41st EPRA meeting
Berne, 14-15 May 2015

Plenary session 2:
How to ensure and assess Media Pluralism and Diversity of Media Content

'Monitoring Media Pluralism – an exercise in futility?'
Summary of Paper[1]
Marie McGonagle

1. Introduction – the implications of the onward march of technology

What recent technological developments tell us at the outset is that they are acquiring a great capacity to monitor everything we do in life, even in private, and the potential for us to monitor them is extremely limited. Society's ability to address potential abuses in a timely-way is very limited, such is the inevitable policy gap between the cutting edge of technology and the 'lagging edge of social norms'.[2] Any attempt at monitoring, therefore, as we have long-since realised, must be substance-based, rather than platform-based, it must be technology neutral. However, it is also clear that any monitoring will have to take account of these new platforms as they arise and gain currency (though not all may do so to any statistically significant degree) not only because of the economic strength of Apple and Amazon and their ilk, their global reach and their power in relation to sourcing and choice of content but also because – or to the extent that – the products are qualitatively and editorially different from traditional media.

At a minimum, as the EBU has pointed out, pursuit of public interest objectives in this regard requires 'a proper understanding of the multi-platform environment and the role of digital intermediaries, such as content aggregators, online distributors, audiovisual platform operators, search engines and social media.' It also requires 'a fair balance between these intermediaries who often operate in an unregulated environment, even though they offer European audiences a platform to access audiovisual works', and regulated European audiovisual media providers 'to ensure that accessing content of public value is not impeded by powerful global players outside the EU.'

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[1] A final, full version of the paper will be produced after the Berne meeting.
[2] Trevor Hughes, CEO of the International Association of Privacy Professionals, cited in Karlin Lillington, 'Many tech tools seem incapable of protecting our data', The Irish Times 23 April 2015.

2. Evolution of methodologies and processes

The pursuit of media pluralism is not new but media pluralism as a democratic goal has moved in Europe from a desirable policy pursuit[3] to a positive obligation on States, following from the jurisprudence of the European Court of Human Rights[4] and more recently the European Charter of Fundamental Rights. The debate on the effects of the inclusion of media pluralism in the Charter, and the question of EU competencies in that regard, led to recognition of the central role to be played by Member States at national level, in what are quite different media landscapes, and the concomitant supportive role to be played by the European Commission.[5] Accordingly, the quest for appropriate and effective methodologies for identifying areas of concentration and factors posing a threat to media pluralism has gained momentum and has increased in intensity and sophistication at national and international level in the past few years. National governments and media regulators, international organisations (such as the Council of Europe, UNESCO, the OSCE), NGOs (e.g. ARTICLE 19, Freedom House), etc., have all contributed to the debate on how best to promote[6] media pluralism in a local and global media environment. Underpinning these attempts there has been a wealth of academic research and a growing volume of metrics and statistical analyses.

A starting point for development of methodologies had (and has) to be to a concerted effort to clarify the underlying public interest values and goals. Definitional clarifications and updates were (and are) also necessary at the outset, given the (continuing) rise of new digital players/intermediaries. Working out how to differentiate and treat these powerful new entrants into the market by reference to the nature of their functions and sphere of influence was also imperative. This kind of exercise needs to be ongoing in such a dynamic market.

3. Key elements of the developing methodologies and processes – goals

The various studies and policy reports in Europe and around the world devoted to the issue of promoting pluralism in the media have set out on different courses, with different approaches to

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[3] For instance, Article 21(4) EU Merger Regulation 139/2004 stipulated that plurality of the media was one of the examples of 'legitimate interest', which would allow States to take 'appropriate' measures'. In 2014, the European Commission published a White Paper 'Towards more effective EU merger control' with an accompanying Commission Staff Working Document – COM(2014) 449 final) and SWD(2014) 217 final and 218 final.

