

Contribution to the EU public consultation on media pluralism and democracy

July 2016

Media pluralism is paramount for a functioning democracy and for a free and open society. Access to a plurality of editorial lines and analyses is essential for citizens to be able to confront ideas, to make their own informed choices and to conduct their life freely.

1. Media pluralism : a complex issue

Two definitions of pluralism

Media pluralism can either mean a plurality of voices, of analyses, of expressed opinions and issues (*internal pluralism*), or a plurality of media outlets, of types of media (print, radio, TV or digital) and coexistence of private owned media and public service media (*external pluralism*).

Global trend of ownership concentration in the mass media

RSF can report a global trend of ownership concentration in the creative industries, including mass media. Alongside this development comes a concentration of control over public opinion in fewer and fewer hands, year after year, which results in a decline of media pluralism almost everywhere. As an outcome of our analysis, we can offer a few indications for possible reasons:

- 1. Business models vanish** : In a highly regulated, analogue environment of the past, the scarcity of distribution channels secured viable businesses. The abundance of offer in our digital world has demolished most of them.
- 2. Emergence of new players** : The subsequent, precarious state of the media has turned it ripe for unfriendly take-overs by all sorts of investors, trying to secure their interests by control over public opinion. Given the tremendous wealth and power of some local oligarchs, seamlessly mixing very profitable businesses of all sorts – organized crime in some cases, political activities and media operations, the development of pluralistic media landscapes stalls or even falls back.
- 3. Content is no longer king** : in the analogue past, technology was seen as an enabler to drive content creation. In the digital era, content is seen as an enabler to drive technological advancements. Traditional gatekeepers of analogue media, i. e. broadcasters and publishers, used to re-invest their revenues largely into content production, either through the employment of staff or the commissioning of ready-made pieces. In our digital economy, media spendings, both by advertising clients and private households, soar. But the gatekeepers change towards multinational, unregulated platform providers who reinvest their profits in anything but content.
- 4. Editor vs. Algorithm** : While the analogue media ecology featured man-made selection of content, digital technology replaces it more and more by robots. This development triggers a whole new range of professional, ethical and regulatory questions, which needs to be addressed in order to secure media pluralism.

Both aspects of pluralism need to be strengthened

Confronted with this trend, the EU and member States should implement legal frameworks that ensure that citizens have access to a minimum number of different media outlets and types of media, and every media outlet should implement rules to guarantee that a minimum level of plurality of editorial lines and analyses is expressed.

2. Pluralism is not sufficient to ensure freedom of information if independence is not guaranteed

⇒ Pluralism of media outlets (external pluralism) alone is not sufficient to ensure freedom of information : A high level of concentration in the media sector is not in itself an obstacle to freedom of information, if the editorial production is independent from any kind of external pressure. Similarly, a very large number of media outlets, if none of them is independent from interests that are external to editorial production (political interests, economical interests, etc.), or if all of them have the same analysis of fact following similar editorial lines, do not contribute to strengthening democracy. Moreover, surveys show that above a certain threshold, a very large number of media outlets can lead to a lower quality and quantity of produced information (due to fragmentation of editorial staffs, duplication of costs, repartition of the audience over a multiplicity of outlets, reduction of audience shares...)

⇒ Pluralism of analysis, of views expressed (internal pluralism) does not either, in itself alone, guarantee that the information produced serves the general interest, if these analysis are not independent from political powers, from economical interests, etc.

Editorial independence is another concern of the same importance

Media pluralism, though essential, is not the only concern as regards to fostering democracy. An other concern, which is of the same level of importance for democracy, is the issue of the independence of information - meaning the independence of the editorial production from influences and interferences by external interests, whether they are economic interests (of the owner, the shareholder, the advertiser), political interests, or any kind of interest that is external to producing uninterested news.

More and more, the news is produced to serve business interests or political agenda, not to provide citizens with tools to take enlightened decisions and informed choices. The recent years, in many EU countries, have seen take-overs by all sorts of investors, trying to secure their interests by control over public opinion.

Therefore, in RSF's view, pluralism and independence, as regards to strengthening democracy, are interdependent and must both be promoted:

- Media pluralism can foster democracy only if implemented in an environment where editorial independence is guaranteed. Or else, pluralism could just mean a variety of propaganda or public relations speeches
- independent journalism can benefit democracy only if an actual pluralism of editorial lines is expressed. Or else, independence will just mean that a large number of journalists and media express the same analysis.

