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Ph.D. Thesis - Abstract

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Following the traces of media pluralism

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The theoretical foundations and interpretation of the principle of media pluralism in certain policies of the European Union (with special regard to audiovisual and media policy), its legislation and institutional practices

Doctoral thesis

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I. A short summary of the subject matter, objective of the research and the research task set

1. Subject matter, objectives, significance, delimitations

The research focuses on the question of how the principle of media pluralism appears and is (can be) interpreted in the European Union (hereinafter: the EU), a specific, supranational regional international organisation. Media pluralism – as a normative value underpinning media regulation – is essentially tied to national constitutional systems.

The idea of the research was primarily triggered by the change made in 2007 to the audiovisual media policy of the European Commission (hereinafter: the Commission). As the consequence of the decision¹ adopted at this time, a new direction came into existence, which was markedly different from the previous, economically orientated media policy, as it shifted towards the domain of fundamental rights and placed great emphasis on media pluralism and the freedom of the media.²

The significance of the process which is primarily tied to fundamental rights issues is demonstrated by the fact that a risk assessment and monitoring instrument measuring media pluralism was put in place by 2009 with the support of the Commission and covering all the EU Member States,³ on the basis of which the competent academic centre, CMPF will draw up its 3rd report in 2018.⁴ In addition, in 2013 an expert group called upon by the Commission⁵ came up with EU-level regulatory proposals to promote the freedom and the pluralism of the media with regard to Member States.⁶

¹ Media pluralism: the Commission underlines the necessity of the transparency, freedom and diversity of European media. IP/07/52 16 January 2007, Brussels <http://europa.eu/rapid/press-release_IP-07-52_hu.htm>

² See *Media pluralism in the Member States of the European Union* – Commission Staff Working Document Brussels, 16 January 2007 SEC(2007) 32.

https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/media_pluralism_swp_en.pdf

³ *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach* Prepared for the European Commission Directorate-General Information Society and Media SMART 007A 2007-0002 by K.U.Leuven – ICRI (lead contractor), Jönköping International Business School – MMTC, Central European University – CMCS, Ernst & Young Consultancy Belgium (hereinafter: Media Pluralism Monitor)

⁴ Center for Media Pluralism and Media Freedom <<http://cmpf.eui.eu/>>

⁵ That is: High-Level Group on Media Freedom and Pluralism. <<https://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism>>

⁶ See *A free and pluralistic media to sustain European democracy* – The Report of the High Level Group on Media Freedom and Pluralism January 2013. <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/hlg_final_report_20130121_web.pdf>

The other motivation behind the research was the 25th anniversary of media regulation and media policy of the Union in 2014. In its birth and scope the EU-wide interpretation of media pluralism, the organising principle of the systems and the regulation of media in the Member States were of decisive importance, as this also determined the relationship between the two regulatory systems (division of competences).

Furthermore, the research serving as the focal issue described in the thesis is also significant since so far media pluralism and the related questions have been examined at regional level, primarily by the Council of Europe (hereinafter: CoE). In light of this, it is of particular interest how the EU, a supranational regional organisation, instrumental in economic integration in the first place, has put on its agenda the issue and interpretation of media pluralism from the perspective of regulation and policy, which had been tackled by the CoE, promoting fundamental rights. Moreover, it is also relevant to see how this is related to economic principles (e.g. the free movement of services and the freedom of competition), which also determine EU media policy.

Last but not least, the research topic of the Thesis has relevance for Hungary, as well, since the freedom of the press and media pluralism have surfaced repeatedly, sometimes in heated, other times in more calm debates from the very outset of the political and economic transformation of the country.

The research does not include the subject matter of and therefore, does not discuss the relationship between media pluralism and the European public sphere, as it basically focuses on the relationship between the EU and its Member States. A further issue outside the scope of this Thesis is the enforceability of the principle of media pluralism (the normativity and enforceability of EU values), which in spite of being a highly interesting area is beyond the scope of the current research.

2. A short summary of the research task

In the course of the research task, following the formulation of the subject matter and objective of the research, the areas indispensable for the in-depth analysis and scientific exploration were identified.

2.1. Identifying and analysing the concepts required for the research

As a pre-requirement for the successful analysis of the main issue of the research (the position and interpretation of the principle of media pluralism in the context of EU law and policies), it was necessary to put in place a conceptual framework, through which the main issue may be examined.

This is described in the first part of the Thesis. In this we describe the roots of the principle of media pluralism, the role it plays in democracy, its embeddedness in media history and in regions, the models that have so far developed in larger systems of media and not less importantly – with the help of an overview of the theoretical framework – we are making an attempt at elaborating a uniform concept of media pluralism.

