



# Transparency of media ownership

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**Alexandros Antoniou, Amedeo Arena, Mark D. Cole, Christina Etteldorf, Roderick Flynn, Pascal Kamina, Carles Llorens, Roman Lukyanov, Marina Piolino, Jörg Ukrow, Krzysztof Wojciechowski, Lorna Woods, Sebastian Zeitzmann**





# Foreword

Mass media are said to have a watchdog role, that is, they investigate, fact-check, interview, in order to publish curated information that hold the rich and powerful accountable. Beyond that, in the words of John Reith, General Manager of the BBC from 1922 to 1939, they also play a role of educating and entertaining the public. All of these are fundamental functions in today's screen-obsessed society.

Now, we could ask ourselves, like the Roman poet Juvenal did: *quis custodiet ipsos custodes*, which translates for our purposes as who watches the watchdogs themselves? Or said otherwise: who keeps the media from using their preeminent position for spurious purposes? To this question, the given answer could be 'civil society, regulatory authorities and, ultimately, the courts of law'. And yet, it is a bit difficult to watch the watchdog when you do not know who really the watchdogs are. Who are the persons, natural or legal, that own the media? Who are the real decision-makers when it comes to, let's say, the editorial line of a newsroom? If we agree, for example, that an unhealthy level of media concentration can threaten democracy and freedom of expression, then transparency of media ownership is fundamental for our societies.

This publication aims at providing some clarity about how the transparency of media ownership is regulated in Europe. After a brief introduction to the topic, chapters 2 and 3 provide an overview of rules on transparency of media ownership in light of EU primary and secondary law, whereas chapter 4 discusses media ownership transparency initiatives at Council of Europe and civil society level. Chapter 5 gathers together a number of country reports that serve as model examples, and chapter 6 provides a comparative analysis thereof. The publication closes with some concluding remarks.

Under the scientific coordination of Mark D. Cole and Jörg Ukrow from our partner institution – the Institute of European Media Law (EMR) in Saarbrücken, Germany - this publication includes country reports by Marina Piolino (Switzerland), Jörg Ukrow (Germany), Carles Llorens (Spain), Pascal Kamina (France), Lorna Woods and Alexandros Antoniou (United Kingdom), Roderick Flynn (Ireland), Amedeo Arena (Italy), Krzysztof Wojciechowski (Poland), and Roman Lukyanov (Russian Federation). All other chapters and the comparative analysis have been written by Mark D. Cole, Jörg Ukrow, Christina Etteldorf and Sebastian Zeitzmann from the EMR.

I would like to extend my warmest thanks to all authors and to the EMR team, in particular to Sebastian Zeitzmann, for his day-to-day engagement during the production process.

Strasbourg, December 2021

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

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# 1. Introduction

*Jörg Ukrow, Executive Board Member, Institute of European Media Law (EMR) and deputy director, Saarland Media Authority (LMS)*

“What we know about our society, indeed about the world we live in, we know through the media.”<sup>1</sup> This often-quoted remark by Niklas Luhmann might be catchy but is increasingly losing its argumentative appeal in the world of digitisation and globalisation, social networks, filter bubbles and user-generated content. However, his assertion remains relevant to the extent that classical media also retain their essential filter and mediator function for the social and democratic discourse. Not least in view of this democratic significance of media involvement for the *res publica*, his dictum needs some expansion, derived from the various ways in which the media are classified as the “fourth estate” by political scientists and, occasionally, legal writers.<sup>2</sup> The purpose of this term is to highlight that the media have special functions in relation to the three traditional state powers: the legislative, the executive and the judicial. These functions include, in particular, the shaping of public opinion and the control of state powers.<sup>3</sup>

In a modern information society, only the media can constitute the public forum on which a democracy depends and where public opinions can be formed. At the same time, the media perform the key function of a “public watchdog” when they monitor the exercise of power and make public what must not be kept secret in a democracy.<sup>4</sup>

In terms of political theory, such recognition of the power to shape discourse and exercise democratic oversight is always accompanied by the question of how to curb the possible abuse of power. The system of constitutional checks and balances needs to be supplemented accordingly, with appropriate account being taken of both the requirement to ensure freedom of the media from state control and media companies’ constitutional rights, in compliance with the principle of proportionality. A key item in a toolbox for curbing any misuse of media power, in conformity with fundamental rights, is ensuring public awareness and transparency.

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<sup>1</sup> Luhmann N., *Die Realität der Massenmedien*, 2nd ed., 1996, p. 9 (own translation, orig. „Was wir über unsere Gesellschaft, ja über die Welt, in der wir leben, wissen, wissen wir durch die Medien“).

<sup>2</sup> Cf. Bergsdorf W., *Die vierte Gewalt. Einführung in die politische Massenkommunikation*, 1980; Hindelang S., *Freiheit und Kommunikation. Zur verfassungsrechtlichen Sicherung kommunikativer Selbstbestimmung in einer vernetzten Gesellschaft*, 2019, pp. 94 ff.; for a critical discussion, see Wagner H., “Vom Gespenst, das als ›Vierte Gewalt‹ erscheint. Bemerkungen zu einer Demokratiegefährdung, die sich als ihr Gegenteil ausgibt”, *Zeitschrift für Politik*, 2007, p. 324 (pp. 328 ff.).

<sup>3</sup> Cf.. Kerssenbrock F., *Die Legitimation der Medien nach dem Grundgesetz*, 2015, p. 41.

<sup>4</sup> W. Berka, *Verfassungsrecht*, 2012, para. 857.

Transparency is also “an ambivalent concept”.<sup>5</sup> Insofar as it relates to the state and its entities, it is regarded as a constituent element of the democratic law-based state.<sup>6</sup> It is said to be an “absolute prerequisite” for the democratic opinion-forming and decision-making process<sup>7</sup> and is described as a “common European legal concept”.<sup>8</sup> However, this democratic ideal of transparency contrasts, not least in the course of digitisation, with the fear of the “transparent citizen” as the victim of a surveillance state that violates human rights.<sup>9</sup> Given this Janus-faced ambiguity, transparency can inspire and justify both praise and lament in equal measure.<sup>10</sup>

Not only political decisions but also the work of the press in shaping and scrutinising them should take place in such a way that openly determining the public interest enables the general public to participate in the common political decision-making process. The requirements of public reporting and transparency thus ensure equal participation rights despite the unequal distribution of resources with regards to influencing the opinion-forming process. An addition to Luhmann’s dictum that ties in with this might read as follows: our knowledge of our media, which in turn determines the image of society and the world we live in, is based on transparency requirements with regards to media ownership. In the changing media ecosystem, such transparency may not be a sufficient safeguard against a problematic shift of opinion-based market power towards ways of manipulating the democratic process. However, without transparency of media ownership, there is a threat that other measures for ensuring diversity of opinion, such as broadcasting slots for third parties independent from a broadcaster and non-discrimination requirements for media intermediaries (such as search engines), are too often likely to be ineffective. Transparency with regards to media ownership is not only crucially important when it comes to avoiding any dominant opinion-shaping-power, but it is also primordial in a cross-fertilisation relationship with the constitutional principles of democratic oversight and the separation of powers. Additionally, it is an important pillar in building resilience to (political) disinformation campaigns. Especially in times of democratic election campaigns, it also helps determine whether, in the run-up to an election, media influences are intended to promote awareness and information or serve the interest of a foreign policy agenda of destabilizing democratic processes.

Last but not least, what is true of parliamentary democracy – that it is based on the trust of the people and that trust is not possible without transparency enabling the citizens

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<sup>5</sup> As explicitly pointed out by the Federal Constitutional Court (Official Collection of Federal Constitutional Court Decisions [BVerfGE] 118, 277 (384).

<sup>6</sup> Ostermann G-J., *Transparenz und öffentlicher Meinungsbildungsprozess*, 2019, p. 2 with reference to BVerfGE 70, 324 (358); 103, 44 (63); 119, 309 (319 f.); 123, 39 (68); cf. also Gröschner R., “Transparente Verwaltung: Konturen eines Informationsverwaltungsrechts”, *VVDStRL* 63 (2004), p. 344 (pp. 351 ff.); Marcic R., “Die Öffentlichkeit als Prinzip der Demokratie”, in Ehmke H. et al. (eds.), *Festschrift für Adolf Arndt*, 1969, p. 267 (pp. 274 ff.); Meinel F., “Öffentlichkeit als Verfassungsprinzip”, *Kritische Justiz* 37, 2004, p. 413 (pp. 414 ff.); Scherzberg A., *Die Öffentlichkeit der Verwaltung*, 2000, pp. 291 ff. and pp. 320 ff.

<sup>7</sup> Stehr N. and Wallner C., “Transparenz: Einleitung”, in Jansen S., Schröter E. and Stehr N., *Transparenz*, p. 13.

<sup>8</sup> Gröschner R., *op. cit.*, p. 344 (p. 346).

<sup>9</sup> Ostermann G-J., *op. cit.*, p. 6.

<sup>10</sup> Cf. Hassemer W., “Über Transparenz”, in Durner W. et al. (eds.), *Freiheit und Sicherheit in Deutschland und Europa. Festschrift für Hans-Jürgen Papier*, 2013, p. 237.

to follow what is happening politically<sup>11</sup> – also applies to trust in the media’s power to exercise democratic oversight. At a time when populist forces are on the rise, quality media in particular are losing the self-evident legitimacy of their power to shape opinions.<sup>12</sup> The transparency of media ownership can stabilise and promote confidence that this power will not be abused for subversively advancing the respective owners’ own political, economic and societal interests but instead used to promote the common good, namely, to carry out media-related fact checks.<sup>13</sup>

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<sup>11</sup> Ostermann, *Transparenz und öffentlicher Meinungsbildungsprozess*, 2019, p. 2 with reference to BVerfGE 40, 296 (327); 118, 277 (353).

<sup>12</sup> Cf. Krämer B. and Holtz-Bacha C. (eds.), *Perspectives on Populism and the Media*, 2020; Meyer T., “Populismus und Medien” in Decker F. (ed.), *Populismus*, 2006, pp. 86 ff.

<sup>13</sup> Cf. on parallel considerations concerning a lobby register Schröck T. and Ruzin F., “Wieviel ist der Verfassung Transparenz im Lobbyismus wert? Zur Rechtfertigung von Grundrechtseingriffen durch das Lobbyregistergesetz”, *Verfassungsblog*, 2021, <https://verfassungsblog.de/lobbyrg/>.



## 2. Rules on transparency of media ownership in light of EU primary law

*Sebastian Zeitzmann, Institute of European Media Law (EMR)*

### 2.1. Introduction

As this IRIS Special issue demonstrates, transparency, not least with regard to the key issue of media ownership, is an important principle in European states.<sup>14</sup> It is also a fundamental principle for the Council of Europe, as can be seen, for example, in its Tromsø Convention on Access to Official Documents<sup>15</sup>, which recently came into force. This section examines to what extent transparency, both in general and with regard to media ownership, plays a role in the EU's constitutional law, its so-called primary legislation.

First of all, the classification of transparency as a possible EU constitutional principle will be discussed. As far as the subject that is the focus of this IRIS Special is concerned, reference will also be made to Article 345 of the Treaty on the Functioning of the EU (TFEU), which concerns the systems of property ownership in the member states. The extent to which this is affected by transparency rules will also be examined. The influence of such rules on EU economic integration, in particular with regard to competition policy and fundamental freedoms, will be addressed below. This will be followed by a discussion of the role of fundamental rights, especially freedom of expression, freedom of information, freedom of the media, respect for private and family life and the protection of personal data. Finally, the question of the extent to which transparency can serve as a means of ensuring media diversity at EU level will be discussed.

### 2.2. Transparency as a constitutional principle of the EU?

Although the terms “transparency”, “transparent”, “openness” or “open”<sup>16</sup> are only found in individual passages of the three basic EU treaties, the Treaty on European Union (TEU), the

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<sup>14</sup> See on this also section 1.3 below.

<sup>15</sup> Convention No. 205, <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=205>. See Zeitzmann S., “The Council of Europe’s Tromsø Convention on Access to Official Documents”, *European Data Protection Law Review* 7, 2021, pp. 232-237.

<sup>16</sup> The connection between “transparency” and “openness” is established by Article 15 TFEU, which uses both terms in the same context.

TFEU and the EU Charter of Fundamental Rights<sup>17</sup>, they nevertheless play an important role in EU primary law and their relevance is also emphasised by the Court of Justice of the European Union (CJEU).<sup>18</sup> For example, according to the statement of principles in Article 1(2) TEU – which itself does not establish any enforceable claims<sup>19</sup> – decisions of the EU are taken “as openly as possible”, and this is repeated in Article 10(3) TEU<sup>20</sup> and fleshed out in Article 15 TFEU.<sup>21</sup> It is noteworthy that the German and French versions of the treaties refer at this point to a principle of openness or *principe d'ouverture*<sup>22</sup>. Additional transparency obligations for EU institutions are to be found in Articles 15(2) and 16(8) TEU, Article 298 TFEU and Articles 31 and 37 of the Statute of the CJEU. According to these provisions, the Council is required to meet in public in the course of legislative procedures, the European Parliament (EP) meets in public as a matter of principle and proceedings of the CJEU and the delivery of its judgments are also public. In particular, the openness of the legislative process is relevant for those who subsequently apply the law. This can also include media companies, so that they don't just inform themselves about current developments but are also able to react to them, both with regard to fulfilling their role as public watchdogs (legislative processes are a key factor in the democratic opinion-forming process) and in connection with lobbying activities (see below).

