying goal of a plural market is most directly achieved through the provision of these two items.<sup>135</sup> Geographically, the focus lies on audiences for UK-news and current affairs and local and regional has also been analysed, with particular importance to audiences within the devolved nations.<sup>136</sup> Finally, Ofcom takes into account the plurality of the news media market across radio, television, press and online.<sup>137</sup> After its investigation, Ofcom came to the conclusion that the Global

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<sup>128</sup> [http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SoS\\_letter-to-Ofcom-18-June-2012.pdf](http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SoS_letter-to-Ofcom-18-June-2012.pdf).

<sup>129</sup> <http://stakeholders.ofcom.org.uk/consultations/measuring-plurality/advice>.

<sup>130</sup> The Leveson inquiry was an investigation of the role of the press and police in the phone-hacking scandal of News of the World. The inquiry was headed by Lord Justice Leveson. The final report was published in November 2012. For more information see <http://www.levesoninquiry.org.uk>.

<sup>131</sup> Ofcom (2012). Report on public interest test on the acquisition of Guardian Media Group's radio stations (Real and Smooth) by Global Radio, <http://stakeholders.ofcom.org.uk/binaries/consultations/gmg-radio-holdings/annexes/final.pdf>.

<sup>132</sup> Ofcom (2012). Report on public interest test on the acquisition of Guardian Media Group's radio stations (Real and Smooth) by Global Radio, <http://stakeholders.ofcom.org.uk/binaries/consultations/gmg-radio-holdings/annexes/final.pdf>.

<sup>133</sup> *Ibid.*, p. 5.

<sup>134</sup> *Ibid.*, p. 5.

<sup>135</sup> *Ibid.*, p. 5.

<sup>136</sup> *Ibid.*, p. 6.

<sup>137</sup> *Ibid.*, p. 6.

Radio's acquisition of GMG Radio does not operate or may be expected to operate against the public interest.<sup>138</sup>

According to Smith, *"by focusing on availability, consumption and impact Ofcom sought to engage with the complex and multi-faceted nature of media plurality yet still provide a clear and consistent framework for investigations in the future"*.<sup>139</sup> However, she also argues that, despite the amount of data, the advice also reveals some of the difficulties regulators are confronted with when they start complex empirical investigations such as this case.<sup>140</sup> She refers to Collins and Cave who have noted that *"attempts to develop 'more practicable data-driven ways of assisting judgement' on media plurality have had mixed results in part due to 'a mismatch between the degree of elaboration of the concepts underlying plurality and the available data, or to unrealistic expectations about what measurement can do in its initial stages"*.<sup>141</sup> Smith illustrates these concerns in the context of the proposed acquisition. First, certain decisions by Ofcom (i.e. the focus on news and current affairs and the interchangeable character of services provided by different types of media) are considered to be controversial and need further investigation. Second, despite the amount of empirical evidence the data proved inadequate because it was insufficiently detailed on key aspects. This was acknowledged by Ofcom itself. Lastly, a more fundamental appraisal of the potential influence of local radio was needed and Ofcom also had to state why it received relatively low scores on the impact evaluation. Again, Ofcom acknowledged that the issue is complex because *"proxies of impact (and particularly perceived 'importance') should play a part of a broader assessment of plurality, noting that they are imperfect because one can only measure people's conscious articulation and not actual effect."*<sup>142 143</sup>

On 28 March 2013 The House of Lords Select Committee on Communications announced an inquiry into media plurality. The aim is to report to the House with recommendations in the late Autumn of 2013. The need for this inquiry can be found in the the Ofcom and the Leveson report: *"While Ofcom and Lord Justice Leveson have made a number of proposals relating to plurality, both have insisted that in a whole range of areas, it is for Parliament to give guidance on the objectives and broad principles of policy relating to plurality."*

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<sup>138</sup> *Ibid.*, p. 8.

<sup>139</sup> R.C. Smith (2013). "Bright-Line Versus Responsive Regulation: Some Thoughts From the United Kingdom", In: Valcke, Peggy, Sükösd, Miklos & Picard, Robert (eds.), *Media Pluralism: Concepts, Risks and Global Trends*, Palgrave (forthcoming).

<sup>140</sup> R.C. Smith (2013). "Bright-Line Versus Responsive Regulation: Some Thoughts From the United Kingdom", In: Valcke, Peggy, Sükösd, Miklos & Picard, Robert (eds.), *Media Pluralism: Concepts, Risks and Global Trends*, Palgrave (forthcoming).

<sup>141</sup> . Collins and M. Cave, 'Measuring Media Pluralism and the Overlapping Instruments Needed to Achieve It' (2013) 31 *Telecommunications Policy* 311-320, at 314 & R.C. Smith (2013). "Bright-Line Versus Responsive Regulation: Some Thoughts From the United Kingdom", In: Valcke, Peggy, Sükösd, Miklos & Picard, Robert (eds.), *Media Pluralism: Concepts, Risks and Global Trends*, Palgrave (forthcoming).

<sup>142</sup> R.C. Smith (2013). "Bright-Line Versus Responsive Regulation: Some Thoughts From the United Kingdom", In: Valcke, Peggy, Sükösd, Miklos & Picard, Robert (eds.), *Media Pluralism: Concepts, Risks and Global Trends*, Palgrave (forthcoming).

<sup>143</sup> Ofcom, *Measuring media plurality*, Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport, 19 June 2012, retrieved from <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>, 22.

## 5. Belgium: Monitoring of ownership and pluralism

### 5.1. Introduction

Both in the Flemish and French Community of Belgium, a permanent monitoring system exists. In the Flemish Community, the Vlaamse Regulator voor de Media (V.R.M.) has the task to map (monitor) concentrations in the Flemish media sector and to report annually<sup>144</sup>, while in the French Community, the Conseil Supérieur de l'Audiovisuel (C.S.A.) has the power to monitor and take actions against undertaking with a 'significant position'.<sup>145</sup> The main difference between the two monitoring systems is that the V.R.M. merely has a mapping exercise, while the C.S.A. has the possibility to take action.

Every year (since 2008), the V.R.M. publishes a Report on Media Concentration (*Rapport Mediaconcentratie*). The report of 2011 can be found on the following website: [http://www.vrmrapporten.be/sites/default/files/pdfversions/mediaconcentratie2011\\_0.pdf](http://www.vrmrapporten.be/sites/default/files/pdfversions/mediaconcentratie2011_0.pdf)The report of 2012 is also available and can be consulted on [www.vrmrapporten.be/rapporten/mediaconcentratie-2012](http://www.vrmrapporten.be/rapporten/mediaconcentratie-2012). In 2007 it developed a 'media database', which is used for its annual reports on media concentration and for ad hoc reports in response to specific questions. The purpose is merely to enhance transparency; the V.R.M. cannot take any action in case of increases in concentration which may endanger pluralism. Although the V.R.M. lacks the power to act on its findings, its report contains suggestions to the Flemish policy makers. The V.R.M. also delivers *ad hoc* reports. Recently, the V.R.M. has written such an *ad hoc* report in the context of the acquisition of SBS Belgium by De Vijver, Corelio and Sanoma.<sup>146</sup> Given that the activities of the V.R.M. concentrate on media ownership and concentration, but do not (yet) offer a content analysis component, the MPM (*supra*) could provide a useful complement to its current media monitoring activities. **However, such a content analysis is provided by the Nieuwsmonitor and the Electronic Archive (*Elektronisch Nieuwsarchief*).**<sup>147</sup>

In the French Community of Belgium, the Conseil Supérieur de l'Audiovisuel (C.S.A.) has been given an important role in safeguarding media pluralism. First of all, the C.S.A. has the duty to preserve diversity in the radio landscape when attributing licenses to FM radio stations.<sup>148</sup> Secondly, the C.S.A. has the power to monitor and take actions against undertaking with a 'significant position'. This monitoring system was introduced in Article 7 of the Broadcasting Act. The main targets of the mechanism are the broadcasting companies; the print sector

<sup>144</sup> Article 218, § 2, 8° of the Flemish Community Broadcasting Act (2009 Flemish Community Radio and Television Broadcasting Act (Decreet van 27 maart 2009 betreffende radio-omroep en televisie), Official Gazette 30 April 2009).

<sup>145</sup> Article 7 of the French Community Broadcasting Act 2003 French Community Broadcasting Act (Décret sur la radiodiffusion du 27 février 2003, Official Gazette 17 April 2003); last amended and renamed by the French Community Act of 5 February 2009 into 'French Community Audiovisual Media Services Act'; coordinated by the Decree of 26 March 2009).