2.2. Identifying areas of EU regulation and policy affected by media pluralism and their analysis

In order to make a detailed exploration of the main issue of the research, there was a need to identify areas within EU regulation and policies where the principle of media pluralism appears, which makes it possible to examine the interpretation of the concept given to it by EU institutions, as a relevant issue. As a result of this exploration, three major areas were identified.

One of the areas identified is the system of fundamental rights in the EU and their practices, because the principle of media pluralism is rooted in the constitutional systems of Member States, even more in the freedom of expression or in the freedom of the press, and is interpreted in respect of these.

The other area identified is EU media regulation – mostly audiovisual – and media policy, since we had identified media pluralism as a normative principle pervading media regulation and media policy.

The third such area is EU competition law. More specifically, within this context we examined how EU competition law relates to a potential EU-level, media-specific regulation on media concentration.

Secondly, within the area of EU competition law we identified and analysed as a separate problem the issue of state aid provided for public service media. In European media systems public service media is considered as the embodiment of internal media pluralism, at the same time, at EU level public service does not fall under the scope of EU media policy. However, it is still necessary to subject it to analysis, as the competition law practice of the European Commission in respect of state aid has an impact on the performance of public service, and thus on the internal pluralistic approach to media pluralism.

Consequently, the Thesis in its second part investigates the focal issue in the three areas identified previously: the principle of media pluralism, and simultaneously it describes and analyses its institutional interpretation relying on the conceptual framework established in the theoretical part.

II. The structure of the thesis and research methodology

1. The structure of the thesis

The Thesis discusses media pluralism in two main structural units.

1.1. Part One – Basic premises

The first part of the thesis makes an overview of the concepts associated with media pluralism and its origin to make it instrumental in investigating the main issue of the principle of media pluralism, its appearance and interpretation in EU law and institutional practice.

Within the framework of laying down basic premises we make an attempt at grasping and exploring the concept of media pluralism, and we also try and make a distinction between media pluralism and the concept of diversity. Following this, we clarify the expectations of media policy in terms of the social benefits derived from enforcing the principle of media pluralism, and what regulatory instruments it opts for to achieve the assumed benefits. In addition, also in the theoretical part, we describe the two major approaches to or models of media pluralism, and briefly outline the embeddedness of these approaches in media history at national and regional (i.e. Council of Europe) levels. When discussing the latter, we also present the context of media pluralism at national level, and how it was reflected in the jurisprudence of a regional judicial forum, the European Court of Human Rights (hereinafter: ECtHR).

1.2. Part Two – The principle of media pluralism in the practices of EU institutions

The second part of the thesis discusses the significance of the principle of media pluralism specifically in the context of the EU. As part of this, we on the one hand take a look at how and in what context the principle and value of media pluralism appeared in certain policies of the EU, most specifically and in the first place in the EU audiovisual media policy⁷, in regulation, furthermore in the activities pursued by individual EU institutions. On the other hand – in possession of the basic premises and the concepts detailed therein – we seek to

⁷ We use the concepts of audiovisual and media policy synonymously, since over the past 25 years these terms have been used alternatively also by EU institutions, depending on the composition of the Commission or the technology environment. Currently DG Connect oversees Audiovisual Media and Services Policy <https://ec.europa.eu/info/departments/communications-networks-content-and-technology_en#leadership>

answer the question of how the principle of media pluralism has been interpreted in the policies mentioned and in the relevant activities of the EU institutional system.

The analysis contained in Part 2 covers three strands. The first strand takes the perspective of fundamental rights. Here we seek to position the principle of media pluralism within the realm of the EU system of fundamental rights, in relation to the freedom of expression and the freedom of the press. The thesis, after the overview of the fundamental rights regime of the EU and its evolution, takes a closer look at practice. As part of the latter we review the judgements handed down by the Court of Justice of the European Union (hereinafter: CJEU) in which the principle of media pluralism played a major role, either in terms of the arguments raised in the proceedings or in terms of the decision adopted in the given case. Presenting and analysing the jurisprudence (case law) related to fundamental rights in respect of the principle of media pluralism is indispensable, as it is decisive for the leverage of EU legislative activities, individual policies and EU institutions. Related to the latter we also tackle the relationship between fundamental rights decisions of the European Court of Human Rights (ECtHR) and the CJEU adopted in the area of the principle of media pluralism.

