

*Media ownership and concentration in Europe:  
a comparative analysis  
with reflections on the situation in Slovenia*

A study commissioned by



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*The views expressed in this report are solely those of the author and may not, under any circumstances, be regarded as representing an official position of AKOS.*

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# 1. Introduction

AKOS has expressed its willingness to benefit from recent and complete information on the regulatory framework regarding media ownership and media concentration in other European countries, on how this regulatory framework is implemented by the authorities in charge and what lessons could be learned from foreign experiences in light with the specific situation of the Slovenian media landscape.

In order to meet these expectations, our study will be structured as follows.

Chapter 2 will explain why the use of anti-concentration measures in the context of media policy differs from the traditional enforcement of competition law by competition authorities, i.e. mainly why such measures go beyond the goal of reaching a competitive media market to encompass way broader democratic goals such as media pluralism and the emergence of a “marketplace of ideas”. However, considering the overabundance of academic research and political statements about media pluralism in the recent years (which are well known by AKOS and widely discussed in diverse international fora where AKOS is usually present), we will limit ourselves to link it with the issues of media ownership and concentration and, in order ease the reader who wishes to go deeper in that aspect of media concentration, we will provide a selected bibliography in chapter 8.

Chapter 3 will address economic issues and will explain which kind of indicators are commonly used to measure concentration, and will provide a few examples of how they have been used recently to assess the degree of concentration of the media industry.

Chapter 4 will address legal issues and will consist in a comparative analysis of the regulatory framework regarding media concentration in the 28 EU Member States and the 4 EFTA countries, providing an unique comparative view on 33 different European legal systems dealing not only with the rules limiting ownership concentration in one way or another, but also with rules related to the assessment of media pluralism, as well as rules contributing to transparency of ownership.

On the basis of the evidence gathered in chapter 4, chapter 5 will move from theory to practice and will go more in depth in a selection of 8 case studies, with a mix between large and small States, EU and non-EU States, different regulatory approaches, but also with a view on recent legal or market developments and available case law.

Chapter 6 will then conclude the study by a reflection on the situation in Slovenia, based on the lessons learned from the previous chapters.

Finally, two annexes (chapter 7 and 8) will provide all the necessary information for the reader who wishes to go more in depth in the analysis of a specific regulatory framework (by providing in chapter 7 all the relevant provisions of the 33 regulatory frameworks analysed) or of a specific issue (by providing in chapter 8 a selected bibliography).

## 2. The “why”: why concentration rules matter in the context of media policy

### 2.1. Democratic objectives

The issue of limitation of ownership and concentration in the media industry is both one of the most complex areas of competition policy and one of the most essential issues of media policy, and for several reasons.

The main one is that it goes far beyond the “traditional” implementation of competition rules to a specific economic sector: it deals with the very health of our democracies. As stressed by Monica Ariño, *“two trends have recently emerged in European Competition Law: a stronger focus on core competition objectives and a related increase in the use of economic-based tools in competition law assessment. Both result in other policy considerations being cast aside. Yet, in communications markets, the goal of competition law is not only to safeguard a competitive market process (i.e. the efficient production of commoditised media), but also to ensure a democratic communications order”*.<sup>1</sup> This goal is what allows to differentiate between a formal democracy, which is limited to the organisation of a (more or less) fair and competitive electoral process and a (more or less) wide range of media players, and an informed democracy in which the opinions of the citizens are formed on the basis of the expression of a plurality of views about the key political, economic, social and cultural issues and a plurality of opinions about on how the society has been run in the past, is currently run and should ideally be run in the future.

That this distinctive type of competition matters much more in the media sector than in any other economic sector is a fact recognised, at the level of the European Union, by the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), which stresses that *“Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law”* and considers that *“public security, plurality of the media and prudential rules shall be regarded as legitimate interests”*, while *“any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken”*.<sup>2</sup>

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<sup>1</sup> Ariño, Monica (2004) *Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps*. Communications and Strategies, 54, p. 97.

<sup>2</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), article 21.4.

More recently, the European Court of Human Right has even gone further and, after having recalled that *“as it has often noted, there can be no democracy without pluralism”*, argued that *“to ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed”*. For the Court, this means that *“in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism”*.<sup>3</sup>

Even though their main objective is also economic-based, both the Framework Directive (for networks) and the Audiovisual Media Services Directive (for content) also acknowledge this democratic dimension, the former by stating that *“the separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection”*<sup>4</sup> and the latter by stressing that *“audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services”*.<sup>5</sup>

This is also broadly recognized at the national level, as we will see in chapter 4: most European countries have adopted sector-specific rules about media concentration and have entrusted media regulatory authorities with their enforcement (instead of leaving the issue to “generalist” competition law and competition authorities), some kind of cooperation is also foreseen between media regulators and competitions authorities in most cases, with a view to guarantee this democratic communications order.

The second reason why of the link between competition and media pluralism matters so much is that it is rooted in the history of media broadcasting. It was in the name of pluralism that monopolistic public service broadcasters have been created: what was sought was the so-called “internal pluralism”. When it appeared that internal pluralism was not efficient and/or not sufficient, it was also in the name of pluralism that the liberalization of the broadcasting industry was carried out: what was sought was then to add “external pluralism” to this internal pluralism. And in the last decade, some of the main technological developments (e.g. digitization of the terrestrial television and radio platforms and the roll-out of different fixed and mobile digital networks) were also partly justified by their contribution to pluralism.

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<sup>3</sup> European Court of Human Rights, case *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, Application n°38433/09, 7 June 2012, §§ 129-135.

<sup>4</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), recital 5.

<sup>5</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), recital 5.



The third main reason why it matters so much is that it concerns almost all the aspects of broadcasting regulation. Whereas public policy objectives like protection of minors against harmful content or protection of consumers against excessive commercial practices are dealt with by a single set of provisions, pluralism is underpinning or influencing most of the duties of media regulatory authorities: ownership rules (and transparency of this ownership), licensing rules, supervision of the fulfilment of the mandate of the public service broadcaster, promotion of non-profit and community media, quotas of European and domestic and independent works, obligations to broadcast certain type of programmes (e.g. news and current affairs), rules about the quality of certain programmes (e.g. respect of journalism ethics, impartiality of news and current affairs)...

## 2.2. Economic specificities

Beyond these democratic objectives, another reason why this distinctive type of competition matters more in the media industry than in other economic sectors is that it has been demonstrated that the media industry has a natural tendency towards concentration, which can be explained by several specific features of the media economy.

The first one is that *“competition in media markets typically requires high initial investment, which creates barriers to market entry. The investment that is needed to set up a radio or TV station, or a newspaper, or even to make a film, has historically been an important obstacle to accessing the media market”*.<sup>6</sup>

The second one is that *“as a consequence of the high initial investment, media outlets largely exploit economies of scale and of scope. For broadcasting and audiovisual businesses especially, the marginal costs can be very low (the cost of an additional reader of a newspaper is just the material cost of the paper, while an additional viewer of a TV or radio show has no additional costs). The low marginal costs and the high initial costs are closely related. Moreover, the low marginal cost is a powerful incentive for firms to attempt to expand into every possible distribution channel in order to maximize their profits”*.<sup>7</sup>

The consequence of this incentive is that *“media companies tend to expand horizontally (monomedia), by consolidating their activity into one single medium diagonally, by extending their activities in order to use the same product, or to provide the same product through different means of distribution or on different platforms (multimedia); or vertically, by owning interests in the various parts of a product’s value chain. This may help incumbent media organisations to keep their prices low and to make it difficult for new players to access the market. The final effect is, again, an increase in concentration and a potential threat to content diversity”*.<sup>8</sup>

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<sup>6</sup> Center for Media Pluralism and Media Freedom – CMPF (2013) *European Union Competencies in Respect of Media Pluralism and Media Freedom*. Fiesole: European University Institute, p. 25.

<sup>7</sup> *Ibidem*.

<sup>8</sup> *Ibidem*.

Finally, the fact that media markets are two-sided markets in which media players, on one side, sell their product to the audience and, on other side, sell their audience to the advertisers, also feeds the tendency towards concentration. *“The fact that media are platforms means that, in order to remain profitable in the market, players must be able to engage both sides of it. Competition for the audience and for advertisers are therefore intertwined and market dynamics are characterised by strong feedback effects or, as it is often called, by a ‘chicken-and-egg’ dynamic: to attract advertisers it is necessary to be able to attract an audience, but only by being able to attract advertisers it is possible to raise the amount of revenue needed to invest in quality content that is desirable to viewers/readers. This is due to the existence of indirect externalities among the consumers in the two sides of the market or, in other words, to the fact that the utility of consumers on one side of the market (advertisers), increases with the number of consumers on the other side of the market (readers/viewers). The two-sided nature of media markets reinforces their natural tendency towards concentration due to the above-described phenomena (high initial costs of investment and economies of scale). This is because, in these markets, the ability to control key resources, such as attractive content (especially ‘premium’ content), confers on market players an advantage in attracting advertising resources, through a process that has mutually reinforcing (i.e. feedback) effects”.*<sup>9</sup>

### 2.3. An outdated concern?

Despite these specific democratic and economic features, critics of regulation of media concentration have strong arguments against any kind of public intervention.

At first sight, it might appear that analysing media concentration in an era of abundance of content providers, service providers and platforms, to which the consumers have access anytime, anywhere and on any device, is an outdated and futile task. However, while it is obvious that consumers have access to the widest range of information sources in history, this does not mean that the risk to have access to “more of the same” is naturally avoided. For example, a research conducted during the two last electoral campaigns in Canada showed that 95% (in 2011) and 70% (in 2015) of the daily newspapers which endorsed a political party were in favor of the Conservative Party, which represented around one third of the electorate.<sup>10</sup>

Another argument against any kind of anti-concentration policy is the fact that public policy can only be imposed on domestic players, which then face a sort of “double penalty”: they have to compete with (unregulated) global players which benefit from global revenues and huge economies of scale, and they have to abide with domestic rules which restrict their national expansion and can even jeopardise their existence. This argument is certainly valid in some segments of the media industry which are highly exposed to Europeanisation or even globalisation (such as VOD), and in which the threat to the sustainability of provision of local

<sup>9</sup> Idem, p. 26.

<sup>10</sup> Windsek, Dwayne (2015) *Lopsided coverage and support of the Conservative Party exemplifies the tilted playing field of electoral politics*. <http://policyoptions.irpp.org/2015/11/03/canadian-newspaper-editorial-endorsements-in-the-2015-federal-election-elite-and-out-of-sync/>

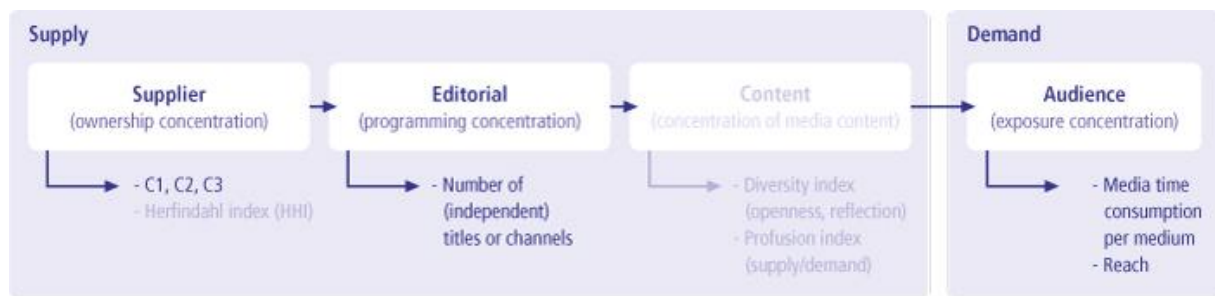
content are real. In these cases, though, it is counter-argued that the remedy lies in the pan-European (and transatlantic) harmonisation of the rules, rather than in discarding these rules altogether. The argument also loses most of its relevance when it comes to some segments of the media industry such as radio, which remains characterised, on the consumption side, by the large dominance of domestic players and, on the distribution side, by the large dominance of the terrestrial platform made of scarce resources that can by no means be compared with the one virtually unlimited availability of resources in markets based on distribution via IP such as music or VOD.

The third main argument is that media concentration can have positive economic impacts (since big companies have stronger capacities to invest and to innovate than smaller ones) while limiting the expansion of some players might hurt the provision of affordable and quality content (since too much fragmentation leads to higher costs, which inevitably will have an influence on the price and the quality of content). Here again, such an argument has to be assessed depending on the segment of the market (for example taking into consideration the unique situation of radio, which is the only media to provide content fully for free) and on the technological developments (for example the shift from analogue to digital terrestrial broadcasting, which might require some investment).

What appears in all circumstances is that, be it in theory or in practice, concentration in the media industry is to be dealt with the careful appreciation of its significance in a democratic society and of its complexity to handle.

### 3. The “how”: how to measure concentration in the media industry

In the media industry, concentration can be measured at different stages of the supply chain (supplier or ownership concentration, editorial or programming concentration, content concentration), as well as on the demand-side (exposure concentration).



Note: the indexes shown in grey are not included on this website

Source : Commissariaat voor de Media (2011) Mediamonitor, The Dutch Media in 2010.

However, this chapter focuses exclusively on the first step of the supply-side, i.e. ownership concentration. This is also the case of most of this study, except in some parts of the next chapters in which we will broaden the scope to see how the regulatory framework (in theory, chapter 4) and some regulators (in practice, chapter 5) deal with content concentration, i.e. with media pluralism.

#### 3.1. Defining relevant markets and indicators

The first step to take when measuring the degree of concentration on a specific industry is to determine the relevant market to analyse, both in its geographical aspect (global, European, national, regional, local) and in terms of products.

The relevant geographic market “comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas, because the conditions of competition are appreciably different in those areas”.<sup>11</sup>

<sup>11</sup> European Commission (2002) *Glossary of terms used in EU competition policy, Antitrust and control of concentrations*, p. 40.

The relevant product market “comprises all those products and/or services which are regarded as interchangeable or substitutable by reason of product characteristics, prices and intended use”.<sup>12</sup>

In the media industry or, even more broadly in the converged electronic communications sector, several non-exclusive options are available: to analyse a specific segment of the broadcasting sector (for example pay TV or radio), to analyse the broadcasting sector a whole (radio and television), to broaden the scope to all content providers (newspapers, magazines, pure online players...), or to broaden it again to take into consideration the converged environment (distribution platforms, fixed networks, wireless networks, search engines, social networks), the resources of the media (the situation on the advertising market) and even devices (manufacturers of television sets, computers, tablets and smartphones) whose operating system can now play the role of gatekeeper of content providers and who play an increasingly significant role in the whole media economy.

These approaches can also be combined, in order to compare the evolution of a specific segment of the media economy compared to the trends of the media economy as a whole (see the Canadian example in chapter 3.3. below).

The definition of the relevant market is essential, since it will have a strong influence on the results of the market analysis. A too narrow definition might lead to identify a spurious concern (it is for example frequent that a local television, radio or newspaper holds a dominant local position simply because it is the only sustainable economic model) while a too broad definition, which encompasses too many products might, on the contrary, lead to artificially dilute a real issue (this is one of main criticisms which was addressed to the renowned “Gasparri law” adopted in Italy in 2004). Ideally, “market definition should abide to three characteristics:

- (i) *it should endure in time and not be subject to superficial trend changes, while duly taking into consideration genuine evolutions,*
- (ii) *it should be coherent and foreseeable,*
- (iii) *it should be consistent with economic principles since, at the end of the day, it is the legal transposition of an economic concept. Even if that ideal goal is often hardly reachable, it should nevertheless be sought, in the current media convergence context.”<sup>13</sup>*

The second main step is to determine which indicators will be used for the assessment. For example, in the *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*, the indicators of ownership concentration (by sector and all media), audience concentration per owner (by sector and all media), advertising concentration (by sector and all media) and time use concentration (by sector and all media) were all used as economic indicators to assess the risks in terms of pluralism of ownership and control.<sup>14</sup> For the risk in

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<sup>12</sup> *Idem*, p. 39.

<sup>13</sup> Bird & Bird (2002). *Market Definition in the Media Sector: A Comparative Analysis, Report for the European Commission, DG Competition*, p. 5.

<sup>14</sup> Katholieke Universiteit Leuven – ICRI, Jönköping International Business School – MMTC, Central European University – CMCS, Ernst & Young Consultancy Belgium (2009) *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*. Leuven : Katholieke Universiteit Leuven, p. 75.

terms of geographical pluralism in the media, HHI index (see below) based on regional channels/newspapers available in the region, divided by total number of channels/newspapers available in the region was one of the indicators.<sup>15</sup>

## 3.2. The leading measurement tools: CR and HHI

Two common analytical tools are usually used to determine the level of concentration in the media industry: concentration ratios (CR) and the Herfindahl-Hirschman Index (HHI).

### 3.2.1. Concentration ratios (CR)

Concentration ratios (CR) measure market share of a given number of the most important players on the market. Its results are expressed in percentage, specifying the number of companies taken into consideration. For example, CR1=100% means a situation of monopoly, CR2=100% a situation of duopoly and CR4=60% means that the summed market share of the largest four companies is 60% of the total size of this industry.

According to the *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*, when CR4 is above 50% and CR7 is above 70% “undesirable concentration or control is said to be evident”.<sup>16</sup>

Similarly, in its recent report, the Canadian Media Concentration Research Project considers a CR4 of more than 50% and a CR8 of more than 75% as indicators of media concentration.<sup>17</sup>

In its yearly *Mediamonitor* publication, the NRA of the Netherlands uses CR1, CR2 and CR3, but does not provide any threshold above which it considers the situation as problematic in terms of concentration. In its yearly *Mediaconcentratie report*, the NRA of the Dutch-speaking Community of Belgium provides data about CR2, CR3 and CR4.

According to the Council of Europe Group of Specialists on Media Diversity, the following thresholds should be considered:

- a CR3 between 0 and 35% reveals low concentration,
- a CR3 between 36 and 55% reveals moderate concentration and
- a CR3 above 56% reveals high concentration.<sup>18</sup>

<sup>15</sup> *Idem*, p. 79

<sup>16</sup> *Idem*, p. 73.

<sup>17</sup> Canadian Media Concentration Research Project – CMCPR (2015) *Media and Internet Concentration in Canada Report, 1984-2014*, p. 6.

<sup>18</sup> Council of Europe Group of Specialists on Media Diversity (2009) *Methodology for monitoring media concentration and media content diversity*, p. 11.

### 3.2.2. Herfindahl-Hirschman Index (HHI)

The most commonly used measurement tool of the level of concentration is the Herfindahl–Hirschman Index (HHI). This index is calculated by squaring the market share of each company in the market and then summing the results obtained, which might range in theory from close to zero (for example in an atomized market when 1000 companies would all have the same market share of 0,1%) to a maximum of 10.000 points (when one monopolistic company would have 100% market share). The HHI therefore increases with the degree of concentration on the market. For example, in a market in which four companies would have respectively 30, 30, 20, and 20 percent market share, the HHI would be the following:  $900+900+400+400=2.600$  points. The HHI can also be presented by dividing this result by 10.000 (i.e. in the latter case 0,26).

The HHI is used for example by:

- the Department of Justice and the Federal Trade Commission of the United States in their *Horizontal Merger Guidelines*;<sup>19</sup>
- the European Commission in its *Merger Guidelines*;<sup>20</sup>
- the NRA of the Netherlands (Commissariaat voor de Media) in its yearly *Mediamonitor* publication;<sup>21</sup>
- the NRA of the Dutch-speaking Community of Belgium (Vlaamse Regulator voor de Media) in its yearly *Mediaconcentratie* report;<sup>22</sup>
- the NRA of the French-speaking Community of Belgium (Conseil supérieur de l'audiovisuel) in its assessment of a the significant position of service providers in the television or radio broadcasting sector;
- the *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*;<sup>23</sup>
- the Canadian Media Concentration Research Project – CMCRP;<sup>24</sup>
- the Organisation for Economic Co-operation and Development – OECD.<sup>25</sup>

The thresholds used to consider the level of concentration can differ from one authority to another and can be reviewed over time. For example, the US Department of Justice and the Federal Trade Commission now considers, when assessing mergers, that:

- an HHI below 1.500 points reveals an non-concentrated market;
- an HHI between 1.500 and 2.500 points reveals a moderately concentrated market;

<sup>19</sup> U.S. Department of Justice & Federal Trade Commission (2010) *Horizontal merger Guidelines*.

<sup>20</sup> European Commission (2004) *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*.

<sup>21</sup> See chapter 8.4 for all the references.

<sup>22</sup> See chapter 8.4. for all the references.

<sup>23</sup> Katholieke Universiteit Leuven – ICRI, Jönköping International Business School – MMTC, Central European University – CMCS, Ernst & Young Consultancy Belgium (2009) *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*. Leuven : Katholieke Universiteit Leuven.

<sup>24</sup> Canadian Media Concentration Research Project – CMCRP (2015) *Media and Internet Concentration in Canada Report, 1984-2014*.

<sup>25</sup> OECD (2013) *Competition Issues in Television and Broadcasting*.

- an HHI above 2.500 points reveals a highly concentrated market.

These thresholds used to be lower and closer to the ones used by the European Commission in its *Merger Guidelines*, which considers that:

- an HHI below 1.000 points reveals a non-concentrated market;
- an HHI between 1.000 and 2.000 points reveals a moderately concentrated market;
- an HHI above 2.000 points reveals a highly concentrated market.

According to the DG Competition of the European Commission<sup>26</sup>, as well as the Council of Europe Group of Specialists on Media Diversity<sup>27</sup>:

- an HHI below 1.000 points reveals a non-concentrated market;
- an HHI between 1.000 and 1.800 reveals a moderately concentrated market;
- an HHI above 1.800 points reveals a highly concentrated market.

The Commissariaat voor de Media (Netherlands) in its research as well the Conseil supérieur de l'audiovisuel (Belgium) in its decisions also adopt these thresholds, while the Vlaamse Regulator voor de Media refers to the same thresholds as the one used the US Department of Justice and the Federal Trade Commission.

At first sight, it might be considered that the HHI is more difficult to implement than the CR, due the sometimes large amount of small players on the media industry and the fact that their market share might be completely marginal or that even data might be lacking. However, even the lack of a few players in the calculation has no influence on the index, since *“the HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly”*.<sup>28</sup>

### 3.3. The practice of CR and HHI

#### 3.3.1. Dutch-speaking Community of Belgium

The following tables show the application of CR2, CR4 and HHI to the broadcasting industry in the Dutch-speaking Community of Belgium over a period of 10 years (2005-2015).

Both tables show a high level of concentration, with a HHI:

<sup>26</sup> European Commission (2002) *Glossary of terms used in EU competition policy, Antitrust and control of concentrations*, p. 24.

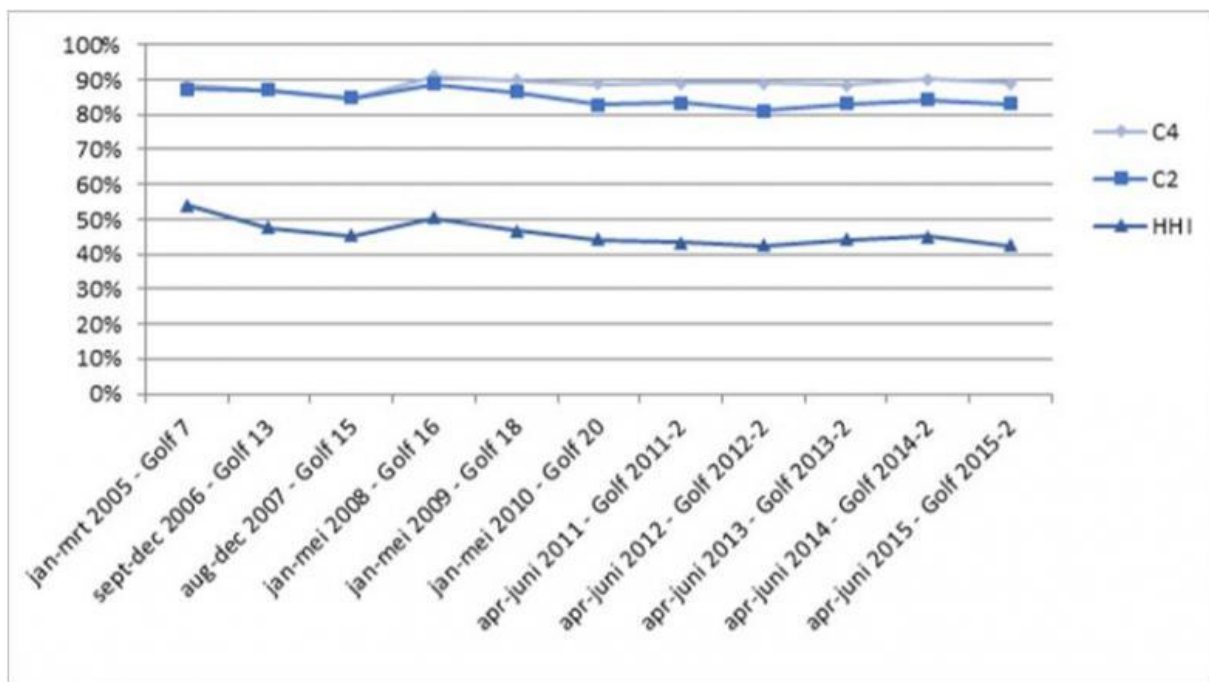
<sup>27</sup> Council of Europe Group of Specialists on Media Diversity (2009) *Methodology for monitoring media concentration and media content diversity*, p. 11.

<sup>28</sup> European Commission (2004) *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, article 16.

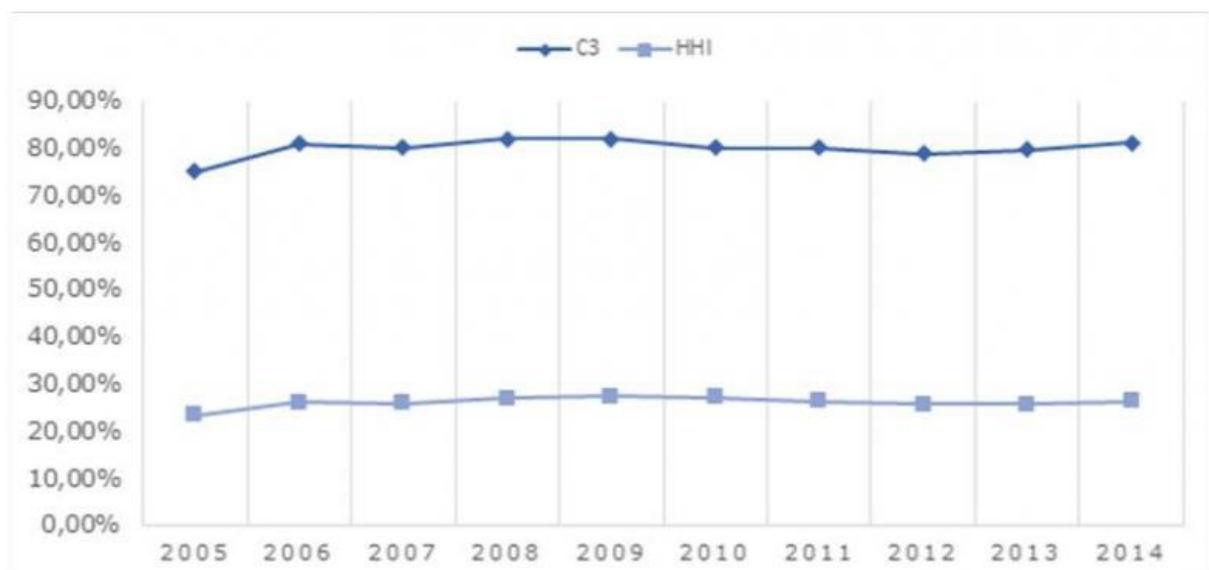


- remaining very high in radio (even if diminishing from 5400 points in 2005 to 4200 points in 2015) due to the domination of two big players (CR2 remains over 80% over the whole period);
- and a relatively high in television (growing from 2.300 points in 2005 to 2600 points in 2014) due to the domination of three big players (CR3 growing from 75% to 81% over the whole period).

*CR2, CR4 and HHI scores for radio  
in the Dutch-speaking Community of Belgium (2005-2015)*



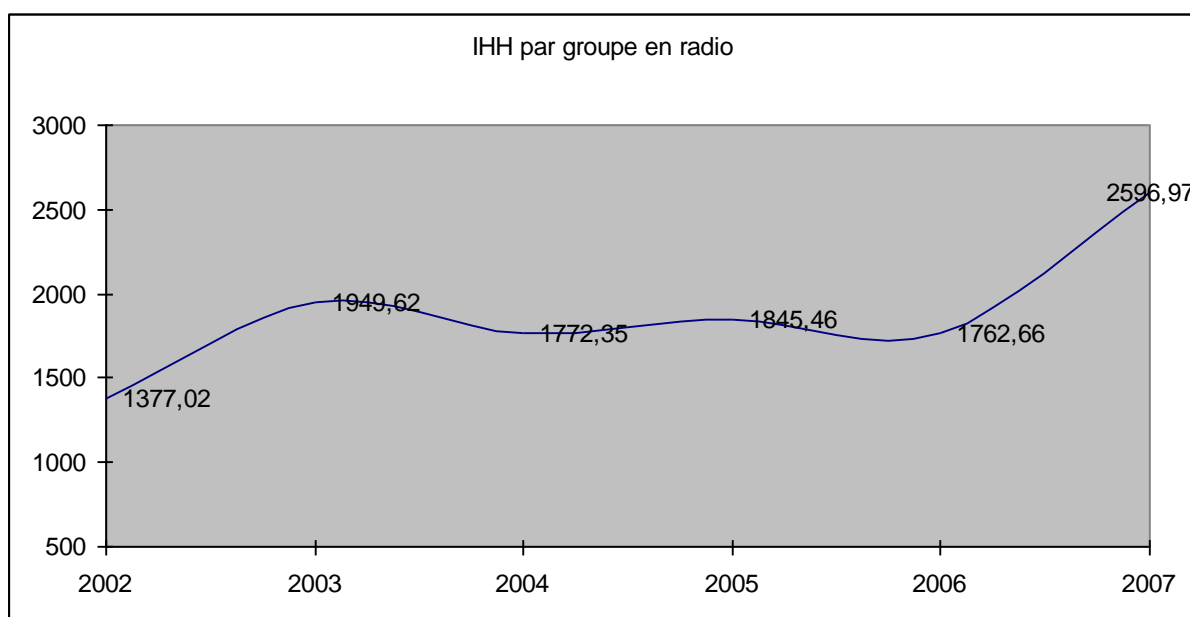
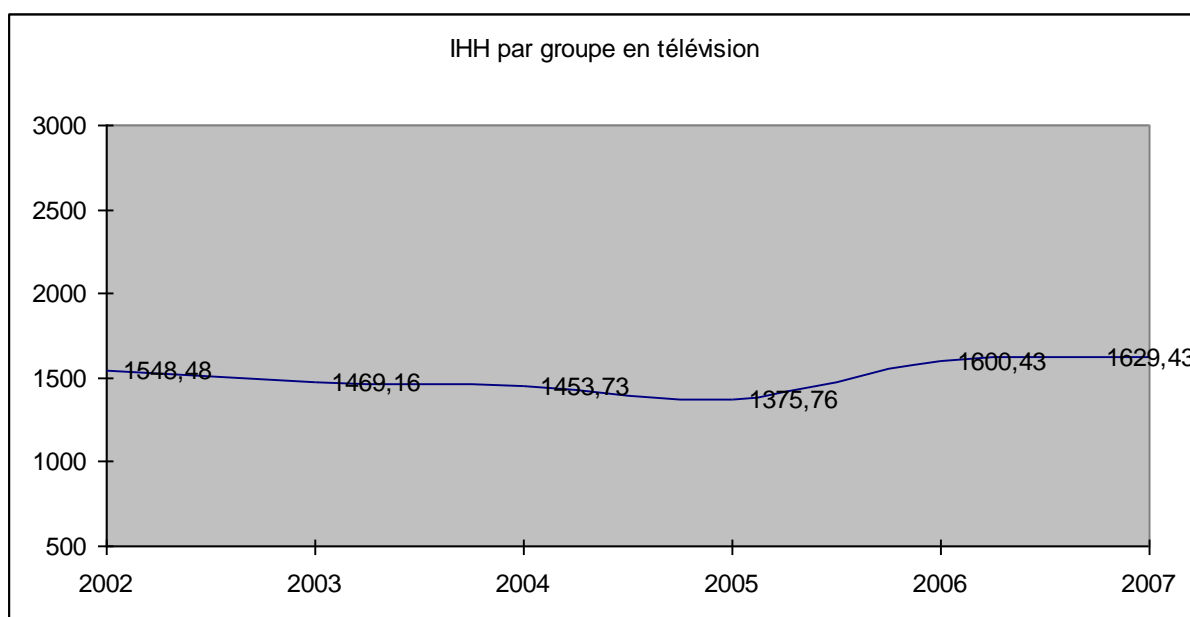
*CR3 and HHI scores for television  
in the Dutch-speaking Community of Belgium (2005-2014)*



### 3.3.2. French-speaking Community of Belgium

The following tables show the application of HHI to the broadcasting industry in the French-speaking Community of Belgium over a period of 5 years (2002-2007).

The first table (television) shows a moderately high and stable level of concentration, which can be explained by the high level of penetration of foreign channels (especially French ones), while the second table (radio) shows a very high level of concentration of the market and a strong trend towards concentration over a short period, which was one of the motivations to take the decisions we will study in chapter 5.2.

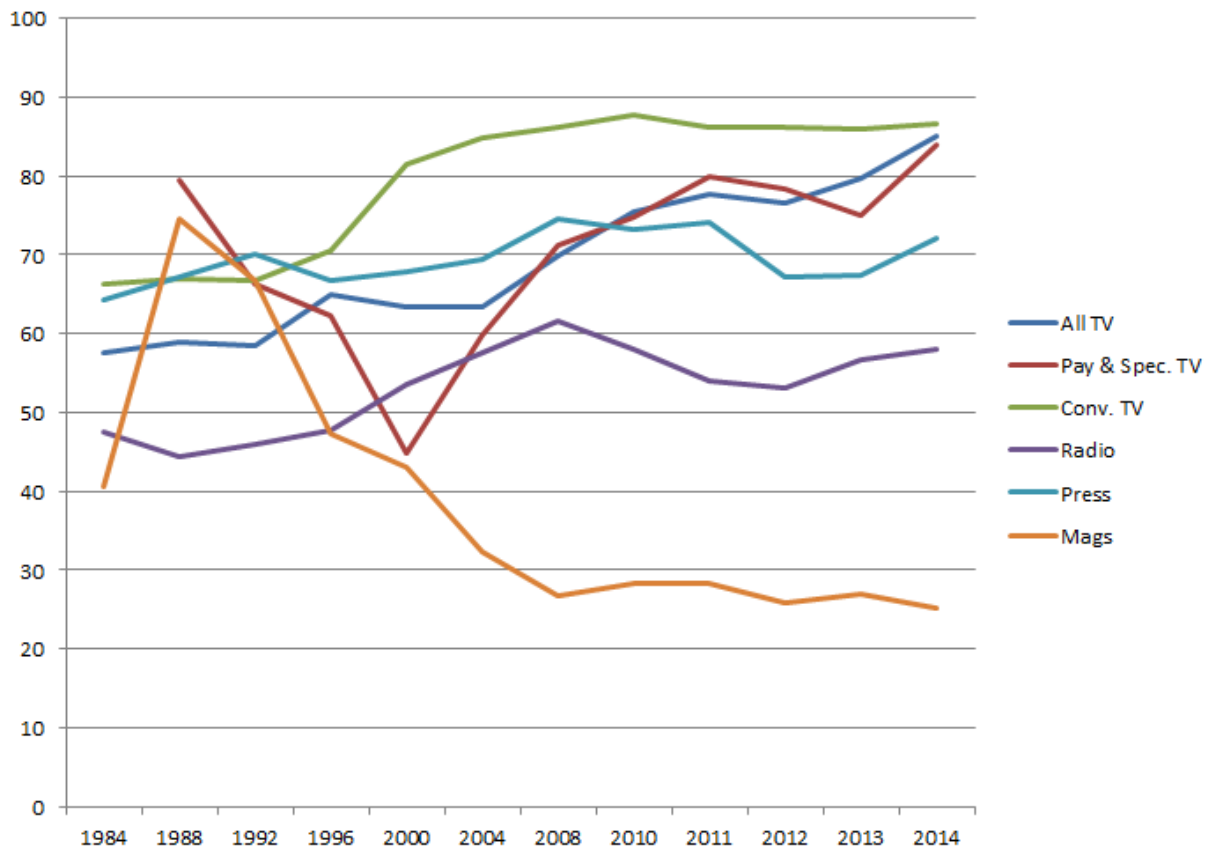


### 3.3.3. Canada

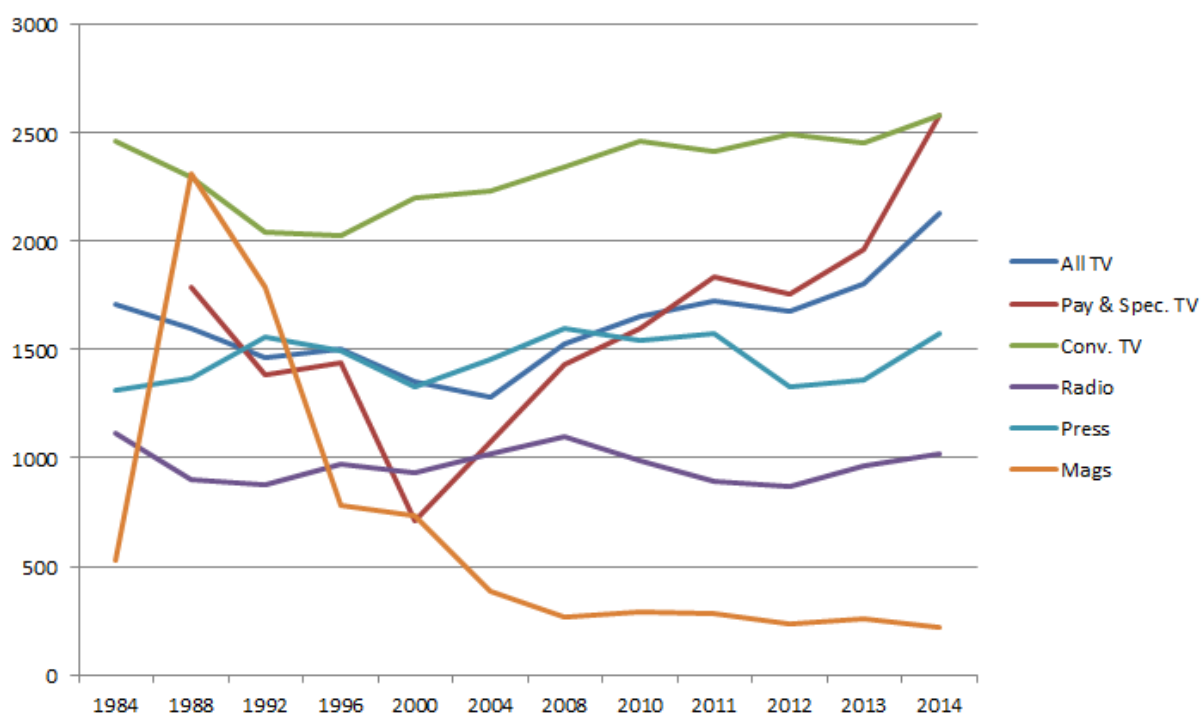
The following tables show the results of the application of CR4 and HHI to the media industry (television, radio, press) in Canada from over a period of 30 years (1984-2014).

Both tables are interesting with a view of comparing very different trends not only over time, but also depending on the different segments of the media industry.

*CR4 scores for the media industry  
in Canada (1984-2014)*



### HHI scores for the media industry in Canada (1984-2014)



### 3.4. The limits of (and lack of alternative to) CR and HHI

Both CR and HHI have their pros and cons. “The HHI considers the whole distribution of a market, though its quadratic dependence on the individual market shares makes it values strongly dependent on the largest players. On the other hand, the CR4 requires a minimal information, just the market shares of the top 4 players, but overlooks whatever happens among the remaining players (who might represent the major portion of the market)”.<sup>29</sup>

The limits of CR4/CR8 and HHI have also been highlighted by the authors of the *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*, even though they used all these indexes to feed their study. About CR4/CR8, they recognize that “because this method typically relies on national or state market data, it subsumes all national conditions and will usually understate concentration in local or regional markets where fewer competitors typically operate.”<sup>30</sup> They estimate that the HHI “is a more robust indicator of market power developed for competition law analysis and is used by some to measure concentration in media

<sup>29</sup> Naldi, Maurizio & Flamini, Marta (2014) *Correlation and concordance between the CR4 index and the Herfindahl-Hirschman Index*, p. 2.

