

In partnership with the Trinity College School of Law, the Coimisiún na Meán is publishing an essay on the topic of EU media regulation prepared by the top student taking the module EU Digital Single Market: Media regulation as part of the postgraduate LL.M programme in Trinity College. This initiative is designed to promote public debate about media policy and practice. The 2023 winning essay focuses is titled ‘Protection of Media Pluralism: towards a virtuous and efficient legal framework at the European Union level’. It was written by Claire de Villiers de la Noue and is edited by Dr Ewa Komorek assistant professor, Trinity College.

Protection of media pluralism: towards a virtuous and efficient legal framework at the European Union level?

1. Introduction: the EU's small-step strategy results in a lack of efficient and meaningful regulation

1.1 The importance of pluralism for the functioning of democracy, hence the need for protection by high-level legislation

Questioning the state of media pluralism in the EU calls for a comprehensive understanding of the contours of pluralism, a concept so extensively intertwined with that of democracy that it is delicate to define. Pluralistic media reflect the diversity of ideas in a society and not those of a few dominant actors¹. As traditionally outlined by John Stuart Mill in *On Liberty*², pluralism in general thus allows not only for a sound public and political debate, but also prevents free expression from petrifying into '*dead dogma*'³. Ideally, media pluralism is therefore a prerequisite for citizens to engage in democratic discussion by making conscious choices on a '*marketplace of ideas*'⁴.

Traditionally, one can distinguish internal from external pluralism. While the former '*presupposes a variety of voices that should be presented in the media*'⁵ and an absence of self-censorship on the part of the journalists when discussing sensitive topics⁶, the latter refers to the need for a '*diversity of media ownership*', of control⁷. One can also differentiate the layers of media pluralism: in the *macro* layer, it requires a diversity of ownership and market conditions. At the *meso* level, pluralism requires functioning institutions, companies, and

¹ Robert G. Picard, 'The Sisyphean Pursuit of Media Pluralism: European Efforts to Establish Policy and Measurable Evidence' (2017) *Communication Law and Policy* 22, 255-273.

² John-Stuart Mill, *On Liberty* (1859).

³ András Koltay, 'Constitutional protection of lies?' (2020) *Communications Law* 25, 131–149.

⁴ Concept made famous by Mill, quoted by Elda Brogi, 'The Media pluralism monitor: Conceptualizing media pluralism for the online environment' (2020) *Profesional de la información* 29(5).

⁵ Ewa Komorek, 'Is media pluralism a Human Right? The European Court of Human Rights, the Council of Europe and the issue of media pluralism' (2009).

⁶ Jan Oster, 'Media Pluralism', *European and International Media Law* (Cambridge University Press 2017), Chapter 3. X.

⁷ Ewa Komorek (n 5).

supervision. Both *macro* and *meso* level combined aim at displaying a wide spectrum of views, that materializes at the *micro* level⁸.

Notwithstanding this apparent simplicity, the very structure of the media tend towards concentration rather than plurality⁹. And while monopolies are not inherently harmful in a market, they are *de facto* harmful in the media sector - given that said sector must remain pluralistic. Hence the need for a proper regulation at EU level, however titanic the task. All the more since in times of crisis, such as the Covid pandemic or Russia's war against Ukraine, citizens have an even greater and acute need for independent and transparent media sources¹⁰.

This is why media pluralism, as a guarantor of the freedom of expression protected under Article 10 ECHR, is safeguarded at the highest spheres of law. Within the EU, Article 11(2) EUCHFR states that pluralism of the media '*shall be respected*', as confirmed notably in case *Sky Österreich GmbH*¹¹. But it is above all the European Court of Human Rights, acting as '*a kind of a European Constitutional Court*'¹², that has recalled on many occasions the significance of media pluralism. In its *Handyside* case, the Court explicitly highlighted that in the absence of pluralism, '*there is no democratic society*'¹³. In *Jersild v Denmark*¹⁴, the judges found that the media are crucial in reflecting a diversity of voices, disruptive ones included, for the general interest¹⁵. Furthermore, in the *Lentia* judgment¹⁶, the Court stated that access to a broad range of information is a right of the public, and that a monopoly in the media sector is

⁸ Judit Bayer, 'Media freedom and pluralism: legislation and enforcement at the European level' (2018) ERA Forum Berlin/Heidelberg : Springer Berlin Heidelberg 19(1), 101-113.