In addition, the EU institutions and bodies have a fundamental duty, enshrined in Article 15 TFEU, to ensure the transparency of their activities and, to this end, ensure access to their documents.<sup>23</sup> Article 42 of the Charter of Fundamental Rights (CFR) gives the right of access to EU documents the status of a fundamental right. In this connection, Articles 296 and 297 TFEU establish a general obligation to state reasons and publish EU legal acts. Finally, Article 11 TEU refers to openness and transparency, stating that “(t)he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”. Ultimately, in the case of the legislative processes of the EU, this also provides primary law protection for lobbying, through which for instance media companies

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<sup>17</sup> OJ 2016 C 202 of 7 June 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC>.

<sup>18</sup> CJEU, Case. C-41/00 P, *Interporc v Commission*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=48109&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2286338>, para. 38 f.; joined Cases C-92/09 and 93/09, *Volker und Markus Schecke GbR and Hartmut Eifert*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=79001&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2286137>, para. 68.

<sup>19</sup> Ostermann G., *Transparenz und öffentlicher Meinungsbildungsprozess*, Mohr Siebeck, Tübingen, 2019, p. 229.

<sup>20</sup> See Blanke H., in Blanke H. and Mangiameli S., *The Treaty on European Union. A Commentary. Volume I*, Springer, Cham, 2021, Article 1 TEU, paras 44 ff.; Porras Ramirez J., in Blanke H. and Mangiameli S., op. cit., Article 10 TEU, paras. 36 f., in each case with further references.

<sup>21</sup> See Porras Ramirez J., in Blanke H. and Mangiameli S., op. cit., Article 15 TEU, paras. 1 ff. with further references.

<sup>22</sup> But not in the English version, which states “as openly as possible”.

<sup>23</sup> The details are regulated by the “Transparency” Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 of 31.5.2001, pp. 0043-0048, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R1049&from=en>. See Broberg M., “Access to Documents: A General Principle of Community Law?”, *European Law Review* 27, 2002, pp. 194-205, and Porras Ramirez J., in Blanke H. and Mangiameli S., op. cit., Article 15 TFEU, paras. 19 ff. with further references.

or data protection associations can seek to put forward their positions in the run-up to and during the legislative process.

The principle of transparency or openness is therefore referred to in the treaties with a frequency similar to that of, for example, the fundamental principles of conferral and subsidiarity, and is rightly considered one of the EU's constitutional principles<sup>24</sup> or at least a legal principle.<sup>25</sup> As such, it pervades all other areas of EU law. It should be emphasised that this constitutional principle only imposes an obligation on the EU and at most has an indirect binding effect on the member states, for example when they are bound by primary law, as in cases involving fundamental freedoms (see below). However, member state documents held by an EU institution are also subject to the disclosure obligation under EU law pursuant to Articles 2(3) and 3(b) of Regulation 1049/2001. Insofar as the EU has an obligation, its secondary law must also be judged against the transparency requirements of primary law.<sup>26</sup> This is, in turn, generally also accompanied by the relevant directly applicable obligations, in particular of the member states and private parties, such as media companies.

However, the principle of transparency is subject to limitations as not all procedural levels of EU legislation are public. This makes it harder to obtain information and for lobbying activities to be carried out by those who will need to apply the law and who will potentially be affected by it, such as media companies. It is also possible to grant only partial access to EU documents, for example in order to protect personal data.<sup>27</sup> In order to comply with the transparency requirement, reasons must be given for imposing such limitations.

### 2.3. Article 345 TFEU and transparency rules

Article 345 TFEU provides that the EU Treaties shall in no way prejudice the rules in member states governing the system of property ownership, thus including the systems of media ownership. This means that from the outset, EU jurisdiction does not extend to aspects of property ownership, in particular with regard to the degree of nationalisation and socialisation of companies and of means of production, thus including that of media companies and necessary infrastructures. More generally, the question of public or private ownership is excluded and, consequently, the EU may not intervene in the member states' systems of ownership even in areas where it has jurisdiction, although this does not preclude it from interfering with private property interests in order to achieve important EU

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<sup>24</sup> Cf. Bröhmer J., *Transparenz als Verfassungsprinzip*, Mohr Siebeck, Tübingen, 2004, pp. 319 ff.; Kläger C., *Transparenz im Kartellverfahren der Europäischen Union*, Nomos, Baden-Baden, 2020, p. 36 f.

<sup>25</sup> Lenaerts K, "In the Union we trust": Trust-enhancing principles of Community law", *Common Market Law Review* 41, 2004, pp. 317-343 (321); for a different interpretation: Ennulat M., *Datenschutzrechtliche Verpflichtungen der Gemeinschaftsorgane und -einrichtungen*, Peter Lang, Frankfurt am Main, 2008, p. 182.

<sup>26</sup> See for example CJEU, joined Cases C-39/05 and C-52/05, *Sweden and Maurizio Turco v. Council*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=67058&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2287707>.

<sup>27</sup> See in particular the CJEU's judgment in the joined Cases C-92/09 and 93/09, *Volker und Markus Schecke GbR and Hartmut Eifert*, *ibid*; see on this Ostermann, G., *op. cit.*, pp. 234 ff.

objectives, for example in the context of measures taken under Articles 75 and 215 TFEU<sup>28</sup>, in connection with the common organisation of agricultural markets<sup>29</sup> or under transparency rules contained in secondary legislation, such as those enshrined in the AVMS Directive.<sup>30</sup> Interference with property itself therefore does not constitute interference with the system of property ownership. Article 345 TFEU thus, without excluding it completely, generally restricts the application of the Treaties as to how the rules of a member state treat company ownership.<sup>31</sup>

Article 345 TFEU does not exempt the member states from the obligation to comply with EU law, as the CJEU has consistently emphasised in its judgments.<sup>32</sup> This applies in particular to EU competition law<sup>33</sup> and the fundamental freedoms<sup>34</sup> as well as to the principle of non-discrimination. Accordingly, apart from the question of public or private legal form, the structure of media ownership systems is also subject to the requirements of EU law.<sup>35</sup> This also applies to the implementation of secondary legislation by the member states, especially where they have a broad scope in this regard, for example in the case of the media ownership transparency rule in the AVMS Directive (see section 3.1.).

On the other hand, the transparency requirement in primary law itself should not be seen as establishing such a binding obligation. As pointed out above, it only imposes a direct obligation on the EU institutions and bodies but not on the member states. Although

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<sup>28</sup> Court of First Instance, Case T-362/04, *Minin v. Commission*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=66049&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2287911>, para. 77.

<sup>29</sup> CJEU, Case C-309/96, *Annibaldi*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=43564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2289643>, para. 23.

<sup>30</sup> See also section 1.3.

<sup>31</sup> On the scope of the rule, see Akkermans B., and Ramaekers E., “Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations”, *European Law Journal* 16, 2010, pp. 292-314 (296 ff.).

<sup>32</sup> For example, CJEU, Case C-235/89, *Commission v. Italy*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0235&from=EN>, para. 14.

<sup>33</sup> For example Court of First Instance, joined Cases T-116/01 and T-118/01, & *O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v. Commission*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=48540&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2289212>, paras. 145 ff.

<sup>34</sup> CJEU, joined Cases C-105-107/12, *Essent*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=143343&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2289478>, para. 36. In particular, the court rejects any restriction on the free movement of capital by Article 345 TFEU; cf. the CJEU’s seminal judgments in Case C-367/98, *Commission v. Portugal*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=47377&pageIndex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=2290217>; Case C-483/99, *Commission v. France*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=47378&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2290554>; Case C-503/99, *Commission v. Belgium*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=47379&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2290629>. On the other hand, nationalisation by means of investment barriers leads to a corresponding blockade of capital transfers and removes the basis for the free movement of capital. Only exceptionally, in particularly important cases, will this be seen as a breach of Article 63 TFEU. See also the critical discussion by Ukrow J. and Röss G., in Grabitz E., Hilf M. and Nettesheim M., *Das Recht der Europäischen Union*, Beck C.H., Munich, 2021, Article 63 TFEU, paras. 54, 151 ff. with further references.

<sup>35</sup> On the operation of public telecommunications installations, cf. CJEU, Case 41/83, *Italy v. Commission*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0041>, paras. 21 f.

transparency is recognised as a principle of the EU, it does not constitute one that must be respected by the member states as a defensive or even positive right. Their systems of public or private media ownership are therefore not subject to any transparency requirements under primary law but can again be regulated or affected by secondary law within the framework of the EU's competences.

## 2.4. The influence of transparency rules on EU competition policy

The competition rules in the TFEU (Articles 101-109) themselves make no mention of any transparency requirements, unlike relevant secondary law.<sup>36</sup> Nevertheless, the greatest possible market transparency is one of the preconditions for competition to function properly, and even for the identification of the relevant market itself. This is also underlined by the rules recently proposed in connection with the Digital Markets Act, which – also against the background of competition law – focus strongly on transparency and are particularly important for the media sector too.<sup>37</sup> Transparency is of paramount importance, especially with regard to market players' ownership structures, for example regarding the ability to determine the extent to which a company has an absolute or relative dominant market position.

Dominant market positions themselves do not pose a problem under EU competition law and only their abuse through certain types of behaviour constitutes an infringement. Ownership structures are also important in the case of mergers,<sup>38</sup> meaning that the European Commission also examines media mergers.<sup>39</sup> In doing so, it bases its investigations solely on economic factors and not on the power to shape opinions. However, economic market power often also creates the power to shape opinions, so this is at least indirectly subject to examination. The disclosure of ownership structures and their core economic figures by (media) companies wishing to merge or be involved in a takeover (data required for the Commission's investigation) thus enables the drawing of conclusions concerning their opinion-shaping power.

The transparency of the conduct of market players, both individually (in particular Article 102 TFEU) and collectively (Article 101 TFEU), is also relevant under competition law, but it must be remembered that public service broadcasters can, via the Protocol (No.

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<sup>36</sup> See section 1.3. Cf. also in particular Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between member states and public undertakings as well as on financial transparency within certain undertakings, OJ 2006 L 318 of 17.11.2006, pp. 17-25, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0111&from=EN>.

<sup>37</sup> See section 1.3.3 below. Cf. also Cole M., *Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe*, EMR, Saarbrücken, 2021, pp. 22 ff.

<sup>38</sup> However, this subject matter is not directly subject to primary EU law but is governed by Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24 of 29.1.2004, pp. 1-22, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004R0139&from=EN>.

<sup>39</sup> Cf. for example the recent decisions in *Walt Disney/Century Fox* (M.8785) of 6 November 2018, [https://ec.europa.eu/competition/mergers/cases/decisions/m8785\\_2197\\_3.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8785_2197_3.pdf), and *Sky/Fox* (M.8354) of 7.4.2017, [https://ec.europa.eu/competition/mergers/cases/decisions/m8354\\_920\\_8.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8354_920_8.pdf).

29) to the Treaty of Lisbon, be exempted from the EU competition rules as services of general economic interest pursuant to Article 106(2) TFEU within the scope of their public service remit and under certain conditions.<sup>40</sup> However, this cannot be accompanied by an exemption from transparency requirements, especially if, for example, subsidiaries of the institutions engage in commercial activities beyond the scope of the public service remit. As far as the review of state aid pursuant to Articles 107 ff. TFEU, relevant under competition law is concerned, the disclosure of certain information by public undertakings pursuant to Article 106 TFEU is of interest. This concerns especially their financial relations with their own member state, for example through obligations regarding documentation, information and reporting. However, transparency requirements also play an important role in connection with support for films and other audiovisual works by private industry.<sup>41</sup>

Competition is ultimately a communication process,<sup>42</sup> not only when it comes to determining anti-competitive behaviour but also for ensuring a functioning competition as such. At the same time, EU antitrust law imposes limits on market transparency: Article 101 TFEU (potentially) prohibits companies from acting in concert and engaging in behaviour that restrains trade and competition and which is, to a certain extent, based on too much transparency, in the sense that business secrets are shared with a selected group of competitors with a view to prompting an adverse impact on competition. A (too-)high degree of transparency vis-à-vis competitors where confidentiality is appropriate in order to safeguard competition seems at least likely to encourage the formation of cartels. Properly functioning competition therefore always requires a certain amount of secrecy or confidentiality. This also applies in the course of anti-trust or other competition proceedings brought by the European Commission<sup>43</sup> to protect the interests of the companies concerned, such as those relating to confidential information, as well as those of their contract partners or other parties whose data should be protected. With regard to media companies, for example, “information on purchasing budgets and willingness to pay may in future cases disseminate information among competitors that may prepare the ground for an anti-competitive price-fixing agreement or act as such an agreement.”<sup>44</sup> Too much transparency can therefore distort competition even in such a situation.

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<sup>40</sup> Cf. Communication from the Commission on the application of state aid rules to public service broadcasting, OJ 2009 C 257 of 27 October 2009, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC1027\(01\)&from=DE](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC1027(01)&from=DE), p. 1, paras. 17, 32 ff.

<sup>41</sup> Cf. Communication from the Commission on state aid for films and other audiovisual works, OJ 2013 C 332 of 15 November 2013, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013XC1115\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013XC1115(01)&from=EN), pp. 1-11.