Secondly, the analysis focuses on EU legislative activities, legislative attempts and related institutional activities that qualify as media policy issues. In this part we make an overview of the role played by media pluralism in the emerging audiovisual regulation, and the regulatory concepts, proposals tabled in the EU with a view to enforce the mentioned principle.

In the third, closing chapter of Part 2 we discuss a distinct segment of EU competition law, namely the law of state aid, more specifically the theoretical and practical questions linked to public service broadcasting, which is due to the necessity of analysing the impacts of the Commission's decisions on the fundamental institution of the European media system, i.e. the public service media, which is the basic, essential model of internal media pluralism in practice. Attempts at introducing special, EU regulation on media concentration are discussed in the legislative part.

In the closing chapter, in the second part of the thesis, a concise summary of partial conclusions are presented.

2. Research methodology

2.1. Processing codified legal norms

The thesis, on the one hand, makes an attempt at a full overview and analysis of EU legislative acts which may be associated with the principle of media pluralism in the period covered by the research.

This includes the primary (EU Treaties) and secondary legislation of the EU. Within secondary legislation, in addition to effective laws⁸ institutional documents, acts whose legal effect is not clear but which contained some regulatory proposal or wanted to decide the direction of regulation⁹ also served as important research material.

The analyses of policy documents not issued by an EU body but prepared at the request of some EU institution (e.g. the Commission) might be linked to secondary legislation,¹⁰ and they were also followed by some EU institutional act.

On the other hand, to be able to construct the concept of media pluralism¹¹ and analyse EU fundamental rights issues, we relied upon the relevant legal and policy documents of the Council of Europe.¹²

Thirdly, we compared and analysed national norms related to and implementing secondary legislation to illustrate how, to what extent the principle of media pluralism (cultural pluralism) may be interpreted as a regulatory objective set.¹³

⁸ For example, the AVMS Directive: the central directive of EU media regulation (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).

⁹ E.g. European Parliament. 1994. Resolution on the Commission Green Paper Pluralism and Media Concentration in the Internal Market."OJ No C 44, 14 February 1994.

¹⁰ E.g. Professor Vaira VĪĶE-FREIBERGA – Professor Herta DÁUBLER-GMELIN – Ben HAMMERSLEY – Professor Luís Miguel Poiares Pessoa Maduro: A free and pluralistic media to sustain European democracy. The Report of the High Level Group on Media Freedom and Pluralism. January 2013

¹¹ E.g. CM/Rec (2007) 2 on media pluralism and diversity of media content;

¹² See Points 7. and 8. of the Thesis.

¹³ See Point 10. of the Thesis The issue of quota rules.

2.2. Processing the case law (jurisprudence) of judicial fora

The part discussing relevant case law (with regard to the principle of media pluralism) of EU judicial fora is a part of central gravity in the Thesis.¹⁴ The reason why this analysis is important is that the CJEU provides interpretation of EU law to ensure its uniformity. Interpretation contained in the judgements of the Court is binding on Member States, EU institutions, and therefore, has an impact on the decisions taken by other EU institutions, legislation and indirectly shapes different views on media pluralism.

In addition, the Thesis also examines the judgements of the European Court of Human Rights (ECtHR) on the interpretation of the principle of media pluralism. From the interpretative provisions of the EU Charter of Fundamental Rights¹⁵ it follows that as a default setting, the content and scope of Article 11 (freedom of expression, the freedom of the media and the principle of pluralism tightly related to that) are equivalent with what is guaranteed by the ECtHR.

The thesis also deals with the case law of national courts at random, if that is associated with the main issue thereof.¹⁶

2.3. Academic Literature

The Thesis aims to make an in-depth discussion of domestic and foreign literature on media pluralism covering the broadest possible spectrum thereof. Due to the specificity of its subject matter, the thesis predominantly discusses foreign (English) language academic literature.

The Thesis relied mostly on the best-known monographs to overview and describe the functioning of the EU *acquis communautaire*¹⁷, to grasp and discuss European media law,¹⁸ more specifically the pluralism of the media¹⁹.

¹⁴ See Part II. (A) The principle of media pluralism in the jurisprudence of the CJEU

¹⁵ European Union Charter of Fundamental Rights HL 2007/C 303/01

¹⁶ See e.g. the analysis of the case law of the German Constitutional Court in relation to the evolution of the EU fundamental rights (Point 7.2. of the Thesis) or the principle of media pluralism at national level (Point 5.1. of the Thesis).

