

Controlling the information

Who owns the EU's media – and who cares?

by **Suzanne Rab***

The European Commission (the Commission) has announced that a seminar will take place in Brussels on 3 October 2014 with the eye-catching title of “Exchange of best practices on transparency of media ownership”. This clarion call to share experiences and views resurrects the ongoing debate about who owns what in the EU's media. It also prompts wider yet familiar questions about the adequacy of competition law, media ownership regulation and laws designed to protect plurality.

Similar debates are taking place overseas. In May 2014, the Law Commission of India issued a wide-ranging consultation on media law reform that was interventionist in stance. This contrasts with the almost contemporaneous publication of a policy background paper on media control and ownership by the Australian Department of Communications, which is deregulatory in tone. These divergent approaches invite a fresh inquiry as to whether the EU should take a more active role in media ownership regulation or take a softer policy stance.

Competition v plurality

To set the context for what follows, it is helpful to distinguish the concepts of competition and pluralism, which are often confused. Pluralism may be summed up as a situation where no single voice or viewpoint can control the news agenda, restrict ideas or debate, or allow government (or indeed other players) to escape scrutiny. It has been said that:

“[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.” (Hansard, Lord McIntosh of Haringey, parliamentary undersecretary, Department for Culture, Media and Sport, 2 July 2003.)

Pluralism is designed to capture issues other than those that are covered by competition inquiries into market concentration. The analysis also has to encompass the capacity of an entity to influence public debate unacceptably, distinct from any competition issues. UK guidance on this issue explains how pluralism and competition interact:

“[The plurality test] is not intended to replicate or import aspects of the substantial lessening of competition test that applies in relation to mergers raising competition concerns. This test will be applied separately by the competition authorities, where appropriate.” (Department of Trade and Industry guidance on the operation of the public interest merger provisions relating to newspapers and other media mergers, Guidance Document, May 2004, paragraph 5.15.)

Competition tests and plurality tests seek to capture very similar and frequently overlapping issues. This is not surprising since both place an importance on ensuring that markets are not controlled by a limited number of people or entities.

There may be cases where a pure competition test does not address the more complex – and inherently harder to define – concept of plurality. Such cases tend to be easily identifiable, such as where a controversial media owner seeks control of the press for political purposes or where religious viewpoints are marginalised.

The vast majority of cases can be dealt with through the robust application of competition law by a specialist regulator. If – and only if – further issues are identified, targeted rules can be developed on a case-by-case basis, such as restraints on political parties controlling a television station.

The experience in the UK, which has an elaborate media plurality regime, bears out the above. In the decade or so since the current framework under the Enterprise Act 2002 was put into operation, only three cases have raised plurality issues such as to warrant a further inquiry. Critically, there has been no final merger control determination in a case involving only plurality issues.

In BSkyB/ ITV, BSkyB had acquired material influence over the broadcaster ITV. Even in those circumstances, the Competition Commission concluded that sufficient plurality remained for each major audience in the UK, both in terms of a TV audience and a cross-media audience.

News Corporation's proposed acquisition of the shares in BSkyB that it did not already own was an unusual case that is unlikely to have international counterparts. The case did not reach a final decision by the secretary of state, so it provides no definitive support for the efficacy or otherwise of plurality controls.

The third instance was Global Radio/ GMG Radio. Despite the issue of a public interest intervention notice, there was no Competition Commission reference on media plurality/ public interest grounds (only on competition grounds).

The EU media regulation framework

EU law does not provide for sector-specific pan-European legislation on the control or ownership of the media. The rules aimed at regulating media diversity and plurality are contained in the laws of the member states, subject to supervision by the Commission to ensure that such rules do not jeopardise the functioning of the internal market.

However, the acquisition of control of a media entity may amount to a concentration with a Union dimension and be subject to exclusive review by the Commission under the EU Merger Regulation (the EUMR). Article 21(4) of the EUMR permits member states, under certain specified conditions, to review concentrations with a Union dimension under their national law on grounds other than competition, and provided that such grounds constitute legitimate interests compatible with EU law. Article 21 specifically mentions plurality of the media as grounds amounting to legitimate interests for this purpose.

* *Suzanne Rab is a barrister at Serle Court Chambers. She is co-author of Media Ownership and Control: Law, Economics and Policy in an Indian and International Context (Hart Studies in Competition Law, 2014)*

Against this rather limited scope for the Commission to intervene in media ownership, it may be asked what form of supranational action could be taken under EU law.

Article 11 of the Charter of Fundamental Rights of the European Union provides that “the freedom and pluralism of the media shall be respected”. However, that still seems a rather tenuous basis on which to adopt a pan-European law on the issue.