<sup>42</sup> Plauth M., *Die Rechtspflicht zur Transparenz im europäisierten Vergaberecht*, Bundesanzeiger, Köln, 2017, p. 39 f.

<sup>43</sup> For an instructive discussion, see Kläger C., *op. cit.*

<sup>44</sup> Kirchhof P., *Transparenz des öffentlich-rechtlichen Rundfunks*, Nomos, Baden-Baden, 2017, p. 91.

## 2.5. The influence of transparency rules on the EU's fundamental freedoms

The rules on the EU's internal market with its fundamental freedoms (Articles 26 ff. TFEU) do not contain any specific provisions on transparency either. Nevertheless, transparency requirements are also relevant in this area, and a lack of transparency in public administration can make the implementation of the fundamental freedoms more difficult<sup>45</sup>, especially where the awarding of public contracts is concerned.<sup>46</sup> In particular, the freedom to provide services and the freedom of establishment cover the media, not so much with regard to the awarding of public contracts but rather, for instance, regarding the allocation of broadcasting frequencies or the granting of licences.

Domestic suppliers have a locational advantage anyway in view of their geographical proximity, and their knowledge of the respective tender procedures and legal requirements as well as the national language, and possibly also because of their personal contacts. Moreover, states have a certain interest in awarding, if possible, public contracts to domestic or regional companies. Giving priority to their own nationals constitutes discrimination and is usually prohibited unless there are recognised<sup>47</sup> grounds of justification. Accordingly, procurement procedures must be designed in such a way that all interested companies, irrespective of their origin, have the same opportunities to actually obtain the contract. A transparency requirement can therefore be inferred from the ban on discrimination<sup>48</sup>: above thresholds set by secondary legislation, the potential European-wide contractor must be given the opportunity, in the course of an EU-wide tendering process, to take note of the contract and be able to win it without being discriminated against.

In the context of the fundamental freedoms, transparency requirements thus have a considerable procedural dimension,<sup>49</sup> especially through obligations concerning

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<sup>45</sup> European Commission, "Green Paper on public sector information in the information society", COM (1998) 585 final., <https://op.europa.eu/en/publication-detail/-/publication/599834ce-7a43-44fe-8cd8-334b3c19feba>, para. 12.

<sup>46</sup> Arrowsmith S., "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?", *Public Contract Law Journal* 35, 2006, pp. 337-384 (338 f.).

<sup>47</sup> Under the TFEU or in CJEU case law, cf. CJEU, Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61978CJ0120&from=EN>.

<sup>48</sup> Cf. CJEU, Case C-507/03, *Commission v. Ireland*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=69528&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2293618>, para. 29.

<sup>49</sup> Cf. for the free movement of goods CJEU, Case 178/84, Purity requirement for beer, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61984CJ0178&from=EN>, para. 45, and Case C-24/00, *Red Bull*, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0024\\_SUM&from=HR](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0024_SUM&from=HR), para. 26; for freedom of establishment in particular Case C-340/89, *Vlassopoulou*, <https://curia.europa.eu/juris/liste.jsf?num=C-340/89>, para. 22.

disclosure, justification and documentation. These obligations also apply to the member states,<sup>50</sup> thus providing the relevant effective legal protection.<sup>51</sup>

As far as media companies are concerned, it should be noted that the allocation of broadcasting frequencies or the granting of licences by public authorities take account of media diversity aspects. In individual EU states, for example, the granting of licences is linked to promotion of the diversity of regional programming. It is in principle conceivable that programmes under foreign ownership are able to promote diversity, but if the companies in question already operate with high penetration in a market, the relevant media regulators must bear this in mind and may prioritise other providers, including domestic broadcasters, when granting licences. In such cases, media diversity would justify the interference with fundamental freedoms. With the promotion of these freedoms in mind, this naturally also applies in the opposite direction, meaning that the state authorities must be given access to the data disclosing ownership to enable them to assess developments in the area of media concentration law and make an informed decision, taking into consideration the fundamental freedoms and their limits.

Compliance with fundamental transparency requirements is therefore at least likely to promote implementation of the EU's fundamental freedoms and can even be regarded as a precondition for the effective exercise of the freedoms of the single market. Any relevant deterrent effect thus does not result from such requirements themselves, but rather from a lack or insufficiency thereof. Against this background, it is even argued that a transparency requirement based on the rule of law can be inferred directly from the fundamental freedoms.<sup>52</sup> It must be borne in mind that in the area of public procurement in particular there has been a far-reaching harmonisation of secondary law, resulting in the direct applicability of the fundamental freedoms being superseded by the relevant secondary legislation.<sup>53</sup>

## 2.6. Transparency rules and EU fundamental rights

The connection between the transparency requirement and fundamental rights<sup>54</sup> can best be seen in Article 42 CFR, which establishes a wide-ranging subjective public right<sup>55</sup> to

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<sup>50</sup> CJEU, joined cases 205-215/82, *Deutsche Milchkontor*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61982CJ0205&from=EN>, paras. 17, 19; CJEU, Case C-340/89, *Vlassopoulou*, <https://curia.europa.eu/juris/liste.jsf?num=C-340/89>, para. 22.

<sup>51</sup> CJEU, Case 222/86, *Heylens*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61986CJ0222&from=HR>, paras. 14 f.; Case C-340/89, *Vlassopoulou*, <https://curia.europa.eu/juris/liste.jsf?num=C-340/89>, para. 22; Case C-75/08, *Mellor*, [https://curia.europa.eu/juris/document/document.jsf?text=&docid=73330&pageIndex=0&doclang=EN&mode=\\_lst&dir=&occ=first&part=1&cid=2294593](https://curia.europa.eu/juris/document/document.jsf?text=&docid=73330&pageIndex=0&doclang=EN&mode=_lst&dir=&occ=first&part=1&cid=2294593), para. 59.

<sup>52</sup> *Plauth M.*, op. cit., p. 46.

<sup>53</sup> Cf. with regard to telecommunications services CJEU, Case C-324/98, *Telaustria and Telefonadress*, [https://curia.europa.eu/juris/document/document.jsf?text=&docid=45859&pageIndex=0&doclang=EN&mode=\\_lst&dir=&occ=first&part=1&cid=2294692](https://curia.europa.eu/juris/document/document.jsf?text=&docid=45859&pageIndex=0&doclang=EN&mode=_lst&dir=&occ=first&part=1&cid=2294692); *Plauth M.*, op. cit., p. 64 f.

<sup>54</sup> Cf. CJEU, Case T-211/00, *Kuijjer v. Council*, [https://curia.europa.eu/juris/document/document.jsf?text=&docid=47741&pageIndex=0&doclang=EN&mode=\\_lst&dir=&occ=first&part=1&cid=2294789](https://curia.europa.eu/juris/document/document.jsf?text=&docid=47741&pageIndex=0&doclang=EN&mode=_lst&dir=&occ=first&part=1&cid=2294789), para. 52

<sup>55</sup> See on this *Ostermann G.*, op. cit., p. 232 with further references.



motivations and intentions behind a report from the user's perspective. Knowing whether and from which angle a media company is politically influenced, and thus possibly controlled in a certain way, is essential in this regard. The appropriate transparency also enables the drawing of conclusions as to whether there is any media diversity at all, without which, according to the European Court of Human Rights, there can – to put it bluntly – be no democracy.<sup>66</sup>

In cases where transparency requirements both protect and interfere with economic integration, in other words where they affect EU competition policy and the exercise of the freedoms of the single market, the corresponding fundamental rights may also be impacted. These are, on the one hand, the right to property under Article 17 CFR<sup>67</sup> and, on the other hand, the freedom to choose an occupation enshrined in Article 15 CFR.<sup>68</sup> However, the protection of the freedom to run a business, which is intrinsically related to this fundamental right, as guaranteed by Article 16 CFR,<sup>69</sup> is also connected to the transparency requirement. These fundamental rights in particular indicate a certain parallel between guarantees of fundamental freedoms and fundamental rights. In cases where, as pointed out, transparency requirements support the implementation of the fundamental freedoms, these requirements can certainly justify an interference with fundamental rights. It is therefore impossible to similarly infer a transparency requirement based on the rule of law from EU fundamental rights. Such a conclusion could only be based on the guarantees provided under Articles 42 and 47 CFR.

## 2.7. Transparency as an instrument for safeguarding media diversity

Transparency, as already repeatedly pointed out, plays a considerable role in the case of the media. This must be all the more true as an increasing number of media companies are international groups, some of which are also controlled by new players, such as private equity firms.<sup>70</sup> Media diversity is, in turn, relevant in terms of primary law, even though the EU has no actual regulatory competences of its own. Media regulation (which also safeguards diversity) can, however, be involved in the context of the competences relating to the single market and consumer protection as well as in connection with the EU's area of freedom, security and justice.<sup>71</sup>

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<sup>66</sup> ECHR, Application no. 13936/02, *Manole and Others v. Moldova*, <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%2213936/02%22%22%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22itemid%22:%5B%22001-94075%22%22%22%7D>, para. 95.

<sup>67</sup> See Vosgerau U., in Stern K. and Sachs M., op. cit., Article 17 CFR.

<sup>68</sup> See Blanke H., in Stern K. and Sachs M., op. cit., Article 15 CFR.

<sup>69</sup> See Schwier H., *Der Schutz der „Unternehmerischen Freiheit“ nach Art. 16 der Charta der Grundrechte der Europäischen Union*, Lang, Frankfurt am Main, 2008.

<sup>70</sup> Cf. the references in Craufurd-Smith R., Klimkiewicz B. and Ostling A., “Media ownership transparency in Europe: Closing the gap between European aspiration and domestic reality”, *European Journal of Communication*, 2021, pp. 1-16, <https://journals.sagepub.com/doi/10.1177/0267323121999523>.

<sup>71</sup> For a fundamental discussion, see Cole M., Ukrow J. and Etteldorf C., op. cit., pp. 69 ff.

Transparency requirements not only apply with regard to EU competition and public procurement law and the fundamental freedoms of the EU single market. Foreign media companies' market access under the freedom of establishment or the freedom to provide services would face being significantly curtailed without open invitations to tender which, amongst other, clearly set out the state's requirements that must be met by the media companies, as well as their obligations.<sup>72</sup> Conversely, this naturally also applies to the withdrawal of broadcasting rights or the refusal to consider a company when frequencies are newly allocated or reallocated. In the case of media company takeovers, for example by private equity firms, an investment screening mechanism that restricts fundamental freedoms can be implemented in order to preserve media diversity as a matter of general public interest.<sup>73</sup> If such interventions, which are relevant both for fundamental freedoms and fundamental rights, are not justified in a sufficiently open manner, this may be accompanied by a reduction in effective legal protection. Stricter public service broadcasting transparency requirements are also fundamental in permitting the counteracting, as far as possible, of any competitive disadvantages resulting from programme funding, for example through licence fees, as well as from the point of view of state aid law. Without a sufficiently transparent system, private providers would be in a worse position than public or state-controlled media companies, which in the worst case could lead to voluntary or forced withdrawal from the market of an EU member state. Such a decision to cease participating in the market can also be motivated by commercial providers' non-transparent ownership structures and funding models, especially if their relationships with or dependence on these state bodies remain unclear. Finally, from a certain point onwards media diversity and diversity of opinion associated with it are reduced in favour of a concentration of market operators in the hands of a few owners, as has indeed occurred in some Council of Europe member states and in the EU. This applies not only to the classical media such as broadcasting or the press. Purely digital groups must be subject to transparency requirements too, especially as far as their tax treatment is concerned, in order to minimise the risk of traditional providers being forced out. Such providers may include film and television production companies, which may also benefit from subsidies to support the national cultural heritage.

Transparency is also an important instrument for ensuring diversity when it comes to the conditions under which media content can be found. This is particularly true for online intermediation services<sup>74</sup> and for algorithm-based digital companies. If those firms' algorithms and the criteria to the (pre-)selection of displayed content, including political advertising, for example, are disclosed,<sup>75</sup> this will foster the media skills of users if it is made clear to them why specific content is (or is not) displayed.<sup>76</sup> In this context, there is once again a conflict between transparency requirements – which are to a large extent governed

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<sup>72</sup> Cf. *ibid.*, p. 228 f.

<sup>73</sup> Ukrow J. and Ress G., in Grabitz E., Hilf M. and Nettesheim M., *op. cit.*, Article 65 TFEU, paras. 79 ff.

<sup>74</sup> Subject to Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ 2019 L 186 of 11 November 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R1150&from=DE>, pp. 57-79; see Cole M., Ukrow J. and Etteldorf C., *op. cit.*, pp. 236 ff.

<sup>75</sup> Cf. *ibid.*, pp. 259 ff.

<sup>76</sup> Cf. *ibid.*, p. 204 f. See also section 1.3 above.

by secondary law – and companies’ economic interests, which are also protected by fundamental rights.

The transparency required to ensure media diversity in the member states can, however, again only be inferred from the EU treaties themselves in those cases in which the member states are obliged to act under primary law, for example in the context of the EU’s state aid policy or the fundamental freedoms. Rather, it is predominantly secondary EU law that actually deals with specific issues and this will become even more relevant in the future, for example in view of the proposed Digital Services Act.<sup>77</sup> Whenever EU law is affected, the rights enshrined in the Charter of Fundamental Rights (Article 51 CFR) must be borne in mind.