<sup>30</sup> Katholieke Universiteit Leuven – ICRI, Jönköping International Business School – MMTC, Central European University – CMCS, Ernst & Young Consultancy Belgium (2009) *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*. Leuven : Katholieke Universiteit Leuven, p. 73.

markets. Unfortunately it is not a very effective measure of issues of pluralism in national media markets because it is a measure of economic concentration whose statistical construction assumes a number of competitors serving a specific geographic market, conditions that are more likely in other industries than in media. The indicator is sometimes applied at the national level by those who want to measure concentration of media ownership, but this use ignores the central geographic market issue of HHI analysis and the fact many media serve regional or local markets and do not compete on the national level. HHI works best in analysis of media when it is applied to proposed mergers, but it rarely elucidates general discussion of media plurality because television, radio, and newspaper markets tend toward monopolistic or oligopolistic competition and the index provides limited insight under those conditions.”<sup>31</sup>

Some scholars even go further and consider that these measurement tools should not be used at all, especially considering the specific economic and technological characteristics of the media industry. “The various concentration measures usually employed to measure concentration are in general appraised cautiously regarding their actual effectiveness and employability. For the Herfindahl-Hirschman Index, a concentration measure commonly employed, for instance, by the US Department of Justice since the 1980s, it is argued, that ‘the index is a pure number with virtually no real-world content’, ‘difficult to interpret’, and thus ‘an empty index’ (Shepherd). Regarding concentration ratios that only measure the market share of a certain number of companies (e.g. the top four or top eight), Heinrich claims: ‘of the rest one learns nothing’, and bearing in mind the increase in conglomerate mergers, Dugger argues: ‘Concentration ratios miss ... conglomerate concentration.’ Against this background it is then often held that these traditional indices for measuring concentration also do not adequately account for the peculiarities of the media sector – especially because of the need to also secure media plurality. To quote Noam: ‘The issue is partly ... whether the HHI methodology itself accounts sufficiently for media pluralism.’ This contention results in claims for alternative approaches (e.g. by measuring audience share, or by comparatively assessing differences in media content), and/or for a stricter handling of media concentration altogether through a sector-specific concentration control (e.g. cross-ownership restrictions, or multiplication factors for turnover to cover mergers that would otherwise not fall under the merger control). Similarly, the definition of relevant markets – which is the key to any competitive assessment – is a very controversial subject with no conclusive definition. It is argued, for example, that: ‘There is no subject in antitrust law more confusing than market definition’. At least two problems – one well known and the other more recent – add to this challenge. The well-known one is that prices of media products are usually not set at a competitive level, which makes it difficult to apply the standard tests usually employed for market definition. The more recent one is the question of what actually constitutes the relevant market in an increasingly convergent communication environment.”<sup>32</sup>

However, no matter their weaknesses, these tools do not have more reliable alternatives which are recognized by scholars, economists or lawyers. “In the United States, for example, the Federal Communications Commission created an alternative measure — the Diversity Index (DI) — as an indicator of risks to pluralism in local markets when cross-media ownership was involved. It extended

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<sup>31</sup> Ibidem.

<sup>32</sup> Just, Natascha (2009) Measuring media concentration and diversity: new approaches and instruments in Europe and in the US, *Media Culture Society*, 31, pp. 105-106.

*the HHI and was designed to overcome some of that index's limitations by a weighting process that assigned scores to media based on the audience use of them for local news and information. The diversity index, however, was rejected by the courts and highly criticised in Congressional hearings in relation to its assumptions, weighting method, and application. Several alternative means of assessing pluralism using HHI based measures have since been suggested, including the Noam Index, but these too have been disputed and none have been widely accepted."*<sup>33</sup>

It should also be stressed that these tools are not sufficient to determine the desirable degree of concentration of the market or the degree of harmfulness of a merger, especially in the media industry. It might happen that a high level of concentration or that a merger which would contribute to reach a high level of concentration does not necessarily harm diversity and pluralism. On the other hand, it might happen that even in a situation of low concentration or in a situation of a merger which would not substantially change the level of concentration, the effects on the market might nevertheless be considered as harmful for diversity and pluralism. *"Media concentration policy is not a mechanistic endeavor and thus cannot be captured by the positivist presuppositions that inform most empirical attempts. The FCC itself has moved away from its Diversity Index in its 2006 review, admitting that it 'is an inaccurate tool for measuring diversity'. In the future it will 'not employ any single metric, such as the Diversity Index, because ... 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."*<sup>34</sup>

These measurement tools should therefore be considered as one of the ways to gather evidence on the situation of the market, but always with a view that no policy (and certainly not media policy) can be elaborated as if it were a science. This is even more important in the media industry since, as it has been stressed by the European Commission, *"Media pluralism is a concept that embraces a number of aspects, such as diversity of ownership, variety in the sources of information and in the range of contents available in the different Member States. For many analysts or observers, media pluralism has come to mean, almost exclusively, plurality of ownership. [...] Although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism. Media ownership rules need to be complemented by other provisions"*.<sup>35</sup>

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<sup>33</sup> *Idem*, p. 74.

<sup>34</sup> *Idem*, p. 113.

<sup>35</sup> European Commission (2007), *Staff Working Paper on Media Pluralism in the Member States*, p. 5. For more details on these indexes and their alternatives, see also Hill, Brian C. (2006) *Measuring Media Market Diversity: Concentration, Importance, and Pluralism*. *Federal Communications Law Journal*, (58)1.

## 4. The theory: regulatory frameworks across Europe

This chapter gathers data and provides a comparative analysis of the regulatory frameworks dealing with media concentration in the 28 Members States of the European Union (EU) and the 4 Members States of the European Free Trade Association (EFTA), i.e. a total of 33 different regulatory frameworks<sup>36</sup>.

This analysis has been carried out by choosing the most extensive view of the issue of media concentration. It has therefore taken into consideration not only the rules limiting ownership concentration in one way or another (horizontal, vertical, diagonal...), but also rules related to content concentration, as well as rules contributing to transparency of ownership.

This chapter will consist in the provision of a cross-country analysis table (chapter 4.1), a comparative analysis of the data gathered (chapter 4.2) and some preliminary conclusion which will link with the next step of the study (chapter 4.3).

In order to ease the reading, all the legal references have been grouped in annex 1, country by country.

### 4.1. Cross-country analysis table

The data provided in this cross-country analysis table come only from media-specific law of the different countries. Other general laws which might also deal with the issues of ownership concentration and ownership transparency have not been taken into consideration (for example competition law for mergers or corporate law for transparency).

This choice appears problematic only for one country (Ireland), where a specific law deals with media mergers. This situation has not been dealt with in the table in order to align the methodology for all countries, but it will be dealt with later on in this chapter, with some preliminary considerations about this specific case, as well as in the next chapter where Ireland will be among the eight cases which will be studied in more depth.

As explained by the German Commission on Concentration in the media, “*with regard to concentration tendencies, media concentration law as well as the law against restraints of competition distinguishes between horizontal, vertical and diagonal concentration. Horizontal concentration takes place when companies within one market, which act on the same level of the value chain, cooperate or merge. Vertical concentration means the integration of upstream and downstream levels of the value*

<sup>36</sup> Due to the different regulatory frameworks in the Dutch-speaking and French-speaking Communities of Belgium.

chain within a group of companies. In case of diagonal concentration, a company becomes active by a participation or merger in a completely different market and on a quite different level in the value chain (so-called cross-media ownership)".<sup>37</sup> We followed this analysis but also developed it further in order to take into consideration different aspects of horizontal concentration as well as other aspects such as geographical concentration and content concentration.

The different columns of the table should be understood as follows:

- "Concentration rules" gives information about the existence (1) or not (0) of rules dealing with concentration in the broadcasting sector;<sup>38</sup>
- "Type of media" gives information about the application of these rules either to TV broadcasting (TV) or to radio broadcasting (R) or to both (B);
- "Criterion horizontal (services)" gives information about the use (1) or not (0) of the amount of TV/radio licenses as a criteria to limit ownership concentration (for example when a service provider cannot own more than two licenses);
- "Criterion horizontal (service providers)" gives information about the use (1) or not (0) of the ownership of shares of other service providers as a criteria to limit ownership concentration (for example when a service provider cannot own more than 50% of another one);
- "Criterion vertical" gives information about the use (1) or not (0) of the ownership of shares in related activities in the same segment of the media industry (upstream or downstream the value chain) as a criterion to limit ownership concentration (for example when a TV service provider cannot own – or be owned by – a TV production company or a distribution rights company or a platform operator distributing TV services);<sup>39</sup>
- "Criterion diagonal" gives information about the use (1) or not (0) of the ownership shares in other segments of the media industry as a criterion to limit ownership concentration; this criterion is also called "cross-media" (for example when a TV service provider cannot be active in radio or print media or online media or film production or news agencies or advertising sales houses or telecommunications);<sup>40</sup>
- "Criterion geographical" gives information about the use (1) or not (1) of the amount of TV/radio licences owned by (or the ownership of shares in) service providers with different coverage zones (usually national, regional and local);
- "Criterion audience share" gives information about the use (1) or not (0) of the audience share of a service provider as a criterion to limit ownership concentration (for example when a service provider cannot reach more than 25% audience share);

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<sup>37</sup> Kommission zur Ermittlung der Konzentration im Medienbereich – KEK (2015) *Turning from a Television-Centred View to a Broader Focus on Media, Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media*, p. 2.

<sup>38</sup> Only according to media-specific law.

<sup>39</sup> Therefore, a telecommunications operator not distributing TV services would not be considered under this criterion, but under the following criterion ("diagonal").

<sup>40</sup> A telecommunications operator distributing TV services would not be considered under this criterion, but under the previous criterion ("vertical").



- “Criterion other” gives information about the use (1) or not (0) of any other criteria than the six ones mentioned above to limit ownership concentration;
- “Criterion pluralism” gives information about the existence (1) or not (0) of rules dealing with concentration of content (for example via an assessment of plurality of information sources or strong influence on opinion-forming);
- “Authority in charge” gives information about which public body is entrusted with the task to supervise and enforce the rules about media ownership: regulatory authority (RA) or government (GV) or competition authority (CA);
- “Cooperation with CA” gives information about the presence in the regulatory framework (1) or not (0) of a form of cooperation between the regulatory authority and the competition authority when concentration issues are at stake (be it mandatory or optional cooperation);<sup>41</sup>
- “Transparency to the NRA” gives information about the existence (1) or not (0) of an obligation for service providers to disclose ownership to the NRA;<sup>42</sup>
- “Transparency to the public” gives information about the existence (1) or not (0) of an obligation for broadcasters to disclose ownership directly to the public;<sup>43</sup>
- “Transparency by the NRA” gives information about the existence (1) or not (0) of initiatives taken by the NRA to disclose to the public the ownership of the broadcasters (be it mandatory or optional).

	Concentration rules	Type of media	Criterion horizontal (services)	Criterion horizontal (service providers)	Criterion vertical	Criterion diagonal	Criterion geographical	Criterion audience share	Criterion other	Criterion pluralism	Authority in charge	Cooperation with CA	Transparency to the NRA	Transparency to the public	Transparency by the NRA
AT Austria	1	B	1	1	1	1	1	0	1	0	RA	0	1	1	1
BE Belgium FR	1	B	0	1	0	0	0	1	0	1	RA	1	1	1	1
BE Belgium NL	1	R	1	1	0	0	1	0	0	1	RA	0	0	0	1
BG Bulgaria	1	B	0	0	0	0	0	0	1	1	RA	0	0 <sup>44</sup>	0	0
CH Switzerland	1	B	1	0	0	0	0	0	0	1	GV	1	1	0	1

<sup>41</sup> Only according to media-specific law.

<sup>42</sup> Only according to media-specific law.

<sup>43</sup> Only according to media-specific law.

<sup>44</sup> Except when applying for a license.

	Concentration rules	Type of media	Criterion horizontal (services)	Criterion horizontal (service providers)	Criterion vertical	Criterion diagonal	Criterion geographical	Criterion audience share	Criterion other	Criterion pluralism	Authority in charge	Cooperation with CA	Transparency to the NRA	Transparency to the public	Transparency by the NRA
CY Cyprus	1	B	1	1	0	1	0	0	0	0	RA	0	1	0 <sup>45</sup>	0
CZ Czech Republic	1	B	1	1	0	0	1	0	1	0	RA	0	0 <sup>46</sup>	0	0
DE Germany	1	T	0	0	0	1	0	1	1	1	RA	1	1	0	1
DK Denmark	0	0	0	0	0	0	0	0	0	0	0	0	0 <sup>47</sup>	0	0
EE Estonia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ES Spain	1	B	1	1	0	0	0	1	0	0	RA	0 <sup>48</sup>	1	1	0
FR France	1	B	1	1	0	1	1	1	1	1	RA	1	0	0	0
FI Finland	1	B	0	0	0	0	0	0	1	0	RA	1	0	0	0
GB United Kingdom	1	B	0	0	0	1 <sup>49</sup>	0	0	1	1	GV RA	1	0	0	0
GR Greece	1	B	1	1	1	1	1	0	0	0	RA	0	1	0	1
HR Croatia	1	B	1	1	1	1	1	0	0	0	RA	0	1	0	1
HU Hungary	1	B	1	1	1	0	1	1	0	1	RA	0	1	0	0
IE Ireland	1	B	0	0	0	0	0	0	1	1	RA <sub>50</sub>	0 <sup>51</sup>	0	0	0

<sup>45</sup> Not directly to the public, but via a yearly publication in two newspapers.

<sup>46</sup> Except when applying for a license.

<sup>47</sup> Except when registering.

<sup>48</sup> IN 2013 the Spanish National Authority for Markets and Competition (CNMC), the new independent authority in charge of both competition and regulatory matters, became operational. The CNMC merges the horizontal antitrust authority with the independent sector-specific NRAs of electronic communications, audiovisual, energy, postal and transport (railway and airport).

<sup>49</sup> Only for Channel 3.

<sup>50</sup> Competition and Consumer Protection Act 2014 provides for a specific procedure for media merger, involving the Ministry in charge and in some cases the NRA.

<sup>51</sup> Not with the Competition Authority, but with the Ministry in charge.

	Concentration rules	Type of media	Criterion horizontal (services)	Criterion horizontal (service providers)	Criterion vertical	Criterion diagonal	Criterion geographical	Criterion audience share	Criterion other	Criterion pluralism	Authority in charge	Cooperation with CA	Transparency to the NRA	Transparency to the public	Transparency by the NRA
IS Iceland	1	B	1	1	0	0	0	0	1	1	CA	1	1	0	0
IT Italy	1	B	1	1	0	1	0	0	1	1	RA	1	1	0	0
LI Liechtenstein	1	B	0	0	0	0	0	0	1	0	GV	0	1	0	0
LT Lithuania	1	B	0	0	0	0	0	0	1	1	RA	1	1	0	1
LU Luxembourg	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LV Latvia	1	B	0	0	0	0	0	0	1	0	RA	0	0	0	0
NO Norway	1	B	0	0	0	1	0	1	1	0	RA	0	1	0	1
MT Malta	1	B	1	1	0	0	0	0	1	0	RA	0	0	0	0
NL Netherlands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
PL Poland	1	B	0	0	0	0	0	0	1	0	RA	0	0	0	0
PT Portugal	1	B	1	1	0	0	0	0	1	1	CA RA	1	1	1	1
RO Romania	1	B	0	0	0	0	0	1	1	1	CA RA	1	1	1	0
SE Sweden	1	B	1	1	0	0	0	0	1	1	RA	1	0	0	0
SI Slovenia	1	B	0	1	<sup>52</sup>	<sup>53</sup>	0	0	1	0	GV RA	1	<sup>54</sup>	<sup>55</sup>	0
SK Slovakia	1	B	1	1	0	1	0	0	1	0	RA	0	1	0	0
TOTAL	29		16	17	5	11	7	7	21	15		13	17	5	11

<sup>52</sup> See explanation below.

<sup>53</sup> See explanation below.

<sup>54</sup> Not to the NRA, but to the Ministry, which manages a “mass media register”.

<sup>55</sup> Not directly to the public, but via the Official Gazette.

## 4.2. Comparative analysis<sup>56</sup>

### 4.2.1. Existence, scope and enforcement of rules

Addressing concentration on the broadcasting sector via a specific regulatory framework and not only via the general framework of competition policy remains widely common, and can even be presented as a rule which displays only a few exceptions. Be it through ownership concentration rules or content concentration rules (and thus leaving aside for the moment the issue of transparency of ownership, i.e. the grey columns of the cross-country analysis table), such a framework exists in 29 of the 33 regulatory frameworks analysed (88%). The only exceptions are Denmark, Estonia,<sup>57</sup> Luxembourg and the Netherlands.<sup>58</sup>

When they exist, similar (or relatively similar) rules apply to both television and radio broadcasters (27 cases out of 29). The two exceptions are the Dutch-speaking Community of Belgium (where concentration rules apply only to radio broadcasting) and Germany (where there is no national radio broadcaster and where the Interstate Treaty applies only to television broadcasting).

The authority in charge is in most cases the regulatory authority (26 cases out of 29), sometimes with a shared responsibility with the competition authority or the government (the latter being involved directly or indirectly via a Ministry). The three exceptions are Switzerland (OFCOM is not an independent regulatory authority, but participates to the implementation of the regulatory framework as a part of the relevant Departement – DETEC), Iceland (where the Competition Authority is in charge) and Liechtenstein (where the Government is in charge).

The cooperation between the regulatory authority and the competition authority is mentioned in only 13 cases out 29 (44%), be it in a mandatory or optional way. But this does not reflect the real practice: further research shows that this cooperation is either mentioned in the competition law or in secondary legislation (by-laws, decrees, regulations ...)

<sup>56</sup> The relevant provisions of the broadcasting laws mentioned in this chapter are all provided in chapter 7, along with the references.

<sup>57</sup> According to article 32 3) of the Media Services Act, one of the conditions for the delivery of a licence is that the applicant “is not connected through the dominant influence over the management to the undertaking that has been issued an activity licence for provision of television and radio service and the issue of the activity licence may substantially damage the competition in the media services market, particularly through creation or reinforcement of the dominant position in the market”. See [https://www.riigiteataja.ee/en/compare\\_original/506112013019](https://www.riigiteataja.ee/en/compare_original/506112013019) (in English and Estonian). We have not consider this single provision, which is rather weak and which consists only in a condition to enter the market as qualifying to consider that Estonia could be qualified as a country whose regulatory framework deals with concentration. No other provisions deal with the issue of concentration one the service providers are on the market. Moreover, the Competition Act does not have any specific provisions about broadcasting (see <https://www.riigiteataja.ee/en/eli/519012015013/consolide> (in English).

<sup>58</sup> There were concentration rules before 2011, but they have now been repealed, except for regional and local broadcasting, whose ownership remains limited to one licence.

#### 4.2.2. Ownership concentration

The issue of media ownership is usually dealt through the six main following tools:

- regulation of horizontal concentration by limiting the amount TV/radio licenses which can be owned by a service provider;
- regulation of horizontal concentration by limiting the percentage of shares which can be owned by a service provider in another service provider;
- regulation of vertical concentration by limiting the ownership of shares in related activities in the same segment of the media industry (upstream or downstream the value chain);
- regulation of diagonal (cross-media) concentration by limiting the ownership of shares in other segments of the media industry;
- regulation of geographical concentration by limiting the amount of TV/radio licences owned by (or the ownership of shares in) service providers with different coverage zones (usually national, regional and local);
- regulation of audience share by introducing some measures when a broadcaster goes beyond a certain level of audience share.

Among these six different tools, regulation of horizontal concentration is used most often, being present in 17 cases out of 29 (58%). Usually, both ways of limiting horizontal concentration are combined. The three exceptions are the French-speaking Community of Belgium and Slovenia (which do not use the criterion of the amount of licenses) and Switzerland (which uses only this criterion).

The next most commonly used criterion is diagonal concentration (cross-ownership), which is present in 11 cases out of 29 (38%). It usually addresses the following issues:

- cross-ownership between TV and radio service providers (Croatia, Cyprus, Italy, Norway and Slovenia);
- cross-ownership between service providers and the press (Austria, Cyprus, Germany, France, Italy, United Kingdom for Channel 3, Norway, Slovenia and Slovakia);
- cross-ownership between service providers and advertising companies (Croatia, Italy, United Kingdom, Greece and Slovenia);
- cross-ownership between service providers and telecommunications companies.<sup>59</sup>

This criterion is used in a unique way in Italy, where concentration is assessed over the “*integrated communications system*” (“Sistema Integrato delle Comunicazioni” - SIC), which includes almost all segments of the media industry (press, books, music, films...).

The criterion of audience share is present in 7 cases out of 29 (24%). The threshold above which a regulatory intervention becomes foreseeable (or mandatory), varies between countries:

- 20% in the French-Speaking Community of Belgium;
- 25 to 30% in Germany (depending on the situation of the broadcasters);
- 27% in Spain;

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<sup>59</sup> Which qualifies also as vertical ownership if the telecommunication company distributes TV services (see below).

- 8% for television (when owning more than 49% of another broadcaster) and 20% for radio in France;
- 15, 35 or 40% in Hungary (depending on the situation of the broadcaster and especially its presence in television and radio);
- 33% in Norway (or less if cross-ownership in television, radio and/or the press);
- 30% in Romania.

The criterion of geographical concentration is also present in 7 cases out of 29 (24%). It is usually used to prevent:

- national broadcasters to control regional or local broadcasters;
- regional broadcasters to control local broadcasters;
- concentration within regional broadcasting;
- concentration within local broadcasting.

The criterion of vertical concentration is the one which is least often used (5 cases out of 29, i.e. 17%). It is also the one which is used mainly for television service providers. It is present in the following different forms in the regulatory framework of:

- Austria: limitation of concentration between TV service providers and cable operators;
- Croatia: ban of ownership of TV (and radio) service providers by platform operators;
- Greece: limitation of ownership of TV service providers by platform operators;
- Hungary: limitation of presence of TV channels owned by a platform in its offer;
- Slovenia: ban of ownership of TV (and radio) service providers by telecommunication operators.<sup>60</sup>

#### 4.2.3. Content concentration

About half of the countries (15 out of 29, i.e. 52%) address the issue of concentration not (or not only) in terms of ownership concentration, but also in terms of content concentration.

Media pluralism is of course the main goal of all the regulatory frameworks. The situations we have highlighted are more focused on when a regulatory authority has the possibility to intervene even though none of the ownership concentration thresholds analysed earlier is met.

This is the case in:

- in the French Speaking Community of Belgium, where broadcasters who hold “a significant position [...] may not infringe on the freedom of the public to access a pluralistic offer in audiovisual media services”;
- in the Dutch-speaking Community of Belgium, where cooperation between national, regional and local radio broadcasters is allowed but “must not lead to a structured uniformity in the programming policy”;
- in Bulgaria, where licenses shall be guided by the goal of “creating favourable conditions for variety of the media landscape and for pluralism”;

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<sup>60</sup> Understood as operators distributing TV services.

- in Switzerland, where broadcasters cannot “jeopardise the diversity of opinion and offerings” and where “if there are several candidates for one licence, preference is given to the candidate that is best able to fulfil the performance mandate. If several candidates are essentially equivalent from this viewpoint, preference is given to the candidate which best enhances to the diversity of opinion and the diversity of offerings”;
- in Germany, where the dominant power of opinion is reached not only when the audience thresholds are met by a service provider, but also “if 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”;
- in France, where licenses are granted “in appreciating the interest of each project for the public, in the light of priority goals which are the safeguard of pluralism of the currents of socio-cultural expression, the diversification of operators, and the need to avoid abuse of a dominant position as well as the practices impeding the free exercise of the competition”;
- in the United Kingdom, where, about the review of media ownership, “it shall be the duty of OFCOM: (a) to carry out regular reviews of the operation, taken together, of all the provisions to which this section applies; and (b) to send a report on every such review to the Secretary of State”;
- in Hungary, where a broadcaster which obtain a certain audience share “shall take measures in order to increase the diversity of the media market by modifying the programme flow structure of its media services, by increasing the proportion of Hungarian works and programmes prepared by independent production companies, or in any other way”;
- in Ireland, where during licensing procedures the NRA has to take into consideration “the quality, range and type of the programmes proposed to be provided by each applicant; the quantity, quality, range and type of programmes in the Irish language and the extent of programmes relating to Irish culture proposed to be provided; the extent to which the applicant will create within the proposed broadcasting service new opportunities for talent in music, drama and entertainment and in particular in respect of Irish culture; the desirability of having a diversity of services in the area specified in the notice catering for a wide range of tastes including those of minority interests”;
- in Iceland, where in case of a merger the Competition Authority “shall assess whether the merger has potentially harmful effects on media pluralism and/or diversity in the market(s) where the media service provider(s) concerned are active”;
- in Italy, where the NRA “adapting to the changing characteristics of markets, notwithstanding the nullity referred to in paragraph 4, shall take the necessary measures to eliminate or prevent the formation of the positions referred to in paragraphs 7, 8, 9, 10, 11 and 12, or otherwise detrimental to pluralism”;
- in Lithuania, where “state and municipal institutions shall exercise control with a view to upholding pluralism in the provision of information to the public and fair competition, avoiding the abuse of a dominant position by producers and/or disseminators of public information or in any separate segment of the media market”;
- in Portugal, where “concentration operations between television operators which are subject to the intervention of the authority regulating competition are to be submitted to a prior opinion of Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media), which

*opinion will be binding where there is deemed to be a risk to free expression and to the exchange of different views and opinions”;*

- in Romania, where *“with a view to protecting pluralism and cultural diversity, ownership concentration and the extension of the audience in the audio-visual field are limited to dimensions ensuring economic efficiency, but not generating dominant positions in forming of public opinion”;*
- in Sweden, where a licence *“may be made subject to conditions that impose an obligation to broadcast a diversified range of programmes”.*

These twelve situations however encompass a large variation in the degree and amount of powers given to the NRA, from the weakest positions in Bulgaria, the Dutch-speaking Community of Belgium, Finland and in Sweden to the (at least potentially) strongest ones in the French-speaking Community of Belgium and Italy.

#### 4.2.4. *Other criteria*

Beyond the six criteria mentioned above, seven other criteria or situations have been identified in the regulatory frameworks analysed:

- the coverage of a certain amount of the population, which is used in Austria (exclusively for radio) and France (television and radio);
- the coverage of a certain percentage of the population, which is used in the Czech Republic, Italy, Slovenia and Slovakia;
- a certain percentage of the revenues raised in the industry, which is used in Italy (see the *“integrated communications system”* mentioned above) and in Latvia (35% of the advertising market);
- the transfer of a license (or of shares of a service provider) from one owner to another, which in Austria, Bulgaria, Czech Republic, France, Germany, Finland, Lithuania, Norway, Portugal, Romania, Sweden and Slovenia is allowed under certain conditions with prior approval of the competent authority; which in Ireland may be prohibited by the licence terms and conditions; and which in Poland may lead to the revocation of the licence;
- the merger between two broadcasters, which in the French-speaking Community of Belgium and the Czech Republic is allowed with prior approval of the regulatory authority; in Iceland is allowed with prior approval of the Competition Authority (and the consultation of the NRA); and in the United Kingdom opens the possibility for the Secretary of State to issue an intervention notice, specifying a *“public interest consideration”* in relation to the merger (which leads to the consultation of the NRA);<sup>61</sup>
- the editorial profile of the broadcasters in Malta, where *“not more than two generalist nationwide television services may be licensed to the same organization, person or company”* and where *“the same organisation, person or company may not own, control or be editorially responsible for more than one nationwide radio or television service predominantly transmitting news and current affairs”;*
- the specific case of Liechtenstein, where *“a withdrawal of the concession program is only permitted if: [...] e) a change in ownership structure or other influences is performed, which*

<sup>61</sup> The specific case of Ireland is not mentioned here, since it is dealt with via competition law.



leads to a dubious media concentration”, but where no by-law or case law further details what shall be understood as dubious media concentration.

#### 4.2.5. Transparency of ownership

Transparency of media ownership is one of means which can be used to achieve the goal of a healthy and informed democratic society. The Parliamentary Assembly of the Council of Europe has recently reiterated in a resolution that *“media ownership transparency is necessary to enable members of the public to form an opinion on the value of the information, ideas and opinions disseminated by the media”*.<sup>62</sup>

This is an issue which is widely debated in international fora and which is the source of several initiatives taken by NGO’s<sup>63</sup> or public bodies.<sup>64</sup> The most recent one is the creation, by the Steering Committee on Media and Information Society of the Council of Europe (CDMSI), of a Committee of experts on Media Pluralism and Transparency of Media Ownership (MSI-MED) whose tasks for the next two years will be to *“analyse best practices in Council of Europe member States with regard to policies and other measures ensuring a pluralist media landscape, transparency of media ownership, diversity of media content, inclusiveness in public service media, gender equality in media coverage of election campaigns”* and to *“prepare standard-setting proposals on media pluralism and transparency of media ownership”*.<sup>65</sup>

Transparency of media ownership remains difficult to implement in most of European countries. In its aforementioned resolution, the Parliamentary Assembly *“notes with concern that media outlets are frequently owned and controlled in a non-transparent manner, either because of a lack of transparency obligations under domestic law in member States or through non-transparent legal constructions of indirect or hidden ownership, which is often linked to political affiliations or economic or religious interests, or to the foreign political propaganda interests of the true owner of a media outlet. [...] While some member States have legislation which ensures transparency of media ownership in compliance with the above standards, such legislation is lacking in a large number of member States and the laws of a few member States permit hidden or indirect media ownership, thus attracting a delocalisation of media companies into their national territory”*. The Assembly therefore *“recommends that parliaments of the member States review their legislation to ensure adequate transparency of the ownership of, and influence over, media outlets (print media, film, radio, television and Internet-based media), including the disclosure of hidden ownership”*. It also recommends that the information about ownership *“and any relevant subsequent change in its respect should be submitted by the media outlets concerned to an independent national media authority. The public should have free access to this information, presented in a meaningful way, in electronic format, through the media’s websites and/or a centralised online database published by the national media authority. The national media authority (or other relevant public body) should be entitled to monitor the respect of reporting*

<sup>62</sup> Parliamentary Assembly of the Council of Europe (2015) Resolution 2065/2015 on Increasing transparency of media ownership.

<sup>63</sup> <http://www.access-info.org/media-ownership-transparency>

<sup>64</sup> <https://ec.europa.eu/digital-agenda/en/news/exchange-best-practices-transparency-media-ownership>

<sup>65</sup> [http://www.coe.int/t/dghl/standardsetting/media/cdmsi/CDMSI%282015%29022\\_en\\_TOR\\_2016-2017.pdf](http://www.coe.int/t/dghl/standardsetting/media/cdmsi/CDMSI%282015%29022_en_TOR_2016-2017.pdf)

*obligations and failure to comply with these obligations should be effectively ascertained and sanctioned. In view of the complexity of media landscapes in Europe and the complexity of the ownership structures of many media outlets, member States should ensure compliance with transparency standards through their regulatory authorities or other competent authorities. It should be possible to bring complaints of noncompliance with transparency standards before the competent authorities”.*

Our analysis shows that a long way remains towards the achievements of these goals, since if we take into consideration 3 types of disclosure of ownership (disclosure by the service provider to the NRA, direct disclosure by the NRA and direct disclosure by the NRA), these 3 are met together in only 3 situations out of the 33 studied (9%): Austria, French-speaking Community of Belgium and Portugal.

Disclosure of ownership of the service providers to the NRA is mentioned in 17 regulatory frameworks out of the 33 studies (51%), while 1 more (Slovenia) might also have been considered to be part of this group, since disclosure obligations to the Ministry are present. However, in some cases, such a disclosure is made only when the service providers apply for a licence instead of being made on a regular or permanent basis.

Only 5 out 33 (15%) also mention the obligation of direct disclosure to the public (Austria, French-speaking Community of Belgium, Spain, Portugal and Romania) while 3 more (Cyprus, Croatia and Slovenia) also have rules about indirect disclosure to the public (via a publication in the press in Cyprus and via a publication on the Official Gazette in Croatia and Slovenia).

Finally, in 11 cases out of 33 (33%), the NRA itself discloses to the public information about ownership of the services providers, whether this information has been collected directly from the service providers or via other public registers (for example trade register or data published by the Central bank). This disclosure can be either mandatory or be the result of initiatives taken by the NRAs themselves. The following links provides examples on how this information is made available to the public by these NRAs:

- AT - Austria:  
<https://www.rtr.at/de/m/Verzeichnisse>
- BE - French-speaking Community of Belgium:  
<http://www.csa.be/pluralisme>
- BE - Dutch-speaking Community of Belgium:  
<http://www.vlaamseregulatormedia.be/nl/mediaconcentratie>
- CH – Switzerland:  
[http://www.bakom.admin.ch/themen/radio\\_tv/marktuebersicht/index.html?lang=fr](http://www.bakom.admin.ch/themen/radio_tv/marktuebersicht/index.html?lang=fr)
- DE – Germany :  
[http://www.kek-online.de/no\\_cache/information/media-database.html?L=1&mt=1,2,3,4&s=&f=0&pq=1](http://www.kek-online.de/no_cache/information/media-database.html?L=1&mt=1,2,3,4&s=&f=0&pq=1)
- HR - Croatia:  
<http://www.e-mediji.hr/en/media/audiovisual-media/>
- LT - Lithuania:  
<http://www.rtk.lt/lt/transliuotojai>

- NL - Netherlands:  
<http://www.mediamonitor.nl/>
- NO – Norway:  
<http://www.medietilsynet.no/mediebildet/eierskap/>
- PT – Portugal:  
<http://www.erc.pt/pt/transparencia>

It should be stressed that the absence of rules of disclosure of ownership by the NRA and/or by the service providers themselves does not necessarily mean that in fact the sector is not transparent. It is for example the case in:

- In the Dutch-speaking Community of Belgium, where the NRA has the task of “*mapping concentrations in the Flemish media sector*”<sup>66</sup> and which publishes the yearly report “Mediaconcentratie”;<sup>67</sup>
- in the Netherlands, where even though there are no more concentration rules in the Media Act and no sector-specific obligation to disclose ownership to the NRA, the Media Act provides that the NRA “*is responsible for investigating developments regarding concentrations and financial and economic conditions of the national and international media markets and its implications for pluralism and independence of information*”, “*reports annually on his findings to the Minister*” and “*will make his findings public, except data which are confidential in nature*”<sup>68</sup>. This leads to the publication of the yearly “Mediamonitor”, which provides all the information about the ownership of the media groups which are active in the Netherlands.<sup>69</sup>

### 4.3. Preliminary conclusion

The main interest of such a wide comparative analysis was to determine to which extent national broadcasting law still takes into consideration concentration and ownership issues, even in era of globalisation of providers and of abundance of services. As we have seen, the answer is overwhelmingly positive.

Another interest of such exercise was to identify potential trends in the reasons why a sector-specific concentration framework may or may not exist and, when it is actually in place, whether the measures that are taken correspond to the main characteristics of the media system or to specific economic, cultural, geographical or technological circumstances.

<sup>66</sup> [http://www.vlaamseregulatormedia.be/sites/default/files/act\\_on\\_radio\\_and\\_television\\_broadcasting.pdf](http://www.vlaamseregulatormedia.be/sites/default/files/act_on_radio_and_television_broadcasting.pdf)

<sup>67</sup> <http://www.vlaamseregulatormedia.be/nl/mediaconcentratie>

<sup>68</sup> [http://wetten.overheid.nl/BWBR0025028/Hoofdstuk7/Titel73/Artikel721/geldigheidsdatum\\_27-12-2015](http://wetten.overheid.nl/BWBR0025028/Hoofdstuk7/Titel73/Artikel721/geldigheidsdatum_27-12-2015)

<sup>69</sup> <http://www.mediamonitor.nl/>

#### 4.3.1. *Media systems*

If we refer to the most popular international comparative media system research (developed by Daniel Hallin and Paolo Mancini)<sup>70</sup> it appears that the regulatory frameworks for media concentration are impervious to such a classification.

Hallin and Mancini conceptualised three models of media systems: the Mediterranean or polarised pluralist model (Cyprus, France, Greece, Italy, Malta, Portugal, and Spain), the North/Central Europe or democratic corporatist model (Austria, Belgium, Denmark, Finland, Germany, Iceland, Luxembourg, Netherlands, Norway, Sweden and Switzerland) and the North Atlantic or liberal model (Britain, United States, Canada, Ireland). Further research added a fourth model: the Eastern European or post-communist media model (Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia).

The five countries where broadcasting law is mute about concentration (Bulgaria, Denmark, Estonia, Luxembourg and the Netherlands) includes indeed three countries which fit the democratic corporatist model (Denmark, Luxembourg and the Netherlands), but is also in this same category that we can find one country with a very detailed ownership legal framework (Austria), one country which created a specific authority in charge on media concentration (KEK, Germany), one country which created a specific law about media ownership (Media Ownership Act, Norway) as well as two countries with a very loose regulatory framework (Finland and Sweden). These five countries also include two countries presented in the fourth model (Bulgaria and Estonia), but if some countries in this group develop common trends, it is not the case for all of them and obviously not the case for Bulgaria and Estonia.

If we look more in depth in the tools which are used to avoid ownership concentration and content concentration, here again the preferences do not match the media systems : a variety of tools are used by the different countries without allowing to link their use with these different models. Only the liberal model appears to fit, with the United Kingdom and Ireland privileging approaches driven by content issues (plurality and diversity) and relying on the traditional competition tool of merger control.

#### 4.3.2. *Domestic circumstances*

If such a conceptual framework does not provides an explanation of why these legal systems have developed over time, then can the specific national economic, cultural or geographical circumstances provide a better analytical framework?

Here again, it is rather difficult to identify common trends based:

- on an economic basis, with deregulation in Bulgaria but also in Denmark and Luxembourg, and intense regulation in Portugal but also in Germany;

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<sup>70</sup> Hallin, Daniel C. & Mancini, Paolo (2004) *Comparing Media Systems: Three Models of Media and Politics*. Cambridge: Cambridge University Press.

- on a cultural basis, with important differences between Nordic States (Denmark vs. Norway), between Baltic States (Estonia vs. Lithuania), between Central European States (Poland vs. Hungary) or between Eastern Balkans States (Bulgaria vs. Romania);
- on a geographical basis with:
  - important differences between small States, in which a priori the size of the market might explain some kind of acceptance of concentration as a way to help domestic players to survive (which is not the case in the French-speaking Community of Belgium or in Austria);
  - and important differences between large States, in which in a priori the size of market will provide enough plurality without the need of public intervention (which is not the case in France and in Germany).

In the absence of manifest trends explaining the reasoning behind the elaboration of the different legal frameworks, the choice of our eight case studies will then be driven by the following objective criteria: the presence of an elaborated regulatory framework, the existence of recent developments, the existence of case law and the mix between the privileged tools to address the issue of media concentration. These criteria combined lead to the following choice:

- for the three large EU Members States: France, Germany and the United Kingdom;
- for the three smaller EU Members States: Austria, Belgium and Ireland;
- for the two EFTA Member States: Norway and Switzerland.

## 5. The practice: 8 selected case studies<sup>71</sup>

### 5.1. AT – Austria

#### 5.1.1. Concentration

Austria has been chosen as a case study due to the fact that, if a ranking had to be made among the 33 regulatory frameworks analysed in the previous chapter, this country would probably make it to the podium, even though it has undergone a process of liberalisation over the years and some analysts consider that *“while initial legislation on private commercial broadcasting contained some elements to increase the variety of media owners and restrict dominant media organisations at the regional level, most of these barriers have been removed”*.<sup>72</sup>

If indeed several cross-ownership concentration rules have been repealed to favor approaches based on coverage, both the laws on private television (Federal Act on Audio-visual Media Services - AMD-G) and on private radio (Federal Act enacting provisions for private radio broadcasting - PrR-G) still impose several limitations on ownership concentration, and sometimes through very detailed provisions. Among the six main criteria identified in our cross-country analysis table (see chapter 4.2. above), five of them are present in the Austrian regulatory framework, the only one lacking being the criterion based on thresholds of audience share:

- criterion horizontal (services) : *“apart from technically unavoidable spill over, persons or partnerships of the same media group must not provide one particular part of the federal territory: 1. with more than two analogue terrestrial radio channels, 2. with more than two digital terrestrial radio channels, 3. with more than one terrestrial radio channel and two terrestrial television channels”*; this third condition also qualifies as a criterion for limiting diagonal ownership concentration;
- criterion horizontal (providers): television broadcasters are considered to belong to the same media groups when *“1. who/which hold more than 25 per cent of the share capital or the voting rights of a media owner or exert a dominating influence or have one of the possibilities to exert an influence as defined in § 244 (2) in connection with paragraphs 4 and 5 of the Business Code; 2. where one of the persons or partnerships listed in item 1 has more than 25 per cent of the share capital or voting rights or a dominating influence or one of the possibilities to exert an influence as defined in § 244 (2) in connection with paragraphs 4 and 5 of the Business Code; 3. where a media owner holds more than 25 per cent of the share capital or voting rights or exerts a dominating influence or has one of the possibilities to exert*

<sup>71</sup> The relevant provisions of the broadcasting laws mentioned in this chapter are all provided in chapter 7, along with the references.