3. RSF's recommendations to foster media pluralism and editorial independence

• On the role of the State in the regulation of media

The media sector, due to its very high importance and impact on a functioning democracy, should not be left only to a free and unregulated market. State authorities do have a role to play to regulate the sector. However, this regulation by the State must have, as a main goal, to guarantee pluralism and independence in order to foster freedom of information and strengthen democracy.

⇒ **States must implement rules on concentration**

The first way to guarantee that citizens have access to a minimum level of diversity in editorial lines, is to ensure that a minimum level of plurality of media outlets is accessible in a said geographical area. In order to guarantee that minimum level of external pluralism, States must develop rules aiming at restricting concentration in the media sector.

In the views of RSF, the best way to restrict concentration is to set a “public interest test” when assessing the level of permissible concentration. Rules on concentration and competition, as well as regulation on any economical aspects of the activity of the media, should always be implemented with regards to its impact on freedom, pluralism and independence of the media, rather than with regards to the functioning of a free market.

⇒ **States must implement rules on transparency**

A multiplicity of media outlets that would all belong to the same person would be an illusion of pluralism. As a consequence, rules on concentration must be supplemented by rules on transparency, to ensure that citizens have access to information on who owns the media, on who has the capacity to influence the editorial production.

Rules on transparency should aim at bringing to light the links between the ownership and other interests, in particular the links with political, economical or religious interests. These rules must be as broad as possible, and should constrain media to inform the public in particular on the capital holding, the participation in other businesses, the fact that the owner(s) is or has been awarded public contracts, the links with governmental institutions, the links of the owner(s) with other businesses, with interest groups, with lobbies, or with political interests

⇒ **States must implement rules on editorial independence**

In many EU countries, local oligarchs take control over media outlets and use them to promote their own interests. For instance, in France in 2015, Vincent Bolloré, who owns in particular the pay TV channel *Canal +*, prevented the release of a documentary film on the bank *Crédit mutuel*, because the bank is a commercial partner of Mr. Bolloré. This is just one example of how private companies use the media not to produce uninterested general interest news, but to promote their own interests, in the logic of so called “convergence”.

This example shows why States should take measures to ensure the editorial independence of all media services, whether paper, radio, TV or digital, whether private or public.

- Regulatory authorities should have the ability and the powers to guarantee editorial independence. Ensuring pluralism and editorial independence of the media should be the prior concern of regulatory authorities.
- Every media outlet should set up an internal organ in charge of assessing the independence of the editorial production. These organs should be able to receive and process complaints from journalists, to go before regulatory authorities, or before the courts in case of conflict of interest or influence peddling.
- Public aid and subsidies to the media should be conditionnal on implementation by this media of mechanisms to guarantee editorial independence.

- States should create a specific tort in penal law to sanction conflicts of interest in the media, similar to corruption or influence peddling.

- **On the role of States to safeguard investigative journalism**

There can be no media pluralism if the core of the activity of journalists, investigation, is not safeguarded. Investigative journalism aims at revealing issues that are hidden to the public, deliberately or behind a mass of facts and circumstances, to sort and analyse those facts, and to release and explain to the public those that are of general interest. Investigative journalism is therefore a critical factor to freedom of expression and information, as well as to media pluralism.

In order to enable journalists and other media actors to fulfil the tasks ascribed to them in a democratic society, the European Court of Human Rights (ECtHR) has recognised that their right to freedom of expression should enjoy a broad scope of protection. Such protection includes a range of freedoms that are of functional relevance to the pursuit of their activities, such as: protection of confidential sources, protection against searches of professional workplaces and private domiciles and the seizure of materials, protection of news and information-gathering processes, and editorial and presentational autonomy.

⇒ **States must take laws and measures to protect the secrecy of journalistic sources**

As the ECtHR hold, *“Protection of journalistic sources is one of the basic conditions for press freedom (...) Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.”* (Case of Goodwin v. the United Kingdom, ECtHR, 1996). States must therefore guarantee in the law the protection of confidentiality of journalistic sources.