## 2.8. Conclusion

Transparency is an extremely important constitutional principle of the European Union. Even though it is not mentioned in the relevant provisions, it is crucial in the context of the EU’s fundamental freedoms and competition policy and, being essential to the principles of the rule of law and democracy, it impacts the EU’s canon of fundamental rights. Nevertheless, the primary law principle of transparency and openness only applies directly to the EU, its institutions and bodies and can only create limited and indirect obligations for the member states, in particular to help ensure that EU law and the legal rights enshrined in it become fully effective in practice. This can be seen not least in media regulation, including the system of media ownership prevailing in the member states: here, the EU’s influence, in terms of its competences, has been reduced in many areas<sup>78</sup>, which means that the transparency requirements under the treaties only play a subordinate and indirect role.

In the course of the deepening of EU integration, politically influenced matters such as the EU’s fundamental values, and its system of fundamental rights protection as well as obligations regarding openness and transparency, have become increasingly relevant. Not least in the course of the last treaty reform with the Treaty of Lisbon, which entered into force in 2009, such matters were again given greater weight. Nevertheless, José María Porrás Ramírez is right when he says that there is a need for further action to accord the issue discussed here the relevance it deserves: “Achieving more openness and transparency in the EU institutions is a permanent task that challenges us all on a daily basis.”<sup>79</sup>

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<sup>77</sup> Cf. *ibid.*, pp. 331 ff.

<sup>78</sup> Cf. *ibid.* for an instructive fundamental discussion.

<sup>79</sup> Porrás Ramírez J., in Blanke H. and Mangiameli S., *op. cit.*, Article 15 TFEU, para. 41.

## 3. Secondary law provisions on media ownership transparency

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### 3.1. The AVMSD

The Audiovisual Media Services Directive (AVMSD) in the codified version of Directive 2010/13/EU<sup>80</sup> so far only provided, in Article 5, that audiovisual media service providers should make accessible information about the service they provide in the form of the provider's name, address, contact details and, where applicable, details of the competent regulatory or supervisory bodies. This general "imprint obligation" was introduced on the grounds that, because of the specific nature of audiovisual media services, especially with regard to the impact of these services on the way people form their opinions, it was essential for users to know exactly who was responsible for the content and how they could contact them.<sup>81</sup> The disclosure of information about the ownership of media companies was, however, not addressed by this and therefore, existing relevant rules at member state level were not determined by EU secondary law.<sup>82</sup>

However, when the AVMSD was amended under Directive (EU) 2018/1808, the provision was extended, with a very similar explanation of a need for accessible information on the responsibility for content, including information on ownership structures. Article 5(2) now stipulates that member states may adopt legislative measures requiring media service providers under their jurisdiction to make accessible, in addition to the aforementioned information, details concerning their ownership structure, including beneficiaries.

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<sup>80</sup> 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, OJ L 95, 15.4.2010, pp. 1–24.

<sup>81</sup> Recital 45 of Directive 2010/13/EU.

<sup>82</sup> See the European Commission's 2020 Rule of Law Report (COM(2020) 580 final), p. 22, and the accompanying country reports, [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en); see also Smith C. and Stolte Y., "The Transparency of Media Ownership in the European Union and Neighbouring States", 2014, [https://www.access-info.org/wp-content/uploads/Transparency\\_of\\_Media\\_Ownership\\_in\\_the\\_EU-09-26-2014.pdf](https://www.access-info.org/wp-content/uploads/Transparency_of_Media_Ownership_in_the_EU-09-26-2014.pdf).

The new Article 5(2) and the corresponding recitals 15 and 16 were included in the amended directive at the suggestion<sup>83</sup> of the Council.<sup>84</sup> In its original proposal, the Council had suggested that the transparency obligation should include information not only on ownership structures, but also on politically prominent persons who own media service providers. While this wording was not ultimately adopted, the final version of Article 5(2) is largely in line with the Council's proposal, although it was complemented in the course of the triologue negotiations by an explicit reference to beneficial owners' fundamental rights of private and family life, i.e., a wording was chosen which is less restrictive for media service providers.

This deliberate exclusion of the political aspects of media ownership does not, however, prevent member states from introducing such rules themselves at national level. This follows, firstly, from the general provision in Article 4(1) AVMSD, according to which member states are free to adopt stricter rules in the fields coordinated by the directive. This applies in the case that the new rule of Article 5(2) is to be classified as a coordinating provision, which is questionable in view of its optional nature and the lack of concrete requirements (more on this later). This can also be deduced from the requirements of the fundamental freedoms if the rules on media ownership transparency are not to be generally understood as falling within the scope coordinated by the AVMSD. In both cases, however, such rules must be compliant with (other) Union law, that is to say be suitable, necessary, proportionate and aim to pursue an objective of general interest, such as the safeguarding of media pluralism.<sup>85</sup> In this context, the requirements of fundamental rights and freedoms are to be observed, above all.<sup>86</sup>

Secondly, the freedom of member states to adopt such provisions is also implied by the broad, open wording of Article 5(2), which does not oblige them to take implementing measures, but simply makes clear that they may adopt rules on the transparency of media ownership. This provision is meant to be read as optional and merely clarifies that (1) the objective pursued by such rules (e.g., consumer protection and safeguarding of opinion and media pluralism) can justify the resulting violation of the provider's fundamental freedoms (especially the freedom to provide services), and (2) should such measures be implemented by the member states, they must be compliant with Union law.

This means, however, that, although Article 5(2) may stimulate a political debate on the adoption of such transparency rules, it will not create a harmonised legal situation across the EU, not only because it is optional, but also because it says very little about what rules

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<sup>83</sup> General approach of the Council on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, ST 9691 2017 INIT - 2016/0151 (OLP) of 24 May 2017, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST\\_9691\\_2017\\_INIT](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST_9691_2017_INIT).

<sup>84</sup> For an overview of the positions taken in the triologue procedure, see the synopsis of the Institute of European Media Law, available in German and English, <https://emr-sb.de/synopsis-avms/>.

<sup>85</sup> See, for example, the recent settled case law that confirms this, CJEU judgment of 3 February 2021, case C-555/19, *Fussl Modestraße Mayr*, ECLI:EU:C:2021:89, rec. 88 *et seq.* See also the detailed report published prior to this decision, Cole, *Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit*, 2020, <https://emr-sb.de/wp-content/uploads/2020/06/Zum-Gestaltungsspielraum-der-EU-Mitgliedstaaten-bei-Einschr%3a4nkungen-der-Dienstleistungsfreiheit.pdf>.

<sup>86</sup> See chapter 3.2.

the member states could actually adopt. Since it only refers to “information concerning their ownership structure”, the AVMSD intentionally<sup>87</sup> gives no indication of how detailed this information should be. For example, does it also cover the disclosure of indirect owners, beneficiaries or even people closely associated with them? Should a media company’s shareholdings in other companies (in particular other media, advertising platforms and agencies, audience measurement companies, etc.) be disclosed? Are the main sources of income to be disclosed? Likewise, this does not indicate how (e.g., online or in analogue form, in a central database or locally with the provider, easily accessible, etc.?) and to whom (e.g. the public, regulatory authorities, independent bodies, etc.?) the information should be made accessible. Regarding the latter question, however, the AVMSD seems to consider recipients to be the main beneficiaries of transparency rules: an awareness of the ownership structures that can lead to control over the content of the respective service should enable them to form their own well-founded judgment regarding that content and any bias in the supply of information. Because of the specific impact on the formation of opinion, recipients are entitled to know who is responsible for the content of audiovisual media services.<sup>88</sup> Such provisions therefore, above all, promote the integrity of the processes of political opinion forming in a democracy.

Since Article 5(2) does not either provide for any form of compliance monitoring with provisions adopted at member state level, any sanctions imposed for infringements are dependent on (non-harmonised) national rules. However, recital 16 of the Directive shows that the disclosed information is also of interest to media regulators or other authorities (depending on the structural design on member state level) that monitor and take steps to prevent media concentration. Although it also focuses on the empowerment of users, recital 16 points out that transparency is important in order to strengthen freedom of expression and, as a consequence, promote media pluralism. The early identification of developments that lead to one or a small number of media companies holding significant power over public opinion as a consequence of their market power, which can therefore jeopardise a balanced information climate, is important to initiate the enactment of media concentration rules in a timely manner or to enforce existing media concentration law at the national level.<sup>89</sup> The same applies to the field of research. In its 2020 Rule of Law Report, the European Commission referred to the importance of media ownership transparency in this context. It stated that such transparency was an essential precondition for any reliable analysis on the plurality of a given media market. It was deemed necessary not only to conduct informed regulatory, competition and policy processes, but also to enable the public to evaluate the information and opinions that were disseminated by the media.<sup>90</sup>

Finally, it is worth noting that the open wording of Article 5(2) ensures that existing national provisions laying down transparency obligations on media ownership can remain in place. No obligation to review existing rules is created, since, according to the general principles of Union law, member state provisions already had to be compatible with

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<sup>87</sup> Recital 16 explains that it is for each member state to decide, in particular with respect to the information which may be provided on ownership structure and beneficial owners.

<sup>88</sup> See recital 16 of Directive (EU) 2018/1808.

<sup>89</sup> Cappello M. (ed.), “Media ownership – Market realities and regulatory responses”, IRIS Special 2016-2, European Audiovisual Observatory, Strasbourg, 2016, <https://rm.coe.int/media-ownership-market-realities-and-regulatory-responses/168078996c>, pp. 51 *et seq.*

<sup>90</sup> *Ibid.*

fundamental rights and freedoms before, and the AVMSD reforms did nothing to change this situation. With the purpose of such transparency measures in mind, member states are therefore free to strive for a uniform regulation of all services that are relevant to the formation of public opinion (broadcasting, press, online media, etc.). Article 5(2) is in fact limited to media service providers, in other words audiovisual media services (television or video on demand). There is no corresponding provision for video-sharing platforms. Other services that are similarly important for the formation of opinion and therefore equally correspond to the intention of the introduction of transparency obligations are also not covered because they lie outside the scope of the AVMSD. Provisions for the purposes of harmonisation, which are too narrowly made and which only apply to audiovisual media services, could create a risk of fragmentation. It could lead to different regulations and levels of strictness applying to different media providers, even though these pose an equal risk.

## **3.2. Transparency in other secondary law and self-regulatory provisions**

Transparency, regardless of the context in which it is achieved, can lead to a strengthening of trust in conditions and processes. At the same time, it makes supervision and monitoring possible, whether by consumers, authorities or researchers, and creates a form of accountability for the companies concerned. Transparency regulations, including both general disclosure obligations and specific information requirements, are therefore frequently used in secondary law to take account of public interests. This is particularly true in the media sector, where the issue of transparency concerns transparency of content, that is to say information that is important for the democratic opinion-forming process, which in turn has a direct impact on the fundamental freedoms of expression and information. Below we will therefore summarise some of the transparency rules in EU secondary legislation, as well as self-regulatory initiatives, in order to demonstrate the importance of transparency as an overarching principle, especially in recent EU law, and how it relates to media ownership transparency.

### **3.2.1. EU Anti-Money Laundering Directive**

The (4th) EU Anti-Money Laundering Directive,<sup>91</sup> which is designed to combat illicit money flows (money laundering, financing of terrorism and organised crime), since these can damage the integrity, stability and reputation of the financial sector, and threaten the internal market of the Union, has little to do with the media sector. However, a recent

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<sup>91</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, pp. 73–117.

change brought by the 2018 amendment of the Directive<sup>92</sup> (5th Anti-Money Laundering Directive) is especially relevant: the “adequate, accurate and current” information on beneficial ownership, including economic interests held, which already had to be provided (Art. 30(1)), was supplemented with additional, stricter transparency requirements. In particular, the updated Directive provides for unlimited public access to registers of beneficial owners of companies, as well as a system of interconnection of registers as part of Europe-wide cooperation.

The Directive itself is only aimed at certain types of companies, in particular credit institutions and financial institutions, and certain natural and legal entities whose professional activities regularly involve large financial transactions, such as notaries, tax advisors or providers of gambling services. However, this does not apply to the transparency rules, which require member states, more generally, to ensure that “corporate and other legal entities incorporated within their territory” provide ownership information. The Directive follows the principle that there is a need to identify any natural person who exercises ownership or control over a legal entity, and that member states should therefore ensure that the widest possible range of legal entities is covered.<sup>93</sup> This can (and probably will) include media companies, depending on their legal form and national structure.<sup>94</sup> The relevant transparency registers and their interconnection are thus also sources of information from a media law perspective. The main question here centres on whether the information that needs to be obtained under the EU Anti-Money Laundering Directive is relevant and adequate with regard to the freedom and diversity of opinion and media.

This information includes details on “beneficial owners” which, according to the Directive, as far as companies are concerned, includes *inter alia* any natural person who ultimately exercises ownership or control over a legal entity. Such control may be exercised not only through ownership of shares or voting rights, but also through a shareholders' agreement, the exercise of dominant influence or the power to appoint senior management.<sup>95</sup> This underlines the context of the Directive, which is aimed at criminal law enforcement, i.e., enabling the identification of the people responsible and preventing them from hiding behind a company name. It is not about describing the ownership structure itself, for example in what proportions a company is owned by which people from which (political) spectrums or backgrounds. Neither does the Directive stipulate which actual information must be provided. For example, it does not require political allegiances, connections or investments in, or ownership of, other companies to be disclosed or linked to other information contained in the transparency register, which would certainly be interesting from a media law perspective. The Directive therefore does not meet the specific needs of the media sector.