<sup>146</sup> V.R.M., *Mediaconcentratie*, <http://www.vrmrapporten.be/rapporten/5-economische-analyse-van-de-sector/51-mediaconcentratie>; V.R.M. (2011). *Jaarverslag 2011*, [http://www.vrmrapporten.be/sites/default/files/pdfversions/vlaamse\\_regulator\\_voor\\_de\\_media\\_-\\_jaarverslag\\_2011\\_0.pdf](http://www.vrmrapporten.be/sites/default/files/pdfversions/vlaamse_regulator_voor_de_media_-_jaarverslag_2011_0.pdf), 24.

<sup>147</sup> <http://www.nieuwsarchief.be/index.php?pg=2> en <http://www.m2p.be/index.php?page=nieuwsmonitor>.

<sup>148</sup> Article 56 of the French Community Broadcasting Act 2003 French Community Broadcasting Act (Décret sur la radiodiffusion du 27 février 2003, Official Gazette 17 April 2003); last amended and renamed by the French Community Act of 5 February 2009 into 'French Community Audiovisual Media Services Act'; coordinated by the Decree of 26 March 2009).

(for which the federal state has regulatory powers) is only indirectly taken into account (i.e. when there are links or agreements with broadcasting companies).

In the following section, we will take a closer look at the Article 7-procedure. Before explaining the Article 7-procedure, it is important to note that the broadcasting legislation in the French Community imposes a transparency obligation on market actors both towards the public and the regulator. All editors of broadcasting services (both public and private) are obliged to make available 'basic information' (such as its legal form, its head/registered office, a list of shareholders with indication of their share, list of its services, financial statement of the last year)<sup>149</sup> to the public in order to allow it to form its opinion about the value of information and ideas distributed in the programs. This provision is effectively monitored by the C.S.A.; in the first half of 2007, the C.S.A. sent formal notices to several radio and television broadcasters urging them to comply with the transparency obligations contained in Article 6, §1 of the Broadcasting Act. In one case leading to an administrative fine of 5.000 EUR. Article 6, §2 of the Broadcasting Act prescribes that 'in order to ensure transparency of ownership and control structures, as well as their level of independence' editors, distributors and network operators should communicate the following information to the CSA:

- identification of shareholders (and % of shareholding);
- interest of these shareholders in other broadcasting or media companies;
- identification of natural or legal persons active in program supporting businesses, contributing to a substantial level to the production of programs.

In October 2009, the C.S.A. launched a special website dedicated to media pluralism: [www.csa.be/pluralisme](http://www.csa.be/pluralisme). A part of the activities of the C.S.A. does also consists of conducting content analysis and created a website where its reports are published: [www.csa.be/diversite](http://www.csa.be/diversite). As mentioned, in the Flemish Community this is done by ENA and the Nieuwsmonitor (*supra*).

## 5.2. French Community: Article 7-procedure

### 5.2.1. Significant position

The holding of a 'significant position' in the audiovisual sector by one or more editors or distributors is prohibited on the grounds of Article 7, §1 Broadcasting Act, if such position infringes upon the freedom of the public to access a 'pluralistic offer of broadcast services'. The wording 'significant position'<sup>150</sup> is used deliberately to mark the difference with the

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<sup>149</sup> Decree of the Government of the French Community of 3 December 2004 concerning the transparency of editors of radio broadcasting services, B.S. 10 March 2005.

<sup>150</sup> In French: *position significative*.

notion of dominant position<sup>151</sup> applied in competition law.<sup>152</sup> According to the parliamentary works, the legislator intended to underline the different objectives of both notions – being safeguarding of media pluralism versus ensuring free and undistorted competition – by using a different terminology.<sup>153</sup> The wording ‘significant position’ also shows that it does not coincide with the notion of significant market power<sup>154</sup> used for the purpose of specific sector regulation in the electronic communications sector.<sup>155</sup> It is the C.S.A. that can designate editors or distributors as having a significant position (which requires monitoring of the audiovisual landscape), and start a formal evaluation procedure (Article 7, § 2). However, it is interesting to note that, even though the notions of significant position and dominant position do not coincide and are measured through different criteria, the C.S.A. has the possibility to consult the Belgian Competition Authority in the context of an Article 7-procedure.<sup>156</sup>

The first step of the Article 7-procedure entails the designation by the C.S.A. of one or more editors or distributors as exercising a significant position in the audiovisual sector. This step is triggered either by a request from the “Bureau” (the managing body of the C.S.A., composed of its president and three vice-presidents) or *ex officio*. Again, the wording ‘in the audiovisual sector’ (instead of ‘on the audiovisual market’) is important. A significant position is not measured on the basis of market shares within relevant markets (in a competition law sense). Instead, on the basis of Article 7, §2, an editor or distributor of broadcasting services is presumed to have a significant position in following situations:

- the same person holds more than 24% of two (or more) editors of radio broadcasting services;
- the same person holds more than 24% of two (or more) editors of television broadcasting services;
- the accumulated audience share of two or more editors of radio broadcasting services reaches 20% or more of the total radio production market and lies in the hands of the same person;
- the accumulated audience share of two or more editors of television broadcasting services reaches 20% or more of the total television production market and lies in the hands of the same person.

<sup>151</sup> In French: *position dominante*.

<sup>152</sup> P. Valcke (2009). From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods. *Journal of Media Business Studies*, vol. 6, no. 3, 32.

<sup>153</sup> Exposé des Motifs, p.17

<sup>154</sup> In French: *puissance significative sur le marché*.

<sup>155</sup> P. Valcke (2009). From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods. *Journal of Media Business Studies*, vol. 6, no. 3, 32.

<sup>156</sup> Article 7, §5 of the French Community Broadcasting Act; P. Valcke (2009). From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods. *Journal of Media Business Studies*, vol. 6, no. 3, 35.



It is clear from the notion ‘*notamment*’ in Article 7, § 2 that these criteria are not exhaustive, but put forward by the legislator as ‘minimum criteria’. If these are met, the C.S.A. has to designate the editors or distributors concerned as having a significant position. The C.S.A., however, remains free to use other criteria —such as revenue shares—as evidence for a significant position.<sup>157</sup>

### 5.2.2. Repercussions for Pluralistic Offer

If a significant position is found, the C.S.A. will have to assess the possible repercussions that this position has for the diversity of broadcasting services, and more specifically, for the public’s freedom to access a pluralistic offer in broadcasting services. A ‘pluralist offer’ is described as a wide range of media products offered by a plurality of independent and autonomous players representing the widest diversity of opinions and ideas possible.<sup>158</sup> This definition is inspired by the common understanding of media pluralism in documents of the Council of Europe, which also refers to external or structural pluralism (existence of a plurality of independent and autonomous media), on the one hand, and internal pluralism or content diversity (diversity of opinions and ideas), on the other hand (*supra*).

In its guidelines of August 29, 2007, the C.S.A. further clarifies the criteria it intends to apply (either cumulatively or alternatively, depending on available data) for assessing both aspects of pluralism in the radio sector:<sup>159</sup>

- plurality of independent and autonomous media companies (structural pluralism):
  - total number of editors and total number of available media services (radio, television, print) in the French Community;
  - average time spent on media (average viewing time for television and average listening time for radio);
  - structure and composition of the media groups active in the radio sector (ownership structure, links between editors);
  - audience share;
  - number of radio services in each category (network radios versus independent radios) and each local market (municipality/city, province...);
  - concentration index (HHI) for each editor and each media group;

<sup>157</sup> Exposé des Motifs, 17-18; P. Valcke (2009). From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods. *Journal of Media Business Studies*, vol. 6, no. 3, 42.

<sup>158</sup> Article 7, § 1 of the French Community Broadcasting Act.

<sup>159</sup> CSA (2007). *Recommandation relative à la diversité du paysage radiophonique et à l'accès du public à une offre plurielle en radiodiffusion sonore*, 29 August 2007, <http://www.csa.be/documents/show/673>.

- advertising power of each editor;
- agreements between radio broadcasters and service providers like press agencies, production houses, recording companies, etc.
- reflecting the largest possible diversity of opinions and ideas (content diversity):
  - general criteria: target audiences reached, categories and description of programs distributed, source of programs (in-house production, co-production, independent production);
  - criteria for informative programs: importance of information in the program, nature of information, procedure of collecting information, information partners;
  - criteria for other programs: music styles and eventual partners, types of games and eventual partners, types of cultural programs and eventual partners.

The criteria developed in this Recommendation are relevant for both the Article 7 procedure and the licensing of FM radio stations under Article 56.