[4] The European Court of Human Rights has held that a pluralistic media is of essential value to democracy and has imposed obligations on states to guarantee that numerous media operators are present in a given national market (Lentia v Austria (1993)). The European Commission on Human Rights supported the proposition that under Article 10 ECHR states have a positive, enforceable obligation to avoid excessive media concentration (De Geillustreerde Pers NV v Netherlands (1976) and Verein Alternatives Lokalradio Bern v Switzerland (1986)). The Court has recognised that one of the ways to media pluralism is to prevent increasingly powerful financial groups from controlling the advertising sector (Tierfabriken v Switzerland (2002)). See generally Ewa Komorek, "The European Court of Human Rights, The Council of Europe and the Issue of Media Pluralism" [2009] 3 European Human Rights Law Review 395-414.

[5] See Council of the European Union, Council conclusions and of the representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment, November 2013, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/139725.pdf

[6] The title of this session says 'ensure' but I would take issue with that verb as the task of 'ensuring' plurality is an arduous if not impossible task.

identifying and tackling the problems and barriers. Some focus primarily on analysis of content, some on structural issues and others on market issues.

The model that has been pursued in the European Media Pluralism Monitor (MPM) is one to enable risk management, in other words to provide a mechanism to identify the problem or risk areas so that they can be further monitored or dealt with by national authorities before they crystallise into something bigger. It is not prescriptive as to what is to happen when risk areas are flagged. In that sense it merely provides information and an analytical and evidential basis for Member States on which to act as they see fit. To the extent that it is based on theoretically informed and empirically-driven research, it can provide a valuable alarm system and benchmark.

There have been a number of interesting initiatives at national level in several countries in the last year or two also that deserve consideration and may provide useful avenues for the outworking and improvement of the MPM. Some of these are outlined in the full paper.

They include initiatives in the U.K., such as Ofcom's proposals of a 'sufficient plurality' test; its 'share of reference' test and 'main source' survey; and its proposal for regular reviews (4-5 years). The Dutch concepts of 'reflective diversity' and 'open diversity' and their sense of a 'future proof monitoring system' are of interest, as is the Norwegian development of a method for quantitative content analysis of news online, and the Catalan approach to content monitoring. A report of the German Commission on Concentration in the Media (KEK) is particularly informative with its references to a recent Constitutional court decision, the Bavarian Media Monitor and the Hans Bredow study on 'Information Repertoires of the German Population'. All are rich in terms of principles, analysis, methodologies. Recent developments in Ireland, where new legislation puts the public interest in media pluralism at the heart of the criteria to be used in testing proposed media mergers and provides for guidelines on the interpretation and application of the criteria, is of significance.

4. **Key principles, practicalities and emerging wisdom**

Common themes in the literature, the reports and initiatives and pilot studies portray considerable agreement on core principles, if not necessarily on aspects of the proposed processes.

➤ **Accountability**

Accountability of whom, to whom? Media organisations (which must include all significant influential elements of integration, e.g. advertising agencies), must be accountable to audiences and users; plurality assessments must focus on the interest of the citizen.

How can we ensure appropriate levels of accountability of the new digital intermediaries? Legal underpinning? Dialogue? Remedies and back-stop powers? Complaints mechanisms? Incentives?

➢ **Transparency**

Obligations should be placed on media businesses themselves to furnish information as an aid to monitoring but the requirements must not be too onerous; they must be proportionate and confined to necessary information relating to priority issues. While providing certainty, there must also be some flexibility built in to safeguard commercially sensitive material and opt-outs where some information is not relevant or less relevant to particular entity/entities. The use of guidelines can help to reduce the onus on companies and provide them with clarity and certainty. Monitoring processes, too, should be open and transparent, in design and implementation, and should be subject to wide consultation with stakeholders and public. Periodic review, feedback and feed-in should be part of the process.

➢ **Access**

Ease and extent of access to the market for both entrants and users are crucial matters and must form part of any monitoring. The concepts of universality and visibility are central to the realisation of effective, fair and non-discriminatory access. Rather than just the availability of content, content distribution models which enable as many citizens as possible to actually access a plurality of media content are important, as is visibility of services of public value on the main platforms.