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<sup>92</sup> Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156 of 19.6.2018, pp. 43–74.

<sup>93</sup> Recital 12 of Directive (EU) 2015/849.

<sup>94</sup> In Germany, for example, legal entities established under private law, i.e. GmbH, UG, Limited or AG companies, as well as all registered partnerships, e.g. OHG, KG, GmbH & Co. KG, have reporting obligations, which means that large German-based media companies such as ProSiebenSat.1 Media AG, Hubert Burda Media Holding GmbH & Co, Heinrich Bauer Verlag KG, etc. are included.

<sup>95</sup> Recital 13 of Directive (EU) 2015/849.

Although the EU Anti-Money Laundering Directive does not provide for the creation of a media ownership database nor does it guarantee that all media companies relevant to the formation of public opinion are covered by respective national transparency obligations, the transparency registers that it describes could serve as a technical basis or infrastructure (for instance through suitable categorisation), or at least a model for similar databases specific to the media sector. The new, publicly accessible, interconnected EU-wide version could also be an important source of information for interested consumers, authorities or researchers, although the registers are not media-focused or customised, provided of course the systems work.<sup>96</sup>

### 3.2.2. Transparency provisions in media-relevant secondary law and self-regulation

While the EU Anti-Money Laundering Directive addresses the transparency of ownership structures without doing so in a media-specific manner, there are numerous transparency rules that are specific, or at least relevant, to the media sector, which however do not address media ownership. For the purposes of this publication, it is impossible to mention all of them, or to look at them in any detail. Rather, it should be noted that, especially in recent legislative and other initiatives at EU level, transparency is seen (partly) as a solution for a variety of different problems, especially in the digital field and in the context of freedom of expression.

For example, the AVMSD, a key instrument of media regulation, creates, in Article 28b(3)(d), (e) and (i), an obligation to establish transparent reporting and complaint systems for video-sharing platforms in relation to certain types of illicit content. Obligations to label content that is harmful to minors (Article 6a(3)) or that constitutes advertising (Articles 9, 10, 11, 24) provide a form of information disclosure designed to keep users informed and to enable them to make responsible judgments. The labelling of sponsorship or product placement, for example, has at least a similar purpose to media ownership transparency: it is intended to enable the user to form an informed, objective opinion on the content, including its economic background (how it is financed). Similar rules can be found in self-regulation and other initiatives. In the fight against online hate speech, for example,<sup>97</sup> clear and easily understandable explanations should be provided for users by platforms, along with annual transparency reports, while the fight against disinformation<sup>98</sup> relies in particular on obligations to label advertising (especially political advertising)<sup>99</sup> and to provide users

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<sup>96</sup> For a critical view, see Granjo and Martini, “Access denied? Availability and accessibility of beneficial ownership data in the European Union”, 2021, <https://images.transparencycdn.org/images/2021-Report-Access-denied-Availability-and-accessibility-of-beneficial-ownership-data-in-the-European-Union.pdf>.

<sup>97</sup> Commission Recommendation on measures to effectively tackle illegal content online (C(2018) 1177 final), <https://digital-strategy.ec.europa.eu/en/library/commission-recommendation-measures-effectively-tackle-illegal-content-online>, nos. 16 and 17.

<sup>98</sup> See, for example, the EU Code of Practice on Disinformation, <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>.

<sup>99</sup> Nos. 3 and 4, 7 to 11.

with means (including technical means) to identify disinformation. There are plans to strengthen these transparency measures in the future.<sup>100</sup>

The Directive on Copyright and Related Rights in the Digital Single Market, which recently entered into force,<sup>101</sup> and the Platform-to-Business (P2B) Regulation<sup>102</sup> also contain transparency-related provisions. While the former is more about improving the assertion of copyright-holders' rights, i.e., essentially dealing with transparency vis-à-vis the media as licence-holders, the provisions of the P2B Regulation are even more relevant to the current context. These concern, for example, the transparency of ranking systems used within online intermediation services and search engines, which can be extremely important for the findability of content and indirectly, therefore, for diversity of media, opinion and information where content relevant to the formation of public opinion is concerned.<sup>103</sup> In principle, these transparency rules only concern the relationship between (media) companies and intermediaries. However, consumers also benefit from them as the information must be made publicly accessible. Incidentally, Directive (EU) 2019/2161 brings the transparency of ranking systems for consumers up to the same level.<sup>104</sup> Both regulatory instruments aim to create clarity over the parameters used for displaying content.

Finally, EU data protection law is characterised by the idea of far-reaching transparency and well-informed data subjects. The comprehensive information obligations and rights to information enshrined in the General Data Protection Regulation<sup>105</sup> are intended to keep data subjects closely informed about the use of their data and enable them to react if necessary by asserting their rights. Nevertheless, the data protection law shows the downside of overly extensive transparency rules: while detailed privacy statements that meet all the rules are certainly an appropriate source of information for data protection authorities that need to assess whether a company's use of personal data is lawful, they are often confusing and hard to understand for the data subjects themselves, for whose protection the information is actually intended. These laws rarely provide data subjects with the information that matters in a manageable way and are therefore often not even consulted.<sup>106</sup> Therefore, transparency, if it is at least also intended for the recipient (as is

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<sup>100</sup> European Commission Guidance on Strengthening the Code of Practice on Disinformation, COM(2021) 262 final, <https://digital-strategy.ec.europa.eu/en/library/guidance-strengthening-code-practice-disinformation>.

<sup>101</sup> Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125.

<sup>102</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, pp. 57–79.

<sup>103</sup> See Cole and Etteldorf, in: Cappello M. (ed.), "Media pluralism and competition issues", IRIS Special, European Audiovisual Observatory, Strasbourg, 2020, <https://rm.coe.int/iris-special-1-2020de-mediennpluralismus-und-wettbewerbsfragen/1680a08425>, pp. 38 *et seq.*

<sup>104</sup> For more detail, see: Cole, Ukrow and Etteldorf, "On the Allocation of Competences between the European Union and its Member States in the Media Sector, An Analysis with particular Consideration of Measures concerning Media Pluralism", 2021, <https://doi.org/10.5771/9783748924975>, chapter II.6.d.

<sup>105</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, pp. 1–88.

<sup>106</sup> In a 2017 Deloitte study, around 91% of those questioned said they knowingly accepted terms of use and data protection conditions without reading them:

the case with media ownership transparency rules), must be presented to the average consumer in a way that is accessible, compact and, if appropriate, categorizable in order to serve its purposes.

### 3.2.3. Transparency for the future in the AI field and the Digital Services Act package

Future EU regulation also looks set to be based largely on transparency.

In its proposal for a Regulation laying down harmonised rules on artificial intelligence (AI),<sup>107</sup> the European Commission suggests, in particular, introducing transparency obligations and provision on information for users in relation to the use of different AI systems – graded according to their potential threat. Here also, the primary objective is to increase people’s trust in AI. Since AI is used in a vast range of fields, including in relation to content relevant to the formation of public opinion, this “basic transparency” is also important from a freedom of expression perspective.

Transparency is also emphasised in the proposals for a Digital Services Act (DSA)<sup>108</sup> and a Digital Markets Act (DMA).<sup>109</sup> The DSA enshrines self-regulatory approaches such as transparency and information obligations concerning illegal content as well as requirements for intermediary services to report on the transparency measures they have taken (with the frequency and scope of such reports depending on the service type and size). It also proposes rules on the transparency of general terms and conditions and on online advertising (also graded according to the size of the online platform). The DSA expressly sets this in the context of users’ rights to freedom of expression and information (recital 41).<sup>110</sup> The DMA, on the other hand, focuses more on the relationship between gatekeepers and business users with regard to transparency, including in particular the disclosure of data and information on the functioning of advertising systems.<sup>111</sup>

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<https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf>, p. 12. For detailed discussion of this subject, see, for example, Steinfeld, “I agree to the terms and conditions”: (How) do users read privacy policies online? An eye-tracking experiment, in: *Computers in Human Behavior*, edition 55 part B, 2016, pp. 992-1000.

<sup>107</sup> COM(2021) 206 final,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1623335154975&uri=CELEX%3A52021PC0206>.

<sup>108</sup> Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final,

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN>.

<sup>109</sup> Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>.

<sup>110</sup> For detailed analysis of this and its importance for online content dissemination, see Cole, Etteldorf and Ullrich, “Updating the Rules for Online Content Dissemination”, 2021,

<https://doi.org/10.5771/9783748925934>, pp. 187 *et seq.*

<sup>111</sup> For detailed analysis of this and its importance for the audiovisual media sector, see Cole, “Overview of the impact of the proposed EU Digital Services Act Package on broadcasting in Europe”, 2021, [https://emr-sb.de/wp-content/uploads/2021/06/EMR\\_Legal-Issue-Paper-DSA-DMA-and-Broadcasting.pdf](https://emr-sb.de/wp-content/uploads/2021/06/EMR_Legal-Issue-Paper-DSA-DMA-and-Broadcasting.pdf), pp. 27 *et seq.*

## 4. Media ownership transparency initiatives

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### 4.1. Council of Europe

Over many years, the Council of Europe has dealt directly or indirectly with aspects of media pluralism and media concentration in numerous recommendations and declarations.<sup>112</sup> The most important of these, in the context of this publication, is Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership.<sup>113</sup> In this document, the Council of Europe reiterates the paramount importance of the media and of media pluralism for the democratic system. It also recognises dangers, in particular in the online environment, linked to the fact that intermediaries are acquiring increasing control over the flow, availability, findability and accessibility of content. Additionally, it points out the need to address the growing concerns arising from pressure exerted on the media by political and economic interests in order to influence public opinion or otherwise compromise the independence of the media.

According to the Council of Europe, in addition to the promotion of media literacy, the adoption and effective implementation of a media-ownership regulation can play a key role. The main advantages of such a regulation include greater transparency, addressing issues such as cross-media ownership, direct and indirect ownership and an effective control and influence over the media. Unlike the AVMSD, the Recommendation also addresses aspects of political control over the media and an increase of media accountability through such rules, and looks in detail at a possible regulatory framework:

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<sup>112</sup> See, for example, Recommendations Rec(94)13 on measures to promote media transparency; Rec(99)1 on measures to promote media pluralism; Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector; CM/Rec(2007)2 on media pluralism and diversity of media content; CM/Rec(2007)3 on the remit of public service media in the information society; CM/Rec(2011)7 on a new notion of media; CM/Rec(2012)1 on public service media governance; CM/Rec(2012)3 on the protection of human rights with regard to search engines; CM/Rec(2015)6 on the free, transboundary flow of information on the Internet; CM/Rec(2016)1 on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality; CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors; CM/Rec(2016)5 on Internet freedom; as well as the Declarations of 11.2.2009 (on the role of community media in promoting social cohesion and intercultural dialogue) and 31.1.2007 (on protecting the role of the media in democracy in the context of media concentration).

<sup>113</sup> Recommendation CM/Rec(2018)1 on media pluralism and transparency of media ownership, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680790e13](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13).

- **Territorial scope of application:** companies operating under the jurisdiction of a state;<sup>114</sup>
- **Addressees:** criteria could include the media outlet's commercial nature, audience reach, editorial control, frequency of distribution or a combination thereof;
- **Content:** name(s) and contact details of the media company, its direct owner(s) with shareholdings enabling them to exercise influence,<sup>115</sup> natural persons with beneficial shareholdings<sup>116</sup> and persons with actual editorial responsibility, as well as information on the nature and extent of the shareholdings or voting rights of the above persons in other media, media-related or advertising companies which could lead to an influence over the decision-making of those companies, or of positions they may hold in political parties;
- **Method:**
  - On the one hand, media outlets publish information themselves in a publicly accessible manner, e.g., on their company website, and send it to an independent national media regulatory authority or other designated body;
  - On the other hand, this authority or body collects the information and makes it publicly available in a database, including categorised data divided according to different types of media (markets/sectors) and according to regional and/or local levels;
- **Accessibility:** general public, media regulatory authorities and other relevant bodies;
- **Timeframe:** specific reporting deadlines should be laid down, as well as the obligation to report changes in ownership and control arrangements;
- **Monitoring:** through regular reports by an independent national media regulatory authority or another designated body or institution;
- **Cooperation and coordination:** inter-agency co-operation and co-ordination, including exchange of information, development of best practices and support for existing initiatives promoting media ownership transparency, such as the MAVISE database.

The Recommendation does not, however, lay down provisions for supervision or sanctioning mechanisms. Nevertheless, it addresses a number of important factors that are essential for the regulation of media ownership transparency, so that the disclosed data can be made useful for the purposes of safeguarding media and information pluralism. It also tackles the important matter of how the information can be made understandable, such as by breaking it down and providing explanations. The need for international cooperation is also emphasised with a view to creating a Europe-wide picture of the status of media pluralism. The member states are also encouraged to take measures requiring the

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<sup>114</sup> However, this shall not apply to owners and other responsible persons whose names are disclosed and who may also fall under the jurisdiction of other states.

<sup>115</sup> According to the Recommendation, the rules should be limited to individuals directly involved in the ownership of a media outlet (with a recommended threshold of 5% shareholding) or its editorial oversight structures.