The C.S.A. has started an evaluation round in the radio sector in June 2007, but has not published any conclusions, nor entered into a consultation phase (*infra*) so far.<sup>160</sup> The information that was gathered, however, fed into the assessment carried out by the C.S.A. of candidate radio stations at the occasion of the major frequency allocation round for FM radio in 2008.<sup>161</sup>

### 5.2.3. Consultation between CSA and Undertaking(s) Concerned

If the C.S.A. concludes that the concentration of ownership interests or audience shares (or other) implies a threat to pluralism, it then has a period of six months to reach an agreement ('protocol') with the person concerned with a view to restoring pluralism in the sector.<sup>162</sup> This six months period starts from the moment of notification by the C.S.A. of its concerns to the editor(s) or distributor(s) involved. There are no deadlines for the first two steps. Failing to consent to such an agreement, or to effectively implement it, the owner would be faced with a range of possible sanctions, spanning from light (a warning and/or publication of the

<sup>160</sup> CSA, *Pluralisme et transparence des médias – FAQs*, <http://www.csa.be/faqs/12>.

<sup>161</sup> P. Valcke (2009). From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods. *Journal of Media Business Studies*, vol. 6, no. 3, 34.

<sup>162</sup> Article 7, §§3-4 of the French Community Broadcasting Act.

decision of the C.S.A.), over medium (the imposition of a fine), to heavy sanctions (the suspension and even revocation of one or more of the operator's licenses).<sup>163</sup>

## 6. The Netherlands: Media Monitor

### 6.1. Introduction

As indicated on the website of the *Commissariaat voor de Media* (CvdM), the Ministry of Education, Culture and Science asked (in 2001) the CvdM to closely monitor media developments with respect to the possible consequences of media concentration. Since then the Media Monitor has been providing insights into the public information supply and particularly into the effects of media concentration on the diversity and independence of that information supply. The Media Monitor publishes a report annually on the Dutch media landscape, media concentration, ongoing trends, as well as analysis of particular issues related to media pluralism on an incidental basis.<sup>164</sup> Like the V.R.M., the task of the CvdM is limited to map the media landscape and, thus, it cannot take any action.<sup>165</sup>

### 6.2. Focus on users and news market

In 2007, the Media Monitor introduced a new model for monitoring opinion power in response to the transitions in the media landscape.<sup>166</sup>

First, in a 2010 document of the CvdM, it has been emphasised that, due to recent evolutions in the media sector, the individual media user has become as important as the suppliers of media content. Given that content and users (instead of distribution techniques and suppliers) are becoming increasingly important, attention is shifting from ownership concentration (or supplier concentration) to the users who are supposed to make responsible choices amid the incredible amount of available news sources.<sup>167</sup>

Secondly, as technological developments have made classical categorisations of traditional media outdated, instead of monitoring suppliers in the radio or television markets, a shift had to be made to content markets. According to the CvdM, the greatest risk to society lies in the area of news content.<sup>168</sup> Research shows that news media have a strong impact on public opinion: what is not in the news is not part of the public opinion. According to the CvdM, the news media's ability to transfer issues of importance from their own media agendas to the public agenda makes them very powerful, and thus essential in assessing concentration of power in the process of opinion

<sup>163</sup> P. Valcke (2009). From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods. *Journal of Media Business Studies*, vol. 6, no. 3, 34.

<sup>164</sup> CvdM, *About the Media Monitor*, <http://www.mediamonitor.nl/content.jsp?objectid=11620>.

<sup>165</sup> P. Valcke (2011). *EU and National Approaches to Monitoring Media Pluralism*, LSE Media Policy Project.

<sup>166</sup> CvdM (2010). *Media Monitor – The Dutch Media in 2010*, <http://www.mediamonitor.nl/dsresource?objectid=11689&type=org>, 10.

<sup>167</sup> *Ibid.*, 86.

<sup>168</sup> *Ibid.*, 10.

formation.<sup>169</sup> News sets the agenda for public debate, which is why the use of news is a good indicator of opinion power. As there are no longer regulations on media concentration in the Netherlands, the importance of signalling concentration of power in public opinion formation in the news market is argued to be even more important.<sup>170</sup>

### 6.3. News market share

As indicated above, Craufurd Smith and Tambini criticised Ofcom's approach because it did not take into account the duration of the visits and the attentiveness of the public. However, a time-methodology designed to assess opinion-forming power was proposed by the CvdM in 2011, which focused on overall exposure. The Dutch model involved a survey of 1,195 Dutch adults over 13 years in age. Those surveyed were asked what news titles they had used the previous day and how long they had spent accessing them. The CvdM then computed the overall reach of news services according to owner and what they termed the 'news market share'. This was the percentage of the total time spent accessing news titles that could be ascribed to news titles from a particular supplier. Time-spent accessing a source provides a 'common currency', enabling exposure figures for the different media to be combined, but weighting will remain an issue for time-based measures if some media are considered more influential than others.<sup>171</sup> This model, however, did not assess the loyalty, attentiveness or multi-sourcing aspects of exposure.<sup>172</sup>

To measure the share of news media consumption independent of type, a clear definition of 'news' was required. The CvdM suggested three criteria as being relevant for identifying news and current affairs services<sup>173</sup>:

- Impact on the national population: Foreign news outlets are excluded because their main function is not to affect the Dutch agenda (and aim, though not directly, at Dutch audiences).
- General news: Thematic news such as sport or music is excluded.
- Updated at least once a week: To offer current information, media need to be updated frequently.

The exclusion of foreign news sources that provide a different perspective on domestic foreign policy, can be criticised for taking a too limited view of what media pluralism entails.<sup>174</sup>

<sup>169</sup> *Ibid.*, 87.

<sup>170</sup> *Ibid.*, 10.

<sup>171</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1); CvdM (2010). *Media Monitor – The Dutch Media in 2010*, <http://www.mediamonitor.nl/dsresource?objectid=11689&type=org>, 86-91.

<sup>172</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

<sup>173</sup> CvdM (2010). *Media Monitor – The Dutch Media in 2010*, <http://www.mediamonitor.nl/dsresource?objectid=11689&type=org>, 87-88.

<sup>174</sup> R. Craufurd Smith & D. Tambini (2012). Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenge, EUI Working Papers, [http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS\\_2012\\_36.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23314/RSCAS_2012_36.pdf?sequence=1).

## 1.1 6.4. Exposure diversity

The CvdM considered the news market share per independent supplier as one of the most important indicators of opinion power. However, the Regulator also stressed that another indicator is the number of news sources each citizen consults. As already indicated above, even though the public has access to almost an unlimited amount of information, actual access to a diversity of sources is not guaranteed. According to the CvdM, citizens have a certain responsibility in finding their way in the media landscape and consulting different ‘voices’. If consumers predominantly choose one or two main sources, a powerful position might be created for those content suppliers.<sup>175</sup>

## 7. Germany: vorherrschender Meinungsmacht

### 7.1. Introduction

Germany is a federal republic and consists of 16 States (*Bundesländer*). This means that powers are divided and shared between the federal level and the States.<sup>176</sup> With regard to the media sector, the federal state has the power to regulate the technical aspects of cable television and telecommunications, whereas the states have the jurisdiction to regulate the public service broadcasting system, the licensing for private broadcasters and the ownership rules that apply to private broadcasters. The states have also the authority to regulate the content of broadcasting and online content.<sup>177</sup>

Given the fact that broadcasting is regulated on state level, the 16 states adopted the Interstate Treaty on Broadcasting and Telemedia (*Rundfunkstaatsvertrag*, RStV) in 1991 in order to provide a harmonised framework.<sup>178</sup> The RStV is an evolving document and to date 15 amendments have been adopted, the last in 2010. The new version has entered into force as of 1 January 2013.<sup>179</sup>

The Federal Constitutional Court (*Bundesverfassungsgericht*) plays an important role in shaping the German media landscape.<sup>180</sup> For instance, there is the *vierte Rundfunkentscheidung*<sup>181</sup>, in which the Court argued that the states should create a framework for balanced diversity and that they should monitor the broadcasting market to prevent a combination of broadcasting and the press that could

<sup>175</sup> CvdM (2010). *Media Monitor – The Dutch Media in 2010*, <http://www.mediamonitor.nl/dsresource?objectid=11689&type=org>, 90-91.

<sup>176</sup> W. Schulz, T. Held & S. Dreyer (2008). Regulation of Broadcasting and Internet Services in Germany. A brief overview, Arbeitspapiere des Hans-Bredow-Instituts Nr. 13, 2<sup>nd</sup> Edition, 7.

<sup>177</sup> S. Müller & C. Gusy (2010). Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe: The case of Germany, Background information report Mediadem, 12.

<sup>178</sup> W. Schulz, T. Held & S. Dreyer (2008). Regulation of Broadcasting and Internet Services in Germany. A brief overview, Arbeitspapiere des Hans-Bredow-Instituts Nr. 13, 2<sup>nd</sup> Edition, March 2008, 10.

<sup>179</sup> [http://www.urheberrecht.org/law/normen/rstv/RStV-15/materialien/00\\_Begruendung\\_Allgemeines.php3](http://www.urheberrecht.org/law/normen/rstv/RStV-15/materialien/00_Begruendung_Allgemeines.php3).