Such laws must guarantee that:

- journalists have a right not to reveal their sources and can't be sued for refusing to reveal the identity of their sources
- a large scope of people benefit from the protection (journalists, members of the editorial staff, media assistants, and any person contributing to the collection, the editing and the release of information. Book writers, documentary filmmakers, bloggers, should also benefit from the protection.
- exceptions to the right to the protection of confidentiality of sources are precisely listed. These exceptions should be based on the following cumulative conditions: 1/ the exception must aim at preventing an offence that would seriously harm the physical integrity of one/several persons ; 2/ the exception must be subjected to prior judicial control ; 3/ the information cannot be obtained by any other mean ; 4/ the information is indispensable for the prevention of the offence.
- a specific tort of “violation of the confidentiality of journalistic sources” is instituted

⇒ **States must take laws and measures to protect whistleblowers**

Those who provide journalists with secret information that are of general interest, at their own risk, should be protected from retaliation. Protection should be accessible to anyone who :

- blow the whistle to a journalist on any type of act which is detrimental to the general public interest, whether this act is illegal or not, whatever the subject, type of activity or entity concerned by the disclosure, and even when he/she is outside a working relationship
- is acting in good faith, meaning he/she did not pursue any financial, unlawful or unethical objectives, and meaning he has a reasonable belief the information he/she disclose is accurate. Whistle-blowers who, based on a reasonable belief, report information that turns out not to be correct should nonetheless be protected against retaliation

Disclosure to journalists of issues that are of general interest should not be discouraged or limited. Revelations to journalists should not be defined by the law as a "last resort"

Whistleblowers should be protected :

- Against any type of retaliation, in particular protection against dismissal and prosecution.
- His/her identity should be kept confidential, and be disclosed only with his/her consent.
- The employer/the administration must bear the burden of proving that measures taken against the whistleblower were not motivated by his/her revelations ;
- States should bear the burden of proving that the harm to a legitimate national security interest outweighed the public interest in disclosure
- Specific sanctions must be provided for by the law to sanction those who retaliate or threaten to retaliate against a whistleblower

4. Replies to specific questions of the consultation

Question 6. Could you provide specific examples of problems deriving from the lack of independence of media regulatory authorities in EU Member States?

Polish President approved on July 13, 2016 the setting up of a "National Media Council" paving the way to wider changes in the state owned media by allowing the regulation body to appoint the management and supervisory boards of state-owned broadcasters TVP, the Polish radio and the PAP news agency. The bill was supported by all members of the Law and Justice party. The Council of Europe had demanded transparent procedures for selecting and appointing the new National Media Council saying members of the media council should be qualified, independent and reflect social diversity, but the recommendation of the Council of Europe remained without effect until now.

Question 10. Have you experienced or are you aware of obstacles to media freedom or pluralism deriving from the lack of independence of public service media in EU Member States? Give specific examples.

In Poland, in January 2016 a law passed by the lower house of Polish parliament and the senate gave the government full control over public broadcasters. The law designed by the Law and Justice party (PiS) that took power in October 2015 gave the government the full powers to appoint and dismiss the heads of the public broadcast media, and constituted a flagrant violation of media freedom and pluralism. Until the new law was passed the heads of the state-owned broadcast media were selected by means of a procedure overseen by the National Broadcasting Council (KRRiT). Several of them, including the heads of the two main public TV channels, TVP1 and TVP2, submitted their resignations as soon as the new law was passed to protest against the procedure.

In Poland, in March 2016, two editors of the public TV channel TVP Mrs Leskiewicz and Mrs Siemiatkowska lost their jobs due to their refusal to accept the censorship decided by the heads of TVP, not to upset the government. The channel had indeed decided not to cover an anti government protest by the KOD and marches in front of the constitutional tribunal.

Confronted with this type of situation, and while the revision of the Audiovisual Media Services (AMS) Directive is being examined, the EU must take measures to guarantee independence of the media regulatory authorities, and independence of public service media.

Question 11. Are you aware of any problems with regard to media freedom and pluralism stemming from the lack of transparency of media ownership or the lack of rules on media ownership in EU Member States? Yes No If yes, please give specific examples.

In Hungary, the free daily newspaper *Metropol* which was handed out for free in Budapest subway stations canceled its publication in June 2016. Reports had suggested earlier that the paper would stop being published and would lose the contract that secured its distribution in metro stations in favor of another free of charge newspaper *Lokal* owned by a close associate of government leaders and Orban in particular. This case shows the need for stronger rules on media ownership and transparency.

In Bulgaria, Reporters Without Borders (RSF) denounced as censorship the removal of 90 political cartoons by the well-known Bulgarian cartoonist Chavdar Nikolov from *Nova TV* website in April 2016. Owned by Swedish media group MTG and run by a Frenchman, Didier Stoessel, Sofia-based *Nova TV* said the cartoons had been removed because the contract with the cartoonist had ended. RSF condemned this as a case of political censorship, coming as it did just days after the latest cartoon mocked Prime Minister Boyko Borisov for publicly supporting a group of criminals who hunt down migrants in order to send them back to Turkey. This case shows the need for stronger rules on media ownership and editorial independence.

