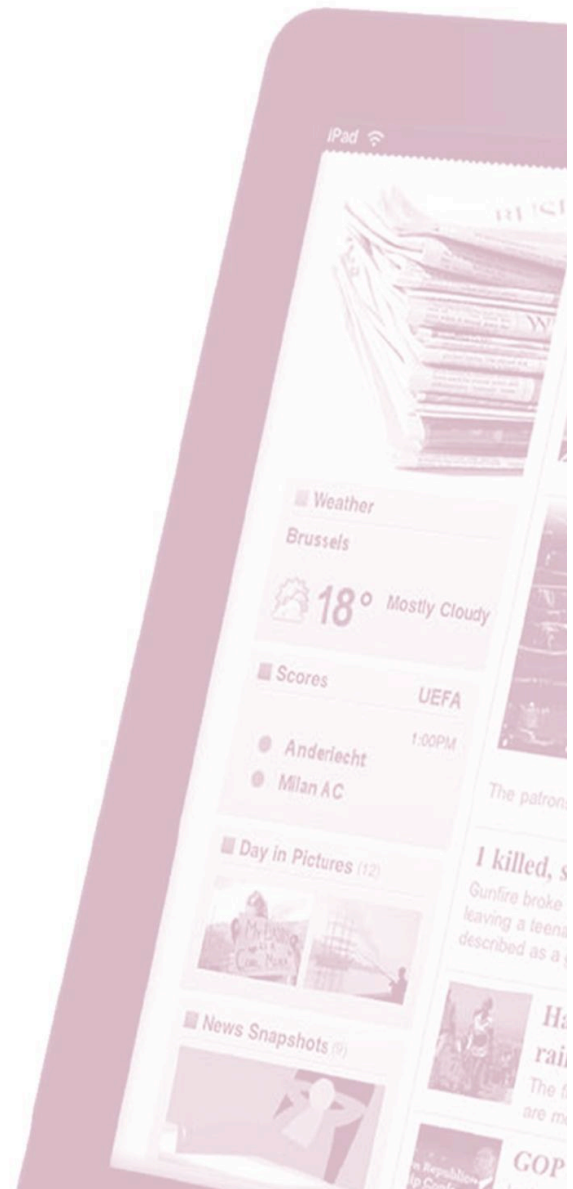




PRESERVING PLURALISM IN A RAPIDLY CHANGING MEDIA MARKET

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Introduction

The newspaper and news media publishing sector is one of the main sources of cultural diversity and pluralism in Europe. In every Member State, newspapers are present in the different local, regional and national markets. They are now also accessible from a wide variety of platforms and devices from printed to digital formats. The editorial content of newspapers covers a wide diversity of topics. Newspapers on all platforms encourage and enable their readers to participate actively in democratic debate through blogs, opinion forums, and other new tools which increase the level of democratic participation, diversity and pluralism in the European media landscape.

The newspaper and news media sector is currently going through a crucial restructuring phase shaping the future of the press from a print environment to today's multi-channel world. Publishers are investing heavily in new business models to provide citizens with an incredible range of news, views and information in both print and digital formats. While the print edition of newspapers is still the engine room driving the creation of professional news content, publishers are also providing readers with a choice of attractive offers via websites, smart phones and tablet applications. These investments are being made at a time when advertising revenues for newspapers have declined in many countries due to the economic downturn and when the digital environment for both content and advertising has yet to yield significant returns. Furthermore, newspapers' growth in the digital market is challenged by news aggregators and search engines which develop their activities by using publishers' content without investing in the development of content and negotiating properly with publishers.

European consumers today can choose from an enormous variety of information sources, many of them in the online environment. So far from dominating the media landscape, publishing houses have embraced change and new technology in order to maintain their readership and respond to consumer demand in a fast evolving media market. In this way, newspapers are fulfilling their vital function of providing a trusted source of news, views and analysis and stimulating open democratic debate on all platforms.

1. Member States have sole competence for preserving media pluralism

National media markets in the EU are very diverse and have been shaped by historical, cultural and societal developments. Each Member State has its own approach to regulating media concentration and pluralism. Media consumption and reading habits vary considerably from one country to another, with the press, public and private TV and radio sectors holding very different local market shares in different territories. In this respect, media pluralism can only be assessed by national authorities who can adapt their legislative framework according to their national, regional and local specificities.