⁹ Robert G. Picard (n 1).

¹⁰ 'Commission publishes first annual report on rule of law situation across EU' (2020), EU Focus 397, 20-21.

¹¹ CJEU, Case C-283/11 *Sky Österreich GmbH* [2013] ECLI:EU:C:2013:28 at [5].

¹² Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) Human Rights Law Review 161, quoted in Christophe Geiger and Dirk Voorhoof, 'Freedom of expression and the right to information: Implications for copyright', *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).

¹³ *Handyside v UK* App no 5493/72 (ECtHR, 1976) at [49].

¹⁴ *Jersild v Denmark* App no 15890/89 (ECtHR, 1995).

¹⁵ Ewa Komorek (n 5).

¹⁶ *Informationsverein Lentia and Others v. Austria* App no 13914/88 (ECtHR, 1993).

inherently dangerous¹⁷. Finally, in *Manole v Moldova*¹⁸, the judges emphasized that the very core of democracy requires a debate of ideas, no matter how much they challenge the organization of the State¹⁹.

Nevertheless, one should bear in mind that the ECtHR is not in itself sufficient to guarantee pluralism. Not only is there no certainty that an individual could successfully invoke before the Court his or her '*right to a pluralistic media environment*', but, as Ewa Komorek notes, the ECtHR remains a purely '*ex post and case-by-case protection*' and is, as such, unsuitable for a comprehensive protection²⁰.

Bearing in mind these definitions and principles, this essay will try to analyze whether the EU is heading, or not, towards a virtuous and efficient legal framework to ensure the protection of media pluralism. For now, it seems that the EU's small-step strategy resulted in a lack of efficient and meaningful regulation (*I*). However, both soft and hard law are being used to promote the protection of media pluralism (*II*), and one could hope for a gradual move towards harmonization, seeing the EU small steps turning into (maybe overly) ambitious ones (*III*). It has to be noted that the issues related to the public media services will not be discussed in this essay, so as not to over-extend the scope of the latter.

1.2 From a clear '*laissez-faire*' approach to a timid intervention by the European legislator

Undeniably, the EU has been reluctant to address the issue of media regulation. Although the European Parliament repeatedly raised the alarm²¹, it does not have the power to start any actual legislative process²². Therefore, with the exception of a certain consensus on a '*general concept of pluralism*'²³, attempts to achieve a harmonized regulatory framework in the

¹⁷ Andrew T Kenyon, 'Assuming Free Speech' (2014) *Modern Law Review* 77(3), 379.

¹⁸ *Manole and others v Moldova* App no 13936/02 (ECtHR, 2009).

¹⁹ Jan Oster (n 6).

²⁰ Ewa Komorek (n 5).

²¹ See for example: European Parliament resolution of 21 May 2013 on the EU Charter, 'Standard settings for media freedom across the EU' (2011/2246(INI)).

²² Elda Brogi, Pier Luigi Parcu, 'Evolving regulation for media freedom and pluralism in the European Union' (2014) *Utilities Policy* 31, 256-265.

²³ Robert G. Picard (n 1).

2000s have failed. This should not be so surprising, since, on reflection, it is consistent with the general philosophy of the EU towards the field of culture in this period. The Commission's focus at that time was on the growth of European companies²⁴, in an attempt to build robust competition to the US hegemony in the media industry, justifying a global *'laissez-faire'* policy. The official discourse of the institutions is indicative of this rationale: *'when it comes to safeguarding a free and pluralistic media sector, there are threats for Media Pluralism from acting too much, and from acting too little'*²⁵. This reflects the rather cautious European stance, whereby media regulation should remain the responsibility of Member States (MS). For instance, faced with media concentration in Italy during the Berlusconi era - when he was prime minister and owned almost all of Italy's media via Mediaset, while also having oversight of RAI, the only State broadcaster - no real action was taken, except in 2010 when the European Commission *'ruled to remove restrictions on Sky Italia'* just to *'promote competition with the existing broadcast operators in Italy, which were controlled directly or indirectly by Berlusconi'*²⁶.