<sup>72</sup> Josef Trappel, *The Austrian Media Landscape*, in Terzis, Georgios ed. (2007), *European Media Governance, National and Regional Dimensions*. Bristol: Intellect Books, p. 69.

an influence as defined in § 244 (2) in connection with paragraphs 4 and 5 of the Business Code”; a similar provision exists also for radio broadcasters;

- criterion vertical : a company active above a certain level in cable networks (“more than a level of 30 per cent of coverage to the population by means of cable network on the national territory”) cannot own a television channel;
- criterion diagonal : a company active at a certain level in radio (“more than 30 per cent of a nationwide range”) or the daily press (“more than 30 per cent of a nationwide range of the daily press”) or the weekly press (“more than 30 per cent of a nationwide range of the weekly press”) cannot be a television broadcaster;
- criterion geographical :
  - a television broadcaster “may hold several licenses for digital terrestrial television as long as not more than three coverage areas included in the licenses overlap”;
  - an analog radio broadcaster “may hold several licenses for analogue terrestrial radio broadcasting as long as the coverage areas of such licenses do not overlap. In addition, the analogue terrestrial coverage areas attributable to any broadcaster must not overlap”;
  - a digital radio broadcaster “may hold several licenses for digital terrestrial radio broadcasting as long as no more than two of the coverage areas covered by such licenses overlap. In addition, more than two of the digital terrestrial coverage areas attributable to any broadcaster must not overlap”;
  - besides, “a coverage area is to be attributed to a person in such case when such person is directly in possession of control possibilities” as defined above (see criterion horizontal – providers);
  - finally, “except for any technically unavoidable overlapping (spill over), a media group may provide the same location in the national territory simultaneously with only one channel licensed under the Private Radio Broadcasting Act and a maximum of one third of the terrestrial television channels that can be received in that location”; this condition also qualifies as a criterion for limiting diagonal ownership concentration.

Additionally to these main criteria, other criteria are also present:

- for radio, the criteria of the coverage of a certain amount of the population: “the total number of inhabitants in an analogue coverage area attributable to a media group must not exceed twelve million people, and the number of inhabitants in an analogue coverage area attributable to a person or partnership of the media group must not exceed eight million people”;
- for television, the criteria of the transfer of shares from a broadcaster to another one: when more than 50% of the shares are transferred, this operation has to be notified to the NRA, which assesses its compliance with the other provisions of the law in terms of ownership; in case of non-compliance, the license shall be revoked.

Foreign ownership of television service providers is also limited to a maximum of 49% of the shares, but individuals and legal entities of the European Economic Area have equal status as Austrians.

The issue of content concentration is not dealt with by the Austrian regulatory framework.

This regulatory framework has not been under market pressure in the recent years, since the latest case law dates as far back as 2003<sup>73</sup> and 2001<sup>74</sup>, in the early years of the development of private radio broadcasting, when the licenses were delivered and the decisions (unsuccessfully) challenged by competitors.

Austria is also worth of interest because it shows a striking paradox: despite this tight regulatory framework, the media industry could also rank as one of the most concentrated throughout Europe: *“Magnitude and power characterize the Austrian media landscape. Magnitude related to the relatively large size of the media compared to the smallish market of 8.5 million people living in Austria. Power related to the high degree of market concentration providing the dominant media actors with influence not only in their respective markets but also in the political arena”*.<sup>75</sup> The combination of a strong and highly concentrated market in the press and a strong position of the public service television and radio in broadcasting (Austria was the last country in Western Europe to put an end to the monopoly of public radio broadcasting in 1998 and television public broadcasting in 2003) has buttressed the important position of the press in the broadcasting sector. This is especially the case in the radio broadcasting sector, since the television sector is not very developed and highly constrained by the success of German television channels (domestic private channels have less than 10% audience share while foreign channels have more than 40% audience share). Incidentally, the motivation for such a regulatory framework was indeed *“to restrict ownership of dominant newspaper publishers”*.<sup>76</sup>

### 5.1.2. Transparency

Finally, Austria is an interesting case in terms of transparency both of ownership and financing and is usually presented as one of the most efficient models in Europe.<sup>77</sup>

Transparency of (public) financing is assured, since the adoption in 2011 of the Federal Constitutional Act on Transparency in Media Cooperation and of Advertising Orders and the Funding of Media Owners of a Periodical Medium (MedKF-TG)<sup>78</sup> by the quarterly disclosure, by

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<sup>73</sup>

[https://www.ris.bka.gv.at/Dokumente/Bks/BKST\\_20030506\\_611058\\_001\\_BKS\\_2003\\_00/BKST\\_20030506\\_611058\\_001\\_BKS\\_2003\\_00.pdf](https://www.ris.bka.gv.at/Dokumente/Bks/BKST_20030506_611058_001_BKS_2003_00/BKST_20030506_611058_001_BKS_2003_00.pdf)

<sup>74</sup>

[https://www.ris.bka.gv.at/Dokumente/Bks/BKST\\_20011130\\_611135\\_003\\_BKS\\_2001\\_00/BKST\\_20011130\\_611135\\_003\\_BKS\\_2001\\_00.pdf](https://www.ris.bka.gv.at/Dokumente/Bks/BKST_20011130_611135_003_BKS_2001_00/BKST_20011130_611135_003_BKS_2001_00.pdf)

<sup>75</sup> Josef Trappel, The Austrian Media Landscape, in Terzis, Georgios ed. (2007), *European Media Governance, National and Regional Dimensions*. Bristol: Intellect Books, p. 63.

<sup>76</sup> *Idem*, p. 67.

<sup>77</sup> <https://ec.europa.eu/digital-agenda/en/news/exchange-best-practices-transparency-media-ownership>

<sup>78</sup> Bundesverfassungsgesetz über die Transparenz von Medienkooperationen sowie von Werbeaufträgen und Förderungen an Medieninhaber eines periodischen Mediums (BVG Medienkooperation und Medienförderung – BVG MedKF-T). German and English versions available at [https://www.ris.bka.gv.at/Dokumente/Erv/ERV\\_2011\\_1\\_125a/ERV\\_2011\\_1\\_125a.pdf](https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2011_1_125a/ERV_2011_1_125a.pdf)



each of the 5.600 existing public bodies, of all the money they spend on advertising and subsidies to any kind of media.<sup>79</sup>

Transparency of ownership is assured in two ways:

- in terms of disclosure to the NRA, by the specific provisions in the Federal Act on Audio-visual Media Services (AMD-G) and on the Federal Act enacting provisions for private radio broadcasting (PrR-G);
- in terms of direct disclosure to the public, via a specific provision in the Media Act (Mediengesetz – MedienG) according to which all the media have to make “*constantly easily and directly retrievable*” the following information : “*name or company name, including the object of the company, residential address or registered office (branch office) and the names of the executive bodies and officers of the media owner authorised to represent the company and, if there is a supervisory board, its members. In addition, the ownership, shareholding, share and voting rights proportions shall be stated in respect of all persons holding a direct or indirect share in the media owner. Furthermore, any undisclosed shareholdings in media owner and in persons holding a direct or indirect share in the media owner as specified in the previous sentence shall be stated, and fiduciary relationships shall be disclosed for each level. In the case of direct or indirect shareholdings of foundations, the founder and the relevant beneficiaries of the foundation shall be disclosed. If the media owner is an association or an association holds a direct or indirect share in the media owner, the management board and the purpose of the association shall be stated in respect of such association*”.

## 5.2. BE – Belgium FR

Several elements could have justified choosing both the Dutch-speaking Community of Belgium and the French-speaking Community of Belgium as case studies, but it appeared more relevant to focus on the latter rather than the former, considering not only the unique experience of the regulatory authority in dealing with ownership concentration, content concentration and transparency of ownership, but also considering the challenges raised by a regulatory framework which combines provisions on content concentration with provisions on ownership concentration and, within the latter, mixes different tools as thresholds in ownership of capital, thresholds of audience share and, specifically for radios, conditions to mergers.

### 5.2.1. Concentration

Contrary to the Vlaamse Regulator voor de Media (VRM) in the Dutch-speaking Community which only has the duty of mapping media concentration in a yearly report, the Conseil Supérieur de l’Audiovisuel (CSA) in the French-speaking Community has the power to intervene against the players which are considered in a “*significant position*”.

<sup>79</sup> For the enforcement by the NRA (RTR), see <https://www.rtr.at/de/m/Medientransparenz>

This concept is the key element of the regulatory framework and has been chosen carefully by the lawmaker in order to make the difference with the concept of “dominant position” which is used in competition law and to show that the objective is not to safeguard competition but to safeguard pluralism. It is also voluntarily different of the concept of “significant market power” (SMP) which is used in the electronic communications sector.<sup>80</sup>

Although this concept of “*significant position*” is the cornerstone of the regulatory framework, it is not explicitly defined in the law, nor is it a threshold which service providers are not allowed to reach or surpass. As in competition law, what is forbidden is not to hold such a significant position but to “abuse” it. This economic concern has been translated into cultural concerns by specifying that the exercise of a significant position in the audiovisual sector “*may not infringe on the freedom of the public to access a pluralistic offer in audiovisual media services*” and that by pluralistic offer, “*it is necessary to hear a supply of media through a plurality of independent and autonomous media reflecting the broadest possible diversity of opinions and ideas*”, which clearly gives the power to the CSA to intervene in terms of content concentration.

The very large leeway that such a provision gives to the CSA is partly framed by the same article of the Law, which specifies four situations in which a significant position is automatically present, situations which combine horizontal ownership concentration and audience share thresholds:

*“1° when a physical or moral person, holding more than 24% of the capital of a television service provider, holds, directly or indirectly, more than 24% of the capital of another television service provider of the French-speaking Community;*

*2° when a physical or moral person, holding more than 24% of the capital of a radio service, provider holds, directly or indirectly, more than 24% of the capital of another radio service provider of the French-speaking Community;*

*3° when the cumulative audience of several television service providers reaches 20% of the total audience of television services of the French-speaking Community and that these television service providers are held directly or indirectly, mostly or in a minority, by the same person or entity;*

*4° when the cumulative audience of several audio service providers reaches 20% of the total audience of radio services of the French-speaking Community and that these radio service providers are held directly or indirectly, mostly or in a minority, by the same person or entity.”*

But here again, leeway is given to the regulatory authority since the “CSA notes the exercise of a significant position including” (in French the adverb “*notamment*” is used) these four situations, which means that this list is not exhaustive and that it has the freedom to take into consideration any other situation which may infringe the freedom of the public to access a pluralistic offer. It can also take into consideration a significant position which would be obtained by distributors of services (for example cable operators providing TV services).

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<sup>80</sup> Parlement de la Communauté française, *Projet de décret sur la radiodiffusion*, 357 (2002-2003) n°1. <http://www.pfwb.be/le-travail-du-parlement/doc-et-pub/documents-parlementaires-et-decrets/documents/000341778> (only in French).

When it comes to the implementation of these provisions, the CSA had the opportunity to apply them in only one case law which, in practice, is quite different of what was foreseen by the lawmaker.

In theory, the “significant position” procedure should be conducted as follows:

- step 1 is the designation by the CSA of one or more service providers (or distributors) as holder of a significant position;
- step 2 is to assess whether or not the significant position infringes or not the freedom of the public to access a pluralistic offer in audiovisual media services; in a Recommendation on the diversity of the radio landscape and the access of the public to a pluralistic radio offer,<sup>81</sup> the CSA has further clarified the criteria it would apply in such an assessment:
  - in terms of structural/quantitative aspects (structural pluralism):
    - total number of service providers and total number services licensed or available (radio, television, press) in the French-speaking Community;
    - structure and composition of the media groups;
    - average time spent on each media;
    - amount of radio services in each category (networks and independent radio) and in each geographical market (local, regional, multi-city...);
    - audience share;
    - share of the advertising market;
    - concentration index (HHI) by service provider and by media group;
    - agreements between service providers and their providers like press agencies, production companies, music companies, rights holders, advertising agencies...
  - in terms of qualitative aspects (content diversity):
    - general criteria: target audiences reached, categories and description of programmes broadcasted, format of services, source of programmes (in-house production, co-production, independent production);
    - criteria for information programmes: importance of information in the program, nature of information, procedure for collecting information, partnerships in terms of information;
    - criteria for other programmes: music styles and potential partnerships, types of games and potential partnerships, types of cultural programmes and potential partnerships.
- step 3 is, in case of infringement of the freedom of the public to access a pluralistic offer, to engage with the service providers concerned “in a conciliation in order to agree on measures allowing the respect of the pluralism of the offer”; the step cannot last more than six months;
- step 4 is, in case of lack of agreement on those measures between the CSA and the service providers, to pronounce any of the available sanctions, which start by a warning

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<sup>81</sup> Conseil Supérieur de l'Audiovisuel (2007) *Recommandation relative à la diversité du paysage radiophonique et à l'accès du public à une offre plurielle en radiodiffusion sonore* (only in French).

or a fine and can go as far as the temporary suspension or the definitive withdrawal of the license.

In practice, this procedure has never been implemented, but its principles have been applied during the particular and unique process of delivery (or renewal) of licenses to all the radio broadcasters at the same time (almost 100 licences).<sup>82</sup> It appeared during this tender procedure that, based on the quality of each application, the results of the tender would automatically create a significant position in terms of ownership concentration in favor a service provider which had applied for three radio networks out of the six available (and even four networks via a secret agreement revealed at the very end of the procedure). Therefore, in order to avoid this tension between diversity (content pluralism) and ownership (structural pluralism), the aforementioned step 2 was passed and led to the decision to grant a maximum of two licences to each service provider. These decisions were of course challenged, but the High administrative Court upheld all of them, by following the reasoning of the CSA according to which *“one could not imagine that the CSA, by granting licenses, could provide to one or several radio broadcasters (or comfort one or several radio broadcasters in) a significant position which could affect the freedom of the public to access a pluralistic offer, position that the CSA would then have to remedy to in consultation with the broadcasters concerned”*.<sup>83</sup>

### 5.2.2. Mergers

Another provision of the Law worth mentioning is the article about mergers between radios. Mergers between any kinds of radios can be authorised (community, local, regional, national), but only if three conditions are met:

- *“the radio stations concerned have radio frequencies intended to cover different coverage zones;*
- *the authorisation is given exclusively for reasons of viability of the project;*
- *a close relationship is maintained with the public referred to in the initial licenses”.*

More broadly, the CSA has also to take into consideration *“the diversity of the radio landscape and the balance between the different formats of radios, through their musical, cultural and information programmes”*, which mean that no merger should lead in a decrease in this diversity.

All mergers are subject to a consultation which is open to any service provider or any person which can justify of an interest (for example a person which would have lost in a tender against one of the service providers concerned by the merger and which would find in this newly created situation an opportunity to apply for the a licence).

According to the internal guidelines adopted by the CSA, five types of decisions can be taken when a request of merger is introduced:

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<sup>82</sup> For more details one the specific procedure followed, see Wagner-Hatfield (2015) *Radio broadcasting regulation in Europe: A comparative study with reflections on the situation in Slovenia*, chapter 3.

<sup>83</sup> Conseil Supérieur de l'Audiovisuel (2007) *Recommandation relative à la diversité du paysage radiophonique et à l'accès du public à une offre plurielle en radiodiffusion sonore* (only in French).

- to accept the merger as proposed;
- to accept the merger upon conditions;
- to refuse the merger while inviting applicants to reformulate a new request with new commitments;
- to refuse the merger irrevocably without withdrawing the license of the service provider which would have been merged, on the grounds that its viability is not at risk;
- to refuse the merger irrevocably while recognizing that the continuation of the activities of the service provider is impossible for reasons of viability.

The CSA had the opportunity to analyse several requests of mergers in the recent years. In most cases, it has taken the decision to authorise the merger, but every time assorted with certain conditions whose goal was to make sure that *“a close relationship is maintained with the public referred to in the initial licenses”* and the overall diversity of the radio landscape was safeguarded. For example:

- a merger between two local independent radios (radio A and radio B) with adjacent coverage zones was authorised due to the lack of viability of radio A, provided:
  - the presence of at least one member of the board of radio A in the board of radio B for a minimum duration of 3 years;
  - the presence, on the frequency of radio A, of programmes of local interest specific to its coverage zone for a minimum volume of 4 hours per week; these programs will need to be clearly identifiable by the public as specific to the coverage zone;
  - upholding of the technical characteristics of the two radio frequencies concerned.
- a merger between two regional networks (radio A and radio B) with adjacent coverage zones was authorised due to the lack of viability of both radios provided the presence on the radio frequencies formerly assigned to radio A and on the radio frequencies formerly assigned to radio B of programmes specific to their respective coverage zone, including:
  - news programs of 20 minutes per day from Monday to Friday;
  - animation programs of 7 hours per day from Monday to Friday including 2 hours in peak time;
  - a minimum of 2 special actions per year intended to cover events of major importance in the respective coverage zones.

In some cases, the merger was initially refused (via informal discussions) and then allowed when the service providers made additional commitments or accepted the conditions proposed by the CSA.

### 5.2.3. Transparency

Finally, the case of the French-speaking Community of Belgium is also worth studying due to its standards and practices in terms of transparency of ownership. The Law on Audiovisual Media Services imposes a transparency obligation on service providers both towards the public and the regulatory authority in terms of:

*“1° identification of natural persons or legal entities participating in the capital of the corporation and the amount of their respective participation or the list of the members for the legal persons incorporated in association;*

*2° nature and the amount of the interests held by the persons mentioned above in other companies in the sector of audiovisual media or other sectors of the media;*

*3° identification of natural or legal persons working in the activities of provision of resources involved significantly in the implementation of the programmes of audiovisual media services, as well as the nature and the amount of their participation”.*

This obligation is duly monitored and has already led to sanctions of service providers which had failed to comply with the Law.

Moreover, even though there is no statutory obligation to do so, the CSA has launched a dedicated website ([www.csa.be/pluralisme](http://www.csa.be/pluralisme)) where detailed transparency information on all the media sector is published, alongside economic and content analysis.

### 5.3. CH – Switzerland

As we already stressed in a previous report for AKOS<sup>84</sup>, Switzerland share with Slovenia several characteristics which usually make it a relevant case study in a comparative study with reflection on the domestic situation. It is a small country, whose French speaking population is of the same size as the Slovenian population (around 2 million). It is also, like Slovenia, a country where private radio and television broadcasters (as well as the press) do not enjoy a “national” coverage or even the coverage of a whole linguistic region.

According to the Federal Act on radio and television, the Swiss regulatory framework regarding concentration is twofold:

- in terms of ownership concentration, a quantitative provision limits ownership to a so-called “2+2 rule”: a broadcaster *“may acquire a maximum of two television licenses and of two radio licenses”*;
- in terms of content concentration, a qualitative provision limits the deliverance of licenses to a broadcaster *“who does not jeopardise the diversity of opinion and offerings”*.

In addition to these limitations, *“if there are several candidates for one licence, preference is given to the candidate that is best able to fulfil the performance mandate. If several candidates are essentially equivalent from this viewpoint, preference is given to the candidate which best enhances to the diversity of opinion and the diversity of offerings”*.

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<sup>84</sup> Wagner-Hatfield (2015) *Radio broadcasting regulation in Europe: A comparative study with reflections on the situation in Slovenia*, chapter 4.2.

If the rules in terms of ownership concentration are clear, the ones in terms of content concentration can lead to varying interpretations. Therefore, the Act also specifies that *“a risk to diversity of opinion and offerings exists if (a) a broadcaster abuses its dominant position in the relevant market; (b) a broadcaster or another enterprise active in the radio and television market abuses its dominant position in one or more media-related markets”*.

It is therefore not surprising that, by referring to a concept which is typically used in competition law rather in broadcasting law, the Act then assigns a specific role for the competition authority. When a risk to diversity arises, the procedure involves both the Federal Department of the Environment, Transport, Energy and Communications – DETEC (in which the Federal Office of Communications – OFCOM – is located but which does have the status of an independent regulatory authority) and the Competition Commission.

The DETEC carries out its analysis of the situation and is obliged to consult the Competition Commission. On the basis of the report of the Competition Commission, if the DETEC *“ascertains that a broadcaster or another undertaking active in the radio and television market has jeopardised diversity of opinion and offerings as a result of its abuse of its dominant position”*, it may take the following measures, i.e. demand that *“the broadcaster or the undertaking concerned:*

- (a) ensures diversity by measures such as granting broadcasting time for third parties or cooperating with other participants in the market;*
- (b) takes measures against corporate journalism, such as issuing editorial statutes to ensure editorial freedom;*
- (c) should such measures prove to be clearly inadequate, adapts the business and organisational structure of the undertaking”*.

The origins of such a regulatory framework are to be found in the willingness of the lawmaker to avoid diagonal concentration by preventing the major actors of the press (a sector which was itself characterised by horizontal concentration) to obtain a powerful position in the radio and/or the television broadcasting markets.

However, the move from an analog to a digital environment has profoundly changed the market conditions, while the regulatory framework has not evolved. This is especially true for radio, since Switzerland is one of the most advanced and of the most successful countries in the world in terms of penetration of DAB and DAB+, with 100% coverage of the territory, more than 2 million digital devices sold, 60% of new cars equipped with a DAB/DAB+ receiver, 15 DAB and 114 DAB+ services launched, an estimated 45% of radio listening on digital devices<sup>85</sup> and even a plan to switch-off from DAB to DAB+ in 2016<sup>86</sup> and to switch-off analog radio between 2020 and 2024.<sup>87</sup>

<sup>85</sup> <http://www.worlddab.org/country-information/switzerland>

<sup>86</sup> [http://www.worlddab.org/public\\_document/file/664/20150903\\_Pr%C3%A4sentation\\_WDMB.pdf?1450265669](http://www.worlddab.org/public_document/file/664/20150903_Pr%C3%A4sentation_WDMB.pdf?1450265669)

<sup>87</sup> [http://www.worlddab.org/system/news/documents/000/004/858/original/DigiMig\\_01.012.14.pdf?1417440406](http://www.worlddab.org/system/news/documents/000/004/858/original/DigiMig_01.012.14.pdf?1417440406)



With potentially between 6 and 36 times more programmes on digital terrestrial radio (6 to 18 on DAB and 12 to 36 on DAB+ depending on the quality of broadcast) than on analog terrestrial radio, the “2+2 rule” becomes clearly unsustainable, and might even appear as counterproductive. In such deeply changed technological (and inevitably economical) conditions, limiting the number of concessions such a low level inhibits technological development, since it automatically prohibits issuing new licences for new DAB services to players which already have two analog licences. In addition, the introduction of new technologies always requires more investment and thus depends more on the presence on the market of broadcasters having the capacity to invest, i.e. broadcasters already active in the analog environment. The risk exists that with the current legal conditions media companies have no incentive to invest since they already have well-established analogue radio stations and cannot find a place on the new digital environment due to these ownership restrictions.

Therefore, a modification of the current regulatory has recently been adopted (in the framework of the referendum on the modification of the licence fee and other provisions of the Federal Act) and should enter into force in 2016. The modification will consist, in terms of content concentration, in repealing the provisions related to the risk to “*jeopardise the diversity of opinion and offerings*” (article 44.1.g of the Act), and in terms of ownership concentration, in maintaining the “2+2 rule” but to allow exceptions “*for the introduction of new broadcast technologies*” (article 44.3 amended). Moreover, there is also a new possibility to renew a licence without a tender “*when the situation in the coverage zone or technological changes pose particular challenges to the broadcaster*” (new article 45.1bis).<sup>88</sup>

This new approach takes into consideration the small size of the Swiss market, divided between 4 linguistic regions, and the fact that, for economic reasons, the information needs of the citizens in some regions can be provided by a single media company active in the press, radio and television simultaneously, which is not allowed within the current framework. It also takes into consideration that the cooperation between DETEC and the Competition Commission, which has to be launched for every new licence in order to check if it is not going to “*jeopardise the diversity of opinions and offering*”, has led to investigate some cases during one or two years, creating economic uncertainties for the candidates. It finally recognises that the law still provides other sufficiently effective instruments to avoid ownership concentration and content concentration (surveillance measures when a concentration occurs, maintaining the “2+2 rule” even with exceptions...).<sup>89</sup>

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<sup>88</sup> Assemblée fédérale, *Loi fédérale sur la radio et la télévision, modification du 26 septembre 2014*. <http://www.parlament.ch/sites/doc/CuriaFolgesseite/2013/20130048/Texte%20pour%20le%20vote%20final%20NS%20F.pdf> (in French and German).

<sup>89</sup> Conseil fédéral, *Message relatif à la modification de la loi fédérale sur la radio et la télévision du 29 mai 2013*. <https://www.admin.ch/opc/fr/federal-gazette/2013/4425.pdf> (in French and German).



## 5.4. DE – Germany

Germany is a federal State in which broadcasting is regulated mainly at the level of the 16 federal States (*Bundesländer*). Each federal State has its own media law and its own media regulatory authority.<sup>90</sup>

Radio broadcasting is fully regulated at the level of the States (there are no national radio broadcasters), while television broadcasting is regulated both at the level of the States and, according to the Interstate Treaty on Broadcasting and Telemedia (*Rundfunkstaatsvertrag – RStV*), at the national level via a joint management office (*Die medienanstalten – DLM*) set up by the States media authorities and whose mandate is to cooperate in different decision-taking councils and commissions coordinating and aligning matters on a national level.<sup>91</sup>

The main task of the DLM is the regulation of private broadcasting with a national reach, which means licensing, monitoring and supervision of the programmes, but also the control of media concentration. For this purpose, a specific Commission on Concentration in the Media (*Kommission zur Ermittlung der Konzentration im Medienbereich – KEK*) has been set up, whose duty is to monitor and enforce compliance with the provisions on media concentration and media pluralism of the Interstate Broadcasting Treaty.<sup>92</sup>

Besides the existence of a specific body exclusively in charge of media concentration matters, the other main specificity of the German regulatory framework is its almost exclusive reliance on audience share thresholds. There are no limitations to horizontal, vertical or diagonal concentration as long as a service provider does not acquire “*dominant power of opinion*”.<sup>93</sup> Above the threshold of an annual average audience share of 30%, it will be presumed to have acquired such a dominant power, to which the KEK has to remedy through different measures. The same presumption applies when a service provider 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 a service provider with a 30% audience share. Also, if a service provider reaches an annual average audience share of 10% with a general channel or an information-oriented thematic channel, then it must allocate broadcasting time to independent third parties.

Since the concept of audience share is the cornerstone of the regulatory framework, the Interstate Treaty provides detailed provisions on how this audience share has to be measured.

<sup>90</sup> There are only 14 regulatory authorities due to the merger between the authorities of Berlin and Brandenburg and between the authorities of Hamburg and Schleswig-Holstein.

<sup>91</sup> <http://www.die-medienanstalten.de/en/profile.html>

<sup>92</sup> <http://www.kek-online.de/>

<sup>93</sup> Referring to Jürgen Habermas, “*power over opinion*” means, according to the KEK, “*the intended and successful influence of media content providers on the process of formation of individual and public opinion*”. See Kommission zur Ermittlung der Konzentration im Medienbereich – KEK (2015) *Turning from a Television-Centred View to a Broader Focus on Media, Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media*, p. 22.

The KEK is in charge of establishing the audience share and commissions this task to a specialised company. The average audience share over a period of twelve months is used as a reference, and the audiences taken into consideration are those of viewers of German broadcasters aged three years and older. Broadcasters have to assist the KEK in this task, otherwise their license can be revoked.

Once the audience shares have been determined, they have to be attributed to each service provider. All services provided by a company or provided by another company in which it holds 25% or more of the capital or voting rights shall be attributed to this company. It is also possible to attribute to a company the audience of service providers *"in which it has an indirect interest insofar as those undertakings are affiliated undertakings within the meaning of Article 15 of the German Company Law and hold a share of 25 per cent or more of the capital or voting rights of a broadcaster"*.

In terms of remedies, several options are available to the KEK. The first consequence is of course that no additional license can be delivered to this provider. But this is not enough to bring the audience share below the threshold. In order to do so, the KEK can:

- propose to the service provider to give up its participating interests in services attributable to it until its audience share falls below the threshold;
- propose to the service provider to limit its market position in media-relevant related markets until its audience falls below the threshold;
- propose to the service provider to grant broadcasting time to independent third parties;
- propose to the service provider to establish a programme advisory council.

The KEK shall discuss the possible measures with the service provider with the objective of reaching mutual agreement. If such an agreement cannot be reached or if the measures agreed upon are not implemented within a reasonable period, then the DLM can revoke the licences of as many of the services as necessary to ensure that the service provider no longer exercises dominant power of opinion.

This assessment of a dominant power of opinion has been conducted in one famous case in 2005: the proposed acquisition of the television service provider ProSiebenSat.1 (which is one of two dominant service providers alongside RTL) by the publisher Axel Springer (which is the first press group in Germany). This proposed acquisition has been prohibited both by the federal competition authority (*Bundeskartellamt*), but also by the KEK. According to the Interstate Treaty, all modifications in ownership are subject to prior notification to and approval by the KEK.

This decision remains today highly controversial, because it was the first refusal of a change of ownership<sup>94</sup> but also (and mainly) because the audience share of ProSiebenSat.1 was at that time around 22%, i.e. below the respective thresholds of 30% and 25%.

The KEK based its decision on the fact that the audience share threshold should be considered as a model, but that the combination of the company's television and other media activities should

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<sup>94</sup> Kommission zur Ermittlung der Konzentration im Medienbereich – KEK (2015) *Turning from a Television-Centred View to a Broader Focus on Media, Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media*, p. 16.

also be taken into account. Other markets are relevant *“firstly if they are either significant to the formation of public opinion (public markets) or likely to strengthen the influence acquired through television. Secondly, it also depends on the extent to which the market is comparable with national television (relationship). The degree of relationship depends on the comparable features of the service that have the potential to influence public opinion. According to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), these are primarily suggestive power, breadth of impact and topicality”*.<sup>95</sup> The KEK considered that daily newspapers were a closely related market.

The KEK also considered that the audience share in television did not have the same value as the market share in the press and applied a “conversion factor” of two-thirds of television viewer ratings. Axel Springer’s 26% share in the overall daily press market was therefore converted into a viewer rating of 17%. The KEK also equated the proportional influence of television with other media: one-seventh for TV program guides, one half for online activities and one half for radio. In total, the cumulative viewer rating of the potentially merger entity estimated by the KEK was 42%.

Axel Springer challenged both the veto of the competition authority and the KEK in court. The decision of the *Bundeskartellamt* was upheld by the Federal Supreme Court (*Bundesgerichtshof*) in 2010, while the decision of the KEK was overruled by the Federal Administrative Court (*Bundesverwaltungsgericht*) and was referred back to the Bavarian Administrative Court (*Bayerische Verwaltungsgerichtshof*). In 2012, the Bavarian Administrative Court judged that the KEK had *“overstepped the boundaries of its decision-making powers in several ways”*, that the other media-relevant markets should not have been taken into account and that the KEK did not represent *“particular circumstances”* under which broadcasters could, in exceptional cases, be deemed to hold a dominant market position even if their audience share was below the threshold.<sup>96</sup> Finally, in 2014, the Federal Administrative Court confirmed this 2012 decision and ruled that the acquisition was acceptable under media law.<sup>97</sup>

The consequence of such a regulatory framework is that the television market remains very stable (due to the “danger” of reaching the thresholds) and oligopolistic (due to the tendency of the main private players to grow as close as possible to the thresholds). The concentration ratio CR4 remains higher than 90%: *“oligopolistic market conditions can still be observed. In nationally-transmitted television the four broadcasting groups ARD, ZDF, Mediengruppe RTL Deutschland and ProSiebenSat.1 Media AG have established themselves. Measured by the average viewing shares, their programming offerings accounted for about 90 % of television usage. Thus the demand for TV programmes is still covered by a small number of television broadcasters, although the number of nationwide television channels has risen”*.<sup>98</sup>

<sup>95</sup> <http://merlin.obs.coe.int/iris/2006/2/article13.en.html>

<sup>96</sup> <http://merlin.obs.coe.int/iris/2012/4/article15.en.html>

<sup>97</sup> <http://merlin.obs.coe.int/iris/2014/3/article14.en.html>

<sup>98</sup> Kommission zur Ermittlung der Konzentration im Medienbereich – KEK (2015) *Turning from a Television-Centred View to a Broader Focus on Media, Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media*, p. 6.

Another consequence of this regulatory framework, which is clearly illustrated by the controversies around the Axel Springer/ProSiebenSat.1 case is that one specific segment of the media industry remains considered in isolation of others, which is getting increasingly problematic in an era of convergence. This has been stressed by the KEK in its last report on media concentration: *“the current TV-centered media concentration law which dates back to 1997 does not take sufficiently account of the changes in the media usage which can be observed over the past 20 years. The boost of the Internet has triggered an accelerating convergence process of formerly separate types of media. In addition, new forms of services are developed that are specifically designed for online usage. Even if television remains particularly relevant for opinion-formation and still retains the function of a lead medium, it does not seem justified to permanently hold on to the television-centred perspective of current media concentration control”*.<sup>99</sup>

## 5.5. FR – France

### 5.5.1. Concentration

The results of the cross-country analysis conducted in chapter 4.1 clearly showed that France is an obvious case study, since it is the one with the largest amount of positive results.

Among the six main criteria identified in our cross-country analysis table (see chapter 4.2. above), five of them are present in the French regulatory framework, the only one lacking being the criterion based on vertical concentration. The provisions of this framework are very numerous and very detailed, and all of them are made available in chapter 7.9 below. However, we will try to sum up the most important ones as follows:

- criterion horizontal (services): a service provider cannot usually hold more than one license; several different exceptions are listed, depending if it is a radio or a television service provider, if the service is broadcasted in analog or in digital and if the service has a national or a local coverage; it can go as high as 7 licences for digital terrestrial broadcasting;
- criterion horizontal (service providers): a national terrestrial television service provider cannot hold, directly or indirectly, more than 49 % another terrestrial television service whose annual average audience share exceeds 8% of the total audience of television services;
- criterion diagonal: a national service provider active in radio, television and/or press faces limitations to its expansion depending on its situation in these different markets (threshold of 4 million people in television, 30 million people in radio and 20% of distribution in the press); local service providers also face similar limitations, with lower thresholds;

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<sup>99</sup> Kommission zur Ermittlung der Konzentration im Medienbereich – KEK (2015) *Turning from a Television-Centred View to a Broader Focus on Media, Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media*, p. 22.

- criterion geographical: a local terrestrial television service provider cannot become the holder of a new license relating to a service of the same nature if this license should have the effect to bring its cumulative potential audience to more than 12 million people;
- criterion audience share:
  - a national terrestrial television service cannot hold, directly or indirectly, more than 49 % another terrestrial television service whose annual average audience share exceeds 8% of the total audience of television services;
  - a national analog or digital terrestrial radio service cannot hold licenses whose potential cumulative terrestrial audience exceeds 20% of the potential cumulative audience of all terrestrial radio services.

This last limitation has been added in a reform adopted in 2004 with the view of favoring pluralism in the framework of the launch of digital terrestrial radio broadcasting. However, since then, France has not been successful in launching such services.

Additionally to these main criteria another criterion is also present, i.e. the coverage of a certain amount of the population: an analog terrestrial radio service provider cannot cover a cumulative potential audience of more than 150 million people (see also examples above).

Another provision worth highlighting is the fact that an independent radio whose programming is similar to more than 50% to the programming of a network is then considered as being part of this network with the view of calculating the thresholds.

Foreign ownership of terrestrial television service providers is also limited to a maximum of 20% of the shares.

The issue of content concentration is dealt mainly when the regulatory authority (Conseil Supérieur de l'Audiovisuel – CSA) is licensing terrestrial broadcasters (non-terrestrial broadcasters only need to be registered): the licences have to be issued by the CSA taking into consideration “*priority goals*” among which “*the safeguard of pluralism of the currents of socio-cultural expression*” is present.

Among these numerous tools used in very different ways depending on the market in terms of products (analog or digital radio or television) and in terms geography (national or local), three dominants policy tools can be highlighted, especially in the radio broadcasting sector:

- ownership concentration thresholds in terms of population and in terms audience, which prohibits a same person to hold networks whose cumulative coverage would exceed 150 million people on the analog terrestrial platform or 20% of the cumulative potential audience of all radio services (analog and digital);
- content concentration measures, which takes into consideration, during the licensing process, the interest of each project for the public, particularly in the light of safeguarding pluralism;
- the prior and conditional approval of mergers and acquisitions, which is also conditioned to considerations derived from the objective to maintain pluralism, but which is also

driven by economic concerns (the CSA has to conduct an economic analysis in each case).

### 5.5.2. Focus on the radio sector

The threshold of 150 million people reached on the analog terrestrial platform is undoubtedly the most original feature of the French regulatory framework. It was introduced in 1994 in order to modify a similar measure which was considered unsatisfactory because it created a “threshold effect”. Before the 1994 reform, a service provider covering more than 30 million people could not hold another service provider covering more than 15 million people, which meant that a national service provider (automatically covering more 30 million people) could control as many radios as it wished as long as each of those were not reaching this threshold of 15 million people. This had a detrimental effect on internal and external growth of service providers, and explained why it has been replaced by the 150 million threshold, which allows a media group to expand nationally and hold three or four national radios depending on their coverage (the French population is 63 million, but all the networks do not cover 100% of the population).

According to the CSA, this measure has been working well in the first years of its implementation: *“in terms of internal growth, the ceiling of 150 million inhabitants has not prevented the allocation of new frequencies released through spectrum planning and management. They have benefited to all the actors of the sector, including the major radio groups”*.<sup>100</sup> In two cases, this provision has led to the withdrawal of acquisitions which were foreseen by Lagardère Group in 1997 and NRJ Group in 2000. In this last case, this has led to the creation of a new media group (NextRadioTV), which has now become one of the four big players on the market.

All these tools have indeed proven their efficiency: the French broadcasting market is not concentrated. This is especially true in the radio broadcasting sector. Alongside the 7 services of the public broadcasters Radio France and Radio France International, around 850 different radio service providers are present on the French market (among which almost 600 community radios). However, while remaining below the aforementioned thresholds of 150 million people and 20% audience share, 4 different media group are holding a significant position (RTL, NRJ, Lagardère and NextRadioTV) and have together more than 80% advertising market share.

However, this large diversification, even if it goes with a rather high level of time spent listening to radio (which remains stable around three hours of listening per day and a daily reach of more than 80% of the population), does not come with a healthy economic situation. The amount of advertising spent on radio is similar to the one observed 15 years ago and is still lower than the one observed before the 2008-2009 economic crisis.<sup>101</sup>

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<sup>100</sup> Conseil Supérieur de l'Audiovisuel (2014) *La Concentration du Média Radiophonique, Rapport au Parlement*, p. 24 (only in French).

<sup>101</sup> *Idem*, p. 12.

In a recent report on concentration in the radio broadcasting sector, the CSA has suggested several adaptations to regulatory framework:

About the threshold of 150 million people, which is the core of the regulatory framework, the CSA notes that this measure does not have any dynamic aspect:

- it has not been adapted since 1994 while in the meantime the population of the country has grown from 56 to 63 million;
- it has not been adapted to spectrum planning, while in the meantime new frequencies have been discovered, allowing for an enhanced coverage of the population by each network;
- it has only a national aspect, while the role of the CSA is to safeguard pluralism in its national and local aspects;
- its automatic aspect makes it a clear and simple for the industry, but it can be counterproductive in some cases, for example when a national radio is prevented to expand its coverage in a region where the offer is relatively poor;
- it is an automatic measure, while the most efficient regulatory measures are those which allow for “fine-tuning” and economic considerations;
- it is focused on analog terrestrial broadcasting, while the audience growingly uses other platforms (internet, satellite) to listen to radio.