<sup>116</sup> Beneficial shareholding applies to natural persons who ultimately own or control shares in a media outlet or on whose behalf those shares are held, enabling them to indirectly exercise control or influence on the operation and strategic decision-making of the media outlet.

disclosure of information on the sources of media outlets' funding obtained from state funding mechanisms (advertising, grants and loans), as well as to promote the disclosure of contractual relations with other media or advertising companies and political parties that may have an influence on editorial independence. The need to guarantee a high level of transparency of media providers and content distribution methods, which is highlighted in this Recommendation, will also come through in future recommendations. For example, the draft version drawn up as part of a public consultation by the Council of Europe's Committee of Experts on Media Environment and Reform (MSI-REF) on a possible recommendation of the Committee of Ministers on principles for media and communication governance also places a strong emphasis on transparency rules.<sup>117</sup>

## 4.2. Existing databases and civil society initiatives

Regardless of any legislative basis for the creation of databases or obligations for media companies to disclose their ownership structures, databases and other initiatives to monitor media concentration and make relevant data accessible have been developed in Europe.

On account of its completeness and quasi-official status, the publicly accessible MAVISE online database, managed by the European Audiovisual Observatory and supported by the EU Creative Europe programme, is particularly important as far as the audiovisual sector is concerned.<sup>118</sup> Covering 41 European states and Morocco, it enables users to interactively search, including by category, the registries of the European audiovisual regulatory authorities. It contains information such as the name and type of service, the ultimate owner(s) that control(s) the service, targeted countries, genre, registering bodies and the country of jurisdiction. The main resource is a collaboration with the European Platform of Regulatory Authorities (EPRA) and its network of European audiovisual regulatory authorities. Press articles, reports and information from TV companies are used as additional sources. The MAVISE database does, however, warn users that the data collection is limited, especially because the databases depend on regulatory authorities whose activities are based on different legal and technical mechanisms.

Another initiative worth mentioning is the EU-funded Centre for Media Pluralism and Media Freedom (CMPF), which was established in 2011.<sup>119</sup> The Media Pluralism Monitor (MPM), created by the CMPF in 2013, is particularly relevant in the present context. It regularly analyses and compares the situation of media pluralism in Europe. As part of its research on pluralism in relevant markets, it also examines national rules on media ownership transparency and – if available – analysis thereof. In 2021, the MPM concluded, for example, that none of the countries studied were free from risks to media pluralism and, in particular, that the overall situation was stagnating or deteriorating. The report, however, stressed that a market analysis is especially difficult because national rules are either not

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<sup>117</sup> See <https://rm.coe.int/msi-ref-2020-05-draft-rec-media-and-comm-governance-principles-en-7-7-/1680a31dd7>.

<sup>118</sup> Further details at <https://mavise.obs.coe.int/pages/about>.

<sup>119</sup> Further details at <https://cmpf.eui.eu/about/>.

available or not standardised in relation to the data presented.<sup>120</sup> Nevertheless, thanks to its detailed analysis of the EU member states and other states,<sup>121</sup> the annual publication of its results and individual country reports, produced in writing and visualised in the form of interactive graphs, the MPM is an important source for policy-makers, regulatory authorities and researchers.

A similar ‘hazard map’ is provided by the annual “World Press Freedom Index” published by the German branch of Reporters Without Borders<sup>122</sup> which, as part of its evaluation of risks for press and information freedom in 180 countries, also deals with media diversity issues. Since 2015, Reporters Without Borders has also been operating the so-called Media Ownership Monitor (MOM), an international research project on media transparency, which mainly seeks to investigate who owns mass media, primarily in so-called developing and emerging countries.<sup>123</sup> The data it collects are published in an online database and include information on political interests, audience concentration and concentration of media use.<sup>124</sup> Country-specific conditions, such as the situation of media markets, competition and media law, are also investigated. The shareholdings of the most influential media owners, combined with their business success (market power) and the reach of their media (power to shape opinion) are then used to generate an indicator of the level of risk of media pluralism in each country.

Finally, reference should be made to the media ownership transparency project run by Access Info Europe, an NGO that defends and promotes the right of access to information.<sup>125</sup> As part of the project, reports on various countries (currently 20<sup>126</sup>) are published and collated in a combined report, on the basis of which recommendations for enhancing transparency are drawn up.

Additionally, there are various, predominantly privately organised initiatives dealing with the transparency of ownership structures and the related risks to freedom of expression and information from a journalistic or media pluralism perspective. However, none of these initiatives are able to rely on harmonised rules at international level or enforceable national obligations, which means that their results are limited. In December 2020, however, the European Commission launched a call for proposals that should improve transparency, at least in the future. As part of its wider efforts to support media freedom and pluralism, the Commission wants to establish a Media Ownership Monitor, which will keep political and regulatory institutions better informed about real ownership structures and potential problems, and which will thereby contribute to a better understanding of the media market. In concrete terms, the Monitor will provide a country-

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<sup>120</sup> MPM 2021, [https://cadmus.eui.eu/bitstream/handle/1814/71970/CMPE\\_MPM2021\\_final-report\\_QM-09-21-298-EN-N.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/71970/CMPE_MPM2021_final-report_QM-09-21-298-EN-N.pdf?sequence=1&isAllowed=y), p. 45.

<sup>121</sup> The MPM 2021 covered the 27 EU member states, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey.

<sup>122</sup> Further details at <https://www.reporter-ohne-grenzen.de/rangliste/rangliste-2021>.

<sup>123</sup> Currently Cambodia, Columbia, Tunisia, Turkey, Ukraine, Philippines, Peru, Mongolia, Serbia, Ghana, Brazil, Albania, Morocco, Mexico, Tanzania, Sri Lanka, Lebanon, Egypt and Pakistan.

<sup>124</sup> Further details at <https://www.reporter-ohne-grenzen.de/mom/projektlaender>.

<sup>125</sup> Further details at <https://www.access-info.org/media-ownership-transparency/>.

<sup>126</sup> Currently Azerbaijan, Bulgaria, Germany, Georgia, Iceland, Italy, Croatia, Latvia, Luxembourg, Macedonia, Morocco, the Netherlands, Norway, Austria, Romania, Spain, Switzerland, Turkey, the United Kingdom and Cyprus.

based database containing information on media ownership, as well as systematically assess relevant legal frameworks and identify possible risks to media ownership transparency.<sup>127</sup>

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<sup>127</sup> <https://digital-strategy.ec.europa.eu/en/funding/call-proposals-media-ownership-monitor>.



## 5. Country reports

### 5.1. CH - Switzerland

*Marina Piolino, media lawyer at BAKOM*

#### 5.1.1. Media ownership transparency rules in constitutional law

Transparency of media ownership is primarily based on the constitutional principle of media diversity. Trends in media concentration that threaten such diversity can only be identified in time and measures to prevent this can only be taken if media ownership is transparent. Under Swiss constitutional law, a diverse media landscape is protected under freedom of expression and information, as well as freedom of the media (Articles 16 and 17 of the Swiss Federal Constitution [BV, SR 101]).<sup>128</sup><sup>129</sup> The media can only effectively carry out its role in the formation of public opinion if it brings the most diverse content possible into the public domain.<sup>130</sup> As far as radio and television are concerned, Article 93(2) BV expressly provides that they should allow a diversity of opinions to be expressed appropriately. Aimed at the Swiss federal legislators, this mandate originates from the fact that the radio and television sector was devoid of competition for many years, largely on account of spectrum scarcity.<sup>131</sup>

In this context, a number of instruments to promote diversity were created through the *Bundesgesetz über Radio und Fernsehen* (Federal Act on Radio and Television – RTVG,

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<sup>128</sup> Federal Constitution of the Swiss Confederation of 18 April 1999 (status as of 7 March 2021), <https://www.fedlex.admin.ch/eli/cc/1999/404/de>.

<sup>129</sup> See Stephan C. Burkert B. and H., in: Ehrenzeller B., Schindler B., Schweizer R.J., Vallender K.A. (ed.), *St. Galler Kommentar Bundesverfassung*, 3rd ed., Zürich/St. Gallen 2014, Art. 17 BV, N 4 and N 26.

<sup>130</sup> With further references, see Hager P., "Rundfunkvielfalt und Medienkonzentration", Zürich 2016, pp. 6 ff. .; BGE 98 Ia 73, rec. 3.b), p. 79, [http://relevancy.bger.ch/php/clir/http/index.php?highlight\\_docid=atf%3A%2F%2F98-IA-73%3Ade&lang=de&type=show\\_document](http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F98-IA-73%3Ade&lang=de&type=show_document).

<sup>131</sup> See Federal Council Dispatch on the Radio and Television Act of 28 September 1987, pp. 719 ff., [https://bundesblatt.weblaw.ch/?method=dump&bbl\\_id=11510&format=pdf](https://bundesblatt.weblaw.ch/?method=dump&bbl_id=11510&format=pdf); Dumermuth M., "„Rundfunkregulierung – Alte und neue Herausforderungen", in Jarren O., Donges P. (ed.), "Ordnung durch Medienpolitik?", Konstanz 2007, pp. 352 ff., p. 376.

SR 784.40).<sup>132</sup> These include concentration law provisions<sup>133</sup> aimed at ensuring that there is a variety of competing broadcasters. This implements the concept of external pluralism, where diversity of content is guaranteed by different media providers through their own individual services.<sup>134</sup> To allow for the gathering of valid information about media concentration developments and for the effective implementation of concentration law provisions, various provisions of the RTVG require ownership structures to be disclosed.

Transparent media ownership also contributes to the free, undistorted formation of opinion. In Switzerland, as a direct democracy, this is extremely important, especially before elections and other votes, and is protected under electoral and voting freedom (Art. 34(2) BV). Disclosure of media ownership is particularly relevant in regions where there are still only a small number of media services.

In the media policy field, the federal government only has the power to regulate electronic media (Art. 93 Abs. 1 BV), while the cantons are responsible for the printed press. At federal level, there is therefore no constitutional basis for introducing a disclosure obligation that covers all media genres.<sup>135</sup> If the federal or cantonal authorities impose transparency obligations, they must always respect the fundamental rights of the media providers concerned.

Finally, disclosure of ownership information is also mentioned in the ethical rules contained in the Journalists' Code of Conduct, according to which journalists are entitled to transparency as to the ownership of their employer.<sup>136</sup> This rule is designed to strengthen the independence of journalists.<sup>137</sup>

## 5.1.2. Media ownership transparency rules in domestic law

### 5.1.2.1. Overview

Since Switzerland is not an EU member state, it is not bound to implement the provisions of the Audiovisual Media Services Directive (AVMSD). Unlike the AVMSD, Swiss audiovisual law deals primarily with linear radio and television. The relevant transparency-related provisions are found in the RTVG: Articles 3 and 16 (notifiable ownership structures), 18 (ownership structures in annual reports), 44 (disclosure of ownership structures as a licence requirement) and 48 (reporting requirement for licence transfers). These comprehensive disclosure obligations enable the authorities to take action in order to prevent media

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<sup>132</sup> Federal Act on Radio and Television of 24 March 2006 (status as of 1 January 2021), <https://www.fedlex.admin.ch/eli/cc/2007/150/de>.

<sup>133</sup> See Art. 45(3) and 74 ff. RTVG (see Hager P., *op.cit.*, pp. 10 ff.).

<sup>134</sup> With further references, see Hager P., *op.cit.*, p. 10.

<sup>135</sup> See, however, the disclosure obligation in criminal law, section 5.1.2.1.

<sup>136</sup> See letter (d) of the Swiss Press Council's Declaration of Rights of a Journalist, <https://presserat.ch/journalistenkodex/erklaerung/>.

<sup>137</sup> Swiss Press Council, statement of 13.7.2011, no. 34/2011, rec. 2b, <https://presserat.ch/complaints/offenlegen-der-besitzverhlttnisse/>.

concentration (see Art. 75 RTVG, for example).<sup>138</sup> The RTVG was completely overhauled in 2006 and has been in force in its new form since 1 April 2007.

For newspapers and magazines, the imprint obligation enshrined in criminal law includes a provision on transparency. According to Article 322(2) of the *Schweizerisches Strafgesetzbuch* (Swiss Criminal Code – StGB, SR 311.0)<sup>139</sup>, the imprint must indicate significant holdings in other companies (so-called active holdings). This requirement is designed to prevent media concentration and therefore does not serve the protective purpose of the imprint obligation (to implement media criminal liability). However, to make economic dependencies more transparent, it would be more useful if the identity of a media company's shareholders (so-called passive holdings) were disclosed. Moreover, the imprint obligation does not apply to all media genres, even though concentration trends can be seen across all types of media. Whether online publications are also subject to Article 322(2) StGB is a controversial question.<sup>140</sup>

Below we will only examine the transparency-related provisions of the RTVG.