Nonetheless, recently, it seems that the EU has entered a new, more interventionist chapter²⁷, even if it is predominantly grounded in soft law²⁸.

2. Ensuring the protection of media pluralism: a conundrum between the use of soft law, and the inevitable recourse to hard law to compensate for the lacunae of the former

2.1 In the absence of an evident legal basis, the use of soft law as a tool to address media pluralism: much ado about nothing?

²⁴ Judit Bayer (n 8).

²⁵ Former Vice-President of the Commission responsible for the Digital Agenda, Neelie Kroes, 'The Future of Media' (2013) Speech before the Annual Conference of the European Magazine Media Association, available at <http://europa.eu/rapid/press-release_SPEECH-13-355_en.htm> accessed on 2nd April 2023.

²⁶ Armando J. Garcia Pires, 'Media pluralism and competition' (2017) *European Journal of Law and Economics* 43, 255-283.

²⁷ For further information, see Ewa Komorek, 'The problem which refuses to go away. Recent developments in the EU approach to media pluralism' (2014) *Communications law (Haywards Heath)* 19(2), 40-46.

²⁸ Elda Brogi, Pier Luigi Parcu (n 22).

Reflecting the change in attitude of the institutions, the European Commission launched in 2007 a *'three-step approach'* to tackle the challenges related to media pluralism: a working paper issued by the Commission, an independent study *'to develop a system of indicators for monitoring media pluralism'*²⁹, and a communication to report on said indicators³⁰. The ideal, however, collided with reality: the working paper argued against too much European intervention in the media³¹, and the communication was never published. However, the second step gave birth to what became the Media Pluralism Monitor (MPM), that *'uses three types of indicators (legal, socio-demographic and economic) to identify risks for media pluralism'*³², in a resolutely holistic analysis.

The construction of the MPM tool allows it to assess the state of pluralism including in the digital age and the benchmarks are being reviewed continuously. For example, while the transparency standard was initially assessed exclusively in an electoral context, its acceptance for the MPM was gradually extended to the evaluation of the transparency of content moderation processes on online platforms³³. For the year 2021, the MPM diagnosis considers that there is a high risk as regards media concentration in the EU (on average 82% of risk), which the report explains by the inherent concentration of the EU market³⁴.

Apart from the MPM, since 2011, two independent bodies have been established to enlighten the European Commission on the state of media pluralism through recommendations³⁵: the Centre for Media Pluralism and Media Freedom (CMPF)³⁶ and the High-Level Group on Media Freedom and Pluralism (HLGMFP). The former, surprisingly

²⁹ Peggy Valcke, Robert Picard, Miklos Sükösd, 'The European media pluralism monitor: Bridging law, economics and media studies as a first step towards risk-based regulation in media markets' (2010) *Journal of Media Law* 2(1), 85-113.

³⁰ Judit Bayer (n 8).

³¹ Elda Brogi, Pier Luigi Parcu (n 22).

³² Ewa Komorek (n 27).

³³ Elda Brogi (n 4).

³⁴ Media Pluralism Monitor (MPM 2022), available at <<https://cmpf.eui.eu/media-pluralism-monitor/>> accessed on 12th April 2023.

³⁵ Steven Barnett, Judith Townend, *Media Power and Plurality* (PGMPB 2015).

³⁶ 'About CMPF', available at <<https://cmpf.eui.eu/about/>> accessed on 13th April 2023.

early, was critical of the Commission's approach³⁷, claiming that it could no longer hide behind a supposed lack of competence so as to avoid addressing the question of pluralism³⁸.