The CSA has therefore formulated different legislative options in order to remedy these weaknesses. The first option would be to index the threshold of 150 million to the growth of the population (possibly in a retroactive manner to take into consideration the growth since 1994). The second option, which is more radical, is to replace this threshold by different criteria such as:

- the coverage in terms of potential cumulative audience share (which already exists in theory – 20% – but which does not apply in since it was established having in mind the development of terrestrial digital radio);
- the amount of frequencies (which has been globally rejected by the industry due to the differences between frequencies in terms of quality and population covered);
- the amount of licenses or a share of the total amount of licences (which raises the issue of the difference in terms of value between national and local licenses);
- the real audience share (which raises the issue of the freedom of choice of the viewers if the threshold is reached only via internal growth);
- the advertising market share (which raises the same issue since the growth of revenues will be the result of the success of the service).

The CSA concluded that none of these alternatives were suitable. *“The coverage indicator expressed in a relative way i.e. the potential cumulative audience share does not remedy to the lack of continuity of the results and further increases the degree of complexity of the calculation. The indicators of potential audience very simple to calculate such as the part of frequencies and the share of licensed services estimate in a too imprecise way the weight of a group in the radio landscape. If we abandon the potential audience for the real audience, pluralism could be apprehended in a more direct way by*



*the threshold and all types of consumption of radio could be integrated. However, the measurement of the real audience by a private provider and the definition of the perimeter of the studies according to the needs of market players pose a problem. But especially, the share of real audience is an indicator not suited to the definition of a threshold which applies in an automatic way. A threshold defined by a share of the real audience could interfere with the free choice of the citizens and punish editorial success. The significant variation of audience share of services over time is also a difficulty. The share of the advertising market presents the same difficulties: it measures pluralism in a less direct way since it incorporates the efficiency of the provider on the advertising market".<sup>102</sup>*

Finally, the French case is also worth of interest for the consequences of the lack of regulation of vertical ownership concentration. As we have seen earlier, the media industry has a natural tendency towards concentration. It is therefore not surprising that the operations of concentration in the French media industry have taken the only path which is not regulated by the Law relating to the freedom of communication, i.e. vertical concentration. This movement is driven by the 4 telecommunications operators, all of which are distributing TV service and most of which try to expand in the business of content:

- Orange, which is editing several pay-tv service under the label "Orange cinema series" (OCS) and which is the owner of the video platform Dailymotion;
- Bouygues, which is the owner the main private media group TF1 and which has recently acquired the main production company Newen;
- Numéricable-SFR (Altice), which is the owner of radios (RMC) and televisions (RMC Découverte, BFM TV, BFM Business, Ma Chaîne Sports) and which is investing in sports rights;
- Free (Iliad), which is the owner of the media group Le Monde.

## 5.6. GB – United Kingdom

The Communications Act 2003 has repealed most of the ownership concentrations rules (except for Channel 3). Since then, the issue of media concentration is addressed mainly in two ways: regulation of media mergers (ownership concentration) and measurement of plurality (content concentration).

### 5.6.1. Ownership concentration: the issue of mergers

Media mergers fall within the scope of competition law, i.e. the Enterprise Act 2002. But this act contains specific provisions about media mergers which have been introduced by amendments to the Communications Act 2003. According to the Communications Act 2003 modifying the Enterprise Act 2002, the Secretary of State for Media can adopt "an intervention notice in relation to a relevant merger situation" which "mentions any media public interest consideration". Following the adoption of such a decision, "Ofcom shall give a report to the Secretary of State on the effect of

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<sup>102</sup> *Idem*, p. 42.



*the consideration or considerations concerned on the case. The report shall contain (a) advice and recommendations on any media public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45; and (b) a summary of any representations about the case which have been received by Ofcom and which relate to any such consideration".* On the basis of this (non-binding) report from Ofcom on the pluralism side and of a (binding) report from the Competition and Market Authority (CMA) on the competition side, the Secretary of State has to decide either to allow the merger or to ask for further examination.

The goal of these amendments was to make sure than not only competition issues but also pluralism issues would be taken into consideration in such cases, as it was stressed by the Government during the adoption of the Communications Act 2003: “[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>103</sup> However, it is striking that the respect of this principle lies in the hands of the relevant Minister and not in those of the regulatory authority.

The media public interest regime applies to all mergers where the media public interest considerations may be relevant i.e. “mergers involving a newspaper enterprise, or a newspaper enterprise and a broadcasting enterprise, or a broadcasting enterprise”.<sup>104</sup> However, there is a threshold to its application: “either the value of the turnover in the UK of the enterprise being taken over exceeds £70 million (the turnover test); and/or the merger would result in the creation or enhancement of at least a 25 per cent share of supply of goods or services of any description in the UK or in a substantial part of the UK (the share of supply test)”.<sup>105</sup>

Since this framework was established, the Secretary of State has issued three media public interest considerations: the proposed acquisition of ITV by British Sky Broadcasting Group (BSkyB) in 2006<sup>106</sup>, the proposed acquisition of BSkyB by News Corporation<sup>107</sup> in 2010 and the proposed acquisition of GMG Radio by Global Radio in 2012.<sup>108</sup> The most famous case of application of this “public interest consideration” has been, in 2010, the proposed acquisition by NewsCorp of 100% of the shares of BSkyB (NewsCorp was already holding 39%), for which the Secretary of State issued an intervention notice motivated by “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”. This case was particularly relevant since it involved the first newspaper publisher and the first private broadcaster of the United Kingdom.

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<sup>103</sup> Ofcom (2010) *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, §1.5.

<sup>104</sup> Ofcom (2004) *Guidance for the public interest test for media mergers*, §8.

<sup>105</sup> *Idem*, §9.

<sup>106</sup> <http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file38017.pdf>

<sup>107</sup> <http://stakeholders.ofcom.org.uk/consultations/public-interest-test-nov2010/>

<sup>108</sup> <http://stakeholders.ofcom.org.uk/consultations/gmg-radio-holdings/>

In its report to the Secretary of State on this proposed acquisition, Ofcom had made it clear that its role was not enforce competition law: *"it is important to note that whilst a number of parties have suggested to us that the proposed transaction may also raise competition concerns, we are concerned only with the specific public interest consideration referred to us by the Secretary of State in his intervention notice. The effect of the transaction on competition was the subject of a separate investigation by the European Commission that resulted in the proposed acquisition being approved under the EU Merger Regulation"*.<sup>109</sup>

Ofcom's investigations were conducted in two ways, in order to address both *"the 'static' effects of the proposed acquisition – on plurality immediately after the transaction in terms of range and number of persons controlling media enterprises including their ability to influence opinions; and the 'dynamic' effects of the proposed acquisition – issues that may arise over time, within a forward view of how plurality may develop"*.<sup>110</sup>

For its assessment of the static effects, Ofcom took into consideration three main types of criteria, i.e. external plurality (audience share within individual platforms, audience reach within individual platforms, analysis of consumers consumption of news and research on consumers' claimed use of different media), internal plurality (the influence of NewsCorp on plurality in the provision of news and current affairs by Sky and especially Sky News) and the use by consumers of multiple sources, especially thanks to on-line news provision. Its main focus was on the provision of news content, in order to stay focused on the main public policy issue which was *"how media enterprises influence opinion and set the political agenda"*.<sup>111</sup> The relevant market was therefore limited in terms of content (only news) but widened in terms of media (press, broadcasting, on-line). Another important characteristic of the analysis conducted by Ofcom is that it took into consideration not only the amount of providers of news content, but their influence on opinion-forming : *"we consider 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>112</sup>, since *"at 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 plurality simply by being available regardless of whether they were used by several million or zero consumers"*.<sup>113</sup> Ofcom's conclusion on the static effects was that to consider *"reasonable to believe 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>114</sup>

For its assessment of the dynamic effects of the proposed acquisition, Ofcom considered that *"these generally relate to the economic position of the merged entity by comparison to the majority of*

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<sup>109</sup> Ofcom (2010) Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation, §1.8.

<sup>110</sup> *Idem*, §1.9.

<sup>111</sup> *Idem*, §3.2.

<sup>112</sup> *Idem*, §1.20.

<sup>113</sup> *Idem*, §5.14.

<sup>114</sup> *Idem*, §1.48.

other news providers in the market (outside of the BBC). Specific concerns include development and launch of integrated news products for convergent devices and media, cross promotion between News Corp news titles and channels, bundling of news products with other media services and winning new wholesale news contracts”.<sup>115</sup> Considering the potential positive as well as negative effects of the proposed acquisition and “the high degree of uncertainty about these developments”, Ofcom decided not to rely upon this analysis for its advice to the Secretary of State.<sup>116</sup>

The final conclusion was that the acquisition may operate against the public interest, leading Ofcom to recommend “a fuller second stage review of these issues by the Competition Commission to assess the extent to which the concentration in media ownership may act against the public interest”.<sup>117</sup> The Secretary of State did not seem to follow this advice and eventually, the acquisition seemed to be close to its approval when NewsCorp made the commitment that Sky News would become a separate company.<sup>118</sup> But, a few days later, the phone-hacking scandal (which led to the creation of the Leveson inquiry)<sup>119</sup> was revealed and the proposed deal was withdrawn by NewsCorp.

#### 5.6.2. Content concentration: measuring plurality

The BSkyB/NewsCorp case has raised many public policy issues and several criticisms about the weaknesses of the regulatory framework in terms of scope, methodology and procedure.<sup>120</sup>

One of them was stressed by Ofcom in the conclusion of its report: the fact that pluralism might be at risk even in the absence of any merger. According to Ofcom, “the future market developments explored in this report suggest that the current statutory framework may no longer be equipped to achieve Parliament’s policy objective of ensuring sufficient plurality of media ownership. These market developments include the risk of market exit by current news providers, or a steady, organic growth in audience shares and increase in the ability to influence by any one provider. These changes are, by their nature, evolutionary. However, a public interest consideration can only be triggered by a specific corporate transaction. The current statutory framework may therefore fail to deliver its public interest objectives if plurality in the UK is significantly reduced by developments that do not arise from a specific corporate transaction involving media enterprises. While there is a clear statutory framework for remedying competition concerns which may develop following a merger or from general market developments, the same is not true of concerns related to plurality. [...] Any new mechanism

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<sup>115</sup> *Idem*, §1.50.

<sup>116</sup> *Idem*, §1.54.

<sup>117</sup> *Idem*, §5.8.

<sup>118</sup> <http://www.independent.co.uk/news/media/tv-radio/hunt-set-to-give-go-ahead-to-bskyb-deal-next-week-2301420.html>

<sup>119</sup> <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/>

<sup>120</sup> For further details, see :

- Craufurd Smith, Rachael & Tambini, Damian (2012) Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges. *EUI Working Papers RSCAS 2012/36*. Fiesole: European University institute.
- Morisi, Davide (2011) Towards a New Approach for Media Plurality: Suggestions for Ofcom’s Consultation.

would need to provide a means for intervention if market developments resulted in significant concerns about the sufficiency of plurality over time. At the same time, it must be transparent and proportionate, ensure freedom to innovate in response to market developments, to make risky investments and earn suitable rewards and must avoid creating negative or perverse incentives”.<sup>121</sup> A similar view was expressed by the Secretary of State Jeremy Hunt: “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>122</sup>

This concern, which makes the link between the issue of ownership concentration and content concentration, has been the main topic addressed by Ofcom in its successive reports of 2012 and 2015 on media plurality.<sup>123</sup>

The source of these reports lies in the consequences of the proposed acquisition of BSkyB by NewsCorp, i.e. Ofcom’s belief that “the existing framework for considering plurality might no longer be equipped to achieve Parliament’s policy objective” as well all the debates which were fed by the Leveson inquiry. In October 2011, the Secretary of State asked Ofcom to provide advice on how media plurality could be measured across different media platforms and on how to trigger a review of plurality in the absence of a merger.

In a response to this request Ofcom produced a report on measuring media plurality which was published in June 2012, followed by a supplementary advice in October 2012. The Secretary of State opened a public consultation in June 2013 and, based on the conclusions from the consultation process, asked Ofcom in September 2014 to develop the measurement framework. In March 2015 Ofcom opened a public consultation process on a proposed document for measuring media plurality and, as a result of the consultation, published its advice to the Secretary of State on a measurement framework for media plurality in November 2015.

Ofcom’s definition of plurality primarily relates to ensuring access for different audience groups to a diverse range of news sources provided by different types of media:

- “Ensuring that there is diversity in the viewpoints that are available and consumed, across and within media enterprises. There should be a diverse range of independent news media voices across all platforms, a high overall consumption across demographics and consumers and active use of a range of different news sources.
- Preventing any one media owner, or voice, having too much influence over public opinion and the political agenda. This can be achieved by ensuring that no organisation or news source has

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<sup>121</sup> Ofcom (2010) Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation, §§1.59 to 1.63.

<sup>122</sup> <https://www.gov.uk/government/speeches/royal-television-society--2>

<sup>123</sup> See all the references in chapter 8.4.

*a share of consumption that is so high that there is a risk that people are exposed to a narrow set of viewpoints.”<sup>124</sup>*

The proposed framework contains four dimensions of measuring media plurality, which should be used combined *“as no single metric can be used in isolation to provide a full picture of plurality”*:<sup>125</sup>

- availability metrics *“measure the number of providers available at the point of consumption”*;<sup>126</sup>
- consumption metrics *“measure the number of people using news sources and the frequency and/or time that they spend consuming it”*;<sup>127</sup>
- impact metrics *“help inform how news content can influence the formation of people’s opinions”*;<sup>128</sup>
- contextual factors such as *“governance models (trusts, publicly limited companies with shareholders, private companies, statutory corporations), funding models (advertising revenues, circulation revenues, subscription fees, public funding), the potential power or editorial control exercised by owners, proprietors or senior executives within news organisations, internal plurality (how far an organisation enables, supports or promotes a range of internal voices and opinions), market trends and potential future developments, and regulation and oversight, in some cases based on statutory obligations (e.g. Ofcom’s Broadcasting Code or the BBC’s own editorial or regulatory processes and compliance)”*.<sup>129</sup>

Ofcom also proposes to address plurality at both the retail and the wholesale level. Distinguishing between the retail and wholesale functions of news provision is important for understanding the differences between the provision of news to the end user, and the production of that news. Ofcom defines the retail function as relating to the individual title, or brand, of each news source that provides content to the consumer. The wholesale function refers to the supply and production of the news for a retail news source. In many cases the retail and wholesale functions are combined – the same entity produces the news source, and provides it to the end user. However, there are also cases in which a retail provider’s news source is supplied by a third-party wholesaler (news agencies)<sup>130</sup>. In some cases, the news source is provided in its entirety by the wholesale entity and in other cases, news providers use also third-party services to supply some of the content for their services.<sup>131</sup>

Ofcom also takes into consideration online intermediaries as a new type of entities which may not operate either at the retail or wholesale level. Therefore, it proposes that their potential

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<sup>124</sup> Ofcom (2015) *Measurement framework for media plurality, Ofcom’s advice to the Secretary of State for Culture, Media and Sport*, para. 2.2.

<sup>125</sup> *Idem*, §3.4.

<sup>126</sup> *Idem*, §3.8.

<sup>127</sup> *Idem*, §3.9.

<sup>128</sup> *Idem*, §3.13.

<sup>129</sup> *Idem*, §3.17.

<sup>130</sup> In UK such examples exist in TV and radio news: the national news broadcasts for ITV, Channel 4 and Channel 5 are produced by ITN, which also provides content for a number of online retail news sources; and Sky News Radio produces news bulletins for the majority of the UK’s commercial radio stations.

<sup>131</sup> For example newswire services such as Associated Press and Reuters supply content to newspapers and online providers.

influence can be examined alongside traditional retail and wholesale players which could be done, when conducting consumer research, by asking people whether they use intermediaries when accessing online sources.

## 5.7. IE – Ireland

The Irish case might appear at first sight not suited for a case study. In the types of media systems developed by Daniel Hallin and Paolo Mancini (see chapter 4.3. above), Ireland is part of the “North Atlantic or liberal model” in which the role of the State is limited, which means for our study that a strong regulatory framework and an important regulatory practice is not expected.

And indeed, the Broadcasting Act 2009 provides a very liberal framework, in which there are no provisions about horizontal, vertical, diagonal, geographical or audience concentration. The only provisions of the Broadcasting Act dealing with concentration are limited to the requirement to consider, upon licensing a broadcaster:

- in terms of ownership concentration, *“the character, expertise and experience of the applicant or, if the applicant is a body corporate, the character expertise and experience of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares” and “the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of services”;*
- in terms of content concentration, *“the quality, range and type of the programmes proposed to be provided by each applicant”, “the quantity, quality, range and type of programmes in the Irish language and the extent of programmes relating to Irish culture”, “the extent to which the applicant will create within the proposed broadcasting service new opportunities for talent in music, drama and entertainment and in particular in respect of Irish culture” and “the desirability of having a diversity of services in the area specified in the notice catering for a wide range of tastes including those of minority interests”.*

What makes this case study interesting is therefore not such an almost completely liberalised broadcasting law, but the recent adoption of the “*Competition and Consumer Protection Bill 2014*” whose purpose is to provide for the establishment of a new authority (Competition and Consumer Protection Commission – CCPC – which is the result of the merger of the Competition Authority and the National Consumer Agency) and in which a whole chapter is dedicated to media concentration, and especially to media mergers, and to the new role of the regulatory authority in this framework. This makes of Ireland one of the three countries (with the United Kingdom – see chapter 5.6. above – and Norway – see chapter 5.8 below) where a specific Act (or part of it) deals in detail with media concentration.



The scope of the law in terms of products is relatively broad and includes the press (*“the publication of newspapers or periodicals consisting substantially of news and comments on current affairs, including the publication of such newspapers or periodicals on the internet”*), radio and television (*“transmitting, re-transmitting or relaying a broadcasting service”*), content production activities related to information (*“providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service”*) and pure on-line players (*“making available on an electronic communications network any written, audio-visual or photographic material, consisting substantially of news and comment on current affairs, that is under the editorial control of the undertaking making available such material”*), thus potentially encompassing situations of horizontal, vertical, diagonal and geographical concentration.

In geographical terms, the law is also ambitious since it intends to deal not only with media mergers between Irish companies, but also between Irish companies and *“media business established elsewhere”*. In this case, the Act explains how the merger procedure has to be harmonized with (and take into consideration) the procedure followed by the European Commission according to the EC Merger Regulation.

In terms of measures, the law is again ambitious since it addresses, within the different steps of the supply-side (see table introducing chapter 3 above) not only the issue of ownership concentration but also the issue of content concentration. These two situations are defined as follows:

- *“diversity of ownership means the spread of ownership and control of media businesses in the State linked to the market share of those media businesses as measured by listenership, readership, reach or other appropriate measures”;*
- *“diversity of content means the extent to which the broad diversity of views (including diversity of views on news and current affairs) and diversity of cultural interests prevalent in Irish society is reflected through the activities of media businesses in the State including their editorial ethos, content and sources”.*

According to the Act, all proposed media mergers have to be notified to the Minister of Communications, which applies a public interest test in order to determine if the proposed merger *“is likely to be contrary to the public interest in protecting plurality of the media”*. Plurality of the media includes both the diversity of ownership aspects and the diversity of content aspects of the merger. The relevant criteria which can be used to carry out this public interest assessment are, among others, *“the likely effect of the media merger on plurality of the media in the State”*, *“the undesirability of allowing any one undertaking to hold significant interests within a sector or across different sectors of media business in the State”*, *“the consequences for the promotion of plurality of the media in the State of intervening to prevent the media merger or attaching conditions to the approval of the media merger”*, the commitments taken by the companies involved and the situation of the public broadcaster (*“the scale and reach of RTE and TG4”*).

Once this test has been carried out, the Minister of Communications has three options:

- approve the merger;

- approve the merger, including the *“proposed commitments offered by the undertakings”* in order to protect plurality of the media;
- consider that the media merger *“may be contrary to the public interest in protecting plurality of the media”*.

In the latter case, it is the duty of the NRA (Broadcasting Authority of Ireland - BAI) to carry out a *“full media merger examination”*. After having conducted a public consultation, the BAI has to recommend to the Minister of Communications within 80 days *“whether the media merger should be put into effect with or without conditions or should not be put into effect”*. The BAI shall have to regard to the same criteria as the ones mentioned earlier, but also to the results of the consultation it has launched and the possible guidelines issued by the Minister of Communications. The BAI has also to take into consideration the opinion of an *“advisory panel”* which can be set up for that purpose by the Minister if *“he or she may, if he or she considers that the opinion of an advisory panel is required in order to assist the Broadcasting Authority of Ireland in carrying out the full media merger examination and in making its report”*. This panel is composed of 3 to 5 persons appointed by the Minister for Communications, *“each of whom shall have knowledge of, and expertise in, law, journalism, media, business or economics”*.

It is then the duty to the Minister of Communications, on the basis of the report of the BAI, to take the final decision, which can be to:

- approve the merger;
- approve the merger subject to conditions meant to protect plurality of the media;
- refuse the merger.

The Act also gives the mission to the BAI, one year after the adoption of the Act and every 3 years thereafter, to *“prepare a report which shall (a) describe the ownership and control arrangements for undertakings carrying on a media business in the State, (b) describe the changes to the ownership and control arrangements of such undertakings over the previous 3 years, and (c) analyse the effects of such changes on plurality of the media in the State”*.<sup>132</sup>

This Act has entered into force in October 2014. Guidelines for its application have been adopted in May 2015<sup>133</sup>. They provide clarifications on some aspects of the procedure, but more importantly also on some concepts such as:

- *“media sector”* which means one of the following:
  - *“1. Publishing – publication of newspapers or periodicals consisting substantially of news and comment on current affairs and the production of content for same.*
  - *2. Broadcasting – transmitting, re-transmitting or relaying a broadcast service including radio or television and the production of content for same.*

<sup>132</sup> The first report has been delivered by the BAI to the Ministry, but has so far no been published.

<sup>133</sup>

<http://www.dcenr.gov.ie/communications/Lists/Publications%20Documents/Finalised%20Guidelines%20on%20Media%20Mergers.pdf>



- 3. *Internet Media – making available on an electronic communications network any written, audio-visual or photographic material consisting substantially of news and comment on current affairs*”.
- “significant interest” which means “has sufficient voting, financial or ownership strength within the relevant media business or media businesses to influence directly or indirectly, to an appreciable extent, the direction or policy of the media business or media businesses with regard in particular to news, current affairs or cultural content. This includes sourcing, production, supply or delivery of such content. The following thresholds in relation to voting power at a general meeting of the media business, or the nominal value of the shareholding, are provided by way of guidance in terms of what constitutes a significant interest:
  - A holding or voting strength of between 10% and 19% (directly or indirectly) may constitute a significant interest.
  - A holding or voting strength of more than 20% or more of the voting power (directly or indirectly) will generally constitute a significant interest”.

Three media mergers have been notified to the Competition and Consumer Protection Commission since the adoption of the Act and its Guidelines:

- the proposed acquisition of the service provider TV3 (Ireland) by the cable operator Liberty Global (United Kingdom), which has been cleared in October 2015;<sup>134</sup>
- the proposed acquisition of the service provider UTV (Ireland) by the service provider ITV (United Kingdom), which has been announced in December 2015 and is pending;<sup>135</sup>
- the proposed acquisition of the service provider Setanta (Ireland) by the incumbent telecommunications operator Eir (Ireland), which has been announced in December 2015 and is also pending.<sup>136</sup>

None of these media mergers have reached the BAI.

## 5.8. NO – Norway

The Norwegian regulatory framework presents two similarities with the Irish one: a rather liberal law on broadcasting, and a specific legal instrument about ownership which complements it.

The Broadcasting Act does not fix any kind of limitation in terms on ownership concentration or content concentration, and the regulations adopted in application of the Act only has a provision about local broadcasting, according to which “licences for the operation of local broadcasting services may not be transferred without the Norwegian Media Authority’s approval. The same applies to purchase of shares or ownership interests that give control over an enterprise, association or other organisation with a local broadcasting licence”.

<sup>134</sup> <http://www.ccpc.ie/enforcement/mergers/merger-notices/m15039-liberty-global-tv3>

<sup>135</sup> <http://www.ccpc.ie/enforcement/mergers/merger-notices/m15069-itv-utv>

<sup>136</sup> <http://www.ccpc.ie/enforcement/mergers/merger-notices/m15074-eir-setanta>

Norway presents a unique feature in the sense that it is the only country where a special act is dedicated exclusively to media ownership, and whose enforcement, contrary to the British or Irish situations, lies in the hands of the NRA (Norwegian Media Authority - Medietilsynet).

The first Media Ownership Act has been adopted in 1997 and gave the duty to a newly established Media Ownership Authority to enforce the Act. However, since 2005, the Media Ownership Authority merged with the Mass Media Authority and the Norwegian Board of Film Classification to become the Norwegian Media Authority, which has enforces the Act since then.

The material scope of the Act is larger than the broadcasting sector and applies to “enterprises which operate daily newspapers, television, radio or electronic media, and to enterprises which as owners exercise an influence on such enterprises”. However, this does not allow acting against electronic media: according to the Guidelines for intervention pursuant to the Media ownership Act, “the Media Authority’s task is only to monitor the ownership of such media”.<sup>137</sup>

The geographical scope of the Act is also large: it applies to “acquisitions of ownership interests or cooperation agreements which have an effect or are liable to have an effect in the realm”. According to the aforementioned Guidelines, this should be interpreted as follows: “what matters is whether the acquisition in question has or is liable to have an effect with regard to the purpose of the Media Ownership Act in Norway. The Act applies to Norwegian as well as foreign enterprises. Firstly, the law will apply if foreign enterprises make acquisitions in Norwegian media enterprises. Secondly, acquisitions of foreign companies may be subject to the Act if these foreign companies have ownership interests that involve control of daily newspaper, radio or television enterprises in Norway. Since it might be difficult to force foreign companies to sell any of their ownership interests, decisions in such cases may be directed towards Norwegian legal entities”.

The Act details the limits above which a company reaches a significant position which can justify a regulatory intervention:

- on the national market:
  - 33% or more of the total daily circulation for the daily press;
  - 33% or more of the audience for television;
  - 33% or more of the audience for radio;<sup>138</sup>
  - control of 30% or more in one of these 3 markets and 20% or more in another one;
  - control of 20% or more in all of these 3 markets;
  - when an company controls of 10% in one of these 3 markets and becomes owner or part-owner of a company controlling 10% or more within the same market.

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<sup>137</sup> Medietilsynet (2006) *Guidelines for intervention pursuant to the Media ownership Act*. Available at [http://www.medietilsynet.no/globalassets/engelsk/engelsk\\_mediaownershipact\\_guidelines\\_forskrift\\_2006.pdf](http://www.medietilsynet.no/globalassets/engelsk/engelsk_mediaownershipact_guidelines_forskrift_2006.pdf) (in English).

<sup>138</sup> The Guidelines specify that audience share of the last three years will be taken into consideration: “Experience indicates that these figures will fluctuate more than what is common in the daily newspaper market. The Media Authority will therefore pay attention to the listening/viewing over a certain period of time. The Authority will make a discretionary assessment on the basis of listening/viewing for the last three calendar years.”

- on the regional market : 60% percent or more of the total daily circulation of regional and local newspapers in the region.

However, another condition for regulatory intervention has to be met, i.e. that these thresholds have to be attained by a merger or an acquisition, not by other means: *“A basic precondition [...] is that there is an acquisition of a media enterprise. [...] The acquisition may take place through a purchase, exchange, gift, lease, or acquisition by inheritance or division of an estate, a forced sale or expropriation, as well as by subscription to an ownership share in an enterprise. If an actor achieves a significant ownership position because other actors drop out, or because there is an increase in circulation, viewers or listeners, the Media Authority will not be able to intervene against the ownership as such. Nor will the provision apply if an actor achieves a significant ownership position by establishing a new enterprise”*<sup>139</sup>.

When informed of an acquisition in these sectors, the Norwegian Media Authority, before any intervention *“shall have attempted to reach an amicable solution with the acquirer, or with the person against whom it is intended to intervene”*.

If the intervention becomes necessary, it can take one of the three following decisions:

- “a) prohibiting the acquisition,*
- b) ordering the divestment of ownership interests that have been acquired and issuing orders necessary to ensure that the purpose of the divestment order is achieved, or*
- c) allowing an acquisition on such conditions as are necessary to prevent the acquisition from conflicting with the purpose set out in section 1 of the Act”*.

It is worth noticing that section 1 of the Act does not refer to competition objectives but clearly to democratic objectives: the purpose of the Act *“is to promote freedom of expression, genuine opportunities to express one's opinions and a comprehensive range of media”*, which makes a significant difference with the Irish framework which is part of a Competition Act and partly motivated by competition concerns.

These objectives explain why the Act applies not only to mergers and acquisitions, but also *“correspondingly to cooperation agreements giving a contracting party the same or a corresponding influence on the editorial product as an acquisition”*. According to the Guidelines, *“the reason for this provision is that cooperation agreements may also give an actor too much control in the media market and thus potentially too much power to influence public opinion”*. The Guidelines however specify that such a provision *“must be practiced with caution and that intervention should only be carried out in relatively clear-cut cases”*, such as:

- *“agreements on editorial cooperation (agreements on a joint editor, editorial coordination or joint news production);*
- *the duration of the agreement and the real opportunity to cancel it;*

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<sup>139</sup> Medietilsynet (2006) *Guidelines for intervention pursuant to the Media ownership Act* (in English).

- *how many areas of the enterprise are included in the agreement;*
- *shareholder agreements, what regulations apply for voting rights in the decision-making bodies of the media enterprises, the distribution of the remaining shares, by-laws and financial and competition-related issues”.*<sup>140</sup>

The decisions taken by the Norwegian Media Authority can be challenged to an Appeals Board, composed of three persons appointed by the King.<sup>141</sup> The Appeals Board has also the power to instruct the Norwegian Media Authority in case it fails to act: *“where the Media Authority does not exercise its power to intervene pursuant to section 9, the Appeals Board may request a written explanation”.*

This institutional framework will probably change again in the near future. In December 2015 the Norwegian Government has seized the Norwegian Parliament with a legislative proposal to repeal the Media Own Ownership Act, considering that the current rules are *“not very accurate in the face of a very dynamic media market, not adapted to the changes that have occurred in distribution technology and media markets, and too inflexible to be accurate in specific cases”.*<sup>142</sup>

According to this proposal, only the Competition Authority would supervise mergers and acquisitions in the media industry, according to the general rules of competition law: *“today considering two supervisory bodies, the Competition Authority and Media Authority, matters regarding acquisitions and mergers in the media sector. This is resource intensive both for the authorities and industry. The proposal to repeal the Media Ownership Act will therefore involve a simplification for both media companies and the state, because one and the same concentration will only be treated by the Competition Act and the Competition Authority”.* The Government also stressed that among the 21 cases dealt with under the Media Ownership Act, only one case ended with a different under outcome under the Competition Act, and therefore *“the main impression is largely of overlap between the two sets of rules”* and *“the benefits of having special legislation and supervision in the area are not proportionate to the regulatory and administrative costs for the state and the business community”.*<sup>143</sup>

The duties of the Norwegian Media Authority in terms of transparency would be maintained through a new law on transparency of media ownership, considering that *“an informed public debate about media ownership prevents the hidden interests to exert influence on the public debate, and can act as a deterrent against undue influence of media content and help to safeguard the media's editorial freedom,”* that *“transparency about ownership of media also in the international context has become a more central concept in recent years”* and that the *“the Government wants to ensure that Norway can still be a leader in this area”.*<sup>144</sup>

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<sup>140</sup> *Ibidem.*

<sup>141</sup> <http://www.mediaklagenemnda.no/>

<sup>142</sup> <https://www.regjeringen.no/no/dokumenter/prop.-39-l-20152016/id2466655/> (only in Norwegian).

<sup>143</sup> *Ibidem.*

<sup>144</sup> *Ibidem.*

## 6. Conclusions and reflections on the situation in Slovenia

The wide variety of regulatory frameworks revealed by the cross-country analysis and confirmed by the case studies makes it is uneasy to draw clear-cut conclusions. Media regulation in general and regulation of media concentration in particular remain highly influenced by the respective national markets, institutional systems and political cultures.

However, we can identify three main trends.

The first one is that media concentration remains an important regulatory concern across Europe. As we have seen in the cross-country analysis (see chapter 4.2.1.), only 4 legal frameworks out of the 33 analysed have no concentration rules. Among these four, one – the Netherlands – repealed them just a few years ago but its regulatory authority continues to be one of the most active in monitoring media concentration, and two others face a market situation which cannot be compared to – and thus can hardly be a source of inspiration for – any other European country:

- in Luxembourg, there is no public broadcaster and the market, which is already the smallest of Europe (with Malta), is highly influenced by the availability of most French, German and Belgian broadcasters (in television via fixed networks and in radio via the spillover);
- in Denmark, the public broadcaster remains in a highly dominant position (two-third audience share in television) and the rest of the market is also highly influenced by foreign players (with less than 5%, Denmark has the lowest audience share of domestic private television broadcasters in Europe).

The second trend is that, if indeed media concentration remains an essential public policy objective, there is a tendency towards either abolishing (Netherlands, Luxembourg) or relaxing (Austria, Switzerland, United Kingdom, Italy, Norway...) the rules. This can probably be explained by the following factors:

- the relevant market is not national anymore: Europeanisation and even globalisation of the audiovisual sector automatically puts pressure on national limitations of concentration and ownership;
- the relevant market is not traditional broadcasting anymore: convergence has brought press groups, VOD providers and network operators on the playing field;
- pluralism might appear to be naturally achieved in an era of abundance of content.

However, if these arguments are relevant for the television market, they hardly are so for the radio market, which remains domestic and characterised by the scarcity of FM frequencies.

In the wider context of public policy, the willingness to avoid duplication of competition regulation and media regulation in times of reduction of public spending certainly also plays a role, as the Norwegian case study has shown and as we have seen in other countries where different regulatory authorities are merged with competition authorities (Spain, the Netherlands).

The third trend worth highlighting is the lack of case law. It looks as if the difficulties to tackle the issue of media pluralism at the EU level (cf. the so-called “3-step approach” of the European Commission in 2007, whose third step was never taken)<sup>145</sup> are shared, at the national level, by its Member States. This assessment that “most member states have established specialised authorities responsible for media concentration but few of them are effectively monitoring media concentration and even less” was already made in 2009 by the Council of Europe’s Group of specialists on media diversity.<sup>146</sup> This third tendency is more difficult to explain, but can probably be linked to the previous trend, to the movements of liberalisation of most if not all the communications markets throughout Europe and also to the growing success of economic over non-economic values, which leads to consider media outlets simply as players competing on a marketplace rather than institutions contributing to the fulfillment of public interest objectives such as media plurality and cultural diversity.

These trends are too contradictory to constitute guidance for the relevant public authorities in Slovenia. Instead, we consider more appropriate to conclude this study by a few considerations worth bearing in mind during their policy-making and decision-making processes:

**1. *Regulating media concentration and ensuring media pluralism/plurality/diversity is not a goal in itself but a means to an end.***

Since the adoption of the Mass Media Act in 2001, it is likely that the main end has not changed: ensuring freedom of communication and consolidating a democratic order in which public opinion is shaped on the basis of a large and diverse amount of sources. However, due to the rapid changes in the media industry, it is likely that some of these means are not appropriate anymore (or at least need some update, as the Swiss and the French case studies have shown) while some new ones might be more appropriate and efficient. A specific review of the ends and the means is therefore likely to be necessary in order to assess the efficiency of the regulatory framework so far and to determine how it should evolve considering the current market situation. This is especially true for radio, which remains highly influenced by public policies, regarding content as well as distribution. More specifically, considering the evolutions in the radio sector, a specific focus on the best ways to regulate mergers/acquisitions and cooperation agreements between service providers (both of which are – at least potentially – threatening content diversity) seem appropriate.

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<sup>145</sup> For further details, see: Center for Media Pluralism and Media Freedom – CMPF (2013) *European Union Competencies in Respect of Media Pluralism and Media Freedom*. Fiesole: European University Institute.

<sup>146</sup> Group of Specialists on Media Diversity (2009) *Methodology for monitoring media concentration and media content diversity*, p. 11.

**2. Regulation of media concentration cannot be left to competition policy alone.**

As we stressed in our introduction and as several case studies have shown, the purpose of competition law and of media law differ, and the focus of the former on safeguarding economic competition completely leaves aside the goal of the latter to secure pluralism and, through pluralism, a proper functioning of the public sphere. Besides, as several case studies have also shown, when competition policy addresses media concentration, it is exclusively via the prism of media mergers, leaving aside not only the issue of internal growth of media companies, but above all the issue of content concentration.

**3. Regulation of media concentration cannot be left to competition authorities alone.**

Media regulators possess specific know-how and have a specific approach of the broadcasting sector that competition authorities – which are generalist institutions – do not have. Giving the driver seat to competition authorities and/or to the relevant Minister (as in Ireland and in the United Kingdom) is taking the risk that the opinion of the media regulator on media concentration becomes either marginal (when it plays the role of an advisor as in the United Kingdom case study has shown) or nonexistent (when mergers are not even referred to the regulator as the Irish case study has shown).

**4. Media concentration rules cannot be applied in the same way to television broadcasting and radio broadcasting any longer.**

The supply of television services is characterised by Europeanisation and multi-platform/fully-digital distribution, while the supply of radio services remains characterised by the presence of exclusively domestic players and a single/mostly-analog distribution platform. This creates completely different situations both on the supply-side and on the demand-side, which the legal framework has to reflect and which the regulatory practice has to take into consideration. This is especially true for Slovenia, whose television market is highly influenced by foreign producers and broadcasters while its radio market remains under the control and influence of domestic producers and broadcasters.

**5. The relevant markets in terms of products should be defined with the outmost care.**

The case studies have shown different frameworks and different practices with their pros and cons :

- The German case study has illustrated how a specific segment of the media industry (in this case, television) can be isolated. On one hand, this acknowledges that this medium *“still remains by far the most important mass medium with the highest usage time and thereby remains the leading medium. In addition, several studies have stated that people appreciate television as the medium that is by far the most versatile and in terms of quality the most reliable”*.<sup>147</sup> On the other hand, it does not take into consideration *“the changes in the media usage which can be observed over the past 20 years. The boost of the Internet has triggered an*

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<sup>147</sup> Kommission zur Ermittlung der Konzentration im Medienbereich – KEK (2015) *Turning from a Television-Centred View to a Broader Focus on Media, Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media*, p. 5.



*accelerating convergence process of formerly separate types of media. In addition, new forms of services are developed that are specifically designed for online usage. Even if television remains particularly relevant for opinion-formation and still retains the function of a lead medium, it does not seem justified to permanently hold on to the television-centred perspective of current media concentration control”.*<sup>148</sup>

- The British case study has illustrated how plurality can be measured by focusing on specific types of programmes such as news and current affairs. On one hand this acknowledges, as it is suggested by OFCOM, that “news and current affairs are the most relevant forms of content for the delivery of the public policy goals”, and this explains why OFCOM “recommends that the scope of any plurality review should be limited to these”.<sup>149</sup> On the other hand, as the KEK points out, “it would be too simplistic to conclude that so-called “pure” entertainment formats had no relevance for opinion-formation; a crime drama that broaches current social issues such as assisted suicide or how to deal with pedophile dispositions under criminal law; the live broadcast of a concert with its song texts or the transmission of recorded, edited conversations from reality shows such as “Dschungelcamp” or “Big Brother”, all of which is targeted to an audience of millions, all contribute significantly to the formation of public opinion. The process of opinion-formation by entertainment formats is “subcutaneous”, subliminal and sometimes emotional. Thus it is occasionally even more effective in transporting messages and reinforcing certain opinions among the audience than pure news formats or political or ‘societal’ magazines”.<sup>150</sup>

**6. The relevant geographical markets in terms of products should also be defined with the utmost care.**

The German and the British case studies provided examples of proposed mergers between sizable and influential media groups, but the relevant public bodies should also bear in mind, as the Belgian and the French case studies have shown, that media concentration has also to be avoided at the regional and the local level, where tendencies to merge or to find other kinds of cooperation agreements might be stronger in some circumstances. This is especially true in small markets like in Slovenia. This is also especially true for the radio sector, where there is traditionally more diversity at the local and regional level.