¹⁷ See e.g. CRAIG, Paul– DE BÚRCA, Gráinne: *The Evolution of EU Law*. Oxford University Press, Oxford, Second Edition, 2011., see also LENAERTS, Koenraad – VAN NUFFEL, Piet: *European Union Law*. Sweet & Maxwell, 2011.

¹⁸ See e.g. CASTENDYK, Oliver – DOMMERING, Egbert – SCHEUER, Alexander (eds.): *European Media Law*. The Hague – London – Boston: Kluwer Law International, 2008., and KELLER, Perry: *European and International Media Law Liberal Democracy, Trade, and the New Media*. Oxford University Press 2011.

III. A summary of the scientific findings of the thesis

1. The principle and significance of media pluralism in national context

Media pluralism is a typically European idea, which evolved in relation to the concept of pluralism in political science after the second world war, in the period of the rebuilding of democracies in Western Europe and broadcasting (television and radio) coming of age.²⁰

The principle of pluralism was formulated as a normative requirement vis-a-vis European systems of the media, since after the second world war only media systems reflecting fundamental democratic values and goals were able to contribute to the democratic rebuilding and revival of Europe.

In this context, the idea of media pluralism appeared at the national scene as a principle facilitating democratic self-government, in which the state actively provides space, public space for diverse voices, values, opinions relevant from the perspective of a social (public) debate and their clashes, and in addition it also induces public discourse on matters of public interest (i.e. the democratic (inclusive) model of media pluralism).²¹

In this model the objective of media pluralism is to contribute to the emergence of an informed public, in which the citizens of a given nation are able to efficiently participate in democratic processes (promoting participation), and thereby strengthen democracy as such.

From an institutional perspective it is visible that in the media systems reborn in Western democracies after the second world war the idea of media pluralism (its democratic model) coalesced with the national public service media provider and its diverse services.²²

The principle has become an inherent part of the concept of public service media, and an underlying organisational principle of content provision. Public service broadcasters, as universal service providers having a monopoly position in the area of audiovisual services, implemented in practice the idea of internal pluralism (universal service provision).²³

¹⁹See e.g. KARPPINEN, Kari: *Rethinking Media Pluralism*. Fordham University Press, New York, 2013.

²⁰ Point 2. of the Thesis

²¹ Point 4.3.2. of the Thesis

²² Point 4.4. of the Thesis

²³ Point 13. of the Thesis

2. The principle of media pluralism in the European context

The issue of media pluralism grew out of national context and appeared on the European scene as a result of technological changes starting in the 1970s on the European broadcasting market (satellite broadcasting, the appearance and spread of cable broadcasting) and processes of liberalisation. The internal pluralist approach and through this the democratic (inclusive) concept of media pluralism – as the unique organising principle of democratic publicity – represented by public service media that have lost their monopoly could no longer be sustained.

This turn was reflected in the case law of both regional judicial fora (i.e. that of the ECtHR and the CJEU). Though indirectly, but the European judicial fora supporting the liberalisation of the market of audiovisual media for different reasons, recognised that commercial media enterprises established independently from the state also contribute to media pluralism.²⁴

In practice it meant that the ECtHR considered the availability of commercial services as the full-fledged implementation of the freedom of expression (fundamental rights approach). The CJEU in the cases it adjudicated – in spite of having used the fundamental rights approach taken by the ECtHR in the cases it discussed – was essentially interested to promote the dismantling of the hurdles from the way of the free movement of services, and commercial services entering the market (economic perspective).

Thus, judicial fora by means of their judgements promoting the liberalisation of the broadcasting market opened up the way to the economic (autonomous) model and interpretation of media pluralism. At the same time, beyond their decisions in favour of liberalisation, they always acknowledged and confirmed the democratic model of media pluralism and by doing so, the positive, active role played by the state in maintaining and safeguarding media pluralism.

²⁴ Points 5.4. and 8.12. of the Thesis

3. The principle of media pluralism in European policies

The issue of media pluralism was reflected in EU media and other policies and related legislation in diverse forms and with varying intensity, which was also due to the judgements handed down by the CJEU.

In the 1980s the democratic (inclusive) model of media pluralism appeared in the EU media policy, which was in the making at that time, as a principle strengthening European political integration, which was rooted in the demand for the legitimacy of the EEC. In the European community policy the idea of implementing the democratic model at the European level manifested in the establishment of a common European public service television.