A mixed bag

It is not surprising, then, that the laws of the member states in matters of media regulation have developed their own idiosyncrasies. The prevailing trend is that there is no “one size fits all”, and the regime design choice cannot be divorced from the political and cultural environment in which it takes place. A few themes tend to stand out.

In most EU countries, competition law and mainstream sector-neutral merger control are applicable, regardless of the market segment. Some countries adopt only sector-neutral regulation where the media market segment is subject to the same regulation as other sectors and there are no additional requirements or controls (eg Denmark, the Netherlands and Sweden).

In the absence of sector-specific regulation – and even where there are sector-specific rules – there is co-operation between the competition authority and the sector regulator (eg Finland and the UK). Refraining from implementing media-specific controls does not mean that sector insights cannot complement and enhance the operation of the competition regime. For example, involvement of the sector regulator in merger review by the competition authority, albeit in a consultative capacity, can facilitate a more efficient and predictable division of regulatory functions.

Where ownership restrictions or caps apply, there tend to be differences depending on the type of media or concentration. There is no universally accepted approach among regulators. Rather, there is an appreciation of the need to take account of the specifics of individual media market segments. The trend is away from taking a crude sledge-hammer approach to tackle complex issues. There tend to be few restrictions on ownership of the press or concentration between newspaper companies. Where cross-media regulation is present, this tends to apply mainly to the broadcasting sector (eg Germany).

Cross-media ownership regulation, where it exists, does not impose limits on ownership across traditional and new media (ie a bricks-and-mortar newspaper provider distributing content online) but does limit holdings across multiple media.

The evolution of new media affects media regulation in two main ways. First, at the definitional level, there does not appear to be a compelling need to differentiate between traditional and new media in terms of the regulation imposed, provided there is functional equivalence. Second, the explosion of new media in the last decade has radically transformed the media landscape. This itself creates additional diversity which might obviate the need for intrusive controls that were developed for a very different era.

The licensing system is also used to supplement competition law or sector-specific controls, particularly in the broadcasting sector (eg Belgium, France and the UK). This impacts on both the number of licensed providers and on the content that is

disseminated. In this way, the licensing system may serve as a screen which seeks to promote pluralism by ensuring that licensed providers observe certain minimum requirements, such as impartiality and accuracy.

Some countries have supplemented their media ownership rules and mainstream merger control with sector-specific substantive rules or presumptions. These tend to be the exception and vary in sophistication. Two approaches emerge:

- (1) the adoption of proxies for measuring plurality, such as market-share thresholds (eg Greece); and
- (2) the use of a specific substantive, quantitative and qualitative assessment that seeks to define plurality more accurately (eg the UK).

A bright-line market share threshold may have advantages in terms of ease of application but it suffers from being a blunt instrument that gives no scope for qualitative assessment. The latter approach, however, does have risks in terms of costs, complexity and unpredictability in its application.

The regulatory regime is subject to evolution. Overall, in the European Union, there are examples of a reeling-back of ownership regulation, whether in the form of ownership caps or restrictions by category of owner (eg the Netherlands and the UK).

It is also important to remember that many of these laws take place against a background of lobbying by interest groups. Ownership caps are often influenced by the need to preserve incumbent interests (or, conversely, may even be targeted to address certain combinations that have been deemed inimical to the public interest).

The 2013 consultations

In the period 2007 to 2009, the Commission engaged a consortium of consultants and academics to conduct a major study on media plurality across EU member states. The Commission’s objectives were to consider appropriate methodologies to measure media plurality, and to monitor and indicate risks to media plurality. It developed a diagnostic tool, the media pluralism monitor, which had multiple indicators.

A report was published in 2009 but (until relatively recently) there were no subsequent developments or momentum for the Commission to take a more activist stance in this area. This is perhaps not too surprising. Two major issues were complexity and regulatory burden. It may seem ambitious to expect 28 member states to compile and monitor some 166 metrics for assessing plurality. Even if that task could be achieved, it still raises the question as to what is the end in sight (ie what to do with the data thus gathered)?

Then two public consultations were launched in 2013, which suggested that the Commission was considering a more interventionist role in setting media regulation policy.

One of the consultations was relatively uncontroversial and need not trouble us here – it concerned the independence of media regulators, highlighting formal as distinct from de facto independence. By contrast, the second – the public consultation on the independent report of the high-level group on media freedom and pluralism – did divide opinion. It advocated a more proactive role by the Commission in the monitoring and regulation of media freedom and plurality in the member states. It sought responses on 30 recommendations

in a report published by the high-level stakeholder group on media freedom and pluralism.