**7. Media concentration cannot be dealt with exclusively with static thresholds.**

The regulatory framework should give a margin of appreciation to the regulatory authority, as it is the case for example in the French-speaking Community of Belgium (where the regulatory authority has considerable leeway to intervene in some specific cases), in Germany, (where the dominant power of opinion is reached not only when the

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<sup>148</sup> *Idem*, p. 22.

<sup>149</sup> Ofcom (2012) *Measuring media plurality, Ofcom’s advice to the Secretary of State for Culture, Olympics, Media and Sport*, § 3.16.

<sup>150</sup> Kommission zur Ermittlung der Konzentration im Medienbereich – KEK (2015) *Turning from a Television-Centred View to a Broader Focus on Media, Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media*, p. 20.



audience thresholds are met by a service provider but also “if 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”) and in Norway (where provisions regarding mergers “shall apply correspondingly to cooperation agreements giving a contracting party the same or a corresponding influence on the editorial product as an acquisition”). One might argue that this might lead to legal uncertainty for service providers and even risks of arbitrary decisions being taken by NRAs. However, the rule of law and due process, via judicial review of the decisions adopted by the NRAs, provide against any disproportionate or arbitrary use of such margin of appreciation.

**8. Media concentration cannot be dealt with without transparency of the media industry in general.**

This implies, for public bodies, the access to relevant and objective data such as economic and audience figures, and the capacity, both in terms of workforce and in terms of competences, to analyse empirical evidences and monitor trends (as in Dutch-speaking Community of Belgium and the Netherlands with yearly reports of the regulatory authority, and in Germany and United Kingdom with the reviews which have to be conducted and the reports which have to be produced at least every three years). What is feasible for German and British authorities is of course out of reach for regulatory authorities of small countries. However, the examples of the Dutch-speaking and the French-speaking Community of Belgium show that monitoring and research can be conducted with limited resources. In this context, the opportunity to develop partnerships with academia or research bodies is worth exploring, especially on this topic which is usually of high interest for them. The first conclusion of the recently concluded Canadian Media Concentration Research Project – CMCRP was that “we are far from a time when studies of media, telecoms and internet concentration are passé. Indeed, theoretically- and historically informed and empirically-driven research is badly needed because there is a dearth of quality data and disinterested research available”.<sup>151</sup>

**9. Regulation of concentration of ownership starts with regulation of transparency of ownership, in all its dimensions.**

This refers not only the basic principle of transparency to the regulatory authority, but also direct disclosure to the public (as in Austria, French-speaking Community of Belgium, Spain, Portugal and Romania) as well disclosure and analysis of data by the regulatory authorities in an accessible and intelligible way (as for example in the French-speaking Community of Belgium, Germany and the Netherlands).<sup>152</sup>

<sup>151</sup> Canadian Media Concentration Research Project – CMCRP (2015) *Media and Internet Concentration in Canada Report, 1984-2014*, p. 46.

<sup>152</sup> Another example of best practice is also Georgia. For more details see the presentation made the Georgian NRA at the 42th EPRA meeting in Nuremberg in October 2015: <http://www.epra.org/attachments/nuremberg-plenary-2-the-regulators-toolkit-to-encourage-diversity-of-sources-and-output-presentation-by-ivane-makharadze-gncc-ge>

Our concluding remark will be about the commonly admitted fact that it is more difficult to remedy a situation than to prevent it. This is certainly also the case for media concentration.

Therefore, if there are concerns among Slovenian policy makers about alarming concentration processes or undesirable levels of concentration which might be reached in the future (especially in markets which are not yet stable and structured), then the opportunity of intervening should be examined without delay.

This examination should be based on evidence. For this reason, it is certainly appropriate – especially in the radio sector – to:

- map the different mergers of the recent years, at the local, regional and national levels;
- include in this mapping not only the situations of ownership concentration, but also the situations of content concentration, for example via cooperation agreements which leads to uniformity of programming (and especially news programming) in the respective coverage areas; a starting base for such a mapping could be for example the “content diversity” assessment carried out by the NRA of the French-speaking Community of Belgium);
- measure objectively the trends in the recent years through the calculation of the evolution of the HHI index :
  - at the local, regional and national levels;
  - in terms of audience share and market (advertising) share.

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*January 2016*

## 7. Annex 1: Relevant provisions in the broadcasting law of countries having concentration rules<sup>153</sup>

### 7.1. AT – Austria

- Federal Act on Audio-visual Media Services (Bundesgesetz über audiovisuelle Mediendienste – Audiovisuelle Mediendienste-Gesetz – AMD-G):<sup>154</sup>

§ 10. (1) *Media service providers or their members must be Austrian citizens or legal persons or partnerships under business law having their domicile in Austria.*

(2) *This Federal Act precludes the following persons from providing audio-visual media services:*

- 1. legal persons under public law with the exception of the churches and religious associations and the Federal Ministry of National Defence for the purpose of operating information broadcasting services, especially in the case of deployments according to § 2 (1) a) to d) of the 2001 Defence Act, Federal Law Gazette I No. 146/2001;*
- 2. parties as defined by the Political Parties Act;*
- 3. the Austrian Broadcasting Corporation;*
- 4. foreign legal persons that shall be considered equivalent to the legal entities listed in items 1 to 3;*
- 5. legal persons or partnerships in which the legal entities listed in items 1 to 4 hold a direct share.*

(3) *The restrictions of paragraph 2 shall not apply to:*

- 1. legal persons under public law, parties as defined by the Political Parties Act and legal persons and partnerships in which these hold a direct share, with regard to the following services:*
  - a. television channels which are not channels as specified in Article 1, paragraph 1 of the Federal Constitutional Law on Guaranteeing the Independence of Broadcasting, Federal Law Gazette No. 396/1974;*
  - b. on-demand audio-visual media services.*

<sup>153</sup> The legal framework of Cyprus and Greece are missing, due to the absence of English translation and our impossibility to translate from Greek alphabet.

<sup>154</sup> [http://www.ris.bka.gv.at/Dokumente/Erv/ERV\\_2001\\_1\\_84/ERV\\_2001\\_1\\_84.pdf](http://www.ris.bka.gv.at/Dokumente/Erv/ERV_2001_1_84/ERV_2001_1_84.pdf) (in German and English).

2. legal persons under public law and legal persons and partnerships in which these hold a direct share, with regard to the following services:

a. cable television channels which are restricted exclusively to the presentation of transmission sequences (images and sequences of images) automatically recorded and transmitted by weather cameras, including directly related self-created factual information;

b. cable television channels with a duration of not more than 120 minutes per day, with repetitions of the channels or parts thereof, as well as the transmission of sessions of general representative bodies not being included when calculating this period, as well as channels in a building or complex of buildings that are in a functional connection with the tasks being performed there, cable information channels that do not contain any advertising, and teletext.

(4) In the event that the media service provider is organized under the legal structure of a corporation, a partnership or a cooperative, a maximum of 49 per cent of the shares may be held by foreigners or held by legal persons or partnerships that are under the uniform leadership of a foreigner or an undertaking which has its domicile abroad, or where foreigners or legal persons or partnerships having their domicile abroad have possibilities to take influence as it is regulated in § 244 (2), in connection with paragraphs 4 and 5 of the Business Code.

(5) Nationals of the Contracting Parties to the Agreement on the European Economic Area shall have equal status as Austrian citizens, and legal persons and partnerships having their domicile on the territory of one of the Contracting Parties to the Agreement on the European Economic Area shall have equal status as those domiciled in Austria.

(6) The shares of a media service provider of a media service subject to a license requirement (§ 3) and its shareholders or partners shall be registered in the name of the owners. Fiduciary relationships shall be disclosed. Shares held on a fiduciary basis shall have equal status as the shares of the trustor. Shares in a private foundation pursuant to the Private Foundation Act, Federal Law Gazette No. 694/1993, shall have equal status as the shares of the founder, to the extent that the founder has an influence upon the activities of the foundation on the basis of factual circumstances, which is comparable to the influence defined in § 11 (5). The present provision shall also apply to foreign legal persons that have equal status as foundations.

(7) The media service provider shall communicate to the regulatory authority the ownership relations or membership relations, existing at the time when an application is filed for being granting a license or when a report is filed, together with the application or the report, and any change in these relations within two weeks of the legal effectiveness of the assignment or transfer of shares. In the event that shares of the media service provider are held, directly or indirectly, by corporations, partnerships or cooperatives, these must also communicate their ownership relations and disclose their fiduciary relations. These obligations shall not affect any other statutory disclosure obligations.

(8) In the event of a transfer to third parties of more than 50 per cent of the shares held by the television broadcaster at the time when the license is granted or a finding is made pursuant to this

paragraph, the television broadcaster shall report this transfer in advance to the regulatory authority. Several transfers shall be added together. The regulatory authority shall find no later than within a period of eight weeks of the report whether the provisions of § 4 (3), § 10 and § 11 are still complied with under the changed circumstances. The license shall be revoked after a public oral hearing has been conducted if the television broadcaster transferred the shares contrary to this finding.

§ 11. (1) A person or partnership may hold several licenses for digital terrestrial television, as long as not more than three coverage areas included in the licenses overlap.

(2) A media owner shall be precluded from providing television channels within the meaning of the Federal Constitutional Law Guaranteeing the Independence of Broadcasting, Federal Law Gazette No. 396/1974, according to this Federal Act if the media owner exceeds the following ranges or levels of coverage in one of the listed markets:

1. terrestrial radio programmes (more than 30 per cent of a nationwide range),
2. daily press (more than 30 per cent of a nationwide range of the daily press),
3. weekly press (more than 30 per cent of a nationwide range of the weekly press),
4. cable networks (more than a level of 30 per cent of coverage to the population by means of cable network on the national territory).

(3) A media owner shall be precluded from providing terrestrial television services if the media owner exceeds the below ranges or levels of coverage in the respective coverage areas in more than one of the listed markets:

1. terrestrial radio programmes (more than a range of 30 per cent in the coverage area),
2. daily press (more than a range of 30 per cent in the coverage area),
3. weekly press (more than a range of 30 per cent of the coverage area),
4. cable network (more than level of coverage of 30 per cent of the population by means of cable networks on the national territory).

(4) Except for any technically unavoidable overlapping (spill over), a media group may provide the same location in the national territory simultaneously with only one channel licensed under the Private Radio Broadcasting Act and a maximum of one third of the terrestrial television channels that can be received in that location. If no licensees as defined in the Private Radio Broadcasting Act belong to a media group, the media group may provide the same location in the national territory with not more than one third of the terrestrial television channels that can be received in that location.

(5) Those persons or partnerships are deemed to belong to a media group

1. who/which hold more than 25 per cent of the share capital or the voting rights of a media owner or exert a dominating influence or have one of the possibilities to exert an influence as defined in § 244 (2) in connection with paragraphs 4 and 5 of the Business Code;

2. where one of the persons or partnerships listed in item 1 has more than 25 per cent of the share capital or voting rights or a dominating influence or one of the possibilities to exert an influence as defined in § 244 (2) in connection with paragraphs 4 and 5 of the Business Code;

3. where a media owner holds more than 25 per cent of the share capital or voting rights or exerts a dominating influence or has one of the possibilities to exert an influence as defined in § 244 (2) in connection with paragraphs 4 and 5 of the Business Code.

For the purposes of the present paragraph it shall be tantamount to a direct capital interest of more than 25 per cent if there are one or several interests and the interest on every level is more than 25 per cent. Interests by media owners, or persons associated with them according to the present paragraph, on the same level shall be added together when determining the limit of 25 per cent.

(6) The ranges and levels of coverage according to paragraphs 2 and 3 shall be determined by the regulatory authority or third parties commissioned by the latter, on the basis of scientific methods and analyses. The results of that determination shall be published in suitable form by 31 March of every year. In the event that the accuracy of the established ranges is contested, the regulatory authority shall issue a decree on the established ranges, upon application by the media owner concerned. In any event, the ranges and levels of coverage shall be established and published prior to any invitation to tender for a license under this Federal Act.

(7) The provisions of the 2005 Cartel Act, Federal Law Gazette I No. 61/2005 shall remain unaffected.

- **Federal Act enacting provisions for private radio broadcasting (Bundesgesetz, mit dem Bestimmungen für privaten Hörfunk erlassen werden – Privatradiogesetz – PrR-G):<sup>155</sup>**

§ 9. (1) A person or partnership may hold several licenses for analogue terrestrial radio broadcasting as long as the coverage areas of such licenses do not overlap. In addition, the analogue terrestrial coverage areas attributable to any person or partnership must not overlap. Moreover, a person or partnership may hold several licenses for digital terrestrial radio broadcasting as long as no more than two of the coverage areas covered by such licenses overlap. In addition, more than two of the digital terrestrial coverage areas attributable to any person or partnership must not overlap. A coverage area is to be attributed to a person in such case when such person is directly in possession of control possibilities as defined in para 4 sub-para 1 through equity interests.

(2) The total number of inhabitants in an analogue coverage area attributable to a media group must not exceed twelve million people, and the number of inhabitants in an analogue coverage area attributable to a person or partnership of the media group must not exceed eight million people. For the purposes of this paragraph a service area is to be attributed to a media group when a person or partnership of the media group is a licensee for such coverage area or is in possession of shares or control possibilities of a licensee as defined in para 4 sub-para 1.

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<sup>155</sup> [http://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_2001\\_1\\_20/ERV\\_2001\\_1\\_20.pdf](http://www.ris.bka.gv.at/Dokumente/ErV/ERV_2001_1_20/ERV_2001_1_20.pdf) (in German and English).

(3) Apart from technically unavoidable spill over, persons or partnerships of the same media group must not provide one particular part of the federal territory

1. with more than two analogue terrestrial radio channels,
2. with more than two digital terrestrial radio channels,
3. with more than one terrestrial radio channel and two terrestrial television channels. This provision shall not apply to television channels broadcast via a multiplex platform for mobile terrestrial broadcasting.

(4) Persons or partnerships considered associated with one particular media owner are:

1. those who hold more than 25 percent of the equity share or voting rights or control of one media owner or one of the control possibilities laid down in § 244 para 2 in connection with paras 4 and 5 of the Business Code;
2. in which one of the persons or companies as per sub-para 1 holds more than 25 percent of the equity share or voting rights or is in control of one media owner or of one of the control possibilities laid down in § 244 para 2 in connection with paras 4 and 5 of the Business Code;
3. in which one media owner holds more than 25 percent of the equity share or voting rights or is in control of one media owner or of one of the control possibilities listed in § 244 para 2 in connection with paras 4 and 5 of the Business Code;

For purposes of this paragraph it is of equal status with an equity share holding of more than 25 percent if there are one or more indirect equity share holdings and the equity share holding on each level exceeds 25 percent. Equity shares of media owners or of persons associated with them on the same level as defined in this paragraph are to be counted together when ascertaining the 25 percent limit.

(5) A media owner must not be a member of a radio broadcaster organized as an association.

- **Federal Media Act (Mediengesetz – MedienG):<sup>156</sup>**

§ 25. (1) The media owner of each periodical media product shall publish the information stated in paras 2 through 4. In the case of periodical media products the imprint shall also include information as to the web address at which the information will, on a constant basis, be easily and directly retrievable, or such information shall be added in the relevant medium. For broadcast programmes all above information shall either be constantly available on an easily retrievable teletext page or be published in the Official Gazette of “Wiener Zeitung” within one month after the broadcast starts and within the first month of each calendar year. In the case of periodically published electronic media the information shall either state under which web address the information will be constantly easily and directly retrievable, or such information shall always be added in the respective medium. If the media owner is a

<sup>156</sup> [https://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1981\\_314/ERV\\_1981\\_314.pdf](https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1981_314/ERV_1981_314.pdf) (in German and English).



provider of services in terms of § 3 para 2 Electronic Commerce Act, promulgated in Federal Law Gazette I No. 152/2001, the information for disclosure can be made available together with the information pursuant § 5 Electronic Commerce Act.

(2) The media owner shall be specified by name or company name, including the object of the company, residential address or registered office (branch office) and the names of the executive bodies and officers of the media owner authorised to represent the company and, if there is a supervisory board, its members. In addition, the ownership, shareholding, share and voting rights proportions shall be stated in respect of all persons holding a direct or indirect share in the media owner. Furthermore, any undisclosed shareholdings in media owner and in persons holding a direct or indirect share in the media owner as specified in the previous sentence shall be stated, and fiduciary relationships shall be disclosed for each level. In the case of direct or indirect shareholdings of foundations, the founder and the relevant beneficiaries of the foundation shall be disclosed. If the media owner is an association or an association holds a direct or indirect share in the media owner, the management board and the purpose of the association shall be stated in respect of such association. Persons holding a direct or indirect share, trust makers, founders and beneficiaries of a foundation shall be obligated, upon request by the media owner, to communicate to the media owner the details required for the media owner to comply with his/her/its disclosure obligation.

(3) If a person to be disclosed under the aforementioned provisions is also owner of another media undertaking or media service, the name, object and registered office of such company shall also be stated.

(4) A declaration on the basic line represented by the periodical print product or any other periodical medium shall also be published. In terms of § 2, any modifications of and additions to the basic line shall not become legally effective before being published.

(5) For a medium in terms of § 1 para 1 sub-para 5a b) and c) that does not contain any information exceeding the presentation of the personal lifestyle or the presentation of the media owner, being suitable to influence public opinion, only the name or the company, possibly the object of the company, as well as the residence or the registered office of the media owner are to be indicated. Paras 3 and 4 shall not apply to such media.

## 7.2. BE – Belgium FR

- Law on Audiovisual Media Services (Décret coordonné sur les services de médias audiovisuels):<sup>157</sup>

Article 6. § 1. The RTBF and providers of services make public the basic information concerning them to allow the public to make an opinion on the value to be given to information and opinions disseminated in the programmes of audiovisual media services covered by this Decree. The Government fixes the list of basic information as well as the modes of dissemination ensuring easy access, direct and permanent

<sup>157</sup>

[http://www.csa.be/system/documents\\_files/1440/original/D%C3%A9cret%20SMA%20coordonn%C3%A9%20au%2012%20mars%202015.pdf?1431957507](http://www.csa.be/system/documents_files/1440/original/D%C3%A9cret%20SMA%20coordonn%C3%A9%20au%2012%20mars%202015.pdf?1431957507) (only in French). Translation provided by the author.



to the latter. This list contains at least the name, the address of the head office, the telephone, e-mail address and website, the VAT number and the list of shareholders or members of the provider of services as well as the address of the CSA as a supervisory body of the provider of services.

§ 2. In order to ensure the transparency of their structures of ownership and control as well as their degree of independence the providers of services, the distributors of services and network operators shall communicate to the CSA the following information when their request for an authorisation or any similar Act:

1° The identification of natural persons or legal entities participating in the capital of the company and the amount of their respective participation or the list of the members for the legal persons incorporated in association;

2° The nature and the amount of the interests held by the persons mentioned above in other companies in the sector of audiovisual media or other sectors of the media;

3° The identification of natural or legal persons working in the activities of provision of resources involved significantly in the implementation of the programmes of audiovisual media services, as well as the nature and the amount of their participation.

§ 3. Any change in the information referred to in § 2, during the period of the authorisation or the act similar, must be communicated in the month at the CSA.

§ 4. The CSA maintains the whole of the information referred to in § 2 and 3 and verifies the actual layout of the information referred to in § 1.

Article 7. § 1. The exercise of a significant position in the audiovisual sector by a service provider or a distributor of services, or by several of these controlled directly or indirectly by a common shareholder, may not infringe the freedom of the public to access a pluralistic offer in audiovisual media services. By pluralistic offer, it is necessary to hear a supply of media through a plurality of independent and autonomous media reflecting the broadest possible diversity of opinions and ideas.

§ 2. When the CSA notes the exercise of a significant position, it engages a procedure for the evaluation of the pluralism of the offer in the audiovisual media services provided or distributed by the legal persons referred to in §1. The CSA notes the exercise of a significant position including:

1° when a physical or moral person, holding more than 24% of the capital of a television service provider, holds, directly or indirectly, more than 24% of the capital of another television service provider of the French-speaking Community;

2° when a physical or moral person, holding more than 24% of the capital of a radio service, provider holds, directly or indirectly, more than 24% of the capital of another radio service provider of the French-speaking Community;

3° when the cumulative audience of several television service providers reaches 20% of the total audience of television services of the French-speaking Community and that these television service providers are held directly or indirectly, mostly or in a minority, by the same person or entity;

4° when the cumulative audience of several audio service providers reaches 20% of the total audience of radio services of the French-speaking Community and that these radio service providers are held directly or indirectly, mostly or in a minority, by the same person or entity.

§ 3. If at the end of its assessment the CSA finds an infringement on the freedom of the public to access a pluralistic offer, it shall notify its grievances to the legal person(s) concerned and engage with them in a conciliation in order to agree on measures allowing the respect of the pluralism of the offer.

§ 4. If the conciliation does not lead to the conclusion of a protocol of agreement within a period of six months or if this protocol is not respected, the CSA can take the sanctions referred to in article 159.

§ 5. In the framework of the procedure referred to in this article, the CSA may consult the Competition Council.

Art. 56. The CSA may authorise the merger fusion:

- between community radios;
- between community radios and independent radios;
- between independent radio;
- between independent radios and radios in network;
- between radios in network.

The merger may be authorised only if the radio stations concerned have radio frequencies intended to cover different coverage zones.

Any merger involving a community radio may not lead to the loss of this quality of the radio after the merger.

The authorisation is given exclusively for reasons of viability of the project and that a close relationship is maintained with the public referred to in the initial licenses. The authorisation is given upon the joint request of the radios concerned.

The CSA allows any merger of radios in ensuring the diversity of the radio landscape and the balance between the different formats of radios, through their musical, cultural and information programmes.

When it is seized of a request for merger of radios, the CSA publishes within a month in the Official Gazette a notice of this request. In the month of this publication, any independent radio or radio in network as well as any person justifying of an interest to act can communicate to the CSA any reason that could justify not to authorise the merger.

The authorisation of a merger is issued in respect of article 7.

A new license is established in accordance with Article 58. The duration of the new license may not exceed the duration of the license the oldest among the radios merged.

### 7.3. BE – Belgium NL

- Act on Television and Radio Broadcasting of 27.03.2009 (Decreet betreffende radio-omroep en televisie):<sup>158</sup>

Article 137. *The national radio broadcasters are responsible for providing a diverse range of programmes, in particular with regard to information and entertainment, for the benefit of the entire Flemish Community.*

*Cooperation with the radio broadcaster of the Flemish Community, with other regional and local radio broadcasters and other national radio broadcasters must not lead to a structured uniformity in the programming policy.*

*The simultaneous and uniform broadcast of radio programmes, irrespective of their length, by national radio broadcasters or by broadcasters together with the radio broadcaster of the Flemish Community or with other regional and local radio broadcasters is prohibited. A collaboration with a view to setting up one-time major events, such as charity events, or in the case of exceptional events, such as reporting on major or important events, does not entail structured uniformity and is thus authorised.*

Article 138. § 1. *The national radio broadcasters have to meet the following requirements to retain their accreditation:*

1° *the conditions, mentioned in articles 129, 130, 131 and 135;*

2° *the following conditions :*

*a) the national radio broadcasters are established in the form of a legal person. The legal entity's purpose is to make radio programmes. The national radio broadcasters can carry out any activities which could directly or indirectly contribute to achieving their purpose, insofar as these activities coincide with or are related to the broadcasting activities. The members of the Board of Directors do not have any political mandate, and are not the director or manager of the public broadcaster or of any other legal person which manages a national radio broadcaster;*

*b) the legal entity, mentioned in item a), does not operate more than two of the national radio broadcasters. Direct or indirect relations between national radio broadcasters do not entitle a company or legal entity to have a say over more than two national radio broadcasters; [...]*

Article 139. § 1. *After gaining accreditation and for the entire duration of the accreditation, the national radio broadcasters adhere to the tender they have submitted and comply with the basic conditions and the additional qualification criteria referred to in Article 138, in accordance with which the Flemish Government allocated the accreditation.*

§ 2. *The national radio broadcasters that wish to change data in the offer that they submitted after their accreditation, thus deviating from the basic conditions and the additional qualification criteria*

<sup>158</sup> [http://www.vlaamseregulatormedia.be/sites/default/files/act\\_on\\_radio\\_and\\_television\\_broadcasting.pdf](http://www.vlaamseregulatormedia.be/sites/default/files/act_on_radio_and_television_broadcasting.pdf) (in English).

referred to in article 138, specifically as regards general programming, need to notify the Flemish Regulator for the Media of this. This notification is made in accordance with article 219.

Changes pertaining to information programmes, the articles of association or the shareholder structure will be submitted to the Flemish Government for approval. In evaluating these changes the Flemish Government takes into account in particular the maintenance of the pluralist character and diversity of the radio landscape.

Article 140. The regional radio broadcasters are responsible for producing a variety of programmes, in particular with regard to information from the region, cultural, sporting and other events in the region, and entertainment, with the aim of promoting communication amongst the population in their area and contributing to the general social and cultural development of the region. They broadcast for no more than one province.

The regional radio broadcasters can only work with the regional linear television broadcasters at the level of making programmes, gathering information and attracting advertising.

Article 141. § 1. The regional radio broadcasters have to meet the following requirements to retain their accreditation:

1° the conditions, mentioned in articles 129, 130, 131 and 135;

2° the following conditions :

a) the regional radio broadcasters take the form of a legal person. The purpose of the legal person mainly consists of providing radio programmes in the area allocated to it. The local radio companies can carry out any activities which directly or indirectly correspond to achieving their purpose; The members of the Board of Directors do not have a political mandate and are not the manager or director of the public broadcaster or of another legal person which manages a national or regional radio broadcaster;

b) the legal entity, mentioned in item a) does not exploit more than two private regional radio broadcasters. Direct or indirect relations between regional or national radio broadcasters do not result in a company or a legal entity having a say or being able to have a say over more than two regional or national radio broadcasters; [...]

Article 142. § 1. After gaining accreditation and for the entire duration of the accreditation, the regional radio broadcasters adhere to the tender submitted by them and to the basic conditions and the additional qualification criteria referred in Article 141, in accordance with which the Flemish Government allocated the accreditation.

§ 2. The regional radio broadcasters that wish to change data in the offer that they submitted after their accreditation, thus deviating from the basic conditions and the additional qualification criteria referred to in article 141, specifically as regards general programming, need to notify the Flemish Regulator for the Media of this. This notification is made in accordance with Article 219.

Changes pertaining to information programmes, the articles of association or the shareholder structure will be submitted to the Flemish Government for approval. In evaluating these changes the Flemish

*Government takes into account in particular maintaining the pluralist character and diversity of the radio landscape.*

*Article 143. The regional radio broadcasters can operate independently or within a cooperative venture with other regional radio broadcasters.*

*A cooperative venture that consists of all regional radio broadcasters and takes the form of a legal person which complies with the conditions mentioned in article 138, §1 [is legally a national radio broadcasting organization].*

*From the date of accreditation by the Flemish Government as a national radio broadcaster, the provisions of subsection II of this chapter apply to this cooperative venture.*

*Contrary to article 134, first indent, the accreditation of the regional radio broadcasters which participate in this cooperative venture expires from the date of accreditation by the Flemish Government of the cooperative venture as a national radio broadcaster.*

*As they await a new transmission licence, granted by the Flemish Regulator for the Media, and contrary to article 193, §1, second indent, the regional radio broadcasters assign their transmission licence to the cooperative venture accredited as national radio broadcaster.*

*Article 144. §1. The local radio broadcasters are responsible for producing a variety of programmes, in particular with regard to information from the area concerned and entertainment, with the aim of promoting communication amongst the population, or the target group within the area that is covered. They broadcast for a city, part of a city, a municipality, a limited number of adjacent municipalities, or a particular target group.*

*The local radio broadcasters can operate independently or in a cooperation venture with other local radio broadcasting organizations within the Flemish Community. Cooperation with the radio broadcaster of the Flemish Community, the national radio broadcasters and other regional radio broadcasters must not lead to a structured uniformity in the programming policy.*

*Cooperation with other local radio broadcasters must not result in more than sixty local radio broadcasters being united in one cooperative venture.*

*A collaboration with a view to setting up one-time major events, such as charity events, or in the case of exceptional events, such as reporting on major or important events, does not entail structured uniformity and is thus authorised.*

*Cooperation with other local radio broadcasters is thus possible at every level, provided article 145 is applied.*

*Without prejudice to the provisions of this chapter and if the other conditions of accreditation are strictly observed, and subject to the application of the procedure provided in Article 150, local radio broadcasters are free to establish cooperative ventures, to terminate them, and to join or leave them.*

*Cooperative ventures as referred to in this article should be notified to the Flemish Regulator for the Media at least fourteen calendar days to the start thereof. This notification should be carried out in*

compliance with Article 219. Without prejudice to the previous sections of this Article, a local radio broadcaster for the Brussels locality and the regional television broadcaster with its service area being the bilingual Brussels-Capital region can cooperate at all levels. [...]

Article 145. § 1. The local radio broadcasters have to meet the following requirements to retain their accreditation:

1° the conditions, mentioned in articles 129, 130, 131 and 135;

2° the following conditions :

a) the local radio broadcasters are established in the form of a legal person. The purpose of the legal person mainly consists of providing radio programmes in the area allocated to it. The local radio broadcasters can carry out all the activities that tie in directly or indirectly with the accomplishment of their purpose. A legal person that operates a local radio broadcasting organization for the Brussels locality can also operate the regional television broadcasting organization with its service area being the bilingual Brussels-Capital region;

b) the legal entity referred to in item a), only operates one private radio broadcaster;

c) the local radio broadcasters provide a daily offer of local information with attention paid to the announcement and reporting of social-cultural, sporting, economic and political events in their transmission area. The daily programming of the local radio broadcaster contains at least three news programmes focusing on the area concerned. An editor-in-chief is responsible for the news programmes. Every news programme also contains local subjects. If a local radio broadcaster cooperates with other radio broadcasters, this cooperation may in no case jeopardise the independence of the reporting. For national and international news, the local radio broadcasters can make use of an editorial team which provides sufficient guarantees of ethical journalism, impartiality and editorial independence on the basis of its editorial status. As regards the local news programmes, local radio broadcasters can cooperate with other local radio broadcasters insofar as cooperating radio broadcasters are within transmission areas that correspond with the transmission areas of the regional television broadcasters;

d) the local radio broadcasters share the following information: the place of transmission, the place of establishment, the infrastructure that is present, the articles of association, the financial structure and the financial plan, the programmes provided, the editorial statute, the broadcasting schedule, the name of the editor-in-chief, the employees of the radio broadcaster, including their radio experience and their statute. Any subsequent changes are duly and immediately notified to the Flemish Regulator for the Media; [...]

## 7.4. BG – Bulgaria

- **Radio and Television Act:**

Article 106. (1) Any licence shall be personal.

(2) Transfer of a licence shall be permitted by the Council for Electronic Media subject to satisfaction of the requirements to the persons for initial licensing. [...]

Article 111. (1) Any applicant for a radio and television broadcasting licence shall submit a written application to the Council for Electronic Media, enclosing therewith: [...]

(2) The applicants for the grant of a radio and television broadcasting licence shall mandatorily attach the following to the documents covered under Paragraph (1):

1. documents proving the origin of the capital for the last three years, including a certified financial statement, reckoned from the date of submission of the documents;
2. documents attesting to the structure of the capital and the distribution of ownership in the capital;
3. a list of the media undertakings wherein the applicants are shareholders or partners. [...]

Article 116f. [...] (7) Upon adoption of the decision on the grant or on a refusal to grant a licence, the Council for Electronic Media shall be guided by the following principles:

1. guaranteed right to information of citizens in the Republic of Bulgaria;
2. creating favourable conditions for variety of the media landscape and for pluralism;
3. preservation of national identity.

## 7.5. CH – Switzerland

- **Federal Act on radio and television (Loi fédérale sur la radio et la télévision – LRTV):<sup>159</sup>**

Article 16. Notification of holdings. Broadcasters of Swiss programme services must notify the Federal Office of any changes in capital and in voting rights as well as any substantial holdings in other enterprises.

Article 44. General licence requirements. 1. A licence may be awarded if the candidate:

<sup>159</sup> <https://www.admin.ch/opc/en/classified-compilation/20001794/201002010000/784.40.pdf> (in English).



- a. is able to fulfil the performance mandate;*
- b. credibly demonstrates that it can finance the necessary investments and operation;*
- c. demonstrates to the licensing authority the identity of the majority holder of its capital and who makes substantial financial resources available to it;*
- d. guarantees that it complies with the employment law regulations and the working conditions of the industry, the applicable law and in particular the obligations and conditions associated with the licence;*
- e. separates editorial activity from economic activities;*
- f. is a natural person with residence in Switzerland or a legal person domiciled in Switzerland;*
- g. does not jeopardise the diversity of opinion and offerings.*

*2. In the absence of any international obligations to the contrary, a legal person controlled from abroad, a domestic legal person with foreign participation or a natural person without Swiss citizenship may be refused the licence if the corresponding foreign state does not guarantee reciprocal rights to a similar extent.*

*3. A broadcaster or the enterprise to which it belongs may acquire a maximum of two television licences and of two radio licences.*

*Article 45. Licensing procedure. 1. Licences are awarded by the Department. As a rule, the Federal Office puts the licences out to tender; it may consult interested parties.*

*2. The Federal Council may provide for a special procedure for the award of short term licences.*

*3. If there are several candidates for one licence, preference is given to the candidate that is best able to fulfil the performance mandate. If several candidates are essentially equivalent from this viewpoint, preference is given to the candidate which best enhances to the diversity of opinion and the diversity of offerings.*

*4. Licences for wireless terrestrial transmission of programme services are as a rule awarded before the invitation to tender for the corresponding radiocommunication licences in accordance with Article 24 TCA.*

*Article 74. Risks to diversity of opinion and offerings. 1. A risk to diversity of opinion and offerings exists if:*

- a. a broadcaster abuses its dominant position in the relevant market;*
- b. a broadcaster or another enterprise active in the radio and television market abuses its dominant position in one or more media-related markets.*

*2. The Department consults the Competition Commission to assess the dominant position as defined in Article 4 paragraph 2 of the Cartel Act of 6 October 1995.*



The latter may publish its comments.

Article 75. Measures. 1. If, after obtaining the Competition Commission's report, the Department ascertains that a broadcaster or another undertaking active in the radio and television market has jeopardised diversity of opinion and offerings as a result of its abuse of its dominant position, it may take measures in the area of radio and television. As a rule, it takes a decision within three months of receipt of the report.

2. It may demand that the broadcaster or the undertaking concerned:

- a. ensures diversity by measures such as granting broadcasting time for third parties or cooperating with other participants in the market;
- b. takes measures against corporate journalism, such as issuing editorial statutes to ensure editorial freedom;
- c. should such measures prove to be clearly inadequate, adapts the business and organisational structure of the undertaking.

## 7.6. CZ – Czech Republic

- Act of 17.05.2001 on Radio and Television Broadcasting and on Amendment to Other Acts ( *Zakon ze o provozování rozhlasového a televizního vysílání a o změně dalších zákonů*).<sup>160</sup>

Section 21. Change to certain facts and change to licence conditions. [...] (6) A licensed radio broadcaster, which is a legal person, or a member within such a legal person, may transfer to third parties a share in the licensed radio broadcaster company with prior consent of the Council. The consent may only be withheld if plurality of information pursuant to Sections 55 and 56 would be limited. The persons who were members in the legal person as of the date of issuance of the decision on granting the licence shall remain holders of at least 66% of the stock or 66% of voting rights for a period of 5 years from the date on which the licence was granted.

(7) A licensed television broadcaster, which is a legal person, or a member within such a legal person, may transfer to third parties a share in the licensed television broadcaster company with prior consent of the Council. The consent may only be withheld if the plurality of information under Sections 55 and 56 would be limited. The persons who were members in the legal person as of the date of issuance of the decision to grant the licence shall remain holders of at least 66% of the stock or 66% of the voting rights for the period of 5 years from the date on which the licence was granted.

(8) With a prior consent of the Council, a legal person or a natural person who is a member of more than one legal person – licensed broadcaster – with a 100% ownership interest may transfer these

<sup>160</sup> <http://www.rrtv.cz/cz/static/cim-se-ridime/stavajici-pravni-predpisy/pdf/Act-on-RTV-broadcasting-reflecting-AVMSD.pdf> (in English).

*legal persons, or some of them, into a single successor company by merger or amalgamation, the successor company becoming either a public limited company or a limited liability company.*

*(9) A natural person who is a licensed broadcaster or a rebroadcaster may request that the licence or registration, which was awarded to it, be transferred to a legal person. The Council will grant the request only in the case that the natural person has a 100% ownership interest in such a legal person.*

*Section 55. Providing information plurality in nation-wide analogue radio and television broadcasting. (1) No single legal person, nor any single natural person, may be a holder of more than one licence for nation-wide analogue television broadcasting.*

*(2) No single legal person, nor any single natural person, may be a holder of more than one licence for nation-wide analogue radio broadcasting.*

*(3) No nation-wide analogue radio broadcaster may possess any ownership interest in the business of any other nation-wide analogue radio broadcaster.*

*(4) No nation-wide analogue television broadcaster may possess any ownership interest in the business of any other nation-wide analogue television broadcaster.*

*(5) No nation-wide statutory television broadcaster may consolidate with any nation-wide analogue television broadcaster, such a consolidation being based on the fact that their governing bodies or members of governing bodies are the same persons or related parties, or are members in the same business entity or are related parties.*

*(6) No nation-wide statutory radio broadcaster may consolidate with any other nation-wide analogue radio broadcaster, such a consolidation being based on the fact that their governing bodies or members of governing bodies are the same persons or related parties, or are members in the same business entity or are related parties.*

*(7) No nation-wide analogue television broadcaster may consolidate with any other nation-wide analogue television broadcaster in any other manner (Section 58).*

*(8) No nation-wide analogue radio broadcaster may consolidate with any nation-wide analogue radio broadcaster in any other manner (Section 58).*

*(9) Provisions of Paragraphs 1, 2, 3, 4, 7 and 8 above shall not apply to radio and television broadcasting distributed via cable systems, satellites and special transmission systems.*

*(10) Provisions of Paragraphs 7 and 8 above shall not apply to persons involved in the promotion and sale of advertising services, sponsorship- and teleshopping-related services, market surveying services and services relating to the purchase of programme units, except news programmes.*

*Section 55a. Providing information plurality in nation-wide digital radio and television broadcasting (1) No single legal person, nor any single natural person, may be a holder of more than two licences for nation-wide digital television broadcasting, which authorise the distribution of full-format programmes.*

(2) No single legal person, nor any single natural person, may be a holder of more than two licences for nation-wide digital radio broadcasting.

(3) No nation-wide digital television broadcaster may possess any ownership interest in the business of any other nation-wide television broadcaster.

(4) No nation-wide digital radio broadcaster may possess any ownership interest in the business of any other nation-wide radio broadcaster.

(5) No nation-wide statutory television broadcaster may consolidate with any nation-wide digital television broadcaster, such a consolidation being based on the fact that their governing bodies or members of governing bodies are the same persons or related parties, or are members in the same business entity or are related parties.

(6) No nation-wide statutory radio broadcaster may consolidate with any other nation-wide digital radio broadcaster, such a consolidation being based on the fact that their governing bodies or members of governing bodies are the same persons or related parties, or are members in the same business entity or are related parties.

(7) No nation-wide digital television broadcaster may consolidate with any nation-wide digital television broadcaster in any other manner (Section 58).

(8) No nation-wide digital radio broadcaster may consolidate with any nation-wide digital radio broadcaster in any other manner (Section 58).

(9) Provisions of Paragraphs 1, 2, 3, 4, 7 and 8 above shall not apply to radio and television broadcasting distributed via cable systems, satellites and special transmission systems.

(10) Provisions of Paragraph 3 above shall not apply to agreements between digital television broadcasters that use transmitters, concerning shared operation of the electronic programme guide. The provisions of Paragraphs 7 and 8 shall not apply to persons involved in the promotion and sale of advertising services, sponsorship- and teleshopping related services, market surveying services and services relating to the purchase of programme units, except news programmes.

Section 56. Providing information plurality in local and regional radio and television broadcasting. (1) If any single legal person or any single natural person is a holder of more than one licence to operate television broadcasting other than nation-wide television broadcasting, then the total coverage of the Czech Republic by such a legal person's or natural person's broadcasting, counted as a proportion of the sum of all such licences for the operation of television broadcasting other than nation-wide television broadcasting, shall not in aggregate exceed 70% of the total number of population of the Czech Republic, based on information from the most recent population census. Each inhabitant of the Czech Republic so covered shall always be counted in the total number of the population of the Czech Republic only once.