<sup>180</sup> W. Schulz, T. Held & S. Dreyer (2008). Regulation of Broadcasting and Internet Services in Germany. A brief overview, Arbeitspapiere des Hans-Bredow-Instituts Nr. 13, 2<sup>nd</sup> Edition, March 2008, 7.

<sup>181</sup> Vierte Rundfunkentscheidung (Landesrundfunkgesetz Niedersachsen), Ruling of the Federal Constitutional Court of 04.11.1986 (BVerfGe 79, 118).

produce a dominant opinion power (*vorherrschender Meinungsmacht*).<sup>182</sup> Therefore, all opinions, including those of minorities, should find expression in private broadcasting and unbalanced influences of individual broadcasters or programmes should be precluded, in order to prevent the development of dominant opinion-power forming.<sup>183</sup> The Court also stated that concentration trends should be countered in a timely manner and as effective as possible, given the fact that mistakes are difficult to rectify.<sup>184</sup>

In 1997, following the third amendment to the RstV, the German Commission on Concentration in the Media (Kommission zur Ermittlung der Konzentration im Medienbereich, KEK) was established. The KEK is “responsible for monitoring and enforcing compliance with the legal provisions designed to ensure diversity of opinion in nationally-transmitted private television.”<sup>185</sup>

## 7.2. Audience share approach

### 7.2.1. Thresholds

The purpose of the audience share model is to “determine the per centage of all television viewers that can be reached by programmes attributable to one company.”<sup>186</sup> The relevant provisions regarding audience shares can be found in article 26 of the RstV.

In principle, a company may provide an unlimited number of national television services as long as it not acquire dominant opinion-forming power.<sup>187</sup>

If a broadcast company would acquire an annual average audience share of 30% it will be presumed to have acquired dominant opinion-forming power.<sup>188</sup> The same presumption is made when a broadcast company holds a dominant position in another media-relevant related market and reaches an overall share of 25% or when an overall assessment of its activities in television and in media-relevant related markets shows that the influence on the formation of opinion obtained as a result of these activities corresponds to that of an undertaking with a 30 per cent audience share.<sup>189</sup> Article 26 paragraph 5 also establishes certain responsibilities when service providers with a general channel or

<sup>182</sup> BVerfGe 79, 118; C. Wittemank (2010). “Constitutionalising Communications: The German Constitutional Court’s Jurisprudence of Communications Freedom”, *Hastings Int’l & Comp. L. Rev.*, 95, 166.

<sup>183</sup> BVerfGe 79, 118; C. Wittemank (2010). “Constitutionalising Communications: The German Constitutional Court’s Jurisprudence of Communications Freedom”, *Hastings Int’l & Comp. L. Rev.*, 95 2010, 166; B. Häussermann & A. Scheuer (2001). Germany, in: *Iris Special: Television and Media Concentration. Regulatory Models on the National and the European Level*, European Audiovisual Observatory, Strasbourg, 10.

<sup>184</sup> BVerfGe 79, 118; B. Häussermann & A. Scheuer (2001). Germany, in: *Iris Special: Television and Media Concentration. Regulatory Models on the National and the European Level*, European Audiovisual Observatory, Strasbourg, 10.

<sup>185</sup> <http://www.kek-online.de/cgi-bin/esc/mission.html>.

<sup>186</sup> P. Valcke (2009). From Ownership Regulations to Legal Indicators of Media Pluralism: Background, Typology and Methods, *Journal of Media Business Studies*, 6(3), 26.

<sup>187</sup> Article 26 (1) RstV.

<sup>188</sup> Article 26 (2) RstV, first phrase.

<sup>189</sup> Article 26 (2) RstV, second phrase.

an information-oriented thematic channel reach a 10 per cent annual average audience share. It is argued that this is a definite limit rather than a presumptive rule.<sup>190</sup>

### 7.2.2. Determining and attributing the audience share

The audience share is determined by “*the viewing duration of a transmitter in a given time interval as measured against the total transmitting time of all transmitters in the same interval.*”<sup>191</sup>

First, the state media authorities (*Landesmedienanstalten*) will determine the audience share through the KEK and decisions shall be based on the average audience share of the previous twelve months.<sup>192</sup> These audience shares will be established through representative surveys by the means of scientific methods and data will be collected among viewers aged three years and older. The broadcasters have to assist in establishing the audience shares. If they refuse to cooperate, their license may be revoked.

Once the audience shares have been determined, they have to be attributed to the companies. All programmes shall be attributed to a company when they are broadcasted by itself or by another company in which it has a direct holding of 25 per cent or more of that company’s capital or voting rights. Next to direct shareholdings, it is also possible to attributing audience shares to indirect participations. So, when Company A and its subsidiary Company B are connected in a group and when subsidiary B Company holds at least 25 per cent of the capital or voting rights in television Company C, then the audience share for all programmes broadcast by Company C are attributed to Company A which is involved indirectly through its subsidiary Company B.<sup>193</sup>

### 7.2.3. Consequences when acquiring vorherrschender Meinungsmacht

The RstV covers both internal and external growth of media companies. In case of external growth, a company cannot be issued licenses for further services that can be attributed to this company and the acquisition of further participating interests in broadcasters will not be confirmed as acceptable.<sup>194</sup>

In case of internal growth, the company is required to give up as many holdings that are needed to bring down the audience share below the 30 per cent.<sup>195</sup> When a broadcast company acquires dominant power of opinion in another media-relevant related market, it can decide to limit its market position in media-relevant related markets or give up its participating interests in broadcasters until the audience share falls below the decisive threshold.<sup>196</sup>

<sup>190</sup> B. Häussermann & A. Scheuer (2001). Germany, in: *Iris Special: Television and Media Concentration. Regulatory Models on the National and the European Level*, European Audiovisual Observatory, Strasbourg, 8.

<sup>191</sup> *Ibid.*, p. 8.

<sup>192</sup> Article 27 RstV.

<sup>193</sup> Article 38 and B. HÄUSSERMANN & A. SCHEUER (2001). Germany, in: *Iris Special: Television and Media Concentration. Regulatory Models on the National and the European Level*, European Audiovisual Observatory, Strasbourg, 8.

<sup>194</sup> Article 26 (3) RstV.

<sup>195</sup> Article 26 (4) 1 RstV.

<sup>196</sup> Article 26 (4) 2. RstV.

A company that has acquired dominant opinion power can also opt for measures in accordance with articles 30 to 32 in order to ensure plurality of opinion. The first measure is to grant broadcasting time to independent third parties in order to contribute to the diversity in programming in particular in the areas of culture, education and information.<sup>197</sup> The second measure consists of establishing a programme advisory council which must advise those responsible for programming, the broadcasting management and the partners or shareholders on how programming should be designed in order to contribute to plurality and the diversity of opinion.<sup>198</sup>

When a company wishes to opt for the so called 'plurality building measures'<sup>199</sup> a specific procedure has to be followed.<sup>200</sup> The KEK will discuss the possible measures with the company in order to reach a mutual agreement. If the KEK limits its proposal to one of the measures of articles 31-32, the company, as part of the discussions, is free to propose other measures. The KEK has the final decision power.<sup>201</sup>

If the KEK and the company do not come to a mutual agreement or if the mutually agreed measures are not implemented within a reasonable period, the state media authorities may revoke as many licenses of the company as may be required to ensure that it does no longer have dominant opinion power. It is the KEK that shall decide on which licenses have to be revoked by taking into account the characteristics of each case. The company will receive no compensation for any financial loss that may incur as a result of the revocation of the license.<sup>202</sup>

This procedure may have severe consequences for a company, therefore it is necessary that a sense of perspective is strictly observed throughout the discussion procedure. This implies that the KEK is obliged to offer and discuss the three options of article 26 (4) and that the KEK has no discretionary powers when submitting its proposals.<sup>203</sup>

### 7.3. Case Axel Springer - ProSiebenSat.1 Media

In August 2005, publishing company Axel Springer notified the Federal Competition and Cartel Authority (*Bundeskartellamt*) of its plans to take over the TV-network ProSiebenSat.1. The procedures before the KEK were submitted on 8 and 17 August 2005. The Federal Competition and Cartel Authority investigated the merger on economic grounds and decided to prohibit the merger.<sup>204</sup>

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<sup>197</sup> Article 31 RstV.

<sup>198</sup> Article 32 RstV.

<sup>199</sup> P. Valcke (2009). From Ownership Regulations to Legal Indicators of Media Pluralism: Background, Typology and Methods, *Journal of Media Business Studies*, 6(3), 30.

<sup>200</sup> Article 26 (4) 3. 2 RstV.

<sup>201</sup> Article 38 and B. Häussermann & A. Scheuer (2001). Germany, in: *Iris Special: Television and Media Concentration. Regulatory Models on the National and the European Level*, European Audiovisual Observatory, Strasbourg, 9.