The detail of the individual recommendations was wide-ranging. While space will not permit an exhaustive examination of them all, the following are particularly noteworthy:

■ **Recommendation 1.** The European Union should be considered competent to act to protect media freedom and pluralism at state level in order to guarantee the substance of the rights granted by the treaties to EU citizens, in particular the rights of free movement and to representative democracy.

■ **Recommendation 2.** To reinforce European values of freedom and pluralism, the EU should designate, in the work programme and funding of the European fundamental rights agency, a monitoring role of national-level freedom and pluralism of the media. The agency would issue regular reports about any risks to the freedom and pluralism of the media in any part of the EU. The European parliament could then discuss the contents of these reports and adopt resolutions or make suggestions for measures to be taken.

■ **Recommendation 6.** A network of national audio-visual regulatory authorities should be created, on the model of the one created by the electronic communication framework. It would help share common good practice and set quality standards.

■ **Recommendation 8.** European and national competition authorities should take into account the specific value of media pluralism in the enforcement of competition rules.

■ **Recommendation 9.** Media freedom and pluralism should play a prominent role in the assessment of accession countries. A free and pluralist media environment must be a precondition for EU membership.

Problems with the Commission's proposals

The Commission's proposals were controversial. A closer examination reveals a disconnect between the ostensible goal of promoting media freedom and plurality in media ownership and what appears to be the promotion of wider policies.

The recommendations that advocate or at least suggest a pan-EU approach to media freedom and pluralism are even more controversial, since there is no consensus on the threshold question as to whether the EU is or should be considered competent to act to protect media freedom and pluralism at member state level. Indeed, this question was one of the issues for consultation and there are arguments on both sides.

The establishment of a monitoring centre of itself might aid transparency and inform policy choices on the basis of objective data. But there is a risk that this organisation might duplicate the work of other agencies. At the very least, the recommendation invites consideration of how such an agency should co-ordinate with other bodies and the national regulatory authorities that are engaged in similar activities. However, it raises a wider issue as to what is the use to which such information might be deployed.

The creation of a network of audio-visual regulatory authorities throughout the EU has counterparts in the communications sector. However, opponents might raise the "thin end of the wedge" argument if there are suggestions that such a network might stray beyond its remit of the exchange of best practice and encroach into policy-setting.

The elevation of plurality as a distinct element that has to be taken into account in competition law enforcement raises a

whole host of definitional questions on which there is, as yet, no consensus among regulators internationally. It may be that the recommendation for the inclusion of such a concept in national competition law is the better (albeit more modest) aim, rather than uniformity in the approach adopted by individual member states. The UK market investigation, where public interest issues such as plurality may be considered in isolation or alongside a competition issues regime, provides an example of the incorporation of public interest issues into competition law enforcement. Beyond the detail of how such a concept would be incorporated into competition law enforcement in the different member states, the question arises as to the relationship with the exclusive competence of the Commission under the EUMR and the interaction with article 21(4) EUMR. Presumably, this division of competences would remain intact.

Finally, the stipulation that accession countries should have plural media sectors raises a wider issue beyond the diversity of the existing EU media landscape.

Transparency in media ownership

The Commission's forthcoming seminar appears to signal a more moderate approach to the EU's role on the regulation of EU media by setting transparency at its core. It remains to be seen, however, whether some of the more radical reforms put forward last year are off the table.

Why, then, does transparency about the ownership of media entities matter? Is it to enable consumers to make effective choices between different media offerings; to assist regulators and policymakers to identify where intervention may be required; or to encourage good corporate governance among media entities themselves? These questions will no doubt be debated, since the pursuit of transparency as an end in itself should not be the agenda.

What should the Commission aim to achieve? First, it should not try to duplicate or complicate existing national schemes. The emphasis should be on co-ordination where broad patterns of consensus emerge (perhaps in the area of editorial independence). Second, it should try to build on existing requirements in the area of transparency, such as obligations under company law. Third, the focus should be on "practices" and not just "best practices". By examining what has not worked so well alongside what has proved effective may yield better pathways to follow. Fourth, industry support will be fundamental to securing the legitimacy and effectiveness of any action taken as a result.

Finally, transparency also calls for openness about why a particular form of media regulation is imposed or a practice encouraged: whether it is motivated by evidence of a competition problem, a concern about diversity of media content, a fear that a particular owner might obtain disproportionate influence – or something else. Even if not everyone agrees with the policy rationale, let us at least be honest about what that rationale is.

Stepping back from the recent consultations and experiences in the EU, it is likely that the debate over the appropriate form of media ownership monitoring and regulation (if any) will continue in Europe and elsewhere. The priority should be on the design of regimes that emphasise co-ordination, transparency and, above all, balance.