➢ **Extent and scope of monitoring**

However desirable it may be to have as comprehensive a view of the whole media anatomy as possible, the level and extent of monitoring must be practical and proportionate to the overall goal. It appears wise, therefore, to start small and monitor only a representative number of countries and confine the monitoring to news and current affairs content, as has been done. Extending it to all Member States, which is now underway, will have the benefit of testing both the methodologies and the process. However, it appears that what is monitored will in time have to be extended to at least some forms of wider cultural and entertainment offerings that can be shown to have public opinion forming power.

Much discussion has revolved around the question of the best method of monitoring and what the most appropriate methodologies are, e.g. metrics versus periodic review. It would appear that what is regarded in much of the literature as the best approach is a metrics based review, followed by periodic reviews. Mixed method, quantitative and qualitative, and triangulation are favoured in a number of the reports and studies examined.

➢ **Policies on new media education and internet literacy**

A number of reports and studies stress the importance of Internet literacy to strengthen independent and informed decision-making regarding content by users.

➢ **Practicalities**

In practice, the success of any oversight or monitoring endeavour is more readily assured where there is partnership or at least cooperation with industry, as industry has a level of knowledge in many respects that no government or regulator will have, and its buy-in is important.

Making use of existing tools and resources such as audience reach surveys and usage data, either national or multi-national for comparative purposes, is clearly advisable. Pooling resources for smaller states could be considered. Linkage between initiatives, studies undertaken and findings made by different bodies either within States or across EU Member States could be helpful both in terms of useful information exchange but also complementarity and avoidance of unnecessary duplication. Clearly, EPRA already performs a very useful and effective role in this regard. Follow-up on monitoring, taking full account of previous findings, through periodic review is imperative in a fast-changing media environment.

Procedures need to be clear and user-friendly, provide certainty to those subject to them and should not be overly complex. Economic sustainability has to be taken into account.

5. **Conclusions**

Monitoring is but one step in tackling a complex web of structures, convergence, integration, consolidation, concentration, fast-paced change, global reach and power, content sourcing and distribution, consumption, and so on.

The MPM on its own has the capacity to provide useful base-line information, including comparative data, and to pinpoint potential risk areas. On its own, it cannot do much more than that, other than act as an incentive or catalyst to national authorities to take reparatory measures. The measures that can be taken ex post facto when a deficit or problem area is flagged are limited, as many of the studies point out. To be effective in practice, the monitoring will need to be 'supported' by other

tools ranging from legal and regulatory mechanisms to policy strategies, benchmarking, provision of guidelines, drafting of codes, stimulating, incentivising, dialogue.

The process itself is as important as the mechanisms and methodologies. Above all, as a tool, it needs to be realistic, proportionate; it cannot easily keep apace unless it gets to the heart of the problems and is designed to accommodate any significant new 'media' gaining a significant foothold in the market. The prospect of multi-issue monitoring becoming disproportionate to the objective and benefits derived has to be avoided. Monitoring for media pluralism will have to be constant and consistent if it is to be effective and allow for rapid responses to problems. Once embedded, however, it may be possible to have a low level of reporting by Member States on an annual basis and only run the full monitoring programme every 4 or 5 years. As CMPF point out, there is potential in their re-design for live time watchfulness.

To conclude, we have had an array of initiatives, as outlined earlier in this paper. We are now at the stage of learning the lessons. Having learnt the lessons, the next step will be the ways to proceed.

There are positive, enabling roles that governments and policy-makers can play. For instance, high quality content is at a premium and central to the multi-platform digital world. Open, competitive, targeted funding schemes (such as the BAI's Sound and Vision scheme) are one way of encouraging and generating quality. Investment in good quality broadband for all is another. Strengthening net neutrality principles, regulation to ensure non-discriminatory access, creating navigational tools, promoting media literacy, can all help significantly.

When all is said and done, it is reassuring that news is readily available and is being accessed on whatever device. Any growth in supply and access must be welcomed, whether it is at the social media end of the spectrum or in the traditional media or both. Even if social media and search engines only mean that some people stumble upon news sources and news rather than directly seeking it out, they serve a purpose. An engaged citizenry is what participatory democracy is all about.

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