

Media ownership and regulation in the European Union
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I would firstly like to thank the organisers for inviting me to what is a highly interesting and topical conference. I will be providing a background to discussions later today by outlining the state of media ownership and regulation in Europe. The talk will be divided into three parts. I firstly will speak about the degree of cross-border market consolidation in Europe and some trends within national markets. Secondly, I will overview national regulatory trends within Europe. Then lastly, I will discuss European Commission approaches to regulating the sector.

This slide shows the leading European groups are Bertelsmann, the Modern Times Group, ProsiebenSat1 and News Corporation in broadcast markets. These groups own television channels with high percentages of national audience shares in both television and radio in the markets they are operating in. Bertelsmann AG has a 91.6 per cent interest in the RLT Group which operates television and radio stations in 10 European countries including RTL television in Germany, M6 in France, the RTL channels in the Netherlands, Belgium, Luxembourg, Croatia and Hungary, Alpha TV in Greece, and Antena 3 in Spain. It also owns radio stations in France, Germany, Belgium, the Netherlands, Spain and Luxembourg. Bertelsmann also owns the FremantleMedia production group which is the largest in Europe. The Modern Times Group (show footprint <http://www.mtg.se/en/brands--operations/footprint>) owns television stations in Norway, Sweden, Finland, Denmark, Latvia, Estonia, Lithuania, Poland, Czech Republic, Hungary, Slovenia, Slovakia, Romania, and Bulgaria within the European Union. Thirty-one of its Viasat television channels are broadcast out of the UK at its West Drayton, London base. ProsiebenSat1 has 27 television channels in 10 countries. The group remains prominent in Austria, Germany, Hungary and Sweden but has recently withdrawn from Netherlands and Belgium. CME operates 23 commercial television stations and a number of subscription channels in six Central and Eastern European states. News Corporation deserves a mention due to holdings in newspaper groups in the UK and Ireland. It also owns 100% of Sky Italia and substantial interests in BSKyB in the UK and Ireland and in Sky Deutschland.

The other leading European players are News Corporation with CME. CME operates in Central and Eastern Europe. Ownership limits *within* television stations in most member states have been removed, meaning that there is less cooperation between the main groups in Europe than in the past. However, there is clearly a higher degree of market consolidation across borders than ever before.

Newspaper ownership is relatively diverse in larger member states. However, smaller states remain highly concentrated and the states of Central and Eastern Europe have been dependent upon foreign investment from early on. Even though ownership is diverse in larger states, in France and Italy, media ownership remains in the hands of industrial families. Dassault in France for example owns 70 newspapers, which brings questions about political influence and independence.

Looking at regulation, traditional instruments used to govern media ownership, such as circulation limits turnover/revenue limits, and restrictions on share capital or voting rights, have been removed in most EU member states and replaced with competition law. In some member states there are no specific sector rules remaining for the media. Some specific sector rules remain in Austria, Germany, Ireland and the UK, such as audience share limits on television and lowered thresholds for competition decisions. Denmark, Finland, Poland, Portugal and Sweden still have some cross-media ownership rules. However, whereas in the past market share used to be limited to 15-20%, today most states limit market share to between 30% and 50%. It is important to remember that all sector specific rules are permitted under Article 21 (4) of the 2004 Merger Regulation which states that “Public security, plurality of the media and prudential rules shall be regarded as legitimate interests”.

Sector specific rules however often do not catch significant market concentrations and, although competition law is thought to give better legal clarity, governments and regulators are still experiencing a lot of problems in taking decisions on media mergers and acquisitions. Turnover thresholds are not always a good indicator, as newspapers in particular, are not that profitable. Public interest tests are also difficult to justify and traditional measures, as stated previously, have been removed. Even larger member states encountered problems with acquisitions in recent years due to the lack of statutory regulation. In 2005, in Germany, the Axel Springer press group acquired ProSiebenSat.1. Axel Springer already owned the national newspapers, the *Bild* newspaper and *Die Welt* which represent 68% of national newspaper circulation and with the acquisition it gained ownership of the 2 largest television stations, ProSieben and Sat.1. The German Federal Court intervened and declared the purchase invalid based upon a study by a regulatory body, the *Kommission zur Ermittlung*

der Konzentration im Medienbereich on concerns of plurality. This was later backed by the Federal Cartel Office. My main point is however that the KEK was specific to the Axel Springer/ ProSiebenSat and was also not supported by any statutory means.

Similarly, in December 2007, the UK Competition Commission encountered difficulties in mandating BSkyB to reduce its 17.9% stake in ITV to 7.5% percent. The acquisition did not exceed limits set out in the 2003 Communications Act. Eventually, the decision was made on voting rights under competition law but clearly questions of plurality were in the background. The point I am making here is however that parliaments are not providing legal clarity to industry. If plurality is considered to be salient, this needs to be made clear in statutory regulation.

I'd like to look in more detail at national regulation with the examples of Germany and the UK. In Germany, the threshold for notification of *mergers and acquisitions* is lowered for companies editing, producing or distributing newspapers and magazines, or television or radio services or engaged in the selling of advertising time in the broadcasting. This lower requirement for the media industry was queried in the mid-2000s – as to whether it was really necessary or justifiable. However, the acquisition of the broadcasting group ProSiebenSAT1 by the press group Axel Springer Media in 2005 triggered a rethink and the thresholds were not dropped. From 2007, the KEK introduced a new weighting system which converts the market share of press, radio, the Internet into the equivalent in television audience share when assessing media concentration decisions.