### 5.1.2.2. Providers subject to the regulations

#### 5.1.2.2.1. Notifiable ownership structures (Art. 3 and 16 RTVG)

Unless they already hold a broadcaster's licence,<sup>141</sup> anyone wanting to operate a Swiss linear radio or television programme service must apply to the *Bundesamt für Kommunikation* (Federal Communications Office – BAKOM) in advance in accordance with Article 3(a) RTVG, providing details of their ownership structure. A Swiss programme service is defined as a programme service that is subject to Swiss sovereignty in accordance with the provisions of the European Convention on Transfrontier Television of 5 May 1989, whose provisions also apply to radio programme services (Art. 2(e) RTVG). No disclosure obligations apply to "programming of minor editorial importance", which lies outside the scope of the RTVG (Art. 1(2) RTVG in conjunction with Art. 1 of the *Radio- und Fernsehverordnung* [Ordinance on Radio and Television – RTVV, SR 784.401]).<sup>142</sup>

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<sup>138</sup> See Federal Council Dispatch RTVG 2002, p. 1683, <https://www.fedlex.admin.ch/eli/fga/2003/223/de>; Weber, *Rundfunkrecht, Stämpflis Handkommentar*, Bern 2008, Art. 3 RTVG, rec. 12; Weber, *Rundfunkrecht, Stämpflis Handkommentar*, Bern 2008, Art. 16 RTVG, rec. 1; Robert, in: Masmajan, Cottier, Capt (eds.), *Loi sur la radio-télévision (LRTV), Stämpflis Handkommentar*, Bern 2014, Art. 18 LRTV, rec. 1; Weber, *Rundfunkrecht, Stämpflis Handkommentar*, Bern 2008, Art. 44 RTVG, rec. 13.

<sup>139</sup> Swiss Criminal Code of 21 December 1937 (status as of 1 July 2021), [https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/de](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/de).

<sup>140</sup> See Zeller, in: Niggli, Wiprächtiger (eds.), *Basler Kommentar Strafrecht II*, 4th ed., Basel 2018, Art. 322 StGB, rec. 1, 12 and 14 ff.

<sup>141</sup> According to Swiss broadcasting law, licences are awarded to broadcasters of local and regional programme services which must fulfil a specific mandate (see Art. 38 ff. RTVG). In return, the broadcasters receive a share of the revenue from radio and television fees (see Art. 40 RTVG) and/or a licence for wireless terrestrial broadcasting of a programme service (see Art. 43 RTVG).

<sup>142</sup> Ordinance on Radio and Television (RTVV) of 9 March 2007 (status as of 1 January 2021), <https://www.fedlex.admin.ch/eli/cc/2007/151/de>.

Article 16 RTVG also states that broadcasters of Swiss programme services must notify BAKOM of any changes in capital and in voting rights (passive holdings) as well as any substantial holdings in other undertakings (active holdings). This applies to all programme service providers, regardless of whether they hold a broadcaster's licence or not. The only exemption applies to non-licensed broadcasters whose annual operating costs do not exceed CHF 1 million (approx. EUR 927 000) (Art. 24(4) and 25(4) RTVV).

#### 5.1.2.2.2. Ownership structures in annual reports (Art. 18 RTVG)

Broadcasters of Swiss programme services must also disclose their ownership structures in their annual reports to BAKOM (Art. 18(1) RTVG). This obligation applies to all licensed broadcasters and other broadcasters whose annual operating costs exceed CHF 1 million (approx. EUR 927 000) (Art. 27(2) RTVV).

#### 5.1.2.2.3. Disclosure of ownership structures as a licence requirement (Art. 44 RTVG) and notifiable economic licence transfers (Art. 48 RTVG)

Finally, the RTVG sets out two other disclosure obligations in its provisions concerning licences for broadcasters of local and regional programming services. Article 44(1)(c) RTVG requires applicants to provide the licensing body with the identity of their shareholders and financial backers.

Article 48 RTVG also states that a licence transfer must be notified and approved by the relevant authority (para. 1), with the economic transfer of a licence also deemed to be a transfer (para. 3). The authority is therefore able to check whether the licence requirements are also met after the transfer (para. 2).

### 5.1.2.3. Scope and content of the rules

#### 5.1.2.3.1. Notifiable ownership structures (Art. 3 and 16 RTVG)

According to Article 2(1) RTVV, broadcasters subject to the disclosure obligation enshrined in Article 3 RTVG must in particular provide the following information: the identity as well as the share of capital or voting rights of shareholders and other co-owners possessing at least one third of the capital or voting rights (passive holdings), as well as their holdings of at least one third in other undertakings in the media sector (f), the identity of the board of directors' and management members (g), and the broadcaster's holdings in other undertakings of at least one third of the capital or voting rights (active holdings) and holdings of these undertakings of at least one third in other undertakings in the media sector (indirect holdings) (h).

In relation to notifiable holdings (Art. 16 RTVG), Article 24 RTVV states that, where changes in holdings in the broadcaster (passive holdings) are concerned, any transfer of share capital, registered capital, cooperative capital, or of the voting rights of a licensed broadcaster of at least 5%, or in the case of a non-licensed broadcaster at least one third,

is subject to the disclosure obligation (para. 1). Any transfer as a result of which economic control of the broadcaster changes must also be notified (para. 2). Under Article 25 RTVV, substantial holdings of the broadcaster in other undertakings (active holdings) must be disclosed if a licensed broadcaster owns at least 20%, or in the case of a non-licensed broadcaster at least one third, of the share capital, registered capital, cooperative capital, or the voting rights of an undertaking (para. 1). Related changes must also be disclosed (para. 2).

#### 5.1.2.3.2. Ownership structures in annual reports (Art. 18 RTVG)

According to Article 27(2) RTVV, the annual report of a licensed broadcaster must include: the identity of the board of directors' and management members (b), the identity as well as the share of capital or voting rights of shareholders and other co-owners possessing at least 5% of the capital or voting rights of the broadcaster (passive holdings), as well as their holdings of at least 20% in other undertakings in the media sector (c) and the broadcaster's holdings in other undertakings of at least 20% of the capital or voting rights (active holdings), as well as holdings of these undertakings of at least 20% in other undertakings in the media sector (indirect holdings) (d).

According to Article 27(3) RTVV, the annual report of a non-licensed broadcaster must include: the identity of the board of directors' and management members (a), the identity as well as the share of capital or voting rights of shareholders and other co-owners possessing at least one third of the capital or voting rights of the broadcaster (passive holdings), as well as their holdings of at least one third in other undertakings in the media sector (b) and the broadcaster's holdings in other undertakings of at least one third of the capital or voting rights (active holdings), as well as holdings of these undertakings of at least one third in other undertakings in the media sector (indirect holdings) (c).

#### 5.1.2.3.3. Disclosure of ownership structure as a licence requirement (Art. 44 RTVG) and notifiable economic licence transfers (Art. 48 RTVG)

Article 44(1)(c) RTVG stipulates that a licence applicant must provide the identity of the majority holder of its capital and outline who makes substantial financial resources available to it.

According to Article 48(3) RTVG, an economic licence transfer must be disclosed if more than 20% of the share capital, nominal capital or registered capital or, where applicable, the participation capital or voting rights are transferred.

#### 5.1.2.4. Disclosure methods

The notifiable ownership structure must be notified to BAKOM before broadcasting begins (Art. 3(a) RTVG), while changes in holdings must be disclosed within one month (Art. 24(3) and 25(3) RTVV). BAKOM publishes the disclosure form and the disclosed ownership

information in the database of radio and television broadcasters<sup>143</sup> (Art. 2(3) RTVV). Changes in holdings are published in the annual reports.

The ownership information to be included in the annual reports must be submitted to BAKOM by the end of April of the following year (Art. 27(7) RTVV). The information is therefore updated annually. BAKOM publishes the annual reports in the database of radio and television broadcasters<sup>144</sup> (Art. 27(4) RTVV).

Licence applications, in which ownership and financing structures must be disclosed as part of the licensing procedure, are published on the BAKOM website.<sup>145</sup> The next licensing process is scheduled for early 2023 and concerns the period from 2025.

Notifiable economic licence transfers must be notified to the Department for Environment, Transport, Energy and Communication (UVEK) before they take place (Art. 48(1) RTVG). Such transfers are mentioned in the subsequent annual report.

In addition, from 2021, ownership information will be published in aggregated form in a so-called media structure report on the BAKOM website.<sup>146</sup> The preparation and publication of this information will create greater transparency.

Another instrument used by BAKOM to create transparency in relation to media power and ownership structures is the *Medienmonitor*.<sup>147</sup> Since 2017, BAKOM has published data on the opinion-forming potential of individual media organisations (radio, TV, print and online) and on ownership structures in the Swiss media sector in an annual report and on [www.medienmonitor-schweiz.ch](http://www.medienmonitor-schweiz.ch).

On BAKOM's behalf, researchers also publish data from various sources:

1. a representative survey on the importance of various media for individual opinion-forming;
2. secondary analysis of usage data from recognised Swiss media usage study (reach);
3. analysis of industry studies and annual reports of Swiss media companies, as well as continuous market observation in order to document economic strength and ownership structures in the Swiss media market (ownership database).

This information, which is easily accessible, contributes significantly to the transparency of Swiss media ownership.

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<sup>143</sup> <https://rtvdb.ofcomnet.ch/de>.

<sup>144</sup> <https://rtvdb.ofcomnet.ch/de>.

<sup>145</sup> <https://www.bakom.admin.ch/bakom/de/home/elektronische-medien/informationen-ueber-radio-und-fernsehveranstalter/provisorische-konzessionen/ausschreibung-der-neuen-ukw-und-regional-tv-konzessionen.html>.

<sup>146</sup> <https://www.bakom.admin.ch/bakom/en/homepage.html>.

<sup>147</sup> <https://www.medienmonitor-schweiz.ch/>.

#### 5.1.2.5. Supervision and monitoring of the rules

BAKOM is responsible for monitoring compliance with disclosure obligations (Art. 3 and 16 RTVG) and the submission of annual reports (Art. 18 RTVG). As a central government agency, part of the UVEK to be precise, BAKOM is not an independent supervisory body.

The UVEK is the licensing authority for broadcasters of local and regional programming services, whereas BAKOM, as the instructing authority, verifies compliance with the licence requirements (Art. 44 RTVG) and licence transfers (Art. 48 RTVG).

Under Article 17(1) RTVG, broadcasters are also obliged to provide the licensing and supervisory authorities free of charge with the information they need for their supervisory activity and for taking measures to prevent media concentration. This may include ownership information. Information may also need to be disclosed by companies that are economically linked to the broadcaster (a to d), that are merely active in the radio and/or television market but occupy a dominant position in a media-relevant market (e.g. print media) (e), or that are active in a media-relevant market in which media concentration is assessed (f). This enables the authorities to get a full picture of possible influences on content and media diversity.<sup>148</sup> However, this obligation mainly concerns the disclosure of information to the authorities rather than to the public.

#### 5.1.2.6. Penalties and legal consequences

If the supervisory authority establishes an infringement of the disclosure requirements, it can require the responsible party to take measures to ensure that the infringement will not be repeated (Art. 89(1)(a)(1) RTVG). Licensed broadcasters can also have their licence made subject to certain conditions, restricted, suspended or withdrawn (Art. 89(1)(b) RTVG).

If a legally binding decision of the supervisory authority is violated, a penalty not exceeding 10% of the company's average turnover achieved in Switzerland in the previous three business years may be imposed (Art. 90(1)(a) RTVG). A fine of up to CHF 10 000 (approx. EUR 9 290) may also be imposed on a company that fails to comply with, or belatedly or incompletely complies with its disclosure obligations, or that provides false information (Art. 90(2)(a), (d), (e), (f) and (k) RTVG).

If an applicant does not disclose its ownership structure during the licensing process, it does not meet the licence requirements and therefore cannot be awarded a licence (Art. 44(1)(c) RTVG).

The disclosure requirements set out in the RTVG are designed firstly to help determine whether measures to prevent media concentration are required. According to Article 75(1) RTVG, the UVEK can take measures in the area of radio and television if a broadcaster or another undertaking active in the radio and television market has jeopardised the diversity of opinion and of programmes within the meaning of Article 74 RTVG as a result of an abuse of its dominant position. In particular, the broadcaster or the undertaking concerned can be required, under Article 75(2) RTVG, to ensure diversity by

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<sup>148</sup> See Robert, in: Masméjan, Cottier, Capt (eds.), "Loi sur la radio-télévision (LRTV)", *Stämpflis Handkommentar*, Bern, 2014, Art. 17 LRTV, rec. 5 ff.

measures such as granting broadcasting time for third parties or cooperating with other participants in the market (a), by taking measures against corporate journalism, such as issuing editorial statutes to ensure editorial freedom (b) or, should such measures prove to be clearly inadequate, by adapting the business and organisational structure of the undertaking (c).<sup>149</sup>

Secondly, the transparency obligations are designed to prevent media concentration as part of the licensing procedure. Article 44(3) RTVG prevents horizontal concentration of broadcasting by stipulating that a broadcaster or the undertaking to which it belongs may acquire a maximum of two television licences and two radio licences (the so-called '2+2 rule').<sup>150</sup> However, this provision is set to be repealed.<sup>151</sup> Article 45(3) remains an effective tool. It states that, during the licensing procedure, if two applications are more or less equally able to fulfil the mandate, preference should be given to the candidate that best enhances diversity of opinion and programming. Both content-related and structural aspects such as the broadcaster's independence are crucial here.<sup>152</sup>

### 5.1.3. Concluding remarks

In the field of (linear) radio and television, Swiss law, in the form of the RTVG, imposes comprehensive disclosure obligations (active and passive holdings) on all broadcasters of Swiss programme services. For newspapers and magazines, a partial transparency obligation (active holdings), the applicability of which to online publications is debated, is enshrined in criminal law. There are therefore no special disclosure requirements in Swiss law for on-demand electronic media services.