(2) If any single legal person or any single natural person is a holder of more than one licence to operate radio broadcasting other than nation-wide radio broadcasting, then the total coverage of the Czech Republic by such a legal person's or natural person's broadcasting, counted as a proportion of

*the sum of all such licences for the operation of radio broadcasting other than nation-wide radio broadcasting, shall not in aggregate exceed 300% of the total number of population of the Czech Republic, based on information from the most recent population census. Each inhabitant of the Czech Republic so covered shall always be counted in the total number of the population of the Czech Republic as many times as many of the respective programmes the inhabitant can listen to, the respective programmes being those broadcast under such a legal or natural person's all licences to operate radio broadcasting other than nation-wide radio broadcasting.*

*(3) Any single legal person or any single natural person may only hold an ownership interest in the business of more than one operator of radio broadcasting other than nation-wide radio broadcasting insofar as the total coverage of the population of the Czech Republic by the broadcasting of all operators of radio broadcasting other than nation-wide radio broadcasting in whose businesses such a legal or natural person has an interest remains under or at 300% of the total population of the Czech Republic, counted on the basis of the information from the most recent population census. Each inhabitant of the Czech Republic so covered shall always be counted in the total number of the population of the Czech Republic as many times, as many of the respective programmes the inhabitant can listen to, the respective programmes being those broadcast by all operators of radio broadcasting other than nation-wide radio broadcasting in whose business such a legal or natural person has an interest.*

*(4) Any single legal person or any single natural person may only hold an ownership interest in the business of more than one operator of television broadcasting other than nation-wide television broadcasting insofar as the total coverage of the population of the Czech Republic by the broadcasting of all operators of television broadcasting other than nation-wide television broadcasting in whose*

*businesses such a legal or natural person has an interest remains under or at 70% of the total population of the Czech Republic, counted on the basis of the information from the most recent population census. Each inhabitant of the Czech Republic so covered shall always be counted in the total number of the population of the Czech Republic only once.*

*(5) The obligations referred to in Paragraphs 1 to 4 above do not apply to radio and television broadcasting distributed via cable systems, satellites and special transmission systems.*

*Section 57. Formation of programme networks. (1) No programme network may cover by radio broadcasting more than 80% and by television broadcasting more than 70% of the total population of the Czech Republic, counted on the basis of the information from the most recent population census. Each inhabitant of the Czech Republic so covered shall always be counted in the total number of the population of the Czech Republic only once.*

*(2) Broadcasters that are, or have been, distributing their broadcasting within a programme network may not change programme network nor may they change the broadcaster from which they take over the programme, during the period of validity of the licences awarded to them or extended for them.*

*(3) The provision contained in Paragraph 2 above shall also be binding on the broadcasters' legal successors.*

Section 58. Consolidation of broadcasters or rebroadcasters. (1) A broadcaster or rebroadcaster shall notify the Council about any of the following circumstances:

a) radio broadcasters have consolidated and television broadcasters have consolidated, such consolidation taking the form of merger of two legal persons or sale of the enterprise or a substantial part thereof,

b) a consolidation occurred between radio broadcasters and between television broadcasters wherein:

1. their governing bodies or members of governing or other bodies, or employees under direct management authority of such a governing body or member thereof or under direct management authority of the managing clerk, are identical natural persons or persons who are related parties,

2. they run a joint business on the basis of a partnership deed, or

3. are related parties,

c) a consolidation of radio broadcasters has occurred whereby one legal person or one natural person exerts a substantial influence on two or more radio broadcasters,

d) a consolidation of television broadcasters has occurred whereby one legal person or one natural person exerts a substantial influence on two or more television broadcasters.

(2) A legal person or natural person shall be regarded as having a substantial influence on a broadcaster insofar as such a legal person or natural person:

a) possesses a direct or indirect interest greater than 34% of the voting rights, an indirect interest being an interest held through a controlled party,

b) makes decisions regarding the majority of employees of the broadcaster who are under the direct managing authority of the governing body or a member thereof, or makes decisions on the persons that provide, on the basis of a mandate agreement or any other agreement, significant administrative, managing or trading activities for the broadcaster,

c) has opportunities to exercise a controlling influence on the management of the broadcaster upon the basis of a contract, a special provision in the Statutes, Memorandum of Association or Founder's Deed or agreement with persons who are members or shareholders of the broadcaster regardless of the validity or non-validity of such an agreement.

(3) Obligations specified in Sections 56 and 57 shall not apply to statutory broadcasters or broadcasters possessing a short-term licence.

## 7.7. DE – Germany

- Interstate Treaty on Broadcasting and Telemedia (Rundfunkstaatsvertrag – RStV):<sup>161</sup>

Article 21. Principles for the Licensing Procedure. (1) The applicant shall provide all information and documents required for the consideration of its licence application.

(2) The obligation to provide information and documents in particular relates to:

1. a description of the direct and indirect interests in the applicant as defined in Article 28 and of the capital and voting rights in the applicant and associated companies as defined in the German Company Law;
2. information about relatives as defined in Article 15 of the Fiscal Code<sup>30</sup> among the parties pursuant to no. 1. The same shall apply to representatives of the person or partnership or of the member of an body of a legal entity;
3. the articles of association and the statutory provisions of the applicant;
4. agreements existing among the parties holding a direct or indirect interest in the applicant within the meaning of Article 28 relating to the joint provision of broadcasting as well as to trustee relationships and relationships that are significant pursuant to Articles 26 and 28;
5. a written statement of the applicant to the effect that the documents and information pursuant to nos. 1 to 4 have been provided in full.

[...](4) The obligations pursuant to (1) to (3) shall apply accordingly to natural persons and legal entities or partnerships holding a direct or indirect interest in the applicant within the meaning of Article 28, or who represent an undertaking associated with the applicant, or who may exercise influence on it in some other manner within the meaning of Articles 26 and 28.

[...] (6) Those obliged to provide information and to submit documents during the licensing procedure must notify the competent state media authority of any change in circumstances without delay which may have occurred since the application was submitted or the licence was issued. Paragraphs (1) to (5) apply accordingly. Article 29 remains unaffected.

(7) Notwithstanding any other notification requirements the broadcaster and the parties holding a direct or indirect interest in the broadcaster within the meaning of Article 28 are required to submit a statement to the competent state media authority upon expiry of the calendar year without delay, indicating whether and to what extent any change has occurred within that calendar year with regard to relevant participating interests and facts necessitating attribution pursuant to Article 28.

Article 25. Plurality of Opinion, Regional Windows. (1) The editorial content of commercial broadcasting shall convey plurality of opinion. The major political, ideological and social forces and groups shall be

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<sup>161</sup> [http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze\\_aktuell/15\\_RStV\\_english\\_01-01-2013.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Rechtsgrundlagen/Gesetze_aktuell/15_RStV_english_01-01-2013.pdf) (in English).

granted adequate opportunity for expression in the general channels; minority views shall be taken into account. The possibility to offer thematic channels remains unaffected.

(2) A single service must not exert an exceedingly imbalanced influence on public opinion.

(3) In the licensing procedure the state media authority shall seek to ensure that interested parties providing cultural contents are also able to participate in the broadcaster. There is no legal entitlement to participation.

(4) The two general channels transmitted nationally with the largest audience reach shall incorporate window services providing up to date, authentic presentations of the political, economic, social and cultural life in the respective state at least in line with the scheduled and regionally differentiated extent of the programme activities as per 1 July 2002 pursuant to the respective state law. The main service provider shall guarantee the editorial independence of the window service provider by its organisation. The window service provider shall be granted a separate licence. Window service providers and main service providers should not be related to one another in the form of affiliated undertakings pursuant to Article 28, unless independence is secured in other ways through state provisions in force per 31 December 2009. Licences in place on 31 December 2009 shall remain unaffected. An extension shall be admissible. The organisation of the window services shall ensure their funding by the main service providers. The state media authorities shall coordinate the scheduling and technical organisation of the window services, taking into account the interests of the main service providers affected.

Article 26. Ensuring Plurality of Opinion on Television. (1) An undertaking (natural person or legal entity or partnership) may itself or through undertakings attributable to it provide an unlimited number of television services transmitted nationally in the Federal Republic of Germany unless this results in the undertaking acquiring dominant power of opinion in accordance with the following provisions.

(2) If the services attributable to an undertaking reach an annual average audience share of 30 percent of all viewers, dominant power of opinion shall be assumed to be given. The same applies for an audience share of 25 per cent if the undertaking holds a dominant position in a media-relevant related market or 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. In the calculation of the relevant audience share pursuant to sentence 2, two percentage points shall be deducted from the actual audience share if window services are included in the general channel attributable to the undertaking with the highest audience share pursuant to Article 25 (4). If at the same time broadcasting time is included for third parties in accordance with (5), a further three percentage points shall be deducted from the actual audience share.

(3) If an undertaking has acquired dominant power of opinion with the services attributable to it, no licence may be issued for further services attributable to this undertaking, nor may the acquisition of further participating interests in broadcasters attributable to it be confirmed as being acceptable.

(4) If an undertaking has acquired dominant power of opinion with the services attributable to it, the state media authority shall, through the Commission on Concentration in the Media (KEK, Article 35 (2) sentence 1 no. 3), propose the following measures to the undertaking:



1. the undertaking may give up its participating interests in broadcasters attributable to it until the attributable audience share of the undertaking falls below the limit pursuant to (2) sentence 1, or
2. it may, in the case specified in (2) sentence 2, limit its market position in media-relevant related markets or give up its participating interests in broadcasters attributable to it until dominant power of opinion pursuant to (2) sentence 2 no longer prevails, or
3. it may, with regard to service providers attributable to it, take the measures within the meaning of Articles 30 to 32 in order to ensure plurality of opinion.

The KEK shall discuss the possible measures with the undertaking with the objective of reaching mutual agreement. If agreement cannot be reached or if the measures which the undertaking and the KEK have mutually agreed upon are not implemented within a reasonable period, the state media authorities may, after the KEK has established the facts, revoke the licences of as many of the services attributable to the undertaking as may be required to ensure that the undertaking no longer exercises dominant power of opinion. The KEK shall select the licences to be revoked, taking into account the specificities of each case. No compensation shall be granted for any financial loss incurred as a result of the revocation of the licence.

(5) If a service provider reaches an annual average audience share of 10 per cent with a general channel or an information-oriented thematic channel, the service provider must allocate broadcasting time to independent third parties in Accordance with Article 31 within six months after this fact has been established and after having been informed accordingly by the state media authority. If a service provider reaches an annual average audience share of 20 per cent with services attributable to it without one of the general channels or information-oriented thematic channels reaching an audience share of 10 per cent, the obligation pursuant to 1 shall apply to the service provider of the service attributable to the undertaking with the highest audience share. If the service provider does not implement the required measures, the licence shall be revoked by the competent state media authority after the facts have been established by the KEK. Paragraph (4) sentence 5 applies accordingly.

(6) Every three years or upon the request of the states, the state media authorities shall jointly publish a KEK report on the development of concentration and on measures to ensure plurality of opinion in the commercial broadcasting sector, taking into account:

1. interdependencies between television and media-relevant related markets;
2. horizontal interdependencies between broadcasters in different areas of transmission, and
3. international interdependencies in the media sector.

The report should also comment on the application of Articles 26 to 32 and on any necessary amendments to these provisions.

(7) The state media authorities shall publish an annual list of services to be drawn up by the KEK. The list of services shall include all services, their broadcasters and parties with participating interests.



*Article 27. Establishing Audience Shares. (1) The state media authorities shall establish the audience share of each service through the KEK, taking into account all German language services broadcast by the public-service broadcasters and the services of commercial broadcasters which can be received nationally. Decisions shall be based on the average audience share reached by the services to be included during the previous twelve months and prevailing at the time of the commencement of the proceedings.*

*(2) Following a decision by the KEK, the state media authorities shall commission an undertaking to determine the audience shares. The contract shall be awarded in accordance with the principles of efficiency and economy. Audience shares shall be established by means of representative surveys among viewers aged three years and older, using generally accepted scientific methods. The state media authorities should agree with the undertaking that the data collected in establishing audience shares pursuant to (1) sentence 1 may also be used by third parties on a contractual basis. In this case the costs to the state media authorities shall be reduced accordingly.*

*(3) The broadcasters are required to assist in establishing the audience shares. In the event that a broadcaster does not comply with this obligation its licence may be revoked.*

*Article 28. Attribution of Services. (1) All services that an undertaking provides itself or that are provided by another undertaking in which it has a direct interest of 25 per cent or more of the capital or voting rights shall be attributed to this undertaking. Furthermore, all services shall be attributed to it which are provided by undertakings in which it has an indirect interest insofar as those undertakings are affiliated undertakings within the meaning of Article 15 of the German Company Law and hold a share of 25 per cent or more of the capital or voting rights of a broadcaster. The affiliated undertakings within the meaning of sentences 1 and 2 shall be deemed to be a single undertaking and their shares in the capital or the voting rights shall be added up. If as a result of an agreement or otherwise, several undertakings cooperate in such a manner that they can jointly exert a dominant influence over an undertaking holding an interest, each of them shall be deemed to be a dominant undertaking.*

*(2) An interest pursuant to (1) also exists if an undertaking is able either by itself or together with others to exert a comparable influence on a broadcaster. Furthermore, a comparable influence exists if an undertaking or an undertaking already attributable to it for other reasons pursuant to (1) or (2) sentence 1:*

*1. regularly provides programming for a significant proportion of the broadcasting time of a broadcaster;*

*2. by virtue of contractual agreements, stipulations in the statutory provisions and in the articles of association or in any other manner holds a position which makes the fundamental decisions of a broadcaster concerning the design, acquisition and production of programming subject to its approval.*

*(3) The attribution pursuant to (1) and (2) shall also include undertakings established outside the scope of this Interstate Treaty.*

(4) The analysis and assessment of comparable influences on a broadcaster shall also take into account existing family relationships. It shall apply the principles of commercial or fiscal law.

Article 29. *Changes in Participating Interests.* The competent state media authority must be notified in writing of any planned change in participating interests or other influences prior to their implementation. Notifications shall be made by the broadcaster and by parties holding a direct or indirect interest in the broadcaster within the meaning of Article 28. The competent state media authority may confirm that no objections exist to such changes only if a licence could still be issued under such changed conditions. If a planned change is implemented to which confirmation pursuant to sentence 3 cannot be given, the licence shall be revoked. The revocation procedure shall be governed by state law. For minor interests in public limited companies the KEK may issue directives detailing exemptions concerning the obligation to report changes.

Article 30. *Measures Ensuring Plurality.* As far as the aforementioned provisions aim at measures ensuring plurality concerning a broadcaster or undertaking, such measures shall include:

1. granting broadcasting time to independent third parties (Article 31),
2. establishing a programme advisory council (Article 32).

## 7.8. ES – Spain

- General Law on Audiovisual Communication 7/2010 of 31.03.2010 (Ley General de la Comunicación Audiovisual):<sup>162</sup>

Article 6. *The right to transparent audiovisual media.* 1. All persons are entitled to know the identity of the audiovisual media service provider, as well as the companies which make up their group and their shareholders.

For this purpose, the provider is deemed to be identified when the following is made known on a website: the name of the service provider; their address; email address and other means of establishing a direct and fast communication; and the regulatory body or competent supervisor. [...]

Article 36. *Pluralism in the Television Audiovisual Market.* 1. Natural and legal persons may hold shares or voting rights simultaneously in different television audiovisual service providers.

2. However, no natural or legal person may acquire significant holdings in more than one television audiovisual media service provider with national coverage when the average audience of all the channels of the considered providers with national coverage exceeds 27% of the total audience for the twelve consecutive months prior to the acquisition.

3. If the average audience exceeds 27% of the total audience after the acquisition of new significant holdings, this shall have no effect on the holder.

<sup>162</sup> [http://noticias.juridicas.com/base\\_datos/Admin/l6-2012.html](http://noticias.juridicas.com/base_datos/Admin/l6-2012.html) (in Spanish). English translation available at [http://www.wen.uni.lu/research/fdef/media\\_law/audiovisual\\_media\\_services\\_directive/national\\_execution\\_measures/spain](http://www.wen.uni.lu/research/fdef/media_law/audiovisual_media_services_directive/national_execution_measures/spain)

4. The shares or voting rights of natural or legal persons from countries that are not members of the European Economic Area are subject to compliance with the principle of reciprocity. In the event of an increase in the shares held by natural and legal persons from countries that are not members of the European Economic Area, on the entry into force of this Act, the total percentage held in the share capital of the television audiovisual media service provider must be less than 50% at all times.

5. No natural or legal person may acquire significant holdings or voting rights in more than one television audiovisual media service provider:

a) When national audiovisual media service providers accumulate rights of use over the radioelectric public domain which together are greater than the technical capacity of two multiplex channels.

b) When regional audiovisual media service providers accumulate rights of use over radioelectric public domain which together are greater than the technical capacity of a multiplex channel.

c) No natural or legal person or participant in the share capital of a national television audiovisual media service provider may acquire significant holdings or voting rights in the capital of another provider of the same service, where this would prevent the existence of at least three different private national television audiovisual media service providers, thus ensuring respect for pluralism of information.

Article 37. Pluralism in the Radio Audiovisual Market. 1. A single natural or legal person may not, under any circumstances, directly or indirectly control more than fifty per cent of administrative licenses for terrestrial radio broadcasting which significantly overlap in their area of coverage. A single natural or legal person may not, under any circumstances, control more than five licenses in the same area of coverage.

2. In a single Autonomous Community, no natural or legal person may control more than forty per cent of existing licenses in areas where only one license has coverage.

3. No natural or legal person may directly or indirectly control more than a third of all terrestrial radio broadcasting licenses with total or partial coverage in the entire territory of the State.

4. In order to limit the number of licenses whose control may be simultaneous, radio broadcasting stations directly operated by public entities shall not be taken into account when establishing such limits. For the purposes provided in this Article, control shall be presumed to exist in the cases referred to in Article 42 of the Commercial Code.

5. The limits above apply separately to licenses for digital technology broadcast and licenses for analogue technology broadcast.

## 7.9. FR – France

- Law of 30.09.1986 relating to the freedom of communication (Loi relative à la liberté de communication):<sup>163</sup>

Article 29. Subject to the provisions of article 26 of this Act, the use of the frequencies for terrestrial radio broadcasting services is licensed by the Council in the conditions laid down in this article. [...]

The Council delivers licenses in appreciating the interest of each project for the public, in the light of priority goals which are the safeguard of pluralism of the currents of socio-cultural expression, the diversification of operators, and the need to avoid abuse of a dominant position as well as the practices impeding the free exercise of the competition. [...]

Article 30. Subject to the provisions of article 26 of this Act, the use of the frequencies for digital terrestrial television broadcasting services is licensed by the Council in the conditions laid down in this article. [...]

The Council proceeds to a public hearing of the applicants.

The Council delivers licenses in appreciating the interest of each project for the public, in the light of priority goals which are the safeguard of pluralism of the currents of socio-cultural expression, the diversification of operators, and the need to avoid abuse of a dominant position as well as the practices impeding the free exercise of the competition and of the criteria referred to in Articles 29 and 30 as well as the commitments of the candidate in respect of coverage of the territory, production and broadcast of French and European audiovisual and cinematographic works.

Article 39. I. A same physical person or legal entity acting alone or in concert may not hold, directly or indirectly, more than 49 % of the capital or of the voting rights of a company holder of a license for a national terrestrial television service whose annual average audience via an electronic communications network within the meaning of 2° of Article L. 32 of the Code of Posts and electronic communications, both in analog mode and in digital mode, exceeds 8% of the total audience of television services.

For the application of the previous subparagraph, the audience of each service consisting, within the meaning of 14° of Article 28, in the replay, full or partial, by an electronic communications network within the meaning of 2° of Article L. 32 of the Code of positions and electronic communications, of a television service broadcasted is counted jointly with the one of the rebroadcasted service.

A decree of the Council of State specifies the terms of application of the previous two subparagraphs. Notably, it establishes the conditions in which the Council fixes the audience share of television services and, in the case of reach of the level of audience mentioned above, gives to the persons concerned a period which may not be greater than one year, to be in compliance with the above rule.

<sup>163</sup>

<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT0000000512205&fastPos=1&fastReqId=78965485&categorieLien=cid&oldAction=rechTexte> (only in French). Translation provided by the author.

*When a physical or moral person owns, directly or indirectly, more than 15% of the capital or of the voting rights of a company holder of a license for a national service of terrestrial television in analog mode, it may not hold, directly or indirectly, more than 15% of the capital or of the voting rights of another company holder of such a license.*

*When a physical or moral person owns, directly or indirectly, more than 5% of the capital or of the voting rights of two companies holders of a license on a national terrestrial television service in analog mode, it may not hold, directly or indirectly, more than 5% of the capital or of the voting rights of another company holder of such a license.*

*II. A same physical person or legal entity may hold, directly or indirectly, more than half of the capital or of the voting rights of a company holder of a license relating to a television service in analog mode exclusively on the frequencies assigned to the radio and television by satellite.*

*When a physical or moral person owns, directly or indirectly, more than a third of the capital or of the voting rights of a company holder of a license relating to a television service in analog mode exclusively on the frequencies assigned to radio and television by satellite, it cannot hold, directly or indirectly, more than a third of the capital or of the voting rights of another company holder of such a license.*

*When a physical or moral person owns, directly or indirectly, more than 5% of the capital or of the voting rights of two companies holders of a license relating to a television service in analog mode exclusively on the frequencies assigned to radio and television by satellite, it cannot hold, directly or indirectly, more than 5 per cent of the capital or of the voting rights of another company holder of such a license.*

*III. A same physical or moral person holder of a license for a national terrestrial television service whose audience exceeds the threshold referred to in I may not hold, directly or indirectly, more than 33% of the capital or of the voting rights of a company holder of a license relating to a service other than national and which does not primarily consist in the rebroadcast, in the French overseas territories, of a national television service. [...]*

*Article 40. Subject to the international commitments entered into by France, no person of foreign nationality may not proceed with an acquisition having for effect of reaching, directly or indirectly, the share of the capital held by foreigners to more than 20% of the social capital or of the voting rights in the general assemblies of a company licensed for a terrestrial radio or television service broadcasted in French language.*

*Is regarded as a person of foreign nationality, for the application of this Article, any physical person of foreign nationality, any company in which the majority of the social capital is not held, directly or indirectly, by natural or legal persons of French nationality and any association whose leaders are of foreign nationality.*

*This article is not applicable to service providers whose capital and voting rights are held at a level of at least 80% by public broadcasters belonging to the Member States of the Council of Europe and whose share of the capital and voting rights held by one of the companies mentioned in Article 44 is at least equal to 20%.*

*Article 41. The same physical or moral person cannot, on the basis of licenses relating to the use of frequencies of which it is the holder for broadcasting one or several terrestrial radio services in analog mode, or by the means of a program that it provides to other holders of a license for terrestrial radio in analog mode, have in law or in fact, several networks to the extent that the sum of the populations covered in the areas served by these different networks does not exceed 150 million inhabitants.*

*No one may be the holder of two licenses relating each to a national terrestrial television service. This provision does not apply to services broadcasted via Personal Mobile Television.*

*No one can be simultaneously the holder of a license for a national terrestrial television service whose audience exceeds the threshold mentioned in article 39.I and of a license for a service of the same nature in analog mode other than national. A same person may however be simultaneously the holder of a license for a national terrestrial television service and several licenses relating to services of the same nature, each covering a different geographical area located in an overseas department of overseas or in New Caledonia.*

*However, the same person may be the holder, directly or indirectly, of a maximum number of seven licenses relating each to a national service other than Personal Mobile Television broadcast in digital terrestrial mode when these services are edited by separate companies or when they are allowed under the conditions laid down in the second subparagraph of iii of Article 30-1, in its drafting prior to the entry into force of Act No. 2007-309 of 5 March 2007 relating to the modernization of the audiovisual broadcast and to the television of the future, or in the last paragraph of the iii of Article 30-1.*

*A person may not be the holder of more than two licenses relating each to a television service broadcasted in analog mode exclusively on the frequencies assigned to radio and television by satellite.*

*A person who is the holder of one or more licenses relating each to a terrestrial television service in analog mode other than national cannot become the holder of a new license relating to a service of the same nature other than national if this license should have the effect to bring to more than 12 million inhabitants the population in the zones covered by all the services of the same nature for which it would be the license holder.*

*A person who is the holder of one or more licenses relating each to a terrestrial television service in digital mode other than national cannot become the holder of a new license relating to a service of the same nature other than national if this license should have the effect to bring to more than 12 million inhabitants the population in the zones covered by all the services of the same nature for which it would be the license holder.*

*A person who is the holder of license for the operation of a terrestrial television service in analog mode in a specific area may not become the holder of a new license relating to a service of the same nature broadcasted in full in the same area in analog mode.*

*A person who is the holder of an authorization for the operation of a service of terrestrial television in digital mode in a specific area may not become the holder of a new license relating to a service of the same nature broadcasted in full in the same area in digital mode.*

No one may be the holder of one or more licenses relating each to a radio service whose potential cumulative terrestrial audience exceeds 20% of the potential cumulative audience of all radio services, public or licensed, broadcasted terrestrially.

No one may be the holder of one or more licenses relating each to a service distributed in Personal Mobile Television if the potential cumulative terrestrial audience of this or these services exceeds 20% of potential cumulative terrestrial audience of all television services, public or licensed, broadcasted in Personal Mobile Television.

Article 41-1. In order to prevent violations of pluralism at the national level in analog mode, no license relating to a terrestrial radio or television service in analog mode can only be issued to a person who would be, of this fact, in more than two of the following situations:

1° be the holder of one or more licenses relating to terrestrial television services allowing the person to reach a population of 4 million inhabitants;

2° be the holder of one or more licenses relating to radio services allowing the person to reach a population of 30 million inhabitants;

3° paragraph repealed;

4° edit or control one or several daily printed publications of political and general information representing more than 20% of the total distribution on the national territory, of daily printed publications of the same nature, appreciated on the 12 months preceding the date on which the application for a licence has been submitted.

However, a license may be issued to a person who does not satisfy the provisions of this Article subject it puts itself in conformity with these provisions within a time limit which is fixed by the Council and which may not be more than six months.

Article 41-1-1. In order to prevent violations of pluralism at the national level in digital mode, no license relating to a terrestrial radio or television service in analog mode can only be issued to a person who would be, of this fact, in more than two of the following situations:

1° be the holder of one or more licenses relating to terrestrial television services allowing the person to reach a population of 4 million inhabitants;

2° be the holder of one or more licenses relating to radio services allowing the person to reach a population of 30 million inhabitants;

3° paragraph repealed;

4° edit or control one or several daily printed publications of political and general information representing more than 20% of the total distribution on the national territory, of daily printed publications of the same nature, appreciated on the 12 months preceding the date on which the application for a licence has been submitted.



However, a license may be issued to a person who does not satisfy the provisions of this Article subject it puts itself in conformity with these provisions within a time limit which is fixed by the Council and which may not be more than six months.

Article 41-2. In order to prevent violations of pluralism on the regional and local level in analog mode, no license relating to a service other than national terrestrial radio or television in analog mode may be issued for a specific geographical area to a person who would be of this fact in more than two of the following situations:

1° be the holder of one or more licenses relating to television services, of national character or not, broadcasted terrestrially in the area concerned;

2° be the holder of one or more licenses relating to radio services, of national character or not, whose potential cumulative audience, within the considered coverage zone, exceeds 10% of the potential cumulative audience, in the same area, of all the services, public or licensed, of the same nature;

3° paragraph repealed;

4° edit or control one or several daily printed publications, of political and general information, of national character or not, disseminated in this area.

However, a license may be issued to a person who does not satisfy the provisions of this article, subject to it puts itself in compliance with these provisions in the conditions laid down in the last paragraph of Article 41-1 above.

Article 41-2-1. In order to prevent violations of pluralism on the regional and local level in digital mode, no license relating to a service other than national terrestrial radio or television in digital mode may be issued for a specific geographical area to a person who would be of this fact in more than two of the following situations:

1° be the holder of one or more licenses relating to television services, of national character or not, broadcasted terrestrially in the area concerned;

2° be the holder of one or more licenses relating to radio services, of national character or not, whose potential cumulative audience, within the considered coverage zone, exceeds 10% of the potential cumulative audience, in the same area, of all the services, public or licensed, of the same nature;

3° paragraph repealed;

4° edit or control one or several daily printed publications, of political and general information, of national character or not, disseminated in this area.

However, a license may be issued to a person who does not satisfy the provisions of this article, subject to it puts itself in compliance with these provisions in the conditions laid down in the last paragraph of Article 41-1 above.



Article 41-3. For the application of Articles 39, 41, 41-1, 41-1-1, 41-2 and 41-2-1:

1° paragraph repealed;

2° any physical or moral person who controls, in the light of the criteria contained in article L. 233-3 of the Code of Commerce, a licensed company or has placed it under its authority or its dependency is regarded as the holder of a license; is also regarded as the holder of license any person who operates or controls a terrestrial radio service or a television service broadcasted exclusively on the frequencies assigned to radio and television by satellite, from abroad or on the frequencies assigned to foreign States, and normally received in the French language, on French territory;

3° any physical or moral person who controls, within the meaning of article 11 of Act No. 86-897 of 1 August 1986 on the reform of the legal regime of the press, the company editing a publication is regarded as the editor of this publication;

4° in the sector of terrestrial radio:

a) constitutes a network any service or group of services broadcasting a same program during the majority of broadcasting time of each service;

(b) constitutes a broadcast network of national character any network that covers a zone in which the population is greater than 30 million inhabitants;

5° any terrestrial television service which covers a geographical zone for which the population is greater than 10 million inhabitants is considered as a service of national character;

6° any terrestrial service broadcasted simultaneously and fully on the frequencies assigned to radio and television by satellite is regarded as a single service broadcasted by terrestrial;

6°bis any terrestrial service in digital mode, authorized after a tender and consisting in full rebroadcasting overseas of a national program licensed on the metropolitan territory, edited by the same legal person, is regarded as a single service broadcasted by terrestrial;

7° the potential audience of a service means the population in the municipalities or parts of municipalities located in the coverage zone of this service. For the calculation of the potential audience of the services in Personal Mobile Television, programs consisting, under the conditions laid down in Article 28 14°, in the full or partial replay of a same service are regarded as separate services.

Article 42-3. The license may be withdrawn without prior notice, in the event of substantial modification of the data on which it was issued, including changes in the composition of the social capital or of the management bodies and in the terms and conditions of funding.

In compliance with the criteria mentioned in article 29, including the fair balance between national networks and local services, regional and thematic independent, the Council can give its approval to a

change of holder of a license of radio services when this change benefits to the moral person who controls, or is controlled by the initial owner of the license in the light of the criteria contained in article L. 233-3 of the Code of Commerce. On the occasion of this change in the holder of the license, the Council may, in the same conditions, give its approval to a change in the category for which the service is authorised. This change may not be approved outside a call for tender by the Council if it is incompatible with the preservation of the balance in the advertising markets, including locally.

This change of holder of the license is not open to the services referred to in article 80 and to local services, regional and thematic independent.

Subject to the respect of articles 1 and 3-1, the Council may, by reasoned decision, give its approval to an amendment of the terms of financing when it focuses on the use or non-use of remuneration on the part of users. Prior to its decision, it proceeds to an impact study, including in its economic aspects, made public in respect of business secrecy. It also proceeds to a public hearing of the holder and of third parties who request it. This modification of the license may be approved if the balance in the advertising market of services of terrestrial free-to-air television is taken into account.

Without prejudice to the application of the first subparagraph, any holder of a license issued in application of Articles 29,29-1,30-1,30-5 and 96 must obtain an approval of the Council in the case of modifications of the direct or indirect control, within the meaning of article L. 233-3 of the Code of Commerce, of the license holder. This approval is the subject of a reasoned decision and is issued taking into account the respect by the service provider, during the two years preceding the year of its application, of its obligations relating to the programming of the service.

When the change of control on a national television service licensed in application of Article 30-1 of the present Act or a radio service belonging to a network of national character, within the meaning of Article 41-3, and that this change is likely to significantly alter the market in question, the approval is preceded by an impact study, including in its economic aspects, made public in respect of business secrecy.

If it considers it useful, the Council can perform such a study for the other licensed services.

## 7.10. FI – Finland

- **Act on Television and Radio operations:**<sup>164</sup>

Section 13. Assignment of a licence to another party and changes in effective control. A licence granted for television or radio broadcasting may not be assigned to another party. If the licence holder assigns the licence to another party, the licence becomes void. The licensing authority must make a formal decision confirming that the licence has become void.

If the effective control with regard to a licence holder changes, the licensing authority may approve the changes in accordance with provisions of subsection 4, or cancel the licence as provided in subsection 5.

<sup>164</sup> <http://www.finlex.fi/fi/laki/kaannokset/1998/en19980744.pdf> (in English).

The same applies to the powers of the licensing authority, if the effective control of the licence holder with regard to the operations referred to in the licence changes in that the licence holder can no longer be regarded as a broadcaster referred to in subsection 2 as regards operations referred to in the licence.

Any transfer or change referred to in subsection 1 or 2 shall be notified immediately to the licensing authority. The licence holder may request a preliminary ruling on the matter. The licensing authority shall decide the matter within two months of reception of notification or application. If a change in the effective control concerns a company acquisition that in accordance with the Competition Act (948/2011) has to be reported to the Finnish Competition Authority, or in accordance with the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "EC Merger Regulation") has to be reported to the Commission, the decision has to be issued by the licensing authority no later than two months after the definitive decision concerning the company acquisition was made. (667/2012)

The licensing authority may approve a change in effective control, if it is evident that

- 1) the conditions for granting a licence referred to in section 10 are met; and
- 2) the operations will continue in accordance with the licence terms.

In cases other than the one referred to in subsection 4 the licensing authority must cancel the licence if any changes in effective control are found.

An internal transfer of a licence within a group between the parent company and a wholly owned subsidiary is not considered to be a licence transfer that would require avoidance. Such a transfer shall be notified immediately to the licensing authority. If the licence holder is declared bankrupt, the licence will become invalid immediately.

## 7.11. GB – United Kingdom

- Communications Act 2003:<sup>165</sup>

391. Review of media ownership. (1) It shall be the duty of OFCOM:

- (a) to carry out regular reviews of the operation, taken together, of all the provisions to which this section applies; and
- (b) to send a report on every such review to the Secretary of State.

(2) This section applies to:

- (a) the provisions of Schedule 2 to the 1990 Act;
- (b) the provision made by or under Schedule 14 to this Act;

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<sup>165</sup> <http://www.legislation.gov.uk/ukpga/2003/21/contents>

(c) the provisions of sections 280 and 281 of this Act;

(d) whatever provision (if any) has been made under section 283 of this Act; and

(e) the provisions of Part 3 of the Enterprise Act 2002 (c. 40) so far as they relate to intervention by the Secretary of State in connection with newspapers or other media enterprises.

(3) The first review must be carried out no more than three years after the commencement of this section, and subsequent reviews must be carried out at intervals of no more than three years.

(4) The report to the Secretary of State on a review must set out OFCOM's recommendations, in consequence of their conclusions on the review, for the exercise by the Secretary of State of:

(a) his power to make an order under section 348(5);

(b) his powers to make orders under Schedule 14;

(c) his powers under sections 282 and 283; and

(d) his powers under sections 44(11), 58(3) and 59(6A) of the Enterprise Act 2002 (media mergers).

(5) OFCOM must publish every report sent by them to the Secretary of State under this section in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to be affected by it.

- The rules mentioned in article 391 (2) of the Communications Act are summed up as follow by OFCOM<sup>166</sup>:
  - Schedule 2 Broadcasting Act 1990

A1.3 Schedule 2 of the Broadcasting Act 1990 disqualifies the following from holding broadcast licences:

- A local authority (except to the extent it is providing a service exclusively to provide information relating to its own activities);
- A body whose objects are wholly or mainly of a political nature;
- A body "affiliated" to a body whose objects are wholly or mainly of a political nature;
- A body corporate (e.g. a company) which controls, or is controlled by, or shares a common controller with a body whose objects are wholly or mainly of a political nature;
- A body corporate (e.g. a company) which controls, or is controlled by, or shares a common controller with a body which is affiliated to a body whose objects are wholly or mainly of a political nature;
- A body corporate, (and any body corporate it controls), in which any of the above is a participant with more than a 5% interest;
- An individual who is an officer (e.g. a director) of a body (e.g. a company) of which the objects are wholly or mainly of a political nature;

<sup>166</sup> <http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-ownership/morr-2012-statement.pdf>

- An individual who is an officer (e.g. a director) of a body (e.g. a company) which is affiliated to a body whose objects are wholly or mainly of a political nature;
- A body which is controlled by any one, or two or more taken together, of: a local authority, a body whose objects are wholly or mainly of a political nature; a body affiliated to a body whose objects are wholly or mainly of a political nature; an individual who is an officer of a body of which the objects are wholly or mainly of a political nature; an individual who is an officer of a body which is affiliated to a body whose objects are wholly or mainly of a political nature; a body corporate which controls, or is controlled by, or shares a common controller with a body whose objects are wholly or mainly of a political nature; or a body corporate which controls, or is controlled by, or shares a common controller with a body which is affiliated to a body whose objects are wholly or mainly of a political nature.
- A body corporate in which the following is a participant with more than a 5% interest: a body which is controlled by any one, or two or more taken together, of the following, (unless it is controlled by one or more of an individual who is an officer of a body of which the objects are wholly or mainly of a political nature; an individual who is an officer of a body which is affiliated to a body whose objects are wholly or mainly of a political nature): a local authority; a body whose objects are wholly or mainly of a political nature; a body affiliated to a body whose objects are wholly or mainly of a political nature; an individual who is an officer of a body of which the objects are wholly or mainly of a political nature; an individual who is an officer of a body which is affiliated to a body whose objects are wholly or mainly of a political nature; a body corporate which controls, or is controlled by, or shares a common controller with a body whose objects are wholly or mainly of a political nature; or a body corporate which controls, or is controlled by, or shares a common controller with a body which is affiliated to a body whose objects are wholly or mainly of a political nature.
- The BBC.
- The Welsh Authority.
- An advertising agency, together with any of its directors or employees, any spouse, relative or partner, any body corporate which controls, or is controlled by, or shares a common controller with it, any body that any of these (taken together) control, any corporate body in which one of them is a participant with more than a 5% interest.

A1.4 Bodies receiving more than half of their income from public funds (other than the BBC, the Welsh Authority and local authorities) may not hold independent sound broadcasting licences or digital terrestrial sound broadcasting licences, and nor may any body which is controlled by such a body or any body corporate in which either is a participant with more than a 5% interest.

A1.5 The Act disqualifies a person from holding a licence if “any relevant body” is exerting influence over its activities which has led, is leading or is likely to lead to results which are adverse to the public interest. Exerting influence can include the giving of financial assistance. What counts as a relevant body differs for television and radio services. For both, it is local authorities and bodies whose objects are wholly or mainly of a political nature, together with various linked persons and combinations of such persons as set out above. For radio, there is an additional exclusion for bodies which are more than half publicly funded, which corresponds to that set out above.

A1.6 The Act also prevents certain kinds of licences from being held by bodies whose objects are wholly or mainly of a religious nature, together with their officers, those they control, or are controlled by, or share a controller with, bodies corporate in which any of these have a 5% interest, and bodies controlled by one or more officers of bodies whose objects are wholly or mainly of a religious nature. The licences so restricted are:

- Channel 3;
- Channel 5;
- National sound broadcasting;
- Public teletext;
- Additional television service; and
- Television or radio multiplex.

A1.7 The Secretary of State has a power under section 348(5) of the Communications Act 2003 to repeal or modify this disqualification of religious bodies.

A1.8 Finally, there are some specific exclusions:

- A BBC company, a Channel 4 company and an S4C company are each disqualified in relation to regional or national Channel 3 services or Channel 5;
  - A BBC company is a disqualified person in relation to independent radio services.
- Schedule 14 Communications Act 2003

A1.9 Schedule 14 Communications Act prevents any person from holding a licence to provide a Channel 3 service if he runs a national newspaper or newspapers which have a national market share of 20 per cent or more. The ban affects both the Channel 3 licence holder itself and “every person connected with” the Channel 3 licence holder, which includes those controlling, controlled by, or sharing a controller with the licensee, together with directors.