<sup>202</sup> Article 26 (4) 3. 2 RstV.

<sup>203</sup> Article 38 and Häussermann & A. Scheuer (2001). Germany, in: *Iris Special: Television and Media Concentration. Regulatory Models on the National and the European Level*, European Audiovisual Observatory, Strasbourg, 9.

<sup>204</sup> Bundeskartellamt, Axel Springer AG/ ProSiebenSat.1 Media AG, B 6 – 92202 – Fa –103/05, 19.06.2006, available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion06/B6-103-05.pdf>.



According to the Authority, the merger would lead to a strengthening of the dominant position, also because of the cross-media opportunities Springer would gain because of the merger.<sup>205</sup>

The KEK prohibited the merger on the basis of article 26 of the RstV because it was of the opinion that the merger between Springer and ProSiebenSat.1 would generate a controlling influence.<sup>206</sup> In the reference period 2004-2005, the audience share of ProSiebenSat.1 was 22.06 per cent and thus below the thresholds of 30 and 25 per cent in article 26 (2) RstV. However, the KEK decided to prohibit the merger nonetheless. It argued that, when interpreting article 26(2) RstV, it is important to take its model function into account and it presumes that the national audience share is a central criterion for evaluating dominant opinion power forming of a company.<sup>207</sup> Therefore the KEK examined if the combination of the companies' television and other media activities would give it a controlling influence.<sup>208</sup>

In order to take into account the possible influences of various media on the diversity of opinion, the KEK developed a new weighting approach.<sup>209</sup> These new weighting criteria are meant to assess the equivalent of television audience share and were developed in compliance with the jurisdiction of the German Federal Constitutional Court. The criteria were (1) the suggestive powers of the media in question (*Suggestivkraft*), (2) the broad effect (*Breitenwirkung*) and (3) the topicality of news (*Aktualität*). A combination of various communication forms such as text, images and sound can result in suggestive powers of the media. Television is a medium that combines all three elements and therefore it is assumed that it has a larger suggestive power than for instance, newspaper or the radio. The broad effect is related to the range of national coverage and the spatial and temporal availability. It is also argued that internet, newspapers and magazines have less coverage which results in a lesser weight. Although at the same time, they have some advantages over television when it comes to their spatial and temporal availability. The final criterion, the topicality, refers to daily relevance. According to the KEK, all three criteria only apply to television and there is a gap between television with other media. This gap is then measured by an analysis of the media based on the three criteria. Finally, the KEK tried to equate the proportional influence of Springer in the publishing sector to per centages in the other media sector as compared to the influence of television. For instance, a conversion factor of two-thirds of television viewer ratings is applied. This implies that the 26 per cent share of the newspaper "Bild" is converted into a viewer rating of 17 per cent.<sup>210</sup> Other markets that are included in the assessment are programme guides, public interest magazines, radio and online content. In the end, the KEK estimated that the market share of Springer

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<sup>205</sup> For more information about this decision, see for instance O. Budzinski & K. Wacker (2007). The Prohibition of the Proposed Springer-ProSiebenSat.1-Merger: How much Economics in German Merger Control?, *J. Comp. L. & Econ.*, 3 (2), 281-306.

<sup>206</sup> A. Scheuer (2006). Media Law Reservations about Springer/ProSiebenSat.1 Merger, IRIS 2006-2:9/13, <http://merlin.obs.coe.int/iris/2006/2/article13.en.html>.

<sup>207</sup> <http://www.kek-online.de/cgi-bin/res/i-presse/362.html>.

<sup>208</sup> A. Scheuer (2006). Media Law Reservations about Springer/ProSiebenSat.1 Merger, IRIS 2006-2:9/13, <http://merlin.obs.coe.int/iris/2006/2/article13.en.html>.

<sup>209</sup> The following section is based on: Just, Natascha, Measuring Media Concentration and Diversity: New Approaches in Europe and the USA, *Media, Culture & Society*, 2009, Vol. 31, No. 1, 110 - 111.

<sup>210</sup> A. Scheuer (2006). Media Law Reservations about Springer/ProSiebenSat.1 Merger, IRIS 2006-2:9/13, <http://merlin.obs.coe.int/iris/2006/2/article13.en.html>.

after the merger would be 42% (22 per cent ProSiebenSat, 25 per cent of related media market, minus a bonus 5 per cent for securing diversity through regional and third-party programmes).<sup>211</sup>

According to Just, this approach has provoked much criticism and although there were the general comments of manageability and validity of the weighing criteria, it was also about the question whether the KEK could depart from the quantitative thresholds and also on the “*premises and limits on the examination and inclusion of related, media-relevant markets in the control of national broadcasting*”.<sup>212</sup>

Although Springer did not proceed with the merger, the company challenged both the veto of the Federal Competition and Cartel Authority and the KEK in court. The decision of the Cartel Authority was confirmed by the Federal Supreme Court (*Bundesgerichtshof*) 8 June 2010.<sup>213</sup>

The appeal to the decision of the KEK was first rejected on procedural grounds.<sup>214</sup> This decision was however overruled by the Federal Administrative Court (*Bundesverwaltungsgericht*) and the matter was referred back to the Bavarian Administrative Court (*Bayerische Verwaltungsgerichtshof*).<sup>215</sup> On 15 February 2012, the Bavarian Administrative Court judged that the KEK had “*overstepped the boundaries of its decision-making powers in several ways*”.<sup>216 217</sup> The 22.06 per cent audience share of ProSiebenSat was too far away from the threshold of 25 per cent so the KEK was not entitled to take the other market-relevant activities of Springer into account.<sup>218</sup> Also, the KEK did not provide particular circumstances why the merger should be prohibited although it stayed under the audience share thresholds.<sup>219</sup>

<sup>211</sup> N. Just (2009). Measuring Media Concentration and Diversity: New Approaches in Europe and the USA, *Media, Culture & Society*, Vol. 31, No. 1, 110 - 111.

<sup>212</sup> N. Just (2009). Measuring Media Concentration and Diversity: New Approaches in Europe and the USA, *Media, Culture & Society*, Vol. 31, No. 1, 110.

<sup>213</sup> A.Y. Hoffmann (2010). BGH Confirms Ban on Merger between Springer and ProSiebenSat1, IRIS 2010-7:1/12, <http://merlin.obs.coe.int/iris/2010/7/article12.en.html>.

<sup>214</sup> J. Maus (2009). Springer AG's Appeal on ProSiebenSAT.1 Takeover Rejected, IRIS 2009-9:9/12, <http://merlin.obs.coe.int/iris/2009/9/article12.en.html>.

<sup>215</sup> A.Y. Hoffmann (2011). BVerwG Quashes BayVGH Ruling on Axel Springer AG's takeover of ProSiebenSat.1, IRIS 2011-2:1/18, <http://merlin.obs.coe.int/iris/2011/2/article18.en.html>.

<sup>216</sup> Bayerische Verwaltungsgerichtshof, Az. 7 BV 11.285, 15.02.2012, <http://www.vgh.bayern.de/BayVGH/documents/7BV11.285.pdf>, 17.

<sup>217</sup> A.Y. Hoffmann (2012). BayVGH Upholds Axel Springer AG Complaint about P7S1 Takeover, IRIS 2012-4:1/15, <http://merlin.obs.coe.int/iris/2012/4/article15.en.html>.

<sup>218</sup> A.Y. Hoffmann (2012). BayVGH Upholds Axel Springer AG Complaint about P7S1 Takeover, IRIS 2012-4:1/15, <http://merlin.obs.coe.int/iris/2012/4/article15.en.html>.

<sup>219</sup> A.Y. Hoffmann (2012). BayVGH Upholds Axel Springer AG Complaint about P7S1 Takeover, IRIS 2012-4:1/15, <http://merlin.obs.coe.int/iris/2012/4/article15.en.html>.

## 8. USA: Diversity Index

### 8.1. Introduction

Media diversity in the USA is federal law and mainly regulated through ownership regulation focusing on broadcasting.<sup>220</sup> Regulation has been in place since 1934 and has undergone substantive changes with the Telecommunications Act of 1996 and the 2003 reforms of the Federal Communications Commission (FCC).

The FCC is an independent regulatory agency and was established by the Communications Act of 1934. It has control over all *“interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories.”*<sup>221</sup> The FCC consists of five commissioners who are appointed by the President and with the advices and consent of the Senate.<sup>222</sup> The Communications Act sets out specific tasks and duties for the FCC, which it has to carry out as *“public convenience, interest, or necessity requires”*<sup>223</sup>, also referred to as the ‘public interest standard’.<sup>224</sup> The actions of the FCC are constrained by the First Amendment of free speech and the FCC is prohibited from using any form of censorship.<sup>225</sup> The most important tool of the FCC is the power to grant or deny broadcasting licenses in which it was authorized to ensure that broadcasters served the *“public interest, convenience or necessity”*.<sup>226</sup>

In order to achieve that broadcasters adhered to the public interest standard, the FCC set viewpoint diversity as a policy goal.<sup>227 228</sup> This was also confirmed by the Supreme Court: *“In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power. This perception of the public interest has been*

<sup>220</sup> L.P. Hitchens (2006). *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation*, Hart Publishing, Oxford, UK, 19.