As for the HLGMPF, its first main recommendations were highlighting the need to set up an independent agency to monitor pluralism. It also proposed to include media pluralism as a criterion for any country wishing to join the EU³⁹. Both groups agreed on the need to consider the EU as competent to act for the protection of pluralism, thus going against most of the trade organisations and industries which largely preferred an approach through self-regulation⁴⁰.

Another tool worth noting is the so-called Rule of Law mechanism. Each year, the Commission publishes a Rule of Law report. For example, for 2022, it notes the efforts of MS to improve the transparency of media ownership, but also a problem of unfair allocation of state advertising⁴¹. The purpose of this mechanism is to prevent reported threats from continuing to escalate until the Commission triggers Article 7 TEU (according to which, after finding a serious violation, the European Council can suspend some of the rights of the offending MS).

Lastly, the European Parliament has also issued resolutions on media pluralism, including one in 2013⁴² in which it considers that it is the Commission's responsibility to take measures to ensure the protection of pluralism. It reiterated its advice and warnings in 2018, calling on MS to take effective action at the national level, and condemning in strong terms

³⁷ Carles Llorens, Andreea Madalina Costache, 'European Union media policy and independent regulatory authorities: A new tool to protect European media pluralism?' (2014) *Journal of information policy* 4, 396-420.

³⁸ Ewa Komorek (n 27).

³⁹ Alison Harcourt, 'Media Plurality: What Can the European Union Do?' in Steven Barnett and Judith Townend, *Media Power and Plurality* (PGMPB 2015).

⁴⁰ Carles Llorens, Andreea Madalina Costache (n 37).

⁴¹ 'Rule of law report 2022: Commission issues specific recommendations to Member States' (2022) *EU Focus* 2022 418, 26-27 ; 'The European Commission has published the third annual Rule of Law Report', (2022) Commission press releases IP/22/4467 and QandA/22/4468.

⁴² European Parliament, Resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU, 2011/2246(INI).

‘attempts by governments to silence critical media and demolish media freedom and pluralism’⁴³.

As a result, there is no scarcity of initiatives for regulation by soft law, with the European institutions being very prolific in this area since the 2010s. And yet, can one not question the effectiveness of this strategy if the aim is to achieve a real European policy and legislation on media pluralism? Through a multiplication of entities and recommendations, don’t these initiatives leave the bitter taste of a regulatory task only half accomplished?

2.2 Hard law acting as a bridge over the troubled waters of soft law

Firstly, in the field of hard law, the country-of-origin principle⁴⁴ laid down in the AVMSD (Audiovisual Media Services Directive), revised in 2018⁴⁵, contributes to the strengthening of media pluralism since, by removing the need to obtain licences, it plays an important role in the free flow of audiovisual content in the EU, and thus in media diversity⁴⁶. But this principle seems to be a double-edged sword, since requiring providers to be subject only to the law of their country of origin may encourage them to base themselves in countries with less strict anti-concentration rules in the EU, to avoid potentially tougher laws in the receiving countries.

Be that as it may, Recital 15 of the Directive asserts that there is a *‘direct link’* between freedom of expression, transparency of media ownership, and democracy. It also recalls that users are entitled to receive information regarding the ownership structure of broadcasters, thereby referring almost unambiguously to media pluralism⁴⁷.

⁴³ European Parliament, Resolution of 3 May 2018 on Media pluralism and media freedom in the European Union, 2017/2209(INI).

⁴⁴ Article 2 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

⁴⁵ Directive (EU) 2018/1808 (AVMSD).

⁴⁶ Ewa Komorek (n 27).

⁴⁷ Rachael Craufurd Smith, Beata Klimkiewicz, Alina Ostling, ‘Media ownership transparency in Europe: Closing the gap between European aspiration and domestic reality’ (2021) *European Journal of Communication* 36- 6, 547-562.