A1.10 There is also a ban on the proprietor of a national newspaper or newspapers with a market share of 20 per cent or more from holding more than a 20% interest in a body corporate (e.g. a company) which holds a Channel 3 licence. A Channel 3 licence holder, similarly, may not be a participant with more than a 20 per cent interest in a body corporate which is a “relevant national newspaper proprietor” (i.e. a person who runs a national newspaper or newspapers with a market share of 20 per cent or more). Finally, there is a ban on a body corporate in which a relevant national newspaper proprietor is a participant with more than a 20 per cent interest from being a participant with more than a 20 per cent interest in a body corporate which holds a licence to provide a Channel 3 service.

A1.11 The restrictions imposed on participation in a body corporate which is the holder of a Channel 3 licence apply equally to participation in a body corporate which controls the holder of such a licence, and restrictions on participation apply as if the newspaper proprietor/Channel 3 licensee and every person connected with him were one person.

A1.12 The Secretary of State has a power to modify or repeal any of these provisions by order.

A1.13 The Secretary of State has a power to make an order prohibiting the holding at the same time by the same person, in specified circumstances, of more than a specified number of local sound broadcasting licences, or of just one local sound broadcasting licence. The power has been used to prevent a body corporate from holding more than one community radio licence at a time. There is a separate power to limit the number of local digital sound programme licences that a person is permitted to provide.

A1.14 Finally, the Schedule prevents religious bodies from holding any broadcasting licence not listed in the relevant paragraph of Schedule 2 of the Broadcasting Act 1990, unless Ofcom has determined that it is appropriate.

A1.15 The Secretary of State has a power to amend or repeal this restriction.

- Sections 280 and 281 of the Communications Act 2003

A1.16 Section 280 Communications Act 2003 requires Ofcom to include as a condition of each regional Channel 3 licence, an obligation for each licensee to be part of arrangements to appoint a single news provider for them all. The obligations are there to ensure that the regional Channel 3 services (taken together) broadcast news programmes that are able to compete effectively with other nationwide news broadcasts in the UK.

A1.17 Section 281 disqualifies certain persons from being the appointed news provider – essentially, anyone who would be prohibited from holding a Channel 3 licence themselves is also prohibited from being the appointed news provider.

A1.18 The Secretary of State has a power to repeal or modify these sections by order.

- Any provision made under section 283 of the Communications Act 2003

A1.19 Section 283 Communications Act 2003 gives the Secretary of State a power to make an order, if she considers it appropriate, making provision requiring news programmes in Channel 5 to be provided by a person appointed as a news provider in accordance with the order.

A1.20 No such order has been made.

- Part 3 of the Enterprise Act 2002 relating to intervention by the Secretary of State in connection with newspapers or other media enterprises.

A1.21 Under Part 3 of the Enterprise Act 2002, the Secretary of State may issue an intervention notice in relation to mergers which meet jurisdictional thresholds, specifying a “public interest consideration” in relation to the merger.

A1.22 An intervention notice triggers review of the merger to determine whether or not it operates or may be expected to operate against the public interest.

A1.23 A public interest consideration may be one that is already specified in the Act, or one which the Secretary of State proposes at the time (in which case it must then be “finalised” by statutory instrument).



A1.24 The considerations relating to newspapers or other media enterprises are known collectively as the “media public interest considerations”. They are:

- The need for (a) accurate presentation of news; and (b) free expression of opinion; in newspapers;
- 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 is specified in this section;
- 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;
- 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
- The need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

A1.25 An enterprise is a media enterprise if it “consists in or involves broadcasting”.

A1.26 The Secretary of State has a power under section 44(11) Enterprise Act 2002 to amend the definitions of “broadcasting” and “newspapers”. She has a power under section 58(3) to modify the list of public interest considerations in the Act, which could be used to create a new consideration or remove or amend the existing ones. She has a power under section 59(6A) to amend the jurisdictional threshold which catches mergers that do not qualify for review on competition grounds, i.e. that one of the parties to the merger supplies at least a quarter of all newspapers of a particular description, or all broadcasting of a particular description.

## 7.12. HR – Croatia

- **Electronic Media Act (Zakon o elektroničkim medijima):<sup>167</sup>**

Article 52. Publicity of Ownership. Article 52. (1) By January 31 of each calendar year, media service providers shall be obliged to forward to the Electronic Media Council the data on a legal person and its seat, i.e. name, surname and permanent residence of all legal and natural persons who have directly or indirectly become holders of stocks or a share in that legal person, along with the data on the percentage of stocks or the share they possess.

(2) Media service providers shall be obliged to deliver certified copies of documents on the acquisition of stocks or shares in the media service provider during the preceding year to the Electronic Media Council within the period referred to in paragraph 1 of this Article. Documents on the acquisition of shares shall not be delivered for stocks or shares up to 1% of the capital value.

<sup>167</sup> [http://www.e-mediji.hr/repository\\_files/file/502/](http://www.e-mediji.hr/repository_files/file/502/) (in English).



(3) The Electronic Media Council shall forward a written warning to a media service provider which fails to perform the obligation referred to in paragraphs 1 and 2 of this Article with the explanation of possible sanctions for the non-fulfilment of the obligation.

(4) A media service provider shall be obliged to publish the data referred to in paragraph 1 of this Article in the Official Gazette. Data on holders of stocks or share up to 1% of the capital value are published collectively.

(5) The concealment of the ownership structure of the media service provider as well as the ownership of the acquirer of the stocks or shares in the media service provider by means of any legal transaction shall be prohibited. Legal transactions which conceal the ownership structure of the media service provider as well as the ownership of the acquirer of the stocks or shares in the media service shall be null and void.

Article 54. The following shall be considered as an impermissible concentration within the meaning of this Act:

- the television and/or radio broadcaster who has concession at the state level and a share exceeding 25% of the capital of another broadcaster who has the same kind of concession or a concession on the regional, county, city or municipality level, and vice versa,
- the television and/or radio broadcaster who has concession at the state level and a share exceeding 10% of the capital of publisher who publishes daily newspapers printed in more than 3,000 copies, and vice versa,
- the television and/or radio broadcaster who has concession at the state level and a share exceeding 10% of the capital of a legal person who performs the activity of a newspaper agency, and vice versa,
- the television and/or radio broadcaster who has concession at the state level and simultaneously publishes daily newspapers printed in more than 3,000 copies,
- the television and/or radio broadcaster with a concession at the local or regional level of coverage and shares exceeding 30% of the capital of another such broadcaster with the concession at the local or regional level of coverage in the same area,
- the television and/or radio broadcaster who has a concession at the regional or local level of coverage and simultaneously publishes daily newspapers of local importance in the same or in the neighbouring area,
- the media service provider set out in Article 79 of this Act who simultaneously publishes daily newspapers printed in more than 3,000 copies,
- the media service provider set out in Article 79 of this Act who has a share exceeding 10% of the capital of a publisher who publishes daily newspapers printed in more than 3,000 copies, and vice versa.

*Article 55. It shall also be considered that impermissible concentration exists in the area of media also when, in cases referred to in Article 54 of this Act, a natural or legal person, who is the founder of the television and/or radio broadcaster or the media service provider set out in Article 79 of this Act, or a founder, or persons related to him/her in the sense of Article 53 of this Act, has a share in the capital of another television and/or radio broadcaster, newspapers publisher of a daily newspaper or news agency, above the determined amount of capital.*

*Article 56. (1) The Electronic Media Council shall not grant a concession to the most advantageous tenderer who applies to the procedure for the award a concession, if it has been determined that the award of a concession would create an impermissible concentration in the sense of this Act.*

*(2) Each tenderer who applies to the published notice of intent to award a concession shall be obliged to enclose a verified statement along with the tender indicating that impermissible concentration in the sense of this Act shall not be created by a possible award of concession.*

*(3) The media service provider set out in Article 79 of this Act shall be obliged to enclose a statement along with the request for issuing licence for satellite, internet and cable transmission of the audiovisual and/or radio programme indicating that the licence issuing shall not create impermissible concentration in the sense of this Act.*

*Article 57. (1) The television and/or radio broadcaster and the media service provider set out in Article 79 of this Act shall report in writing on any change in the ownership structure to the Electronic Media Council.*

*(2) Should the Electronic Media Council determine that the occurred changes in the ownership structure resulted in an impermissible concentration in the area of media, it shall give an order to the television and/or radio broadcaster and the media service provider set out in Article 79 of this Act to conform its ownership structure, within a certain deadline, in a manner which is not contrary to the provisions of this Act.*

*(3) Should the television and/or radio broadcaster fail to comply with the order of the Electronic Media Council, the provisions of this Act stipulating the termination of validity of the concession prior to the expiration of the deadline for which it was granted shall be applied, and the decision on the cancellation of the concession shall be passed by the Electronic Media Council.*

*(4) Should the media service provider set out in Article 79 of this Act fail to comply with the order of the Electronic Media Council, the provisions of this Act stipulating the termination of validity of the licence for satellite, internet and cable transmission of the audiovisual and/or radio programme shall be applied.*

*Article 58. (1) A domestic legal person, whose founders include also foreign legal persons registered in countries in which, according to those countries' regulations, it is not permissible or it is not possible to determine the origin of the founding capital, may not participate in a procedure for a concession grant in compliance with this Act.*

(2) Should it be subsequently determined that one of the founders of the television and/or radio broadcaster to whom a concession was awarded is a foreign legal person referred to in paragraph 1 of this Article, the provision of Article 57 paragraph 2 and 3 of this Act shall apply.

Article 59. (1) A particular broadcaster may perform either television media service or radio media service.

(2) The provision of the previous paragraph shall not apply if the broadcaster obtains, pursuant to this Act, the approval of the Electronic Media Council, in the case when the broadcaster does not provide television and radio media services in the same area.

Article 60. (1) A legal person whose activity is collection, shaping and mediation in advertising, as well as a natural or legal person, or a group of connected persons, which has more than 10% of the ownership share in the capital, i.e. property of that sort, or which has more than 10% of management or voter's rights, may not be a television and/or radio broadcaster and/or founder of radio and/or television broadcaster, nor can it have ownership of stocks or shares in the capital of the television and/or radio broadcaster.

(2) Should the Electronic Media Council determine that the impermissible changes in the ownership structure referred to in paragraph 1 of this Article have occurred, it shall give an order to the television and/or radio broadcaster to conform its ownership structure within a certain deadline in a manner which is not contrary to the provisions of this Act.

(3) Should the television and/or radio broadcaster fail to comply with the order of the Electronic Media Council, the provisions of this Act stipulating the termination of validity of the concession prior to the expiration of the deadline for which it was awarded shall be applied, and the decision on the cancellation of the concession shall be passed by the Electronic Media Council.

Article 61. An operator who performs the activity of audiovisual and/or radio programme transmission may not be the television and/or radio broadcaster as well as the media service providers referred to in Articles 79 of this Act.

Article 62. The provisions on ownership and concentration shall also apply to foreign legal and natural persons, regardless of the state in which they have their seats, i.e. permanent residence, save if otherwise stipulated by this Act.

## 7.13.HU – Hungary

- Act CLXXXV of 2010 on Media Services and Mass Communication (évi CLXXXV törvény a médiaszolgáltatásokról és a tömegkommunikációról):<sup>168</sup>

Article 67. The market concentration of media service providers providing linear media services may be limited within the framework of this Act in order to maintain the diversity of the media market and to prevent the formation of information monopolies.

<sup>168</sup> [http://hunmedialaw.org/dokumentum/153/Mttv\\_110803\\_EN\\_final.pdf](http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf) (in English).

Article 68. (1) Linear audiovisual media service providers with an average annual audience share of at least thirty-five percent, linear radio media service providers, and media service providers having a joint average annual audience share of at least forty percent on the linear audiovisual and linear radio markets, any owners of the media service provider and any person or undertaking having a qualifying holding in the media service provider's owner:

a) may not launch new media services, may not acquire shares in undertakings providing media services, and

b) shall take measures in order to increase the diversity of the media market by modifying the programme flow structure of its media services, by increasing the proportion of Hungarian works and programmes prepared by independent production companies, or in any other way.

(2) In the case presented under Paragraph (1) (a), if the media service provider affected by the rule restricting media market concentration wishes to acquire a share in an undertaking providing media services, the Media Council shall be obliged to reject the special authority approval under its procedure as per Article 171.

(3) In the case presented under Paragraph (1) (b), in order to determine the measures aimed at increasing diversity, the Media Council may conclude a public contract – for a term of at least one year – with the media service provider, at the media service provider's request, and under such procedure the Media Council shall be entitled to assess whether it accepts the obligations the media service provider wishes to undertake or not. Such applications may be submitted within thirty days from the communication of the Media Council's regulatory decision as per Article 70 (7). If the public contract – due to failure to reach an understanding – is not concluded within three months from the communication of the regulatory decision specified in Article 70 (7), the Media Council shall terminate the procedure by a decision.

(4) In the absence of the conclusion of a public contract specified under Paragraph (3), the media service provider shall submit its application for the approval of its measures aimed at increasing media market diversity, within six months of the communication of the Media Council's regulatory decision specified in Article 70 (7). In its procedure conducted regarding the approval of the application, the Media Council shall assess whether the proposed measures are suitable for decreasing the former information monopoly and for increasing media market diversity and information pluralism. In the event of the late fulfilment of such obligation, the Media Council shall impose a procedural fine.

(5) If the application complies with the conditions specified under Paragraph (4), the Media Council shall approve it by its decision.

(6) In case of any doubt, it is the media service provider's responsibility to prove that the proposed measures comply with the conditions specified under Paragraph (4).

(7) If the Media Council does not approve the proposed measures, it shall adopt a decision wherein it shall identify the causes of non-compliance, as far as the principles specified under Paragraph (4) are concerned.

(8) In the case presented under Paragraph (7), the media service provider shall submit a new plan for proposed measures by the deadline set by the Media Council, but, within thirty days at most, taking into account the considerations specified in the Media Council's decision as per Paragraph (7). In the event of the late fulfilment of such obligation, the Media Council shall impose a procedural fine. If the measures specified in the new application also fail to satisfy the criteria defined under Paragraph (4), the Media Council may enforce the respective legal sanctions in accordance with Articles 185-187.

(9) The Media Council shall supervise the implementation of the measures approved through its decision within the framework of general regulatory supervision.

(10) The average annual audience share jointly reached on the linear audiovisual and linear radio market shall, for the purposes of Paragraph (1), be determined by adding the individual average annual audience shares, expressed as a percentage, attained separately on the linear audiovisual and linear radio markets.

Article 69. (1) Linear audiovisual media service providers and linear radio media service providers with an average annual audience share of at least fifteen percent shall qualify as media service providers with significant market power, provided that the average annual audience share of at least one their media service reaches three percent.

(2) The Media Council shall regularly monitor the fulfilment of the obligations prescribed for media service providers with significant market power under Article 32 and Articles 38-39.

(3) The Authority may conclude an agreement with an external contractor for measuring the average annual audience share defined in Article 68 and Paragraph (1). The contracting party shall be selected in an open tender procedure. When preparing the agreement and determining the tender result, the Authority shall cooperate with the media service providers. The agreement shall define the method for measuring audience share, the professional criteria thereof, and the procedure for auditing the results.

(4) The Authority shall publish on its website the methodology used for measuring audience share and the average annual audience share of media services for the previous calendar year.

Article 70. (1) For the purposes of the procedures aimed at the prevention of media market concentration and at identifying media service providers with significant market power, the Media Council shall examine market facts and circumstances important (hereinafter as: relevant) for the assessment of the level of concentration, in particular the media service provider's average annual audience share for the previous calendar year, under the regulatory inspection as per the Act on the General Rules of Administrative Proceedings and Services, with the deviations defined under Paragraphs (2)-(6).

(2) In order to clarify the relevant facts and circumstances, the Media Council may require the media service providers to provide data in the course of its regulatory inspection, by way of an order. No independent legal remedy shall be available against the order; the order may be challenged in a legal remedy procedure brought against the decision on the merits made in a procedure that may follow the regulatory inspection and is aimed at the prevention of media market concentration and at identifying media service providers with significant market power.

(3) In the event of failure to provide data or upon inadequate provision of data, the Media Council may, pursuant to Article 175 (8), impose a procedural fine. Over and above the fine, if the data are not provided or if data are provided inadequately, the Media Council shall be entitled to, and in case of a repeated breach of law, shall be obliged to impose a fine ranging from fifty thousand forints to three million forints on the officer or registered representative, as per Article 45 (1) (ad), of the media service provider found in breach of the law.

(4) The following shall be taken into account when determining audience share, or added to the audience share:

a) the audience share of all linear media services distributed by the media service provider on the territory of Hungary,

b) the audience share of the linear media services distributed on the territory of Hungary by media service providers in whom the affected media service provider has a qualifying holding, and

c) the audience share of linear media services distributed on the territory of Hungary by a media service provider in whom any owner of the affected media service provider, or the owner of the owner thereof has a qualifying holding.

(5) If, based on the regulatory inspection, the Media Council established that there is a circumstance providing grounds for conducting a procedure aimed at the prevention of media market concentration and at identifying media service providers with significant market power, then, notwithstanding the relevant provisions of the Act on the General Rules of Administrative Proceedings and Services, it shall only decide to launch the procedure in an order.

(6) No procedure shall be launched by the Media Council if it establishes on the basis of the regulatory inspection that neither the media service provider affected by the rules restricting media market concentration identified in the decision made earlier as per Paragraph (7), nor the group of media service providers with significant market power identified in the decision as per Paragraph (7) or in the public contract as per Paragraph (10) have changed.

(7) In the procedure aimed at the prevention of media market concentration and at identifying media service providers with significant market power, the Media Council shall identify the media service provider affected by the rules restricting media market concentration as per Article 68 or the media service provider with significant market power as per Article 69 in a regulatory decision, and shall decide on the termination of such status determined in its earlier decision.

(8) In its decision made within the framework of a procedure aimed at identifying media service providers with significant market power, the Media Council shall also define the exact contents of the obligations imposed on the media service provider with significant market power pursuant to Article 32 and Articles 38-39, taking into account the assessment criteria defined therein.

(9) A review of the Media Council's decision made within the framework of the procedure aimed at the prevention of media market concentration and at identifying media service providers with significant market power may be requested from the Budapest Administrative and Labour Court by the client and



by any other participant in the proceeding as regards the provisions expressly applicable to him/her, within fifteen days of the decision's announcement, on the grounds of breach of law.

(9a) The Media Council shall forward the statement of claim, together with the documents and representations of the case, to the Budapest Administrative and Labour Court within fifteen days of receipt thereof. The court shall assess the statement of claim for a judicial review within sixty days from the submission of the statement of claim by the Media Council to the court and shall put down its decision in writing until the day of its announcement. No appeal may be lodged against the decision of the court and no retrial can be requested. The petition for review of the decision can be lodged within fifteen days from announcement of the decision, with the provision that the petition for review must be actually received by the Budapest Administrative and Labour Court within the time limit set for filing. If this deadline (limitation period) is missed, no petition for excuse will be accepted. The Curia shall assess the petition for review within sixty days and shall put down its decision in writing within this deadline. The Budapest Administrative and Labour Court and the Curia shall hold an accelerated procedure. The court shall have the right to change the decision of the Media Council.

(10) In the procedure aimed at identifying media service providers with significant market power, the Media Council, rather than issuing a decision, may also conclude a public contract with the media service provider in order to identify whether the media service provider has significant market power and to define the exact contents of the obligations imposed on the media service provider with significant market power pursuant to Article 32 and Articles 38-39. In such case, the parties may depart from the assessment criteria for determining the obligations specified in Article 32 and Articles 38-39 with the provision that the media service provider with significant market power may not be exempted, not even in the public contract, from its obligations defined therein.

(11) The Media Council shall conduct its procedure aimed at the prevention of media market concentration and at identifying media service providers with significant market power, with the deviations determined under Paragraph (6), by 30 September each year. When identifying media service providers with significant market power, their average audience share during the previous calendar year shall be taken into account. Media service providers with significant market power shall fulfil their obligations from 1 January of the year following the Media Council's decision. The Media Council's decision made within the framework of the procedure aimed at the prevention of media market concentration and at identifying media service providers with significant market power and also the public contract concluded shall remain in force until the entry into force of the subsequent decision made, or public contract concluded on the same subject as a result of a procedure conducted in the following year.

(12) For the purposes of Paragraphs (1)-(11), sales revenue shall mean the net sales revenue achieved by the participant of the procedure through sales relating to media service activities in the course of the previous business year.

Article 71. (1) Those authorised to provide analogue linear radio media services based on a public contract or broadcasting agreement shall have the right to simultaneously provide:

- a) maximum one national analogue linear radio media service,

b) maximum two regional and four local analogue linear radio media services, or

c) maximum twelve local analogue linear radio media services.

(2) With the exception of thematic analogue linear radio media services, providers authorised to provide national analogue linear radio media services and those having a qualifying holding therein may not acquire a qualifying holding in undertakings providing or distributing other media services.

(3) The same undertaking may only acquire a qualifying holding in organisations authorised to provide analogue linear radio media services within the limits defined under Paragraph (1).

(4) The media service provider's own rights and the rights of the undertakings in which it has a qualifying holding shall be taken into account jointly for the purposes of Paragraphs (1) and (3).

(5) A regional or local linear radio media service provider or its owner may not, with the exceptions defined under Paragraph (6), acquire a qualifying holding in other undertakings providing regional or local linear radio media services falling within the reception area of their media services, and the regional or local linear radio media service provider or its owner may not provide another regional or local linear radio media service falling within the reception area of their media services.

(6) The restriction defined under Paragraph (5) shall not be applied if a) the reception areas of the two media service providers overlap up to twenty percent at most, or b) unused transmission time remains following the evaluation of the tender and, parallel to an invitation being issued to a new tender, an agreement is concluded with the media service provider defined under Paragraph (5) in respect of the unused transmission time, provided that the transmission time thereby acquired by it differs from its existing transmission time by eighty percent, and neither transmission time exceeds four hours.

(7) Concentration of companies as per the Act on the Prohibition of Unfair and Restrictive Market Practices shall not be permitted if such were prejudicial to this Act.

Article 72. (1) The number of media services in the media service providers of which the same undertaking has a qualifying holding shall not exceed one quarter of the audiovisual media services or half the radio media services distributed on the given transmission system. (2) The number of media services the providers of which also perform media service distribution activities or in the providers of which the same media service distributor undertaking has an ownership stake shall not exceed one quarter of the audiovisual media services or half the radio media services broadcasted on the given transmission system.

(3) The ratios defined under Paragraphs (1)-(2) shall also apply to the programme package, offered by the media service distributor undertaking to viewers or listeners, which had the highest number of subscribers at the end of the previous calendar year in the given transmission system.

(4) The obligations defined under Paragraphs (1)-(3) shall not apply to media service distribution activities carried out by the public media service provider.



## 7.14.IT – Italy

- Legislative decree n°177 of 31.07.05 (decreto legislativo 31 luglio 2005):<sup>169</sup>

Art. 43. Dominant positions dominant in the integrated communications system. 1. Operators in the integrated communications system shall be required to inform the Authority of any understandings and concentration operations, in order to allow compliance with the principles set out in paragraphs 7, 8, 9, 10, 11 and 12 to be verified in accordance with the procedures laid down in an appropriate regulation adopted by that Authority.

2. The Authority, on notice from whomsoever it may concern or, periodically, of its own motion, having identified the relevant market in accordance with the principles set out in Articles 15 and 16 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002, shall verify that dominant positions are not being formed in the integrated communications system and the markets that comprise it and that the limits referred to in paragraphs 7, 8, 9, 10, 11 and 12 of the present law are respected, taking into account *inter alia*, in addition to income, the level of competition within the system, the barriers to entry to the system, the degree of economic efficiency of the firm and statistics on the transmission of television programmes, editorial products and cinematographic or phonographic works.

3. Where the Authority finds that a firm or a group of firms operating in the integrated communications system is in a position in which it is likely to exceed the limits referred to in paragraphs 7, 8, 9, 10, 11 and 12, it shall issue a public reprimand, drawing attention to the risk and naming the firm or group of firms and the market concerned. Should a breach of the abovementioned limits be found, the Authority shall take action under the terms of paragraph 5.

4. Legal acts, concentration operations and understandings that contravene the prohibitions referred to in this article shall be null and void.

5. The Authority, adapting to the changing characteristics of markets, notwithstanding the nullity referred to in paragraph 4, shall take the necessary measures to eliminate or prevent the formation of the positions referred to in paragraphs 7, 8, 9, 10, 11 and 12, or otherwise detrimental to pluralism. If such a position exists, it opens an investigation in respect of the adversarial principle, after which it intervenes so that they are promptly removed; if it finds the accomplishment of acts or operations meant to create a situation prohibited pursuant to paragraphs 7, 8, 9, 10, 11 and 12, it inhibits its continuation and orders the removal of its effects. The Authority may decide to adopt measures affecting the structure of the undertaking, require divestitures of businesses or branches of a company, and may require in the same measure a reasonable deadline for the implementation; this deadline cannot be more than twelve months. In any case the provisions relating to the concentration limits referred to in this Article shall apply in relation to the granting or extension of concessions, licenses and authorisations.

<sup>169</sup> <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig> (only in Italian). English translation partly provided by the author and partly available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2004\)092-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2004)092-e)

6. The Authority, through its regulations adopted in accordance with the criteria for participation and transparency of Law on August 7 1990 n. 241 as amended, implements the measures referred to in paragraph 5, the relevant processes and the modalities of communication. In particular, interested parties must notified of the opening of the investigation, of the possibility to present their comments at any stage of the investigation and of the power of the Authority to request from interested persons and third parties who are in possession of information to any produce documents relevant for the investigation. The Authority is required to fulfill the obligations of confidentiality related to persons and companies and is required to protect information and data in conformity with the data protection laws.

7. Once the national plan for the allocation of digital radio and television frequencies is fully operational, a single content provider may not, even through companies that may be regarded as controlled or linked companies within the meaning of paragraphs 13, 14 and 15, hold authorisations to broadcast more than 20 % of all television programmes or more than 20% of radio programmes that can be transmitted nationwide on terrestrial frequencies through the networks provided for under that plan.

8. Until the full implementation of the national plan for the allocation of frequencies for digital television, the limit of the total number of programs for each person is 20% and is calculated on the total number of television programmes broadcasted or licensed under Article 23, paragraph 1 of Law no. 112 of 2004, on national terrestrial frequencies either analogue or digital. Television programs broadcasted in digital can constitute the basis of calculation where they reach coverage equal to 50% of the population. To comply with the 20% rule, the programs that are a rerun of those transmitted in analogue are not taken in count. The present criterion of calculation is only applied to subjects that are transmitting digital programs reaching coverage equal to 50% of the population.

9. Without prejudice to the ban on forming dominant positions in the various markets that make up the integrated communications system, persons qualifying for compulsory entry in the register of communications operators established under Article (1)(6)(a)(5) of Law no 249 of 31 July 1997 may not, either directly or indirectly through controlled or linked persons within the meaning of paragraphs 14 and 15, acquire income exceeding 20 % of the total income of the integrated communications system.

10. The income referred to in paragraph 9 shall be income from the funding of the public television broadcasting service, net of tax, from national and local advertising, including direct advertising, from teleshopping, from sponsorship, from distribution of the product at the point of sale, disregarding any action affecting prices, from agreements with public bodies of a permanent nature and from public provisions granted directly to persons exercising the activities mentioned in article 2(1)( )1, from pay-per-view television, from subscriptions and from the sale of daily papers and periodicals, including books and phonographic products sold with those publications, and from national press agencies, from electronic publishing and annuals, including publishing through the Internet, and from the use of cinematographic works in various forms for the enjoyment of the public.

11. Firms, including firms operating through controlled or linked companies, whose income in the telecommunications sector, as defined under Article 18 of Legislative Decree no 259 of 1 August 2003, exceeds 40 % of the total income in that sector, may not acquire income in the integrated communications system exceeding 10 % of that system.

12. Persons exercising television broadcasting activity nationwide through more than one network may not, until 31 December 2010, acquire shares in firms publishing daily newspapers or participate in the establishment of new firms publishing daily newspapers. The prohibition shall also apply to controlled, controlling or linked firms within the meaning of Article 2359 of the Civil Code.

13. For the purposes of identification of dominant positions which are prohibited by this decree in the integrated communications system, are included capital shares acquired or still held by the company and also indirectly controlled by trustees or nominees.

Are considered as possessed the shares that were previously owned by independent entities before any operation of fusion, acquisitions, incorporation or similar that can potentially be relevant to such entities. As soon as any kind of agreements exist between partners in regards to concerted voting rights, or in regards to company management, besides the simple consultation between partners, every one of the partners is considered a representative of the sum of shares and stocks detained by all the partners who detain such shares and stocks.

14. For the purposes of this decree control shall also be refer to subjects other than companies as in the cases provided by article 2359, first and second paragraphs, of the Civil Code.

15. Control is deemed to exist in the form of dominant influence, unless proved otherwise, in one of the following situations:

a) the existence of a person who, alone or on the basis of an agreement with other partners, has the ability to exercise majority of the votes at the general assembly or to appoint or remove a majority the members of the board;

b) subsistence of financial, organisational or economical relationship between partners that could lead to the following:

1) the transfer of profits and losses;

2) the coordination of the management of the company with the one of other companies in order to pursue a common goal;

3) the allocation of powers greater than those arising from the shares or units held;

4) the award to persons other than those entitled to take such decision of the power to select managers or members of the board of the company;

c) the placement under a common direction that can result from a company particular composition or from its administrative departments or from any own significant or determinant elements.

16. The Authority supervises the evolution of the markets related to the integrated communications system, makes public though appropriate annual reports to Parliament the results of the analysis carried out, and answers to specific requests on the appropriateness of the limits set forth in this article.

- See also the Decision no. 368/14/CONS of 17 July 2014, Regulation on the procedure for the authorisation of ownership transfers in the broadcasting sector and on the procedures under Section 45 of Legislative Decree 31 July 2005, no. 177 (Delibera n. 368/14/CONS Regolamento recante la disciplina dei procedimenti in materia di autorizzazione ai trasferimenti di proprietà, delle società radiotelevisive e dei procedimenti di cui all'articolo 43 del decreto legislativo 31 luglio 2005, n. 177)<sup>170</sup>

## 7.15. IE – Ireland

- **Broadcasting Act 2009:**<sup>171</sup>

*Article 66. (1) The Contract Awards Committee shall, in accordance with this Part, consider every application received by it:*

*(a) for a sound broadcasting contract made under section 65(8), or*

*(b) for a television programme service contract, for the purpose of determining the most suitable applicant, if any, to be awarded a broadcasting contract.*

*(2) In the consideration of applications referred to in subsection (1) received by it and in determining the most suitable applicant to be awarded a broadcasting contract, the Contract Awards Committee shall have regard to:*

*(a) the character, expertise and experience of the applicant or, if the applicant is a body corporate, the character expertise and experience of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares,*

*(b) the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles,*

*(c) the quality, range and type of the programmes proposed to be provided by each applicant or, if there is only one applicant, by that applicant,*

*(d) the quantity, quality, range and type of programmes in the Irish language and the extent of programmes relating to Irish culture proposed to be provided,*

<sup>170</sup>

[http://www.agcom.it/documentazione/documento?p\\_p\\_auth=fLw7zRht&p\\_p\\_id=101\\_INSTANCE\\_kidx9GUnlodu&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_struts\\_action=%2Fasset\\_publisher%2Fview\\_content&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_assetEntryId=1501602&\\_101\\_INSTANCE\\_kidx9GUnlodu\\_type=document](http://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=1501602&_101_INSTANCE_kidx9GUnlodu_type=document) (in Italian).

Summary in English available at <http://merlin.obs.coe.int/iris/2014/9/article23.en.html>

<sup>171</sup> <http://www.bai.ie/wordpress/wp-content/uploads/Broadcasting-Act-2009.pdf>

- (e) the extent to which the applicant will create within the proposed broadcasting service new opportunities for talent in music, drama and entertainment and in particular in respect of Irish culture,*
- (f) the desirability of having a diversity of services in the area specified in the notice catering for a wide range of tastes including those of minority interests,*
- (g) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under this Part,*
- (h) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in the area specified in the notice,*
- (i) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified in the notice [...]*

*Article 69. (1) Every broadcasting contract may contain such terms and conditions as the Authority thinks appropriate and specifies in the contract.*

*(2) Without prejudice to the generality of subsection (1), the Authority may specify in a broadcasting contract all or any of the following terms or conditions:*

- (a) the period during which the contract shall continue in force;*
- (b) whether the contract may be renewed and, if so, the manner in which, the terms on which, and the period for which, the contract may be so renewed;*
- (c) a condition prohibiting the assignment of the contract or of any interest in it;*
- (d) if the broadcasting contractor is a company, a condition prohibiting any alteration in the Memorandum or Articles of Association of the company or in so much of that Memorandum or of those Articles as may be specified or prohibiting any material change in the ownership of the company;*
- (e) a condition requiring the broadcasting contractor to provide the quality, range and type of programmes which he or she proposed to offer in his or her application for the award of the contract;*
- (f) a condition requiring the sound broadcasting contractor to pay to the Authority the amount which the contractor specified in his or her application.*

*(3) If a broadcasting contract does not contain a condition of the type specified in paragraph (c) or (d) of subsection (2), the following provisions shall have effect:*

- (a) a broadcasting contract, or any interest in a broadcasting contract, shall not be assignable, nor shall any alteration be made in the Memorandum or Articles of Association of any company which is a broadcasting contractor, nor shall there be any material change in the ownership of*

such a company, without the previous consent in writing of the Authority, and the Authority may, if it considers it reasonable so to do, refuse such consent;

(b) in considering whether to grant its consent to an assignment of a broadcasting contract, a change in the Memorandum or Articles of Association of a company which is a broadcasting contractor, or a material change in the ownership of such a company, the Authority shall have regard to the criteria specified in section 66(2) and, where applicable, section 66(4).

- See also the **Competition and Consumer Protection Act 2014**<sup>172</sup>, whose part 4 is dedicated to media mergers.

## 7.16.IS – Iceland

- Media Act of 20 April 2011 (Lög um fjölmiðla):<sup>173</sup>

Article 62a. The Competition Authority may take action to rectify any situation leading to the prevention, restriction or impairment of media pluralism and/or diversity to the detriment of public interest. The term ‘situation’ refers, *inter alia*, to factors relating to the relevant market’s characteristics, including the structure of undertakings active in that market. The Authority’s actions may take the form of measures to modify the organisation of undertakings where other equally effective and less onerous measures are not available. The Authority shall seek the opinion of the Media Commission prior to taking action pursuant to this provision.

The Media Commission may issue a recommendation to the Competition Authority that it take action pursuant to the first paragraph. Where a recommendation by the Media Commission to this effect is received by the Authority it shall open an investigation and consider the substantive merits of the case.

Article 62b. §1. The Competition Authority shall be notified of any merger involving at least one media service provider with a turnover in Iceland of at least ISK 100 million.

A merger is deemed to arise where a permanent change of control takes place as a result of:

- a. the merger of two or more previously independent undertakings or parts of undertakings;
- b. the takeover of one undertaking by another undertaking;
- c. one or more parties already controlling at least one undertaking or one or more undertakings acquiring direct or indirect control, in whole or in part, of one or more additional undertakings, whether by purchase of securities or assets, by contract or by any other means;
- d. the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Control within the meaning of the second paragraph shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact

<sup>172</sup> <http://www.irishstatutebook.ie/eli/2014/act/29/enacted/en/html>

<sup>173</sup> [http://fjolmidlanefnd.is/wp-content/uploads/2011/12/Log-um-fjolmidla\\_ensk-thyding\\_mai2015.pdf](http://fjolmidlanefnd.is/wp-content/uploads/2011/12/Log-um-fjolmidla_ensk-thyding_mai2015.pdf) (in English).

or law involved, confer on a party the possibility of exercising decisive influence on an undertaking, in particular by:

- a. ownership or the right to use all or part of the assets of an undertaking;
- b. rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Control is acquired by parties which:

- a. are holders of the rights or entitled to rights under the contracts concerned; or
- b. while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

In the case of a merger within the meaning of point a of the second paragraph, or the acquisition of joint control within the meaning of point c of the same paragraph, the parties to the merger or those acquiring joint control, as the case may be, shall submit a joint notification of the merger.

Where an undertaking acquires a controlling interest in another undertaking, the merger notification shall be submitted by the acquiring undertaking. In the case of a takeover bid, the notification shall be submitted by the bidding party.

The Competition Authority shall be notified of a proposed merger prior to its implementation and following the conclusion of a merger agreement, the public announcement of a takeover bid, or the acquisition of a controlling interest. A merger falling within the scope of this Act shall not be implemented while under examination by the Competition Authority. Where the Media Commission considers that an already implemented merger that escapes the turnover criteria of the first paragraph is very likely to significantly restrict media pluralism and/or diversity, the Commission may ask the Competition Authority to require the parties to the merger to submit a merger notification.

When carrying out a conformity assessment pursuant to the first paragraph, the Competition Authority shall assess whether the merger has potentially harmful effects on media pluralism and/or diversity in the market(s) where the media service provider(s) concerned are active. The Competition Authority shall seek the opinion of the Media Commission on the effects of the merger in this respect. The Authority may invalidate a merger having potentially harmful effects on media pluralism and/or diversity or approve it subject to conditions aimed at limiting such harmful effects.

Article 62c. As regards the form and content of merger notifications, procedure, penalties, appeals to the Competition Appeals Committee and any other matter referred to in Articles 62a and 62b, the provisions of the Competition Act and any rules laid down on the basis thereof shall apply unless otherwise provided for in this Act.

The possibility of notifying mergers using a short form notification as provided for in the Competition Act shall not apply to mergers falling under Article 62b.



## 7.17.LI – Liechtenstein

- Media Act of 19 October 2005 (Mediengesetz):<sup>174</sup>

Article 65. 1) A withdrawal of the concession program is only permitted if:

[...] e) a change in ownership structure or other influences is performed, which leads to a dubious media concentration [...]

## 7.18.LT – Lithuania

- Law on provision of information to the public (Visuomenės informavimo įstatymas):<sup>175</sup>

Article 22. Producers and Disseminators of Public Information and their Participants. [...] 3. Upon selling or otherwise transferring at least 10% of the broadcaster's or re-broadcaster's shares (interests, member shares), a licence holder must, not later than within 30 days of the transfer of ownership rights, inform thereof the Radio and Television Commission of Lithuania (hereinafter referred to as the "Commission").

4. Where upon selling or otherwise transferring the shares (interests, member shares) of a broadcaster and/or re-broadcaster holding a broadcasting and/or re-broadcasting licence there is a change of the owner (owners) of the majority holding or where the control (management) of a licence holder is transferred to another person (persons) on other grounds, the persons intending to transfer and acquire the shares (interests, member shares) and/or control (management) must obtain a written consent of the Commission.

5. The Commission may refuse to give its consent to the transfer of a broadcaster's and/or re-broadcaster's shares (interests, member shares) and/or its control (management) if:

- 1) persons who intend to transfer and acquire the broadcaster's and/or re-broadcaster's shares (interests, member shares) and/or its control (management) have not submitted the data required by the Commission or have submitted incorrect data;
- 2) persons who intend to transfer and acquire the broadcaster's and/or re-broadcaster's shares (interests, member shares) and/or its control (management) are prohibited, in cases provided for by laws, from being participants of producers and/or disseminators of public information;
- 3) the transfer and acquisition of the broadcaster's and/or re-broadcaster's shares (interests, member shares) and/or its control (management) results in concentration and an authorisation from the Competition Council has not been obtained where such an authorisation is required under the Law on Competition.

Article 24. Data on Participants of Legal Persons who Are Publishers of Local, Regional and National Newspapers and Magazines or Managers of the Information Society Media. 1. Legal persons who are

<sup>174</sup> <http://www.llv.li/#/1333/medienkommission> (only in German). Translation provided by the author.

<sup>175</sup> [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=458157&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=458157&p_tr2=2) (in English).