<sup>221</sup> <http://www.fcc.gov/what-we-do>.

<sup>222</sup> Communications Act of 1934, 47 U.S.C. 154.

<sup>223</sup> Communications Act of 1934, 47 U.S.C. 303.

<sup>224</sup> L.P. Hitchens (2006). *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation*, Hart Publishing, Oxford, UK, 19.

<sup>225</sup> Communications Act of 1934, 47 U.S.C. 326.

<sup>226</sup> G. Belmas & W. Overbeck (2011). *Major Principles of Media Law* (2011 Edition), Wadsworth, Boston, 455.

<sup>227</sup> 266.

<sup>228</sup> The FCC has defined —viewpoint diversity as —the availability of media content reflecting a variety of perspectives. The FCC has stated the reasoning behind its goal of viewpoint diversity: *“Because outlet owners select the content to be disseminated, the Commission has traditionally assumed that there is a positive correlation between viewpoints expressed and ownership of an outlet. The Commission has sought, therefore, to diffuse ownership of media outlets among multiple firms in order to diversify the viewpoints available to the public. Prior Commission decisions limiting broadcast ownership concluded that a larger total number of outlet owners increased the probability that their independent content selection decisions would collectively promote a diverse array of media content.”*

implemented over the years by a series of regulations imposing increasingly stringent restrictions on multiple ownership of broadcast stations.<sup>229</sup>

In 1996, Congress adopted the Telecommunications Act of 1996 and is considered to be the most substantive reform of the communications sector since the Communications Act of 1934.<sup>230</sup> The reform can be situated in an environment of deregulation and liberalisation of the media market.<sup>231</sup> Several limits on ownership were removed. For instance, provisions limiting the number of nationally owned radio stations (AM and FM) were removed.<sup>232</sup> For television, restrictions on the number of stations that can be nationally owned were removed and the cap on audience reach was increased from 25% to 35%.<sup>233</sup> Next to the relaxing of ownership limits, the Telecommunications Act instructed the FCC to review its regulations every two years<sup>234</sup> and determine whether these regulations are still necessary in the public interest. If these regulations are no longer necessary in the public interest, the FCC has to repeal or modify these regulations.<sup>235</sup>

It was the biennial review requirement that led to a comprehensive review of ownership regulation in 2003. Next to the review of four rules (national television, local television, radio-television cross-ownership and dual networks, the FCC developed a Diversity Index. This index, which was struck down by the court as will be discussed in more detail in the next section, was intended to serve as a guide to assess the status of local media markets and whether further consolidation is permitted in these markets.<sup>236</sup>

## 8.2. Measuring media diversity

### 8.2.1. Diversity Index

The Diversity Index (DI) provided a method to analyse and measure the concentration of the media market with the aim to inform the FCC when making a decision about ownership limits.<sup>237</sup> The FCC emphasised that the DI was not construed to measure diversity in specific markets and was only intended to “capture generalised, typical market structures and identify trends.”<sup>238</sup>

<sup>229</sup> A. Flarity (2010). “David slays Goliath: The fight against the FCC’s recent relaxation of the newspaper-broadcast cross-ownership rule,” *Baylor Law Review*, Vol. 61:1, <http://www.baylor.edu/content/services/document.php/116820.pdf>, 364.

<sup>230</sup> G. Belmas & W. Overbeck (2011). *Major Principles of Media Law* (2011 Edition), Wadsworth, Boston, 448.

<sup>231</sup> L.P. Hitchens (2006). *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation*, 2006, 1, Hart Publishing, Oxford, UK, 115.

<sup>232</sup> Telecommunications Act, 1996, Sec. 202 (a).

<sup>233</sup> Telecommunications Act, 1996, Sec. 202 (c).

<sup>234</sup> In January 2004, Congress amended the Telecommunications Act and replaced the biennial review with a quadrennial review.

<sup>235</sup> Telecommunications Act, 1996, Sec. 402 (a).

<sup>236</sup> P.M. Napoli (2013). “Assessing Media Diversity in the U.S.: A Comparative Analysis of the FCC’s Diversity Index and the EC’s Media Pluralism Monitor”, In: Valcke, Peggy, Sükösd, Miklos & Picard, Robert (eds.), *Media Pluralism: Concepts, Risks and Global Trends*, Palgrave (forthcoming).

<sup>237</sup> FCC, Report and Order and Notice of Proposed Rulemaking, FCC 03-127,158.

<sup>238</sup> FCC, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, 159.

The DI was modelled on the Herfindahl-Hirschmann Index (HHI)<sup>239</sup>, an index that is used in the field of antitrust and which measures concentration in a market by calculating the sum of squared market shares of relevant providers in each local market.<sup>240</sup>

The FCC first decided which media should be included in the DI. They based their decision on the results of the “Consumer Survey on Media Usage”, commissioned from Nielsen Media Research. In this survey, the respondents were asked to identify the sources they used for getting local and national news and current affairs and they could choose from television, newspaper, radio, Internet, magazines, friends/family, other, none, don’t know and refuse.<sup>241</sup> The survey continued with follow-up question about the first five choices which required the respondents to rate the different media in terms of reliance for coverage of local news and public affairs.<sup>242</sup> The results of the study indicated that television, newspapers, radio, Internet and magazines were the most important sources of news and current affairs. The FCC decided to incorporate information on television, newspapers, radio and Internet in the DI.

Magazines and cable television were excluded because their focus lies mainly on national news rather than on local news coverage.<sup>243</sup>

Next, the FCC assigned a weight to the different media. The FCC considered the various media to be substitutes but at the same time, it acknowledged that they are not necessarily of equal importance and thus relative weights for the various media are needed.<sup>244</sup> The FCC based these relative weights on the frequency of use which the respondents had indicated in the survey. This led to the following shares: 33.8% for television, 28.8% for newspapers, 24.9% for radio and 12.5% for Internet.

Then, the FCC decided how to weigh the different media owner within each category. The FCC adopted an availability measure, meaning that it would count all the number of independent outlets for a particular medium and assumed that all the outlets within a particular medium have equal shares.<sup>245</sup> This ‘equal share’ approach was not followed in the case of the Internet where subscribers shares of the two significant sources of Internet access at that current moment are used, namely telephone and cable companies.<sup>246</sup>

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<sup>239</sup> An HHI index less than 1000 (market with ten equal sized firms) is considered to be “unconcentrated”; between 1000 and 1800 is considered to be “moderately concentrated” and above 1800 is considered to be highly concentrated. In: J. Kang (2009). *Communications Law and Policy. Cases and materials*, Thomson Reuters, Foundation Press, New York, 589.

<sup>240</sup> *Ibid.*, p. 160

<sup>241</sup> *Ibid.*, p. 162.

<sup>242</sup> S. Wildman (2007). “Indexing Diversity”, in: Napoli, Philip M. (ed.), *Media Diversity and Localism. Meaning and Metrics*, Lawrence Erlbaum Associates Inc., Mahwah, 154.

<sup>243</sup> FCC, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, 164.

<sup>244</sup> *Ibid.*, p. 165.

<sup>245</sup> *Ibid.*, p. 169.

<sup>246</sup> *Ibid.*, p. 170.

For instance, the 23 television stations in New York City would be assigned with a 4.3% share of the television market.<sup>247</sup> Then, the assigned market shares of the outlets within each media type would be multiplied by the relative weight of that type. In an example, each television market share would be multiplied by 0.338 (33.8% *supra*) in order to calculate the weighted market share. Next, the FCC would derive the weighted ownership shares of a single company by combining the weighted market share of all the media outlets owned by that company. Suppose ABC, a television network, owns one television station and four radio stations in New York City. The FCC would then combine ABC's weighted television share with its weighted radio share: 4.3% multiplied by .338, which equals 1.45% for the weighted television share combined with a total of 6.7% for four radio stations multiplied by .249 for the radio market weight, which equals 1.67%. To ABC's combination the FCC assigned a total weighted ownership share of 3.12%. In the last step, the FCC would sum the squares of the weighted ownership to calculate the market's DI score. In this example, New York City received a total DI score of 373 to which ABC's squared weighted ownership share had contributed 9.8 points.<sup>248</sup>

The FCC considered a fully competitive market to consist of ten or more equally sized firms. A DI of 1000 points to a market in which there are roughly ten companies with more or less the same market power. DI of 1800 would refer to six roughly equal companies and to a moderately concentrated market. In general, the higher the DI, the more concentrated the market is.<sup>249</sup>

The FCC also looked into several hypothetical consolidation scenarios, based on the number of television stations in markets.<sup>250</sup> It considered seven possible combinations: (1) one newspaper and one television station; (2) one television station and all of the radio stations allowed under the local radio rule; (3) one newspaper and all of the radio stations allowed under the local radio rule; (4) one newspaper, one television station, and half of the radio stations allowed under the local radio rule; (5) two television stations; (6) one newspaper and two television stations; and (7) one newspaper, two television stations, and all of the radio stations allowed under the local radio rule.<sup>251</sup> For instance, a market with five television stations has an average DI score of 911. If in that same market there

<sup>247</sup> This example is taken from B.C. Hill (2006). "Measuring Media Market Diversity: Concentration, Importance, and Pluralism, *Federal Communications Law Journal*, Vol. 58: Iss. 1, Article 6.