Yet, apart from the AVMSD, one must not forget that *'the cornerstone of media pluralism policy remains European competition law'*⁴⁸. Historically, the legal basis for EU policy on the regulation of media pluralism is derived from the rules of competition law in the internal market, i.e. mainly Articles 101 and 102 TFEU: as emphasized by Armando J. Garcia Pires, *'in reality, the EU has in very few instances accepted non-economic considerations (like media pluralism) in competition cases in the media sector'*⁴⁹. This implies that any issue is in fact analyzed quasi-exclusively through the prism of the *'concepts of ownership and anti-competitive behaviors'*.⁵⁰

Indeed, it is undeniable that concentrations at the head of different media are a challenge to pluralism. Article 101 TFEU has thus already been invoked, for example, in the long-running case of *BSkyB v. Premier League*⁵¹. It was ruled that the broadcaster BSKyB's exclusive deal with the English Premier League was in breach of competition law, and BSKyB was forced to sell some of its rights to other broadcasters, leading to increased competition and lower prices for consumers, and hence, indirectly, to more media pluralism.

Moreover, the Merger Regulation⁵² even includes a specific mechanism for media mergers. In principle, the Commission is the competent body to rule on a merger under EU law. However, the Regulation provides in Article 21(4) that MS *'may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation (...)'*⁵³. These legitimate interests include, inter alia, the preservation of media plurality⁵⁴, which can therefore be used as a basis for refusing a merger. That being said, Ewa Komorek remarks that *'it seems more like a theoretical mechanism, rarely used in practice'*⁵⁵.

⁴⁸ Robert G. Picard (n 1).

⁴⁹ Armando J. Garcia Pires (n 26).

⁵⁰ *Ibid.*

⁵¹ The European Commission, 'Commission Decision of 22/III/2006 – Joint selling of the media rights to the FA Premier League' C (2016) 868 final.

⁵² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

⁵³ Article 21(4) Regulation (EC) No 139/2004 of 20 January 2004.

⁵⁴ 'Concentrations et abus de position dominante' *Répertoire de droit européen* (Dalloz 2023).

⁵⁵ Ewa Komorek (n 27).

One concern remains: obviously, competition law has, inevitably, an indirect impact on media pluralism. Yet this is not its intended purpose, as it is meant only to regulate the market, and should not be required to address the cultural sector of the media.

There are numerous cases at the national level illustrating the influence (and, arguably, the effectiveness) of competition law on media pluralism. It is interesting to consider states where pluralism is admittedly respected, but is under increasing pressure. In terms of competition law, the case of France, known for its rather interventionist approach⁵⁶, and ranked 6th best country in terms of media risk out of 32⁵⁷, can be taken as an illustration, especially since the recent refusal of the merger between the channels TF1 and M6.

Although Article 34 of the Constitution explicitly protects the pluralism and independence of the media, and the Constitutional Council highlighted how respect for media pluralism is *'one of the conditions of democracy'*⁵⁸, the French market is still characterized by a high level of concentration. Some are advocating for the defense of concentration and national champions and argue for the need for a *'strong commercial presence'*⁵⁹ for the viability of the media. However, too much concentration may prove harmful, by forming oligopolies hampering the pluralism of expression - and therefore the quality of democratic debate.

TF1 (owned by Bouygues) and M6 (owned by RTL) are considered the dominant private players in the media sector. The situation itself is already being criticized, since, for example, TF1 news was accused of not being perfectly neutral when commenting on Bouygues's telecommunications or construction projects⁶⁰. In 2021, TF1 and M6 suggested merging, potentially resulting in seven of France's major channels being brought together in a single group, giving the merged group 60% of the commercial audience of French television, around

⁵⁶ Armando J. Garcia Pires (n 26).

⁵⁷ Media Pluralism Monitor (MPM 2022), available at <<https://cmpf.eui.eu/media-pluralism-monitor/>> accessed on 12th April 2023.

⁵⁸ Conseil constitutionnel, decision n° 86-217 DC (18 September 1986).

⁵⁹ Benoit Huet, 'Repenser le dispositif anti-concentration dans le secteur des médias' (2022) *Légipresse* 2022, 221.