Question 13. What is the impact of media concentration on media pluralism and free speech in your Member State? Please give specific examples and best practices on how to deal with potential challenges brought by media concentration.

In France, the media landscape is basically made of groups whose owners – industrialists in particular – may have other objectives in mind than defending editorial independence. Political and financial pressures are more and more frequent.

Reporters Without Borders (RSF) denounced in September 2015 the censorship by the billionaire and owner of *Canal +* Vincent Bolloré of a documentary film on tax evasion at the Credit Mutuel bank, which was scheduled to be broadcasted on *Canal +*. Crédit Mutuel is one of the main financial partners of the Bolloré group. Bolloré feared to upset this commercial partner and decided to ban the program to protect the larger interests of his industrial group. The documentary was finally shown on French public TV channel *France 3* and led to months of wrangling between the *Canal +* management and the programme's journalists.

In same logic, RSF condemned plans in June 2016 by the management of the French 24-hour TV news channel *iTélé* also owned by Mr. Bolloré to make the editorial staff produce advertorials – which would not be clearly identified as such – in order to attract more advertising. Management of the channel clearly wants to favor programmes funded by advertisers and promote its commercial partners in the TV programmes, in this way violating the principles of ethical journalism.

Question 17. Have you ever experienced, or are you aware of, any limitation imposed on journalistic activities by state measures? Please give specific examples and further information, including justifications given by authorities and the position taken by journalists.

In Spain, a new law (known as the “gag law” “Ley Mordaza”) was passed in July 2014 by the ruling conservative Popular Party which allowed authorities to fine journalists and media organisations who distributed unauthorized images of police with the argument that being publically identified could put officers and their families in danger.

Question 20. Have you experienced or are you aware of problems linked to hate speech and threats directed towards individuals exercising journalistic activities?

In France, the *Charlie Hebdo* tragedy has highlighted the extreme nature of the violence to which journalists are exposed when they criticize or even only question religion – an action often branded as “blasphemy” by fundamentalists.

Question 21. Are you aware of cases where fear of hate speech or threats, as described above, has led to a reluctance to report on certain issues or has had a generally chilling effect on the exercise of freedom of speech? please give specific examples and further information.

In the wake of the *Charlie Hebdo* attacks, several newspapers feared to publish some worrying cartoons or texts that could endanger their people and publication. The general climate led a number of medias to behave with care with the publication of delicate news that would not have raised the same questions before Charlie's attacks

Question 22. Have you experienced, or are you aware of, problems concerning journalists' safety and security in the EU? please give specific examples.

In Croatia, journalists investigating corruption, organized crime or war crimes are often subjected to harassment campaigns in Croatia. RSF's Croatia correspondent and winner of a 2014 investigative journalism prize awarded by the Association of Croatian Journalists (HND), Zeljko Peratovic was badly beaten and nearly strangled in his home near the central city of Karlovac by three men in May 2015. He was notified soon after by letter that the local prosecutor had closed the murder attempt investigation for lack of evidence. Peratovic believes the attack was linked to a series of articles he has written about a corruption case dating back to 2010.

Question 24. Have you ever experienced or are you aware of pressures put by State measures on journalistic sources (including where these sources are whistleblowers)?

In July 2016, RSF regretted that a Luxembourg court took the disturbing decision to impose suspended jail sentences on two French whistleblowers Antoine Deltour and Raphaël Halet who exposed Luxembourg's gigantic system of tax avoidance for multinationals. Even if the length of the jail terms passed on the former employees of the accounting firm PricewaterhouseCoopers, were slightly less than those requested by the prosecutors, whistleblowers must have seen the sentences as an intimidatory signal. Deltour was given a suspended sentence of 12 months in prison, while Halet got a suspended sentence of nine months.

Question 40. Do you consider that there are specific risks or problems regarding the role of platforms and social media — in relation to pluralism of the journalistic press or more generally — as regards the quality of the democratic debate and the level of engagement? please give specific examples.

Lately, Facebook announced that as a result of changes to its algorithm Edgerank, media content would get less exposure on the platform. Facebook said its goal was to ensure that what one's friends post gets priority over other content such as journalistic content published by the news media. Facebook's decision to reduce the space for news media content is fraught with consequences and according to RSF will encourage biased, demagogic and even manipulated content at the expense of quality content that helps users to break out of their certainty bubble and rub up against opinions different from their own.