The European Union does not have the competence to regulate media diversity, other than through the provisions on competition law (notably the EC merger regulation, antitrust rules set out in Articles 81 and 82 of the EU Treaty which prohibit anti-competitive horizontal and vertical agreements, the Treaty's public service provisions in Article 86, and EC state aid control in Article 87 (TFEU).

The media sector in Europe has to comply with general EU Competition policy¹ which also clearly indicates that Member States must take appropriate measures to protect legitimate interests including plurality of the media.²

This has been confirmed by the Commission in its Staff Working Document from 2007³ which stated: “European competition law cannot replace - nor does it intend to do so - national media concentration controls and measures to ensure media pluralism”.

The Charter of Fundamental Rights of the European Union states that the pluralism of the media shall be respected, according to Article 11. However, despite the fact that the Charter is binding through its inclusion in the Treaty, Article 51(2) of the Charter clearly indicates that the EU competencies cannot be extended in order to protect the rights included in the Charter⁴. In addition, subsidiarity is a founding principle of EU cultural policy according to which harmonisation of the laws and regulation of the Member States is excluded⁵.

2. Positive actions to promote pluralism in EU policies

There has been no evidence that regulating media ownership at European level would foster pluralism in the different Member States. On the contrary, attempts to legislate⁶ in the past have failed not only because of the lack of competence but also because the draft legislation represented a serious threat to the development of local and regional newspapers. More recently, the Commission has also pointed out that “although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism⁷”.

ENPA believes that there are many other efficient ways to support pluralism in the current media market.

Firstly, it is necessary for newspapers to be financially viable and sustainable. Advertising revenues from both print and digital news media are indispensable to maintain a free and independent press in Europe. Any further advertising bans and restrictions, also in the form of mandatory information requirements for advertising in the press, should therefore be avoided to ensure the sustainability of newspapers and news media.

¹ EU merger regulation, antitrust rules set out in Articles 81 and 82 of the EU Treaty which prohibit anti-competitive horizontal and vertical agreements, the TFEU public service provisions in Article 106, and EU state aid control in Article 107 of the TFEU

² Council Regulation 139/2004

³ Commission Staff Working Paper: Media pluralism in the Member States of the European Union, 16 January 2007, pp. 7, http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf

⁴ Article 51(2) of the Charter: "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

⁵ Article 167, par. 5 TFEU. “In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States.”

⁶ Commission’s Green Paper on media concentration in 1995

⁷ Commission Staff Working Paper on Media Pluralism in the Member States of the EU

In the changing media landscape it is today more essential than ever to ensure the effective enforcement of copyrighted protection measures regarding newspaper content. Without sufficient copyright protection, publishers would not be able to continue making heavy investments to offer professional journalistic content in both the print and digital environment. In particular, the authorities should be alert to the activities of third parties such as technology platforms and news aggregators which are exploiting news media content financed and developed by publishers for their own commercial activities, without any prior consent or remuneration of the relevant right holders.

Publishers are also concerned by the expansion of Public Service Broadcasters' activities in the commercial sphere, especially in the digital environment, which go beyond their public service remit. These activities, publicly financed, distort the digital market and seriously undermine publishers' investments in this area. Unfair 'competition' from the digital activities of PSBs offering press like written content on all platforms jeopardises, in particular, the future development of newspapers that have comparatively very limited resources. If the PSBs are allowed to expand their digital activities without respecting competition rules, such circumstances could, in the long terms, mean that public access to various types of news becomes limited. It is the task of the European Commission and the national authorities to ensure that PSBs stay within their remit and do not infringe competition rules.

EU and national decision makers should ensure that the VAT System helps to promote, rather than hinder, the development of newspapers and news media on all platforms. Today, most EU Member States provide for a zero, super reduced or reduced rate of VAT for printed newspapers, in recognition of their valuable role in democratic society. It is essential, in the course of the current review of the EU VAT System, that these conditions for printed press are maintained. Moreover, ENPA calls for the extension of these rates to newspapers in their digital formats. This would improve consumers' access to professional news information, promote paid-for content models in the digital environment and foster the growth of the digital content market. Ideally, zero VAT rate should apply to newspapers and news media on all platforms.

3. Pluralism crucially depends on upholding freedom of the press

ENPA believes that the protection of press freedom and freedom of expression in the different Member States is essential for ensuring pluralism. Recently, the debate on the controversial Hungarian media laws illustrated the potential for Government interference in editorial content and raised questions over the independence of the national media authority.