⁶⁰ Raymond Kuhn, 'Media Plurality in France' in Steven Barnett and Judith Townend, *Media Power and Plurality* (PGMPB 2015).

70% of the television advertising market⁶¹ and 75% of the commercial audience of television news⁶².

But for the French Competition Authority, the operation entailed too many competitive risks on the advertising market (increase in rates and coupling practices between TF1's and M6's offers), and on the markets for the acquisition of rights⁶³. In France, when a merger involving a broadcaster is subject to an in-depth review by the Competition Authority, the latter must obtain ARCOM's (audiovisual and digital communication regulatory authority)⁶⁴ opinion. Therefore, after the merger was abandoned on the 6th September 2022, the ARCOM published an opinion on the project, in which it agreed with the Competition Authority's decision, adding that television remains the only medium capable of reaching such a large audience, and that it is consequently all the more important to ensure its plurality⁶⁵.

3. Moving gradually towards harmonization: small steps turning into (overly?) ambitious ones

3.1 The glittering promises of the EMFA

As illustrated above, during years of dithering, the European legislator failed to find a legal basis for effective media regulation. Indeed, Article 11 of the CFREU alone is not sufficient to constitute a comprehensive media policy. However, it is worth mentioning that several proposals have been put on the table to justify EU action in the area of media pluralism:

⁶¹ Franck Rebillard, Jedediah Sklower, 'Monitoring media pluralism in the digital era - Application of the media pluralism monitor in the EU in the year 2021, Country report: France' CMPMF, available at <<https://cadmus.eui.eu/bitstream/handle/1814/74689/MPM2022-France-EN.pdf?sequence=1&isAllowed=y>> accessed on 12th April 2023.

⁶² Benoit Huet (n 59).

⁶³ 'Les parties annoncent l'abandon du projet de fusion TF1-M6' (2022) *Légipresse* 2022, 520 ; 'TF1/M6 : l'Autorité de la concurrence prend acte de la décision de Bouygues de retirer son projet d'acquisition', French Competition Authority, available at <<https://www.autoritedelaconcurrence.fr/fr/communiqués-de-presse/tf1m6-lautorite-de-la-concurrence-prend-acte-de-la-decision-de-bouygues-de>> accessed on 12th April 2023.

⁶⁴ Regulatory Authority for Audiovisual and Digital Communication, resulting from Law n° 2021-1382 of 25th October 2021.

⁶⁵ Laurence Pécaut-Rivolier, 'Douze mois d'ARCOM' (2023) *Légipresse* 2023, 84.

to be lawful, the latter necessarily has to find its source in one of the founding treaties of the EU.

Thus, the possibility, among others, of resorting to Article 352 TFEU, has interestingly been brought up: it empowers the Council, acting unanimously, and the Commission, after agreement by the Parliament, to *'adopt the appropriate measures'* in cases where EU policy is necessary to achieve one of the objectives of the TEU or TFEU, but where said Treaties have not conferred on the Institutions any power to take action. As Elda Brogi and Pier Luigi Parcu point out⁶⁶, in the absence of evident legal basis, this article could thus prove useful when it comes to the implementation of a EU policy focused on media pluralism. But one can be skeptical as to the feasibility of this suggestion. Indeed, the wording of Article 352 TFEU per se creates difficulties. To put it in the words of Ewa Komorek, *'first of all, media policy is not yet a defined policy of the EU and protection of media freedom and pluralism is not one of the stated objectives'*⁶⁷. The CMPF considered the possibility of invoking, for example, the protection of human rights (Article 5 TEU) as an *'objective'*⁶⁸, but noted that it seemed highly unlikely that a unanimous vote of the Council would take place, as this would mean a perfect agreement of all EU MS, which is known to be rather unrealistic. The possibility of relying on Article 167(4) TFEU has also been raised in the past, since it requires the Commission to take cultural characteristics into account when formulating EU competition law policy⁶⁹. But none of these options were finally chosen⁷⁰.