In the UK there are no lowered thresholds as in most of continental Europe. Newspapers are subject to normal merger regulation under the Enterprise Act. However, the Secretary of State for Trade and Industry can intervene on public interest grounds. Guidance for this is outlined in a document entitled *Public interest intervention in media mergers* published in 2004. It advises that newspaper mergers assessment with a market share of 25 percent or more be assessed. This can be applied to local and regional as well as national markets. The 'public interest' test is protected under Article 21 of the EU's Merger Regulation but, as stated, this was not used when assessing BSkyB's stake in ITV nor did it make any difference during News Corporation's proposed acquisition of BSkyB last year. So what good is it?

What about the European level? In 2007, the Council of Europe recommended that its member states adopt rules governing ownership thresholds based on traditional instruments of audience share, circulation, turnover/revenue, the share capital or voting rights. However, as stated, most European states have now removed these instruments and there are proposals

under way to remove them further at national levels. Indeed, local ownership rules were removed in the UK under the 2011 Media Ownership (Radio and Cross-media) Order.

The Council of Europe recommendation also conflicts with the European Commission's internal market aims. The Commission has historically supported media market consolidation. The view of the European Commission is to ensure that there are as few impediments to the internal market as possible. In a speech to the European Publishers Forum in 2005, Vivian Reding stated that she would like to have "an early warning system in order to signal whether new policy initiatives would damage the editorial or commercial freedom of the media". This indicates that the European Commission is opposed to additional regulation on press markets, an industry which the Commission sees as in steep decline, particularly due to advertising revenue loss to the internet.

As similar message was apparent in the 2007 European Commission staff working document on *Media pluralism in the member states of the European Union*. The Commission's document generally argues that member states' rules are outdated due to convergence and that other measures are needed to ensure pluralism to compensate for market concentration. It further states that "the development of strong European players in the global media landscape helps preserve media pluralism".

The Commission challenged the normative argument that greater concentration leads to less pluralism in its distinction between 'internal' and 'external' media pluralism. According to this view, countries with highly concentrated press and broadcasting markets such as the Netherlands, and Scandinavian states, would have a less pluralistic media than countries with a greater number of market players such as France, Spain and Italy. Hence, the Commission argued, assessing pluralism becomes much more complex and multiple indicators need to be delineated.

Accordingly, in 2009, the EC published a large scale independent study on media pluralism which identified indicators and develop monitoring tools for assessing media pluralism in EU member states. The European Commission had planned to release a Communication which will which would recommend that EU member states applied these indicators at the national level. However the Communication never came to fruition. There was in any case little enthusiasm for application of the indicators at a national level. Only the Italian media regulator AGCOM applied the indicators and reported its results to the European Platform of Regulatory Authorities (EPRA) in 2009. However, AGCOM's comments on the study related more to methods problems rather than questions of media plurality. Indeed, many member states simply do not have the resources or enough information to implement the study.

In October 2011, the Commission since established a High Level Group to discuss freedom and pluralism of the media across the EU following European Parliament pressure. This group will analyse political interference from state intervention which means that state broadcasters will be scrutinised; legal threats to the protection of journalists' rights; and media accountability.

It is difficult to see however how the European Commission can legislate for media pluralism beyond a vague recommendation which in any case needs to be supported by Member States. The EU has no real treaty basis for regulation in this field. The only available on which to base a Directive is Article 151(4) of the Treaty which is a weak instrument as it requires unanimity. It has mainly been used to justify structural funds. Article 11 of the Charter of Fundamental Rights is even weaker.

As stated, in any case, the core agenda of the European Commission however is clearly the creation of strong European companies which favours market consolidation and the reduction of state aid. National regulation continues to govern media ownership protected under Article 21 (4) of the EU Merger Regulation which needs to be preserved. There are areas where the European Union has stronger legal basis and could take action. The European Union could however promote much greater transparency and exchange of information on media corporation activities within Europe which would allow for greater public scrutiny.

Presently, most regulatory authorities in Europe mainly rely upon company reporting for monitoring. They do not necessarily require submission of annual company reports. And company accounts are not necessarily made available publicly which restricts public scrutiny. Since companies are increasingly multinational, this greatly reduces the ability for member states to monitor media ownership and the activities of executives and non-executive directors. There is presently no European equivalent to the US Securities and Exchange Commission. In the US, companies are obligated to submit quarterly and annual reports to the Commission as well as management reports which are then made publicly available. In the US, the Commission has enforcement powers granted by Congress which permits it to take companies to court if they have misinformed the authority or violated company law. The 2004 EU Transparency Directive and 2007 Recommendations for implementation now require companies to disclose financial information to regulatory authorities in half-yearly reports. But there is a need for *public* disclosure and access of such information. Although exchange about the operations of media companies often takes place on a voluntary basis (via EPRA for example), there is no requirement for regulatory authorities to share information across Europe. It would be useful if there were public disclosure of company accounts and

management reports of all media firms operating within Europe which would allow greater scrutiny of media company activities by citizens and interest groups.

The 1994 European Union Works Council Directive is another useful tool. It is applicable to companies with 1,000 or more employees, requires companies to disclose information to unions and to consult them on company decisions. Journalists' unions have been able to use this measure successfully to negotiate better editorial terms, for example with the CME group in Central and Eastern Europe. This Directive could be expanded and revised with a special status for media companies.