Available at: <http://www.repository.law.indiana.edu/fclj/vol58/iss1/6>, 172-173 and is in its turn based on Appendix C of the FCC's Report and Order and Notice of Proposed Rulemaking in which the FCC calculated the DI in ten sample markets.

<sup>248</sup> B.C. Hill (2006). "Measuring Media Market Diversity: Concentration, Importance, and Pluralism, *Federal Communications Law Journal*, Vol. 58: Iss. 1, Article 6.

Available at: <http://www.repository.law.indiana.edu/fclj/vol58/iss1/6>, 172-173.

<sup>249</sup> FCC, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, 178.

<sup>250</sup> FCC, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, Appendix D; B.C. Hill (2006). "Measuring Media Market Diversity: Concentration, Importance, and Pluralism, *Federal Communications Law Journal*, Vol. 58: Iss. 1, Article 6.

Available at: <http://www.repository.law.indiana.edu/fclj/vol58/iss1/6>, 174.

<sup>251</sup> B. C. Hill (2006). "Measuring Media Market Diversity: Concentration, Importance, and Pluralism, *Federal Communications Law Journal*, Vol. 58: Iss. 1, Article 6.

Available at: <http://www.repository.law.indiana.edu/fclj/vol58/iss1/6>, 174.

would be a merger between a newspaper and a television station, the DI score would increase by 223 to a DI score of 1134.<sup>252</sup>

Based on these consolidation scenarios, the FCC prohibited newspaper/television, newspaper/radio, and radio/television combinations in the smallest markets, being those with three or fewer television stations. In the large markets, being markets with nine or more stations, the Commission found that the consolidation scenarios resulted in acceptable increases to the average DI scores and as a result, no limits on cross-media ownership were imposed in those markets. In the mid-sized markets, being markets with television stations that varied between four and eight, the FCC found that all of the scenarios should be allowed because of the modest increase in the DI scores for those markets. The FCC did make an exception in cases involving a newspaper and television duopoly.<sup>253</sup>

### 8.2.2. Criticism

The 2003 reforms on the rules in general and the DI in particular were subject to considerable criticism and were eventually challenged in court. A returning point of criticism is the equal share approach. Baker for instance, calls it an 'absurdity' and illustrates it with an example.<sup>254</sup> The FCC calculated a DI score for Kansas City of 509.<sup>255</sup> Under the new proposed rules of the FCC, in Kansas City, a company could own a daily paper, two television stations and nine radio stations. According to Baker, the new rules would permit "*the creation of a Kansas City media empire*".<sup>256</sup> Also, it would be plausible to have a Kansas City market of nine stations with percentage shares of 34, 23, 14, 10, 7, 4, 3, 3, and 2. Under these rules, the conglomerate could own two stations and have a combined 41% market share. When a merger would take place between two independent television stations and the independent newspaper, the DI score would increase by about 79 points, bringing the new DI score on 588. Baker concludes that the DI "*would see hardly a blip due to a merger of the dominating Kansas City Star, the largest television station, an additional television station, and at least nine local radio stations – possibly the only radio stations providing significant local news. Diversity, the FCC believes, is not even moderately threatened by such a combination.*"<sup>257</sup> He makes a comparison with the Justice Department that has authority over antitrust matters. In general, this market treats daily newspapers and television as separate markets. Application of the HHI index on the daily newspaper market shows that, even before the now allowed merger, the daily newspaper market has a HHI of greater than 7.569, which is high above the 1.800 that suggests high concentration. For the television market, before the merger and using the above percentages shares, there would be a HHI of 2.068. This score could increase to 2.872 when the combinations of the FCC would be allowed. Thus, the new rules of the FCC would allow the merger of dominant media companies that come from two separate but already highly concentrated media markets.<sup>258</sup>

<sup>252</sup> FCC, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, Appendix D; United States Court of Appeals, Third Circuit, Prometheus Radio Project v. Federal Communications Commission, 373 F.3d 372, 404.

<sup>253</sup> FCC, Report and Order and Notice of Proposed Rulemaking, Appendix D; United States Court of Appeals, Third Circuit, Prometheus Radio Project v. Federal Communications Commission, 373 F.3d 372, 404.

<sup>254</sup> E.C. Baker (2007). *Media Concentration and Democracy*, Cambridge University Press, Cambridge, 79 & 82.

<sup>255</sup> FCC, Report and Order and Notice of Proposed Rulemaking, FCC 03-127, Appendix C.

<sup>256</sup> E.C. Baker (2007) *Media Concentration and Democracy*, Cambridge University Press, Cambridge, 79.

<sup>257</sup> *Ibid.*, p. 79.

<sup>258</sup> *Ibid.*, p. 80.

According to Just, the equal share approach seems inconsistent with the choice of the HHI, because the latter particularly emphasises “differences in size by squaring market shares and with FCC statements regarding the differing importance of media and the need for weighing.”<sup>259</sup>

### 8.3. Prometheus Radio Project v. FCC

The equal share approach was also one of the points of criticisms of the court in *Prometheus Radio Project v. FCC*.<sup>260</sup> This case was brought before the court both by several public interest groups and associations of networks, broadcasters and newspaper owners. In general, the court did not object the principle of taking the HHI as a starting point for measuring diversity in local markets. However, the FCC “gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results. For these reasons, detailed below, we remand for the Commission to justify or modify further its Cross-Media Limits.”<sup>261</sup> The court found three fundamental flaws that related to the DI: (1) the FCC did not justify the choice and weight of specific media outlets in the DI; (2) the FCC did not justify its assumption of equal market shares and (3) the FCC did not rationally derive its Cross-Media Limits from the Diversity Index results.<sup>262</sup>

The first flaw can be summarised as follows: the court was of the opinion that the FCC failed to establish a consistent methodology for determining the weights that would be assigned to the different media in the DI.<sup>263</sup> In particular, the majority of the court had issues with the weight of the Internet: “the Diversity Index grants too much weight to the Internet, understating the level of market concentration and overstating the level of diversity in a given market.”<sup>264</sup> Also, the majority argue that the exclusion of cable (*supra*) from the DI is justified, but the differential treatment of the Internet versus cable is unsupported.<sup>265</sup> The court remands the FCC to “either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable.”<sup>266</sup>

As for the second flaw, the court found that “assuming equal market shares is unrealistic and inconsistent with the Commission’s overall approach to the Diversity Index and its proffered rationale”.<sup>267</sup> The court criticised the equal share approach on different grounds. First, it did not correspond to the decision to assign relative weights to different media types themselves, about which the FCC said “we have no reason to believe that all media are of equal importance”.<sup>268</sup> Second, it is not consistent with the FCC’s rationale for using the HHI formula in the first place, which was to measure the actual loss of diversity by taking into account the actual contributions to diversity rather

<sup>259</sup> N. Just (2009). “Measuring Media Concentration and Diversity”, *Media, Culture & Society*, Vol. 31 (1), 108.

<sup>260</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004).

<sup>261</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004)

<sup>262</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004),403

<sup>263</sup> S. Wildman (2007). “Indexing Diversity”. In: P. Napoli, *Media Diversity and Localism. Meaning and Metrics*, Lawrence Erlbaum Associates Inc., Mahwah, 155.

<sup>264</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004),464.

<sup>265</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 464.

<sup>266</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 408.

<sup>267</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 409.