And yet, eventually, after years of wandering, the Commission appears to have finally identified a legal basis for a coherent and harmonized pluralism policy. It does so explicitly in its proposal for a regulation and recommendation, called the European Media Freedom Act⁷¹. Of course, one can read in this sudden turnaround a political will to finally address the issue of

⁶⁶ Elda Brogi, Pier Luigi Parcu (n 22).

⁶⁷ Ewa Komorek (n 27).

⁶⁸ CMPF, 'European Union competencies in respect of media pluralism and media freedom' (2013) EUI RSCAS PP, available at <<https://hdl.handle.net/1814/26056>> accessed 14th April 2023.

⁶⁹ Ewa Komorek (n 27).

⁷⁰ For a more detailed overview of several of the potential legal bases, see Ewa Komorek, 'Case for Action at the EU Level?', *Media Pluralism and European Law* (Wolters Kluwer 2012), 245-263.

⁷¹ EC, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU' (2022) COM/2022/457 final.

pluralism, and thereby give more control power to the EU, especially in the online media environment, which the EU is worried could slip out of its hands. The Commission suddenly seems to want to take up the issue of pluralism very deliberately, as highlighted by President of the Commission Ursula von der Leyen, who stated that *'media companies cannot be treated as just another business. Their independence is essential. Europe needs a law that safeguards this independence'*⁷². As things stand, the Commission has thrown its lot in with Article 114 TFEU, specific to the internal market. It allows for the adoption of *'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'*⁷³. Besides, according to the Commission, Article 114 TFEU could also warrant the creation of European structures responsible for overseeing the implementation of the regulation⁷⁴.

Several of EMFA's proposals are designed to strengthen media pluralism. The draft is meant to be pioneering in the field of pluralism, as Věra Jourová, Vice-President of the Commission for Values and Transparency, recalls: *'this is what we are proposing today for the first time ever: common safeguards to protect media freedom and pluralism in the EU'*⁷⁵. Overall, the proposal tackles the risk of state interference in public media, issues of quality of public media, national measures affecting free movement in the EU and biases in audience measurement systems⁷⁶. The Regulation would for instance require MS to respect the effective editorial freedom of media providers and to strengthen the protection of journalistic sources. In addition, media service providers would have to ensure transparency of ownership. MS should also assess the impact of concentrations on media markets through what could be described as a kind of *'pluralism test'*, and any measure taken by a MS which may influence the media should be duly justified and proportionate. Then, it is worth noting that according to Article 3

⁷² Dirk Voorhoof, 'Will the EU Media Freedom Act (EMFA) be able to strengthening the protection of journalistic sources?' (2023) Communications Law 28(1).

⁷³ Article 114.1 TFEU.

⁷⁴ Francisco Javier Cabrera Blázquez, 'The proposal for a European Media Freedom Act' (2022) European Audiovisual Observatory.

⁷⁵ EC, 'European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU', available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5504> accessed on 14th April 2023.

⁷⁶ Francisco Javier Cabrera Blázquez (n 74).

of the EMFA, for the sake of the public discourse, recipients of media services in the EU would have a right to receive a variety of news and current affairs information⁷⁷.

Additionally, the Commission also proposes to create a *'European Board for Media Services'*, an independent body composed of national media authorities, that Thierry Breton, Commissioner for the Internal Market, qualified as a *'new European watchdog'*⁷⁸. The Board would promote the consistent application of the EU's media framework, notably by assisting the Commission in the development of guidelines for media regulation. It may also issue opinions on national measures and decisions and on mergers in media markets⁷⁹.

Nevertheless, skepticism can quickly set in upon reading the proposal. In fact, as deplored for example by Dirk Voorhoof, with the EMFA, *'the expectations are high, probably too high, and the goals the EMFA seeks to achieve, are very ambitious'*⁸⁰. Moreover, the EMFA seems to lack measures relating more specifically to the economic threats specific to online media, as the latter are under increasing pressure from the information society intermediaries, that are capturing a substantial part of the advertising revenue traditionally dedicated to the media. The text has also been accused of being insufficiently enforceable: few sanctions are mentioned, and many of the core elements for safeguarding pluralism are in fact only mentioned in the recommendations, rather than in the regulation itself⁸¹.