In the Czech Republic in April 2009, a draft law on criminal proceedings was a direct threat to press freedom and journalistic investigation as regards the use of police wiretapping material. The law established a heavy punishment for those who publish any information coming from police wiretapping, even if the information is in public interest.

In Poland, the Criminal Code has – until 2009 – foreseen a one year imprisonment for slander, and two years' imprisonment for the same act committed "via mass media". The Parliament has since agreed to change the Criminal Code, unfortunately only softening possible penalties and maintaining criminal procedures and fees, including a one year term of imprisonment for the media representatives.

These are just a few examples to indicate that the preservation of media pluralism and respect for freedom of the press do not centre on the question of ownership and concentration. State interference and misguided legislative proposals can be more damaging to freedom of the press and editorial independence.

Mechanisms, such as the use of Constitutional courts and judicial proceedings are already in place at national level in order to prevent the adoption of legislation which would be against press freedom or media pluralism. The European Court for Human Rights (ECHR) plays also an essential role in ensuring that freedoms and fundamental rights are respected by Member States. ECHR judgements are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas.

4. Pluralism is a multi-dimensional concept

Pluralism can be assessed from political, economical, cultural or other perspectives, so the impossibility of covering all these elements in any European legislative measure would quickly become clear. Pluralism is not limited to the question of media concentration or media ownership. It also includes other elements like press freedom, cultural diversity, freedom to work on numerous media platforms and editorial independence.

Furthermore, the development of the information society and of new technologies has increased media pluralism: citizens are now able to contribute to the democratic debate through different channels in using blogs, social networks, mobile platforms, etc. Pluralism can therefore not only be assessed through the “traditional media” and all of these developments should be taken into account.

Concerning the relationship between regulation and pluralism, it should be noted that the Resolution of the European Parliament on the Hungarian media law, states that "over-regulation of the media is counterproductive, jeopardizing effective pluralism in the public sphere"⁸. This indicates that respect by EU and national policy makers of the fundamental rights of press freedom rather than more regulation promotes pluralism in the public sphere. Legislative authorities should therefore restrain from any more regulation at national or at EU level.

Any legislative measures aimed at regulation of media concentration would only limit press freedom and the vital role of the news media in democratic society. Newspapers should be allowed to decide voluntarily about their future activities and business structures and be bound solely by national legal frameworks.

5. Changing media landscape and new challenges

Newspapers are facing new challenges in a more competitive and changing media environment. First of all, publishers need to ensure that newspaper content is accessible on a range of platforms and in various forms. Publishers have set up new business models, including paid-for-offers. They invested in the development of their advertising market by using new advertising techniques and proposing innovative offers to advertisers.

⁸ European Parliament resolution of 10 March 2011 on media law in Hungary

However, other players of the information society, such as search engines, news aggregators and other technology platforms are more and more “vampirising” the content provided by publishers but without making the necessary investment for remunerating such content. In some cases, some players disregard EU legislation on copyright by using newspaper content in their own services.⁹

The activities of some technology platforms are also under scrutiny under competition law because of the dominance they exercise on the market (advertising, search)¹⁰. These huge corporations have become gatekeepers on the internet and exercise control over users’ access to digital newspapers. Their dominant market position enables them to influence access to information with an inevitable impact on public opinion. In this area, publishers call for fair search in order to ensure that access to information is ensured without discrimination.

6. Self-regulation as a tool to guarantee editorial independence

Self-regulation has been adopted in all EU Member States, including those who joined in the last decade. Various codes of conduct have been adopted either by professional associations of news media (in some cases in cooperation with associations of journalists) or by individual newspapers¹¹. Some newspapers have their own ombudsman applying the relevant code. National press councils, financed by the industry, have an important role to play in the respect of self-regulatory rules and in the handling of press complaints.

The use of self-regulation and the establishment of press councils are aimed at preserving media freedom and pluralism and at the same time promoting the truthfulness of information. Independent professional bodies which develop codes of conducts have in-depth knowledge of the situation in their local media environment. Self-regulation also has the advantage of flexibility, so codes of conduct can be adapted to respond easily to changes in the media market. Furthermore, any government intervention in media self-regulation would be contrary to editorial independence and could lead to press control.

In this context, it is important to recognise the role of the editor-in-chief, as an essential element of self-regulation, in the whole process of creating the content of newspaper. The editor-in-chief is responsible on a day to day basis for the final shape of articles and the orientation of the newspaper. It is vital for the future of every newspaper to maintain a high editorial standard to retain its readership. In addition, the editor-in-chief has overall responsibility for making sure that any complaints from readers concerning the newspaper content are properly addressed.