At this time media is considered as an instrument which plays a significant role in shaping the „European identity” of citizens. In this narrative the media is instrumental in enabling citizens to exercise their right to information on European matters, and thus their commitment to the EEC, which in the end will contribute to the strengthening of European political and cultural unity (strengthening political integration).²⁵

The idea based on the democratic nature of media pluralism vanished in the regulation adopted by the end of the 1980s. What is more, it was replaced by an economic directive promoting the liberalisation of European audiovisual market and approving of the free movement of services. Though the normative (internal pluralistic) regulatory instruments (right of reply, quota rules, events of high interests after 1997) were included in the provisions of the TVWF Directive, the core of EU media regulation, they do not seem to have a close correlation with the media policy ideas and goals set and described at the beginning of the 1980s.²⁶

In the 1990s the EU media policy and media regulation discourse – in response to the restructuring of the European media sector – shifted towards instruments supporting external pluralism, more precisely the need to handle cases of media concentration. In the debate between the European Parliament (hereinafter: EP) and the Commission the former drafted EU-level legislative proposals to regulate media concentration at the level of the Community. In its argumentation the EP linked the issues of external and internal pluralism claiming that

²⁵ Point 9.1. of the Thesis

²⁶ Point 9.3. of the Thesis

the excess concentration of media ownership undermines its internal pluralism. With this approach the EP represented the democratic (inclusive) idea of media pluralism.²⁷

As opposed to the definite position of the EP, the Commission showed signs of uncertainty for a long time, which is likely to have been caused by heterogeneous interests and discussions of competence. Finally, however, the Commission decided to advocate the economic (autonomous) approach to media pluralism, and refused to regulate media concentration at EU level claiming that the protection of media pluralism – as a subsidiarity issue – falls primarily under the competence of Member States.²⁸

The proposals made by the Commission in debates of media concentration are significant not only because they may be deemed as an important stage in the process of the autonomous pluralist argument evolving, but also because one proposal is an alternative solution, namely: the ensuring of the EU-level transparency of the media market in general and media concentration in particular.

The issue of media pluralism comes into the fore of EU media policy again as of the mid-2000s, this time it is not the EP but the Commission that actively tackles this question. This turn was brought about by the great emphasis put by the two consecutive Commissions lead by Barroso on the enforcement of fundamental rights as well as media policy.²⁹

As a result, the Commission – supported by the academia and professional organisations – took initiatives through its proposals aiming to contribute to the fulfilment of the freedom of the press and media pluralism enshrined in Article 11 of the Charter. Of the proposals promoted by the Commission, the initiative that ensures the transparency of the media market without imposing a normative obligation on the Member States was put into practice through the setting up of the Media Pluralism Monitor.

From this step taken by the Commission it also followed that other proposals to adopt regulation in order to enforce the principle of media pluralism and to increase the efficiency of already existing regulatory instruments (e.g. competition law) were not implemented. Thus, the Juncker Commission continued and developed further the achievements of the Barroso Commission.

Nevertheless, the Media Pluralism Monitor enriched the EU discourse on media pluralism by uniting the two models of that in its indicators, and thereby it makes an attempt to reconcile the two approaches. At the same time, this compound solution intended to be neutral

²⁷ Points 11.1.-2. of the Thesis

²⁸ Point 11. 3. of the Thesis

²⁹ Point 12. of the Thesis

does not solve the problem in practice, since the various approaches to media pluralism may lead to different or even opposite interpretations of the very same indicator after a risk assessment.

Though as of the 1980s the democratic (inclusive) model of media pluralism was gradually losing ground in EU media policy (except for such specific indicators of Media Pluralism Monitor), the opposite applies to EU competition policy in this respect.

The practice of state aid related to public service media clearly indicates that the EU competition policy corroborated the democratic model represented by the public service media by not questioning the right of public service media to providing universal services and access, even on the liberalised, then converging European digital media market. What is more, it has established a system which explicitly supported the efforts of public service media to redefine in a digital environment – under certain conditions – the principle of universality, which is the basis of the democratic model of media pluralism.³⁰

³⁰ Point 14. of the Thesis

IV. Academic publications of the author in the relevant field

NYAKAS, Levente: *A BBC alapító okiratának felülvizsgálata*. AKTI Füzetek 3., 2006.

NYAKAS, Levente: A közszolgálati műsorszolgáltatás a közösségi jog kontextusában – avagy az audiovizuális szolgáltatások természetéről folytatott európai vita. *Collega* Vol. X. issues 2-3., 227-230.

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NYAKAS, Levente A médiapluralizmus fogalma és szerepe a szabályozásban 121-129., In KOLTAY, András – NYAKAS, Levente (ed.): *Magyar és európai Médiajog*. 2nd, revised edition Budapest, WoltersKluwer, 2015.