*publishers of local, regional and national newspapers and magazines or managers of the information society media, with the exception of those referred to in paragraph 6 of Article 22 of this Law, must submit to the institution authorised by the Government in the field of provision of information to the public (hereinafter referred to as the “institution authorised by the Government”) in accordance with the procedure and within the time limits established by the aforementioned institution the data on their participants who have the right of ownership to or control at least 10% of all the shares or assets (where the assets are not share-based) and inform of the revised data if they change. Notifications of the revised data must contain the names and surnames (names) of such participants, their personal numbers (registration numbers), the stake held in the assets or the number of shares as well as the percentage of votes, administrative bodies and members thereof as well as information about property relations and/or joint activity linking them with other producers and/or disseminators of public information and/or their participants. Where the participants of the legal persons are legal persons registered in the Republic of Lithuania or in a foreign state, the participants of such entities must also be indicated. The institution authorised by the Government shall publish the received data on its website not later than within 15 days from the date of receipt thereof.*

*2. The President of the Republic, members of the Seimas and the Government, members of municipal councils, civil servants of political (personal) confidence as well as heads of state and municipal institutions and agencies must submit to the institution authorised by the Government according to its established procedure the data about the legal persons who are publishers of local, regional and national newspapers and magazines or managers of the information society media of which they are participants. The institution authorised by the Government shall publish the received data on its website.*

*3. Producers and/or disseminators of public information and their participants must publish in their media information about any sponsorship received if it exceeds the amount of ten base social benefits, specifying the amount and provider of the sponsorship.*

*4. Failure to submit the data referred to in paragraphs 1 and 2 of this Article shall incur liability in accordance with the procedure established by laws and other sanctions.*

*Article 29. Fair Competition in the Field of Provision of Information to the Public. 1. State and municipal agencies as well as all types of other enterprises, agencies and organisations or natural persons may not monopolise the media.*

*2. The State shall create equal legal and economic conditions for fair competition among producers and disseminators of public information, except for producers and/or disseminators of productions of violent and erotic nature. In accordance with the procedure established by this Law and other laws, state and municipal institutions shall exercise control with a view to upholding pluralism in the provision of information to the public and fair competition, avoiding the abuse of a dominant position by producers and/or disseminators of public information or in any separate segment of the media market. A dominant position in the field of provision of information to the public shall be determined in conformity with this Law and the Law of Competition.*

*Article 31. Licensing of Radio and/or Television Programme Broadcasting and Re-broadcasting Activities. [...] 14. The Commission may adopt a decision to revoke a broadcasting and/or re-broadcasting licence if:*

[...] 8) there is a change of the owner of the majority share holding of the licence holder or the control (management) of the licence holder is transferred to another person (persons) without receiving the Commission's consent or incorrect data have been provided in the application submitted to receive the Commission's consent. [...]

## 7.19. LV – Latvia

- **Electronic Mass Media Law (Elektronisko plašsaziņas līdzekļu likums):**<sup>176</sup>

Section 14. *Prohibition of Abuse of a Dominant Position by an Electronic Mass Medium.* Abuse of a dominant position of an electronic mass medium is prohibited. Within the meaning of this Law the position when the market share of an electronic mass medium in Latvia in a particular market exceeds 35 per cent shall be considered as a dominant position.

## 7.20. MT – Malta

- **Broadcasting Act:**<sup>177</sup>

Article 10. (6) *Subject to the provisions of subarticle (2) and without prejudice to the provisions of subarticle (4D), the same organisation, person or company may concurrently own, control or be editorially responsible for more than one nationwide radio service and one nationwide television service, provided that:*

(a) *only one nationwide radio service may be licensed on the FM frequency to the same organization, person or company;*

(b) *not more than two generalist nationwide television services may be licensed to the same organization, person or company;*

(c) *the same organisation, person or company may not own, control or be editorially responsible for more than one nationwide radio or television service predominantly transmitting news and current affairs.*

(6A) *The same organisation, person or company may not own, control or be editorially responsible for more than one community radio service and any organisation which owns, controls or is editorially responsible for a nationwide radio service or a nationwide television service or such other service as mentioned in subarticle (4)(d) may not own, control or be editorially responsible for a community radio service.*

<sup>176</sup> [http://www.neplpadome.lv/en/assets/documents/anglu/Electronic\\_Mass\\_Media\\_Law%5B1%5D.pdf](http://www.neplpadome.lv/en/assets/documents/anglu/Electronic_Mass_Media_Law%5B1%5D.pdf) (in English).

<sup>177</sup> <http://www.ba-malta.org/file.aspx?f=3> (in English).

## 7.21.NO – Norway

- Regulations relating to broadcasting and audiovisual on-demand services (Forskrift om kringkasting og audiovisuelle bestillingstjenester):<sup>178</sup>

*Licences for the operation of local broadcasting services may not be transferred without the Norwegian Media Authority's approval. The same applies to purchase of shares or ownership interests that give control over an enterprise, association or other organisation with a local broadcasting licence.*

- Media ownership Act (Medieeierskapsloven):<sup>179</sup>

*Section 7. Duties of the supervisory authority. The Media Authority shall be responsible for continuous supervision pursuant to this Act, and shall hereunder:*

- a) supervise market conditions and ownership in the daily press, television, radio and electronic media,*
- b) contribute to creating greater openness about, awareness and knowledge of ownership in Norwegian media, and*
- c) make decisions pursuant to section 9.*

*Each year the Media Ownership Authority shall prepare an annual report on its activities pursuant to this Act. The report shall be sent to the Ministry by the end of March of the following year.*

*Section 8. Appeals Board. The King will appoint a board for appeals against individual decisions pursuant to this Act. The board shall consist of three members and two deputy members, and the King will determine who shall be the chairman and vice-chairman of the board.*

*The Appeals Board may not reverse decisions of the supervisory body on its own initiative.*

*The provision in section 6 shall apply correspondingly to the relationship between the King and the Appeals Board.*

*Any legal action taken shall be brought against the State as represented by the Appeals Board for Media Ownership.*

*In connection with acquisitions of ownership interests where the Media Authority does not exercise its power to intervene pursuant to section 9, the Appeals Board may request a written explanation.*

*Section 9 Intervention against the acquisition of an ownership interest. The Media Authority may intervene against the acquisition of an ownership interest in enterprises that operate daily newspapers, television or radio if the person acquiring the interest alone or in cooperation with others has or gains a significant ownership position in the national or regional media market, and this is contrary to the purpose set out in section 1 of the Act.*

*A decision to intervene pursuant to the first paragraph may entail:*

<sup>178</sup> [http://www.medietilsynet.no/globalassets/engelsk/engelsk\\_kringkastingsforskriften\\_091015.pdf](http://www.medietilsynet.no/globalassets/engelsk/engelsk_kringkastingsforskriften_091015.pdf) (in English).

<sup>179</sup> [http://www.medietilsynet.no/globalassets/engelsk/engelsk\\_mediaownershipact\\_medieeierskapslov\\_2006.pdf](http://www.medietilsynet.no/globalassets/engelsk/engelsk_mediaownershipact_medieeierskapslov_2006.pdf) (in English).

- a) prohibiting the acquisition,
- b) ordering the divestment of ownership interests that have been acquired and issuing orders necessary to ensure that the purpose of the divestment order is achieved, or
- c) allowing an acquisition on such conditions as are necessary to prevent the acquisition from conflicting with the purpose set out in section 1 of the Act.

The Media Authority may adopt a temporary prohibition against concluding an acquisition or adopt other measures where there are reasonable grounds for assuming that the conditions for an intervention have been satisfied and the Media Authority considers it as necessary in order to carry out any later decision to intervene.

Prior to carrying out an intervention pursuant to the first subsection, the Authority shall have attempted to reach an amicable solution with the acquirer, or with the person against whom it is intended to intervene.

The Media Authority may intervene against an acquisition by making a decision not later than six months after a final agreement has been entered into concerning the acquisition. If special considerations so warrant, the Authority may intervene within one year of the same date.

The provisions of this section shall apply correspondingly to cooperation agreements giving a contracting party the same or a corresponding influence on the editorial product as an acquisition.

Section 10. National restrictions on ownership. A significant ownership position in the market nationally shall normally be considered to exist:

- a) in the case of control through a share of 40 percent or more of the total daily circulation for the daily press,
- b) in the case of control through a share of 40 percent or more of the total viewing figures for television,
- c) in the case of control through a share of 40 percent or more of the total listening ratings for radio,
- d) in the case of control through a share of 30 percent or more in one of the media markets mentioned in litras a), b) or c), and 20 percent or more in one of the other media markets mentioned in litras a), b) or c),
- e) in the case of control through a share of 20 percent or more in one, 20 percent or more in another and 20 percent or more in a third of the media markets mentioned in litras a), b) or c) or
- f) when an enterprise controlling 10 percent or more in one of the media markets mentioned in litras a), b) or c) becomes owner or part-owner of an enterprise forming part of another grouping controlling more than 10 percent or more within the same media market (cross ownership).

*Section 11. Regional ownership restrictions. A significant ownership position in the media market regionally shall normally be considered to exist in case of control through a share of 60 percent or more of the total daily circulation of regional and local newspapers in one media region.*

*The King shall lay down regulations establishing the media regions.*

*Section 12. Advance clearance. Any person who has a relevant interest in ascertaining whether an intervention may be carried out against acquisition pursuant to section 9 can notify the Media Authority of the acquisition of an ownership interest before making the acquisition. If the Media Authority does not within 30 days of receipt of the notification give notice that an intervention may be carried out, the Authority may not decide to intervene against the acquisition pursuant to section 9.*

*The Media Authority may lay down further provisions concerning notification pursuant to this section.*

*Section 13. Duty to provide information, etc. Every person has a duty to provide the Media Authority and the Appeals Board for Media Ownership with the information required by these authorities in order to be able to perform their functions pursuant to this Act, among other things in order to:*

- a) examine whether the criteria for intervention laid down in the Act have been satisfied,*
- b) examine whether a decision pursuant to the Act has been contravened, or*
- c) contribute to creating greater openness about, awareness or knowledge of ownership in the Norwegian media.*

*It may be required that information pursuant to the first subsection must be provided in writing or orally within a specified time limit.*

*The Media Authority may give anyone a standing order to send notification of any acquisitions of shares or interests in enterprises as mentioned in section 3. Such orders may not be given for more than three years at a time.*

*Information required pursuant to the first paragraph may be provided notwithstanding the statutory duty of confidentiality that is otherwise incumbent on the tax assessment authorities, other tax authorities and authorities charged with monitoring public regulation of economic activity. Nor shall the said duty of confidentiality preclude the surrender of documents in the possession of such authorities for examination.*

## **7.22. PL – Poland**

- **Broadcasting Act of 29.12.1992 (Ustawa o radiofonii i telewizji):**<sup>180</sup>

<sup>180</sup>

[http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/angielska/Documents/Regulations/broadcasting\\_act\\_28022013.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/Regulations/broadcasting_act_28022013.pdf)  
(in English).

Article 36. [...] 2. The broadcasting licence shall not be awarded if transmission of a programme service by the applicant could result in:

- 1) threat to the interests of the national culture, transgression of the standards of public decency conduct and proprieties, danger to national security and defence or threat to security of classified information,
- 2) achievement, by the applicant, of a dominant position in mass media in the given area.

Article 38. [...] 2. The broadcasting licence may be revoked if:

- 1) the transmission of the programme service threatens the interests of the national culture, security and defence or if it transgresses the standards of public decency,
- 2) the broadcaster is declared bankrupt,
- 3) by transmitting the programme service the broadcaster gains a dominant position in mass media on the given relevant market as defined in regulations on protection of competition and consumers,
- 4) another person takes over direct or indirect control over the activity of the broadcaster.

## 7.23. PT – Portugal

- **Television Law of 30.07.2007 (Lei Lei da Televisão):**<sup>181</sup>

Article 4. Transparency of ownership and management. 1 - Shares representing the capital of television operators which are constituted in the form of a public limited company are to be registered.

2 - The shareholders of television operators, the composition of the administrative and management boards of television operators and the identification of the person responsible for giving guidance to and undertaking supervision of the content of their broadcasts are to be publicly disclosed on the website of the respective media organisations and are to be updated within seven days of any event occurring whereby:

- a) Any shareholder reaches or exceeds 5%, 10%, 20%, 30%, 40% or 50% of the share capital or voting rights;
- b) A shareholder reduces his stake to a value which is less than one of the percentage thresholds indicated in the preceding point;
- c) There is change in the dominance of the television broadcaster;
- d) Any change occurs in the composition of the administrative and management boards or in the structure or responsibility governing the guidance and supervision of broadcast content.

<sup>181</sup> <http://www.anacom.pt/render.jsp?contentId=1105532> (in English).

3 - The reporting stipulated in the preceding paragraph shall contain, with such updates as are warranted:

- a) The breakdown of the percentage shareholdings of the respective shareholders;
- b) The identification of the entire chain of entities controlling a shareholding of at least 5% in the operators concerned; and
- c) Indication of the shareholdings of said shareholders in other media organisations.

4 - Where no website is available, this information and the updating thereof, as referred to in paragraphs 2 and 3, is to be additionally reported by the operator responsible to Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media), which will make said information available to the public.

5 - The provisions of paragraphs 2 and 3 apply, *mutatis mutandis*, to legal persons which are not corporations but which pursue the television broadcasting activity, including associations, cooperatives or foundations

Article 4-B. Competition, non-concentration and pluralism. 1 - Television operators are subject to the general regime governing the assurance and promotion of competition.

2 - Concentration operations between television operators which are subject to the intervention of the authority regulating competition are to be submitted to a prior opinion of Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media), which opinion will be binding where there is deemed to be a risk to free expression and to the exchange of different views and opinions.

3 - It is prohibited for any natural or legal person to hold, either directly or indirectly, including through a relationship of control, a number of licenses for national unrestricted free-to-air television programme services exceeding 50% of all the licenses granted to similar programme services in the same area of coverage.

4 - The practice of legal acts which entail changes to the control of providers pursuing the television activity under license are prohibited except where a period of not less than three years has elapsed following the original granting of the license, where a period of not less than two years has elapsed following modification of the approved project and where a period of not less than one year has elapsed following the most recent renewal; such acts are additionally subject to authorisation being given by Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media).

5 - Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media) will decide thereon, subsequent to having heard interested parties and within a period of 30 working days following verification and consideration of the initial conditions determining the award of the title and the interests of the potential audience of the programme services provided, ensuring that the conditions which gave basis to the decision on the original project or on subsequent alterations are safeguarded.

6 - The provisions of the preceding paragraphs shall apply, *mutatis mutandis*, to legal persons which are not corporations, including legal persons which are associations, cooperatives or foundations and which pursue the television activity, whereas Entidade Reguladora para a Comunicação Social (Regulatory



Authority for the Media) shall, where the requisites for performance of the operation are fulfilled, undertake the respective alterations to the title under which pursuit of the activity is authorised.

- **Radio Law (Lei da Rádio):**<sup>182</sup>

Article 3. Transparency of ownership and management. 1 - Shares representing the capital of radio operators constituted in the form of a public limited company shall be registered.

2 - The list of shareholders, the composition of administrative and management bodies and the person in charge of providing guidance to and monitoring broadcast contents shall be publicly disclosed in the respective media website, and updated within seven days from the occurrence of an event where:

- a) A shareholder reaches or exceeds 5%, 10%, 20%, 30%, 40% or 50% of the share capital or of votes;
- b) A shareholder reduces its shareholding to an amount lower than each percentage indicated in the preceding point;
- c) The control held on a radio operator is subject to a change;
- d) A change occurs in the composition of administrative and management bodies or in the structure in charge of providing guidance to and monitoring broadcast contents.

3 - The list referred to in the preceding paragraph shall include and duly update:

- a) Shareholding percentages broken down by shareholders;
- b) Identification of the full chain of entities holding at least 5% shares in operators under consideration;
- c) Shares held by shareholders in other media bodies.

4 - In the absence of a website, the radio operator in charge shall notify the information and updates referred to in paragraphs 2 and 3 by way of complement to the Entidade Reguladora para a Comunicação Social, ERC (Regulatory Authority for the Media), which shall provide such data in its public access website.

5 - Paragraphs 2, 3 and 4 shall apply, duly adapted, to legal persons other than companies that pursue the radio broadcasting activity, namely associations, cooperatives or foundations.

Article 4. Competition, non-concentration and pluralism. 1 - The general scheme of protection and promotion of competition shall apply to radio operators.

2 - Concentration operations between radio operators subject to the intervention of the regulatory authority for competition shall be submitted to a prior opinion of ERC, which shall be binding were grounded on a risk to free expression and exchange of different views.

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<sup>182</sup> <http://www.anacom.pt/render.jsp?contentId=1074024> (in English).

3 - Natural or legal persons shall not hold, either directly or indirectly, namely through a relationship of control, a number of licenses for radio programme services on a local level exceeding 10% of all licenses granted on national territory.

4 - Natural or legal persons of private or cooperative sectors shall not hold, either directly or indirectly, namely through a relationship of control, a number of frequency modulated radio programme services on a national level equal to or exceeding 50% of programme services qualified for the same coverage area and for the same frequency band.

5 - Natural or legal persons shall not hold in the same district, metropolitan area, municipality, or, in the autonomous regions, in the same island, either directly or indirectly, namely through a relationship of control, a number of licenses for radio programme service on a local level exceeding 50% of programme services of the same scope qualified for each of the referred territorial areas.

6 - Any change in the relationship of control of operators pursuing a licensed radio broadcasting activity may only take place three years after the original license is issued, two years after the approved project is altered or one year after the last renewal, being subject to an authorisation by ERC.

7 - ERC shall take a decision on the application for authorisation referred to in the preceding paragraph after hearing the parties concerned, within 30 working days, following the assessment and weighing of the initial conditions based on which the qualification was granted and the interests of the potential audience of programme services provided, safeguarding the conditions that permitted the original project or subsequent alterations to be decided on.

8 - The preceding paragraphs shall apply, duly adapted, to legal persons other than companies that pursue the radio broadcasting activity, namely associations, cooperatives or foundations, being incumbent on ERC, insofar as the conditions for the operation are satisfied, to promote the respective amendments to the qualification certificate required to pursue the activity.

9 - The transfer of programme services on a local level and respective licenses or authorisations shall be permitted, according to the procedures laid down for the alteration of operator control, where it can be proved that this will promote the safeguard of the licensed or authorised project, insofar as all the property, rights and obligations, including those which are labour-related, exclusively concerned with the programme service under consideration are transferred.

10 - Without prejudice to powers granted to the national communications regulatory authority according to the regime applicable to electronic communications networks and services and to radiocommunications, the transfer referred to in the preceding paragraph is dependent on an authorisation by ERC, which shall take its decision within 60 days from the application.

Article 19. Public tender. 1 - The public tender for licensing the radio broadcasting activity and for allocation of the corresponding rights of use for frequencies shall be launched by a joint administrative rule of members of the Government in charge of the media and communications areas, which shall include the respective subject-matter and regulation.

2 - The regulation shall identify the conditions under which applications are eligible, as well as documents to be attached, to allow the assessment of compliance of applicants and projects with legal and regulatory requirements, namely:

- a) Requirements for operators and restrictions to the pursue of the activity;
- b) Rules on pluralism and non-concentration of media ownership;
- c) Correspondence between projects and the scope of the tender;
- d) Economic and financial feasibility of projects;
- e) Coverage obligations and respective scheduling;
- f) Sufficiency of human and technical resources to be assigned;
- g) Evidence of compliance with tax and social security obligations, unless exemption from this requirement is granted pursuant to Decree-Law number 114/2007, of 19 April.

3 - Where general radio programme services are concerned, applications submitted to tender shall be ranked according to the following criteria:

- a) The contribution of each project towards the improvement of the radio offer in the area to be covered, which shall be weighed according to the guarantees of protection of pluralism, non-concentration and independence from political and economic powers, to the emphasis on information and to the safeguard of rights granted in the Constitution to journalists;
- b) The contribution of each project towards the diversification of the radio offer in the area to be covered, which shall be weighed according to its originality, enhancement of innovation and creativity;
- c) The contribution of each project towards the dissemination and promotion of Portuguese culture, language and music;
- d) The investment in professional training and qualification;
- e) The quality and technical efficiency of the project, which shall be weighed according to the proposed coverage index, to how fast the network is set up and how it is scheduled, to its reliability and to how broadcasting stations are interconnected.

Article 26. Compliance with the licensed or authorised project. 1 - The radio operator must comply with the conditions and terms of the licensed or authorised programme service.

2 - Any alteration to the project shall be subject to the express approval by ERC and may only take place:

- a) One year after the authorisation has been granted or the respective programme service has been transferred;

*b) Two years after the licence has been granted or the respective programme service has been transferred, or after the approval of the previous alteration.*

*3 - The request for alteration shall be justified, taking into account, more specifically, the market technological development and the implications for the potential listeners of the programme service under consideration.*

*4 - ERC shall decide within 60 days from the date of the application for alteration, taking into account its impact on the radio offer diversity and pluralism in the respective geographic area of coverage and the safeguard of local news.*

*5 - The alteration of licensed or authorised projects may cover the change in the respective programme contents ranking.*

*6 - Radio operators with authorised programme services may also request the alteration of the respective coverage area ranking, pursuant to the preceding paragraphs.*

## **7.24. RO – Romania**

- **Audiovisual Law (Legea audiovizualului):<sup>183</sup>**

*Article 43. [...] (4) The ownership rights on shares and social parts may be transferred according to the provisions of the present Law provided also that they do not harm the rights and liabilities stipulated in the license(s) held by the respective commercial company.*

*(5) Any natural or legal person holding or acquiring a quota from the share capital that is equal to or higher than 10% of the share capital or of the voting rights of a company holding an audio-visual or broadcasting license or of a company that controls a company holding such a license must notify the Council thereof within one month since the date when it has reached such a quota.*

*(6) Shares representing the social capital of joint-stock companies shall be only nominal.*

*(7) The use in whatever way of another person's name by a company that applies for an audio-visual or broadcasting license or of any other authorisation regarding an audio-visual communication service or that controls a company holding such an authorisation for the purpose of eluding the provisions of this Law is forbidden.*

*Article 44. (1) With a view to protecting pluralism and cultural diversity, ownership concentration and the extension of the audience in the audio-visual field are limited to dimensions ensuring economic efficiency, but not generating dominant positions in forming of public opinion.*

*2) For the purpose of this Law and in order to establish the market share of the program services, it is considered that:*

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<sup>183</sup> <http://www.cna.ro/The-Audio-visual-Law,1655.html> (in English).

- a) the market of national coverage television programmes comprises all the program services transmitted at national level by radio-broadcasters under the jurisdiction of Romania, including public television service programmes;
  - b) the market of national coverage sound radio-broadcasting programmes comprises all program services transmitted at national level by radio-broadcasters under the jurisdiction of Romania, including the public radio-broadcasting service programmes.
  - c) the market for regional or local radio and/or television program services includes all program services in the respective area;
  - d) program services with significant importance in shaping public opinion are generalist programmes, news, analysis and debates on latest political and/or economical topics;
  - e) the relevant market covers all radio and television services mentioned at point d) broadcast in a certain geographical area.
  - f) the audience share or the market share shall represent the share provided to a certain program service, established under the conditions stipulated by art. 45.
- (3) During the procedure for evaluating the dominant position in shaping public opinion of a natural or legal person, the program services stipulated in par. 2, point d) it shall be taken into account. The program services stipulated in par (2), point d) provided by this person, either as an audiovisual license holder, for which it holds directly or indirectly a percentage of more than 20% of the capital or of the voting rights of a company holding an audiovisual license shall be considered during the evaluation of the dominant position.
- (4) During the procedure of evaluating the dominant position in shaping public opinion, family relationship connections, in keeping with the legislation in force in the field of trade, economy and finance shall be taken into account and evaluated.
- (5) For the purpose of the present law, by family is understood the relationship to spouse, kin and in-laws, up to the second kinship.
- (6) A natural or legal person shall be deemed to hold a dominant position in shaping public opinion, in case the average market share of its services surpasses 30% of the relevant market.
- (7) The establishing of the market share of each national, regional or local program service is performed annually by establishing the average market share registered during the respective year for the entire broadcasting duration.
- (8) The average market share of program services covered by a natural or legal person represents the sum of market shares of each program service in par. 3, multiplied by the capital share or voting right held by the respective person.
- (9) The Council initiates the procedure for the evaluation of the dominant position in shaping public opinion by a natural or legal person in case there are serious reasons to believe that the dominant position may have been reached, according to par. (6) provisions.

(10) In case the Competition Council identifies by decision an anti-competition practice (an agreement or an abuse of dominant position), or authorises an economic concentration in the field of audiovisual media services respectively, the Council shall act according to the provisions of par. (9).

(11) Upon the Council's request the institute appointed in keeping with art. 45 provisions, shall unfold ad-hoc measurements, required by the procedure for the evaluation of the pre-averaged position in forming public opinion. Program services not included in the audience measurement system, which should be included in the evaluation process, shall be submitted to ad-hoc measurement for a three-month period; in case the market share surpass accepted is confirmed, provisions of art. 46 apply.

(12) For the purpose of the present law:

- a) the national audiovisual license shall provide the right to broadcast the same program in a geographical area covering a potential audience of over 60% for radio and 70% for television of the country's censused population;
- b) the regional audiovisual license shall entitle the broadcasting of the same program on the territory of one or more counties without reaching the coverage stipulated in point a);
- c) the local audiovisual license is the license which has a geographical coverage area that is smaller than that stipulated for a regional license, serving a unique local community ;
- d) the audiovisual licenses granted for Bucharest, that are not part of a national or regional radio or television network shall be deemed to be local licenses.

13) Situations stipulated in par. 12, a) and b) that do not fall in the case of initial grant of national/regional license, but are the result of accumulation of local licenses, shall be taken into account by the Council as such, or upon the express request of the license owner, with the adequate modification of the license data.

Article 45. (1) The measurement of audiences and market shares shall be accomplished in compliance with the international standards and practices by specialized institutions assigned by tender.

(2) The tender shall be organized by a commission composed of 5 representatives of radio-broadcasters, 5 representatives of advertising agencies and 5 representatives of the Council.

(3) The first tender shall be organized within maximum one year after the date of entry into force of this Law and the following tenders shall be organized every four years.

(4) The Council shall benefit for free of the results of measurements.

Article 46. (1) Should the case arise when a natural or legal person holds a dominant position in shaping public opinion that surpasses the rating accepted in keeping with art. 44 (6), the Council shall summon broadcasters with a majority position in shaping it, so as to abide by the accepted rating and to the time compliance which should be fulfilled.

2) By the time the summon expires, a new evaluation shall be made and should the situation in which the rating continue to be surpassed, the Council shall decide upon the precise ways to diminish some of

*the participation quotas or the number of licenses held, in keeping with the natural or legal person's choice, within a three-month period.*

*(3) In case, even after this latter term expires, the dominant position persists for the license for which the natural or legal person holds the largest participation share, then conditions for applying provisions of art. 57, par. 1, c) shall be deemed to be fulfilled.*

*(4) Broadcasters shall cooperate in establishing the rating by providing all information required by the Council. Refusal to communicate the required information or false data shall lead to applying provisions of art. 57, par. 1 c).*

*Article 47. (1) By way of derogation from the provisions of Art. 43, audio-visual licenses may be granted to the local public authorities, provided:*

- a) there is no other audio-visual license for a local program service;*
- b) it provides exclusive information services regarding the respective community.*

*(2) In case of granting another audio-visual license, the license granted under the terms of paragraph (1) shall be rightfully withdrawn.*

*Article 48. Providers of audiovisual media services shall assure simple, direct and permanent access of the public to at least the following information categories:*

- a) name, legal status, social headquarter;*
- b) name of the legal representative and the structure of the shareholders to the level of the natural and legal person, as associate or shareholder having a larger share than 20% of the social capital or of the voting rights of a company holding audiovisual license;*
- c) names of the persons in charge of the trade company management and of those that are mainly in charge of the editorial responsibility;*
- d) data of media services provider, including the e-mail and web-site, for rapid, direct and efficient contact;*
- e) list of publications edited by the respective legal person and list of the other program services that it provides;*
- f) Annulled;*
- g) competent regulatory or supervision authorities.*

*Article 49. The operation of the audiovisual media services shall comply with transparency rules, in keeping with which persons operating an audiovisual media service shall inform the Council on the following aspects:*

- a) changes that arose during service operation, regarding information categories mentioned in art. 48, within 30 days since the time of the respective changes;*



b) other categories of data regarding service operation, as soon as the activity has started.

Article 87. Any contract provisions, irrespective of the parties involved, that infringe, in the audiovisual field, the public's right to receive information of public interest and the free competition are null.

## 7.25. SE – Sweden

- Radio and Television Act (Radio- och tv-lag):<sup>184</sup>

### Chapter 4

Section 9. A licence to broadcast TV or Teletext may be conditioned on the obligation to:

[...] 13. broadcast a diversified range of programmes [...]

Section 11. A licence to broadcast TV or Teletext may be conditioned on the ownership structure and influence within an enterprise that receives a licence only changing to a limited extent.

Section 15. A licence to broadcast TV and Teletext may be transferred if this is approved by the Broadcasting Authority. This approval may only be granted if:

1. the acquiring party satisfies the conditions in section 5,
2. the transfer will not increase the concentration of ownership among those with licences to broadcast TV and Teletext more than to a limited extent, and
3. the transfer will not cause a reduction of diversity in the range of media services requiring a licence.

A transfer that is not approved is null and void.

### Chapter 13

Section 5. No one is allowed to hold more than one licence to broadcast analogue commercial radio within a transmission area, unless there are special grounds for this.

Section 18. A licence to broadcast analogue commercial radio may be transferred if this is approved by the Broadcasting Authority. This approval may only be granted if the acquiring party satisfies the conditions in section 4 paragraph 2.

If the acquiring party already has a licence in the same transmission area to which the transfer relates directly or indirectly through a company in which the acquiring party has an interest corresponding to twenty per cent of all the shares or interests, or has sole determining influence as a result of an agreement, the transfer should be allowed only if there are special reasons for doing so.

<sup>184</sup> <http://www.radioochtv.se/Documents/Styrdokument/Radio%20and%20Television%20Act.pdf?epslanguage=sv> (in English)

Section 27. In addition to the conditions set out in section 9, a licence to broadcast digital commercial radio may be made subject to conditions that impose an obligation to:

1. broadcast a diversified range of programmes,
2. devise broadcasts in such a way so that these are accessible to persons with functional impairments, and
3. not change the ownership structure and influence within the enterprise that receives a licence more than to a limited extent.

Prior to making a decision to grant a licence, the Broadcasting Authority shall give the applicant an opportunity to access, and express an opinion on, the conditions which the Authority intends to stipulate for the licence.

Section 28. A licence to broadcast digital commercial radio may be transferred if this is approved by the Broadcasting Authority. This approval may only be granted if:

1. the acquiring party satisfies the conditions in section 23 paragraph 1,
2. the transfer will not increase the concentration of ownership among those with licences to broadcast digital commercial radio more than to a limited extent, and
3. the transfer will not cause a reduction of diversity in the range of diversity in media services requiring a licence.

A transfer that is not approved is null and void.

## 7.26. SI – Slovenia

- **Mass Media Act (Zakon o medijih – Zmed):**<sup>185</sup>

*Restriction of ownership. Article 56. (1) A publisher of a daily informative printed medium or a single legal or natural person or group of connected persons that holds an ownership stake of more than twenty percent or a share in the management or voting rights of more than twenty percent in the capital or assets of such a publisher may not also be the publisher or a co-founder of the broadcaster of a radio or television programme service and may not perform radio or television activities.*

*(2) A broadcaster of a radio or television programme service or a single legal or natural person or group of connected persons that holds an ownership stake of more than twenty percent or a share in the management or voting rights of more than twenty percent in the capital or assets of such a broadcaster may not also be the publisher or a co-founder of the publisher of a daily informative printed medium.*

*(3) A publisher/broadcaster, a legal or natural person or a group of connected persons specified in the first and second paragraphs of this article may hold an ownership stake of no more than twenty percent*

<sup>185</sup> [http://www.akos-rs.si/files/APEK\\_eng/Legislation/mass-media-act.pdf](http://www.akos-rs.si/files/APEK_eng/Legislation/mass-media-act.pdf) (in English).

or a share in the management or voting rights of no more than twenty percent in the assets of any other publisher/broadcaster, except in cases when the present Act stipulates otherwise.

Connected persons. Article 57. (1) Under the present Act connected persons are persons that are connected in terms of management or capital or are otherwise connected such that because of the connections they jointly formulate business policy or operate in a coordinated manner with the intent of attaining joint objectives, or such that one person has the opportunity to direct any other person or significantly influence the person in making decisions on financing and operations or in deciding on the programme concept of a mass medium.

(2) Persons connected in the following manner shall be deemed connected persons as specified in the previous paragraph:

- those related by blood as close family members (parents, children, siblings, adoptive parents and adopted children) - married persons or persons in a non-marital union;
- those related through marriage/non-marital union as close family members of a spouse or non-married partner - such that one person or, together, persons deemed to be connected according to the other points in this article hold(s) a commercial stake, shares or other rights on the basis of which the person(s) participate(s) in the management of another person with at least twenty percent of the voting rights - such that in the two persons the same person or, together, persons deemed to be connected according to the other points in this article hold(s) a commercial stake, shares or other rights on the basis of which the person(s) participate(s) in the management of each of the other two persons with at least twenty percent of the voting rights - in such a way that they form a group according to the CA;
- those connected as members of the board of directors or supervisory board with a company in which they perform this function and persons considered to be connected with members of the board of directors or supervisory board under the other points of this article.

Restriction of concentration. Article 58. (1) Any person who wishes to acquire an ownership or management stake or a share in the voting rights in the assets of a broadcaster of a radio or television programme service or a publisher of general informative printed journal of twenty percent or more shall be obliged to obtain approval from the relevant ministry for the conclusion of the legal transaction or the resolution adopted by the General Meeting or another competent body of a company to be valid.

(2) All legal transactions or resolutions of the General Meeting or another competent body of a company that are not adopted in accordance with the previous paragraph shall be deemed null and void.

(3) The competent ministry may refuse to issue approval to any person, referred to in the first paragraph hereunder, which would, by means of acquiring an ownership or management stake or a share in the voting rights:

- obtain monopoly on the advertising market by itself or together with a group of associated persons;

- establish a prevailing position in the media sphere by achieving, itself or together with a group of associated persons, the coverage of more than fifteen percent of the Republic of Slovenia with analogue low-lying terrestrial radio programmes, with regard to the overall coverage of this area by all radio programme services diffused through analogue low-lying terrestrial radio technique over the radio frequencies for analogue broadcasting;
- establish a prevailing position in the media sphere by achieving, itself or together with a group of associated persons, the coverage of more than thirty percent of the Republic of Slovenia with analogue low-lying terrestrial television programmes, with regard to the overall coverage of this area by all television programme services diffused through analogue low-lying terrestrial radio technique over the radio frequencies for analogue broadcasting;
- achieve, itself or together with a group of associated persons, a prevailing market share with the number of the issued copies of the journals exceeding 40 percent of all sold copies of general informative printed journals in the Republic of Slovenia issued at least three times a week.

(4) The following stakes or voting shares shall be included in the stake specified in the first paragraph hereunder:

- those held by the controlled companies and subsidiaries of the legal entity referred to in the first paragraph hereunder;
- those obtained by a third person for its own name and for the account of the entity referred to in the first paragraph hereunder;
- those obtained by the entity referred to in the first paragraph hereunder through its related persons according to Article 57 hereof.

(5) Prior to the issue of the approval for obtaining the stake referred to in the first paragraph hereunder, the competent ministry shall obtain the data from the Securities Market Agency and an opinion of the body competent for the protection of competition.

(6) Prior to the issue of the approval for obtaining more than 20 percent in ownership or management stake or a share in the voting rights in the assets of a broadcaster of a radio or television programme service, the competent ministry shall obtain from the Agency the data on the coverage of population with radio and television programme services referred to in the second and the third indent of the third paragraph hereunder.

(7) For the issue of the approval for obtaining more than 20 percent in ownership or management stake or a share in the voting rights in the assets of a broadcaster of a radio or television programme service, and after having obtained from the data and the opinion referred to in the fifth and the sixth paragraph hereunder, the competent ministry shall obtain the opinion of the Broadcasting Council.

(8) On the basis of the abovementioned approval of the competent ministry, the Agency shall issue a regulation stipulating the manner of determining the coverage referred to in the second and the third indent of the third paragraph hereunder.

*Incompatibility of performing radio and television activities. Article 59. (1) A single broadcaster may perform radio activities alone or television activities alone, unless stipulated otherwise by law.*

*(2) The provision of the previous paragraph shall not apply if the publisher/broadcaster obtains the appropriate licence pursuant to Article 105 of the present Act.*

*Incompatibility of performing advertising activities and radio and television activities. Article 60. An advertising organisation whose activity is the collection, design and dissemination of advertisements, and a legal or natural person or group of connected persons that hold(s) an ownership stake of more than ten percent or a share of the voting or management rights of more than ten percent in the capital or assets of such an organisation may not be the broadcaster or the founder of a broadcaster of a radio or television programme service, and may not hold a stake of more than twenty percent in the capital or a share of more than twenty percent of the management or voting rights in the assets of a broadcaster of a radio or television programme service.*

*Incompatibility of performing telecommunications activities and radio and television activities. Article 61.*

*(1) An operator that provides telecommunications services specified in Article 111 of the present Act or in the act governing telecommunications may not be the broadcaster of a radio or television programme service, and may not disseminate programme or advertising, unless the licence for performing radio or television activities specified in Article 105 of the present Act is obtained.*

*(2) The licence specified in the third paragraph of Article 105 of the present Act shall be issued to an operator under the application of the sense of the criteria specified in the second paragraph of Article 104 of the present Act.*

*Protection of competition. Article 62. The regulations on protection of competition shall apply to broadcasters of mass media and operators. The relevant ministry shall participate in the procedures of the body responsible for protection of competition relating to the concentration of publishers/broadcasters of mass media and operators; the Agency shall also participate in those procedures relating to broadcasters of radio and television programme services.*

*Article 64. (1) By the end of February each year a publisher/broadcaster must publish the following information in the Official Gazette of the Republic of Slovenia: the full name and address of permanent residence of any natural person and/or the business name and head office address of any legal entity that in the publisher's/broadcaster's assets holds a stake of five percent or more of the capital or a share of five percent or more of the management or voting rights, and the full names of the members of the publisher's/broadcaster's board of directors or management body and supervisory board.*

*(2) The publisher/broadcaster must report any changes to the information specified in the previous paragraph to the Official Gazette of the Republic of Slovenia within thirty days of their occurrence.*

*(3) The Official Gazette of the Republic of Slovenia must publish the information specified in the first and second paragraphs of this article within fifteen days of receiving the order to publish.*

## 7.27.SK – Slovakia

- Act 308/2000 of 14.09.2000 on Broadcasting and Retransmission (Zakon o vysielaní a retransmisii):<sup>186</sup>

§ 42. (2) A publisher of periodicals that appear at least five times a week and are distributed in public in at least half of the territory of the Slovak Republic must not be a licensed broadcaster for multiregional or nationwide broadcasting at the same time.

(3) One legal or natural person must not be connected through capital with more than one licensed broadcaster of multiregional or nationwide broadcasting of radio programme services, or with one licensed broadcaster of multiregional or nationwide broadcasting of television programme service; at the same time, this person also must not be connected through capital with a publisher of nation-wide periodicals.

(3) One legal or natural person may be connected through capital with several licensed broadcasters of local broadcasting of radio programme service or regional broadcasting of radio programme service, or with several licensed broadcasters of local broadcasting of television programme service or regional broadcasting of television programme service only if the broadcasting of all of the broadcasters with whom this person is connected through capital can be received by maximum 50% of total population.

(4) The broadcasters may develop a programme network to an extent allowing that it is received by maximum 50% of total population.

§ 43. Any connection through capital or through personnel of a broadcaster of a radio programme service and a broadcaster of a television programme service with each other, or with a publisher of nation-wide periodicals, shall be prohibited.

§ 44. (2) A broadcaster shall be obliged to submit to the Council for examination at its request, documents and data necessary for providing proof that the conditions laid down in §§ 42 and 43 are met.

(3) If it is proved that a broadcaster does not meet the conditions laid down in §§ 42 or 43, the Council shall give the broadcaster adequate time limit for redress. If the redress is not obtained in the determined time limit, the Council shall revoke the licence of the broadcaster.

§ 47. In making a decision about granting the licence, the Council shall be obliged to evaluate and take into account:

- a) prerequisites for the observance of plurality of information and medial content,
- b) transparency of ownership relations of the applicant for the licence,
- c) transparency and credibility of financial funds designated to financing of the broadcasting,
- d) proportionality of programme structure proposed by the applicant for the licence in relation to the

<sup>186</sup> <http://www.wipo.int/wipolex/en/details.jsp?id=10804> (in Slovak and English).

*existing offer of programme services in the area of broadcasting in the territory that should be covered by this broadcasting,*

*e) contribution of the applicant for the licence in relation to the broadcasting and production of programmes in public interest,*

*f) the fact that the applicant for the licence should not win a dominant position in the relevant market,*

*g) the fact that it is necessary to ensure adequate capital participation of the Slovak persons and their representation in bodies of the company provided that the applicant for the licence is a legal person with foreign capital participation.*



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