Reliability and maintaining readers’ trust remain crucial for the sustainability of newspapers and news media. If a reader loses his or her confidence in one newspaper, for whatever reason, he or she will turn to a different media source. This “law of supply and demand” secures pluralism of opinions better than any legislative measures¹². Professional standards and ethical rules also aim to ensure that journalists respect certain limits whilst providing for freedom of investigation and reporting.

⁹ Copiepresse v. Google case ; Infopaq v. DDF case

¹⁰ FIEG v. Google case ; EU competition case (Microsoft)

¹¹ e.g. in Bulgaria we can find Ethical Code of the Bulgarian Media from 2004, in Germany German Press Code as updated from 2006 or in Portugal Journalists’ Code of Ethics from 1993. Other codes of journalism ethics can be found on <http://www.rjionline.org/MAS-Codes-of-Ethics>

¹² COMMISSION STAFF WORKING DOCUMENT: Media pluralism in the Member States of the European Union, 16 January 2007, pp. 12

7. Media ownership, cross media ownership and pluralism

In its 2007 Staff Working Document, the Commission underlined that “diversity of ownership of media outlets is not sufficient per se to ensure media pluralism of media content.” National legislation regarding the possibility for one group to own different media is already in place and these laws are revised according to the changes in the national media landscape.

Furthermore, the Commission’s study on indicators on media pluralism also revealed the difficulty of establishing any method to measure pluralism considering the specificities of the media market in each Member State. There is also a risk that the application of these indicators would interfere with editorial independence and press freedom.

The question does not so much concern who owns a particular media outlet or group, but whether there is a sufficient level of competition in the media market. In this respect, national authorities and the EU play a role in ensuring that different media have the opportunity to develop and in preventing anti-competitive behavior. When it comes to evaluating pluralism in a particular national and local market, however, this can only be done by the national authorities.

In this context, it should be noted that many newspapers have benefited from being part of a larger media group that has allowed them to be more resistant to the financial crisis and the downturn in advertising revenues. In fact, some titles would have closed down in recent years if they were not part of a larger media structures or did not belong to a family owned structure with solid financial basis.

Being part of a larger group can also enable essential investment in new products and services for readers. In addition, it puts newspapers in a better position to compete with the many other media outlets and also in a stronger position to negotiate with other market players such as paper producers, printing companies, news agencies and sport federations.

A newspaper which is part of a media group can rely on this group’s economic strength, without this leading to political pressure or intervention by the owners in editorial content. There are currently many examples of media groups owning newspapers, TV or radio stations which take different political and editorial lines.

One striking example is the Danish newspaper group JP/Politikens Hus A/S which owns three major national newspapers in Denmark, all very distinct from each other. Among other things, the different titles support either the government or the opposition parties. Another example is the Swedish Aftonbladet, a social democratic newspaper owned by the Norwegian Schibsted group, that also runs the major Norwegian center-right national Aftenposten. In Belgium, IPM SA group owns two newspapers from different political perspectives: La Libre Belgique (Christian Democrat) and la Dernière Heure, which is liberal; De Persgroep owns Het Laatste Nieuws (liberal) and De Morgen (left-leaning).

Conclusion

Media concentration and pluralism have always been subject to lively debate at European and national level, since these issues touch upon fundamental values of democracy and upon freedom of expression. Whenever these issues are high on the political agenda, politicians, experts and decision-makers must have a clear and comprehensive picture of the many challenges facing the professional news media today.

This ENPA Position highlights that there are many different ways to assess media pluralism and diversity, which cannot be regulated at European level because there is no competence to do so. Members' States play an essential role in this field because they are best placed to assess adequately the market situation at national, regional and local level.

Most importantly of all, any initiative or legislation affecting directly or indirectly the media, whether at EU or national level, always needs to be carefully evaluated for its potential impact on freedom of the press and the functioning of a free and independent media. Press freedom is the main guarantee of pluralism and diversity of opinion and information in our democratic society.

The European Newspaper Publishers' Association (ENPA) promotes the professional interests of the European newspaper and news media publishing industry on all platforms. ENPA members represent over 5,200 national, regional and local newspaper titles, published in 23 European Union Member States, plus Norway, Serbia and Switzerland. More than 150 million printed newspapers are sold and read by over 300 million Europeans every day, in addition to many millions of readers of newspapers in digital formats.

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