Therefore, the Commission could be criticized for its lack of realism: it is by no means so easy to switch so swiftly from a near-absence of a legal framework to such total harmonisation on pluralism. The proposal still has to be discussed and voted on by the Parliament and the Council anyway, and only time will tell whether it will remain a dead letter or not.

3.2 Online media and rise of new challenges requiring a subtle method of regulation

⁷⁷ *Ibid.*

⁷⁸ EC (n 75).

⁷⁹ *Ibid.*

⁸⁰ Dirk Voorhoof (n 72).

⁸¹ Francisco Javier Cabrera Blázquez (n 74).

Notwithstanding all the regulatory efforts at the European level, the *de facto* issue for all policies is the velocity of developments and changes in the media. While adapting to the consumption of information in the online environment, the diversity of the media can nowadays be jeopardized by the phenomenon of *'information bubbles'*. No matter how hard the EU strives for a strict legal framework, the fact remains that citizens, when informing themselves online, are victims of a mechanism of customized filtering of information and are consequently *'exposed mainly to content which reinforces or confirms their previously formed views'*⁸². All within a *'winner takes all'* online model, which *'creates serious and specific concerns for pluralism in all areas in which the mass media are involved'*⁸³. As a result, gradually, users are no longer confronted with a variety of content that is vital to the general interest and democratic debate.

And the EMFA also foresees a new user right to customise their media offering to reflect their personal preferences⁸⁴. One can imagine that this could further lock users into their usual information bubbles, as they will have the choice to be confronted with only the media they want.

Hence the emergence of the notion of *'exposure diversity'*⁸⁵, paramount for reconceptualizing pluralism in a mass media market. One could therefore say that the philosophy of mass and diversity characteristic of the internet does not, paradoxically, allow for more diversity and pluralism of the media. Maybe it is no longer the variety of broadcasters that matters to achieve plurality, but rather the reduction of audience segmentation, algorithmic profiling, and over-personalization of access to the medium, as well as reforming the liability of information society intermediaries, and regulating the removal of online content.

4. Conclusion

⁸² Elda Brogi (n 4).

⁸³ Elda Brogi, Pier Luigi Parcu (n 22).

⁸⁴ Article 19 Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (EMFA).

⁸⁵ Natali Helberger, Kari Karppinen, Lucia d'Acunto, 'Exposure diversity as a design principle for recommender systems' (2018) *Information, Communication & Society* 21(2),191-207 as quoted in Elda Brogi (n 4).

Among the propositions for a more virtuous framework, from a *de iure condendo* view, some have suggested a complete and resolutely *'incisive'*⁸⁶ harmonization of national legislations on media broadcasters, or the addition of new principles in the TFEU, to ensure the protection of media pluralism from any political influence, and to aim at avoiding all forms of economic influences. Although a laudable approach, this might seem overly idealistic. On the other hand, as is often the case in EU law, perhaps a solution that should not be overlooked is to rely heavily, and increasingly, on the case law developed by the CJEU, all the more so given that its preliminary judgments are binding upon the courts of the MS⁸⁷. Indirect regulation on a case-by-case basis would eventually lead to the creation of a European standard for the protection of media pluralism⁸⁸. This way, the CJEU could *'pave a common path in order to try and approach similar cases in a similar manner'*⁸⁹.

⁸⁶ Elda Brogi, Pier Luigi Parcu (n 22).

⁸⁷ *'In particular through the mechanism of references for preliminary rulings, as its answers are binding upon the courts and parliaments of all the MS'*, Pierre-Yves Gautier, 'Why internet services which provide access to copyright infringing works should not be immune to liability' (2020) European Intellectual Property Review 42(8), 464-468.

⁸⁸ This is already the case in many areas of EU law, such as for the notion of communication to the public, in copyright law.

⁸⁹ Elda Brogi, Pier Luigi Parcu (n 22).

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