<sup>268</sup> *Prometheus Radio Project v. FCC*, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 408.



than simply counting voices.<sup>269</sup> Third, assigning equal market shares to outlets that provide no local news almost certainly presents an understated view of concentration in several markets.<sup>270</sup> The court also stated that the assignment of equal market shares generates absurd results and cited an example to support this claim: in New York, the Dutchess Community College television station has a weighted share of 1.5% while the combined share to the New York Time's Company's co-owned daily newspaper and radio station is 1.4%. The court concludes that *"A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality."*<sup>271</sup>

Finally, the court acknowledged the right of the FCC to decide where to set limits for accepting or rejecting increases in the DI scores but it disagrees with the *"seemingly inconsistent manners"* in which the limits were set.<sup>272</sup> The court takes the consolidation scenarios (*supra*) as a reference point and shows that the Cross-Media Limits allow some combinations where the increases in DI scores were generally higher than for other combinations that were not allowed. For mid-sized markets (four to eight stations) in particular, a combination of a combination of a newspaper, a television station, and half the radio stations allowed under the local radio rule would generate a DI score that would be higher for combinations that were not allowed, such as the combination of a newspaper and two television stations. The court concluded that the FCC failure to *"provide any explanation for this glaring inconsistency is without doubt arbitrary and capricious, and so provides further basis for remand of the Cross-Media Limits."*<sup>273</sup>

On 21 June 2006, the FCC published a *Further Notice of Proposed Rulemaking* (*"Further Notice"*) with the purpose to seek comments on *"how to address the issues raised by the opinion of the U.S. Court of Appeals for the Third Circuit in Prometheus v. FCC and on whether the media ownership rules are "necessary in the public interest as the result of competition"*.<sup>274</sup> This led to the Report and Order and Order on Reconsideration (*"Order"*) which is the conclusion of the 2006 Quadrennial Review of the broadcast ownership rules.<sup>275</sup> In this Order, the FCC abandoned the idea of using one index: *"we will not employ any single metric, such as the Diversity Index, because, as the Commission has learned from experience, there are too many qualitative and quantitative variables in evaluating different markets and combinations to reduce the task at hand to a precise mathematical formula. Measuring concentration across platforms in the local news and information market for the purposes of preserving diversity is not akin to measuring concentration in the market for automobiles or washing machines for antitrust purposes. Moreover, the record does not reveal any "silver bullet" formula in this regard."*<sup>276</sup>

Following the 2006 Quadrennial Review, in its Media Ownership Order of 2008, the FCC decided to relax the existing ban on newspaper/broadcast cross-ownership by introducing a case-by-case

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<sup>269</sup> p. 157; Prometheus Radio Project v. FCC, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 408.

<sup>270</sup> Prometheus Radio Project v. FCC, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 708.

<sup>271</sup> Prometheus Radio Project v. FCC, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 408.

<sup>272</sup> Prometheus Radio Project v. FCC, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 408.

<sup>273</sup> Prometheus Radio Project v. FCC, 373 F. 3d 372 (3<sup>rd</sup> Cir. 2004), 408.

<sup>274</sup> Further Notice of Proposed Rulemaking, 21.06.2006, FCC 06-93.

<sup>275</sup> Report and order and order for consideration, FCC 07-216.

<sup>276</sup> Report and order and order for consideration, FCC 07-216, 73.

approach in which a four-factor test would be used.<sup>277</sup> The Order was challenged in court and the FCC had to remand the proposed rules because it failed to comply with the administrative procedure.<sup>278</sup> In 2010 the FCC performed a new quadrennial review and in December 2012 it proposed its new rules. In its Notice of Proposed Rulemaking, the FCC concluded that some newspaper/broadcast cross-ownership restrictions continue to be necessary but that a blanket ban on newspaper/broadcast combinations is “*overly broad and does not allow for certain cross-ownership that may carry public interest benefits*”.<sup>279</sup> Summarized, the new rule would be as follows. A daily newspaper could be combined with a television station on the condition that (a) the television station is not ranked among the top four television stations in the market, and (b) at least eight independently owned and operated “major media voices” would remain in the market after the combination. In all other circumstances the combination would be considered to be inconsistent with the public interest.<sup>280</sup> The newly proposed rules have evoked a lot of criticism but to our knowledge have not yet been subject to a court case.<sup>281</sup>

## 9. Conclusion

Different monitoring tools for media pluralism have been developed in recent years. The objective of these tools is to collect empirical data on the level of, or risks for, media pluralism, and to support policy makers to better define priorities and actions for improving media pluralism. This trend towards more evidence-based regulation can also be witnessed in other sectors, like finances or climate change.

This report described recent developments in monitoring / measuring tools in Europe and beyond. It can be concluded that ownership of media remains a key factor in these monitoring systems, but that regulators increasingly recognise that media pluralism entails a much more comprehensive assessment. It is advisable to look not only at ownership issues, but also at internal pluralism, content diversity, regulatory safeguards for editorial independence, relationship between media and political actors, etc.

In the past, when dealing with media pluralism, the focus used to be on diversity of sources and content. The analysis of the different measurement tools in this report shows that a growing importance is attributed to measuring the actual use of content (the consumption instead of the offer). Several mechanisms are characterised by a shift from a supply side perspective to a consumer side perspective, measuring diversity of exposure or use. However, shifting the regulatory focus too enthusiastically or radically from source and content diversity to exposure diversity is not advisable. Such a radical shift may entail risks of error since there is currently no general consensus on the appropriate method to measure exposure diversity, nor about its role and impact on existing

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<sup>277</sup> *Prometheus Radio Project v. FCC*, 652 F. 3d 437 (3<sup>rd</sup> Cir.), 441 (*Prometheus II*).

<sup>278</sup> *Prometheus Radio Project v. FCC*, 652 F. 3d 437 (3<sup>rd</sup> Cir.), 453 (*Prometheus II*).

<sup>279</sup> FCC, Notice of Proposed Rulemaking, FCC 11-186, 89.

<sup>280</sup> FCC, Notice of Proposed Rulemaking, FCC 11-186, 102.

<sup>281</sup> For more information see for instance: P. Moura (2012). FCC Cross-Ownership Proposals – Is U.S. Media Plurality Threatened?, <http://blogs.lse.ac.uk/mediapolicyproject/2012/12/14/fcc-cross-ownership-proposals-is-u-s-media-plurality-threatened/>, P. Moura (2013). The FCC’s Policy on Media Ownership Concentration: The role of ownership diversity, <http://blogs.lse.ac.uk/mediapolicyproject/2013/05/31/the-fccs-policy-on-media-ownership-concentration-the-role-of-ownership-diversity>.

regulations of source and content diversity. Indicators relating to exposure diversity should therefore be seen as complementary to, rather than substitutes for, the traditional indicators relating to ownership and media supply. It is recommended that regulators broaden the scope of their attention to also include exposure diversity, rather than shift their focus entirely from source diversity and content diversity to exposure diversity.<sup>282</sup>

Furthermore, it can be concluded that in the new media landscape cross-media assessment becomes increasingly important. In this regard, it is necessary that in the near future, more research will be done about the weighting coefficient for the different media and the impact of internet on the opinion formation of the public.

In this report we also focused on alternative tools, such as the Federal Communications Commission's ('FCC') Diversity Index (US) and the system of 'vorherrschende Meinungsmacht' (Germany). Both systems take only one aspect into account: audience share in Germany, ownership in the United States. They do not look at other factors such as content diversity, regulatory safeguards for editorial independence, relationship between media and political actors, etc.

Germany has a mixed fixed-flexible system. On the one hand there are fixed thresholds and once these are reached, dominant opinion power is presumed. On the other hand, the company can adopt plurality-building measures to avoid giving up licenses in order to stay under the thresholds. In the United States, the FCC has established fixed limits for the number of media interests that may be accumulated in specific markets.

In both jurisdictions, the regulatory authorities concerned have strived at establishing a cross-media tool in which the perceived influence of a medium could be measured. The KEK did so by converting media shares into equivalent audience shares; the FCC by proposing a DI weighing the different media companies in terms of importance in consumption.

Both attempts were subject to severe criticism. The FCC even abandoned the idea of employing a single measuring tool. Most of the criticism can be attributed to methodological shortcomings: the DI did not take the different size of media companies into account and the weighing approach of the KEK is considered to be too arbitrary when assigning the equivalences of audience shares to other media.<sup>283</sup>

As for recent developments, we looked at an advice that Ofcom published for the UK in June 2012. One of the suggestions of Ofcom is to take consumption metrics into account. Interestingly, the report not only focuses on the content producers themselves but also the possible role of navigation tools and potential new gatekeepers which can influence plurality on the level of editorial influence or control over content. Unfortunately, the report does not further elaborate this and recommends a measuring system that solely focuses on share (and potentially reach) of the top news websites as a source to measure online consumption.

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<sup>282</sup> P. Valcke (2011). Looking for the user in media pluralism regulation: unraveling the traditional diversity chain and recent trends of user empowerment in European media regulation. *Journal of information policy*, vol. 1, 287.

<sup>283</sup> N. Just (2009). Measuring Media Concentration and Diversity: New Approaches in Europe and the USA, *Media, Culture & Society*, Vol. 31, No. 1, 114.