In practice, information about ownership structures in the broadcasting sector obtained as a result of the disclosure obligations has not yet resulted in measures being taken to combat media concentration, since no relevant claim of editorial abuse has been upheld in the courts.<sup>153</sup> To date, only the provisions designed to protect editorial diversity in the licensing procedure have been relevant to an actual case.<sup>154</sup>

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<sup>149</sup> For more detail, see Hager P., *op.cit.*, pp. 82 ff. and 103 ff.

<sup>150</sup> For more detail, see Hager P., *op.cit.*, pp. 111ff.

<sup>151</sup> See Federal Council Dispatch on the package of measures in favour of the media, p. 4519, <https://www.fedlex.admin.ch/eli/fga/2020/1026/de>.

<sup>152</sup> For more detail, see Hager P., *op.cit.*, pp. 114 ff.

<sup>153</sup> For more detail, see Hager P., *op.cit.*, pp. 82 ff. and 84.

<sup>154</sup> See, for example, the Federal Administrative Court ruling of 16 September 2009, BVGE 2009/64, <https://jurispub.admin.ch/publiws/download.jsessionid=7190F434EBDA7B047AD4F9F8AE2B8499?decisionId=4b70a9cb-e595-43e8-bf1d-29d3c708b43c>.

## 5.2. DE - Germany

*Jörg Ukrow, Executive Board Member, Institute of European Media Law (EMR) and deputy director, Saarland Media Authority (LMS)*

### 5.2.1. Media ownership transparency in constitutional law

The *Grundgesetz* (Basic Law – GG), the constitution of the Federal Republic of Germany, does not contain any explicit regulations on transparency in general, nor on the transparency of (media) ownership in particular. It does, however, lay down all kinds of requirements and prohibitions, the primary purpose of which is in any case also to ensure transparency in the broadest sense.<sup>155</sup> However, despite these approaches, it has not been clarified whether there is a transparency requirement as an unwritten constitutional principle and what content and dogmatic significance it may have.<sup>156</sup> This applies not least in view of any property-related aspects of such an unwritten constitutional principle.

Property itself (along with the right of inheritance) is protected as a fundamental right under Article 14(1) sentence 1 GG. At the same time, paragraph 1 sentence 2 stresses that the content and limits of this basic right are defined by law, while paragraph 2 highlights the social responsibility of ownership:

*(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.*

*(2) Property entails obligations. Its use shall also serve the public good.*

The legislative provisions regarding media ownership described below can, on the one hand, be interpreted under constitutional law as limitations on this form of ownership. However, whether they are also an expression of the social responsibility of ownership has not been clarified by the courts. Such an interpretation is supported by the fact that transparency obligations regarding media ownership help create an open society characterised by a free democratic discourse.

Moreover, the legal requirements for media ownership are an expression of the constitutional imperative for a positive order for broadcasting, which the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) considers as enshrined in Article 5(1) sentence 2 GG (“Freedom of reporting by means of broadcasts ... (shall be) guaranteed”). Here, the concept of broadcasting is to be understood dynamically and, in addition to radio and television, includes telemedia, which can be important in terms of

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<sup>155</sup> See Bröhmer J., *Transparenz als Verfassungsprinzip*, Mohr Siebeck, Tübingen, 2004, p. 7.

<sup>156</sup> See *ibid.*, pp. 33 ff., 371 ff.; Ostermann G., *Transparenz und öffentlicher Meinungsbildungsprozess*, Mohr Siebeck, Tübingen, 2019, pp. 1 ff., 241 ff.

mass communication.<sup>157</sup> The broadcasting freedom guaranteed under the constitution does not give broadcasters completely free rein.

*In contrast to other freedoms enshrined in the Basic Law, broadcasting freedom ... is not a fundamental right given to the holder for the purpose of their personal development or the pursuit of their interests. Rather, broadcasting freedom is a “serving freedom” that serves the free individual and public formation of opinion. If Article 5(1) sentence 2 of the Basic Law were understood merely as a means of preventing state influence and otherwise leaving broadcasting in the hands of social forces, this characteristic would not be reflected. Rather, broadcasting needs a legal order that ensures that it provides the service it is required to under the constitution.<sup>158</sup>*

According to BVerfG case law, the positive order that is therefore required must ensure, *inter alia*, that diversity of opinion is reflected as widely and fully as possible in broadcasting, thereby providing the recipient with a comprehensive supply of information. The legislator must lay down mandatory guiding principles that guarantee a minimum level of balance, objectivity and mutual respect.<sup>159</sup> Precautions must be taken to ensure the highest possible degree of balance and diversity, including in private broadcasting. In principle, the minimum standard must be to ensure that all types of opinion are disseminated by private broadcasters. In the court’s view, individual broadcasters or channels must be prevented from exerting a highly unbalanced influence on the formation of public opinion.<sup>160</sup> Transparency rules relating to media ownership are a suitable means of preventing the emergence of a dominant influence on public opinion.<sup>161</sup>

## 5.2.2. Media ownership transparency rules in domestic law

### 5.2.2.1. Overview

Transparency rules on media ownership are in particular contained, at federal level, in competition and foreign trade legislation, and in the media laws of the *Länder*. The *Medienstaatsvertrag* (state media treaty – MStV) of the *Länder*,<sup>162</sup> which replaced the 1991 *Rundfunkstaatsvertrag* (state broadcasting treaty – RStV) on 7 November 2020, contains

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<sup>157</sup> See Federal Constitutional Court decisions 73, 118 (154), <https://oj.is/175210>; 83, 238 (298 ff.), <https://www.servat.unibe.ch/dfr/bv083238.html>; 119, 181 (218), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2007/09/rs20070911\\_1bvr227005.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2007/09/rs20070911_1bvr227005.html) (established case law).

<sup>158</sup> See Federal Constitutional Court decisions 57, 295 (319 ff.), <https://oj.is/182249>; 87, 181 (197 ff.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/10/rs19921006\\_1bvr158689.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/10/rs19921006_1bvr158689.html) (established case law).

<sup>159</sup> Federal Constitutional Court decision 57, 295 (320 ff.), *op. cit.*

<sup>160</sup> Federal Constitutional Court decision 73, 118 (157 ff.), *op. cit.*

<sup>161</sup> Regarding the preventative approach in BVerfG case law on diversity of opinion in the media, see Ukrow J., “Algorithmen, APIs und Aufsicht”, EMR, Saarbrücken, 2019, para. 36, 40, [https://emr-sb.de/wp-content/uploads/2019/05/Impulse-aus-dem-EMR-MedienStV-Verfahren\\_1905-01.pdf](https://emr-sb.de/wp-content/uploads/2019/05/Impulse-aus-dem-EMR-MedienStV-Verfahren_1905-01.pdf).

<sup>162</sup> *Medienstaatsvertrag* (state media treaty – MStV) of 14–28 April 2020, <https://www.gesetze-bayern.de/Content/Document/MStV/true>.

rules applicable to nationwide services. In addition, the 16 *Länder* each have their own individual media law provisions governing non-nationwide services.

Since these rules, which have remained unchanged in terms of general content if not precise wording, applied long before the entry into force of Article 5(2) of the Audiovisual Media Services Directive (EU) 2018/1808 (AVMSD), they are not specifically designed to implement the said directive. However, Article 5(2) does not impose any obligations, but gives member states freedom as to the measures they wish to adopt. The legislative provisions described below were adopted in this context.

Transparency of media ownership is also aided by the provisions on so-called imprint obligations for telemedia services. However, these rules are designed not so much to guarantee diversity, but rather to ensure that information is made available for the benefit of private individuals who wish to enforce their rights (e.g., concerning an infringement of their general privacy or copyright by a telemedia provider) and for the benefit of regulatory bodies.

#### 5.2.2.2. Providers subject to the regulations

German cartel law applies to all undertakings and associations of undertakings within the meaning of Article 1 of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against restraints of competition – GWB),<sup>163</sup> including undertakings and associations of undertakings that operate exclusively or partially in the media industry. However, Section 30 (2b) of the ARC contains an exception to the prohibition of agreements restricting competition in the press sector for agreements between newspaper or magazine publishers on cooperation in the publishing industry, insofar as the agreement enables the parties involved to strengthen their economic basis for intermedia competition, though this exemption does not apply to cooperation relating to editorial activities.

German foreign trade legislation, which is set out in the *Außenwirtschaftsverordnung* (Foreign Trade and Payments Ordinance),<sup>164</sup> contains transparency rules relating to acquisitions of undertakings that are likely to harm the public order or security of the Federal Republic of Germany or of another European Union member state.

The state media treaty's provisions regarding media ownership are generally addressed to broadcasters. Providers of different forms of telemedia, for example media intermediaries such as search engine operators, social network providers or video-sharing service providers, are not directly addressed by these provisions, which are systematically placed in the part of the agreement that only applies to broadcasting as defined in the

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<sup>163</sup> *Gesetz gegen Wettbewerbsbeschränkungen* (Act against restraints of competition) in the version published on 26 June 2013 (Federal Law Gazette I p. 1750, 3245),

[http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger\\_BGBL&jumpTo=bgbL113s1750.pdf](http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbL113s1750.pdf), last amended under Article 30 of the Act of 23 June 2021 (Federal Law Gazette I p. 1858),

[http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger\\_BGBL&jumpTo=bgbL121s1858.pdf](http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbL121s1858.pdf).

<sup>164</sup> *Außenwirtschaftsverordnung* (Foreign Trade and Payments Ordinance) of 2 August 2013 (Federal Law Gazette I p. 2865),

[http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger\\_BGBL&jumpTo=bgbL113s2865.pdf](http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbL113s2865.pdf), last amended under Article 32 of the Act of 23 June 2021 (Federal Law Gazette I p. 1858),

[http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger\\_BGBL&jumpTo=bgbL121s1858.pdf](http://www.bgbL.de/xaver/bgbL/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbL121s1858.pdf).

treaty. This is partly because telemedia providers do not require a licence. However, telemedia providers may be subject to the state media treaty's provisions on media ownership if they hold interests in a broadcasting company. Transparency obligations also apply to operators of infrastructure-bound media platforms.

According to Article 1(3) and (4) MStV, the transparency obligations of the MStV and state law provisions relating to media ownership only apply to television broadcasters under the country-of-origin principle enshrined in the AVMSD, that is to say usually only to television broadcasters who are established, as defined in the AVMSD, in Germany. For radio broadcasters, the MStV (and AVMSD) do not specify any boundaries as regards jurisdiction. State law only contains transparency rules for broadcasters that have applied for or received a licence for a state-wide, regional or local radio station from a state media authority.<sup>165</sup>

### 5.2.2.3. Scope and content of the rules

In German cartel law, transparency is an important instrument for preventing abuses of economic power. The merger control rules are set out in Articles 35 ff. GWB,<sup>166</sup> which only apply if the European Commission does not have jurisdiction, are designed to prevent threats to competition resulting from changes to market structures that can result from company mergers. Such controls can only be effective if there is a high level of transparency when it comes to the ownership structure and market share of the companies concerned.<sup>167</sup> In principle, a merger is subject to German concentration control if it meets the criteria laid down in Article 37(1) GWB<sup>168</sup> and if the turnover thresholds set out in Article 35 GWB<sup>169</sup> are exceeded by the companies involved. Under Article 38(3) GWB, for the publication, production and distribution of newspapers, magazines and parts thereof, four times the amount of the turnover achieved and for the production, distribution and broadcasting of radio and television programmes, and the sale of radio and television advertising time,

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<sup>165</sup> See, for example, Articles 44 and 49 of the *Saarländisches Mediengesetz* (Saarland media law – SMG) of 27 February 2002 (Saarland Law Gazette pp. 498, 754); last amended by the Act of 16 September 2020 (Saarland Law Gazette I p. 1028),

[https://www.amtsblatt.saarland.de/jportal/docs/anlage/sl/pdf/VerkBl/ABL/ads\\_64-2020\\_teil\\_I\\_signed.pdf](https://www.amtsblatt.saarland.de/jportal/docs/anlage/sl/pdf/VerkBl/ABL/ads_64-2020_teil_I_signed.pdf).

<sup>166</sup> The German concentration control described in Articles 35 ff. GWB does not apply if the European Commission has exclusive jurisdiction pursuant to the Merger Regulation.

<sup>167</sup> Loddenkemper H., *Transparenz im öffentlichen und privaten Wirtschaftsrecht*, Nomos, Baden-Baden, 1999, pp. 176 ff.

<sup>168</sup> The criteria are (a) acquisition of the assets of another undertaking, (b) acquisition of control by one or several undertakings of the whole or parts of one or several other undertakings, (c) acquisition of more than 25% or 50% of shares in another undertaking, and (d) the possibility of exercising a material competitive influence on another undertaking.

<sup>169</sup> The provisions on concentration control apply and a transaction must be notified to the *Bundeskartellamt* (Federal Cartel Office) before it is completed. These thresholds are reached if, in the last business year preceding the concentration, (a) the combined aggregate worldwide turnover of the undertakings concerned was more than EUR 500 million, and (b) the domestic turnover of at least one undertaking concerned was more than EUR 25 million and that of another undertaking was more than EUR 5 million. If neither the target undertaking nor any other undertaking concerned achieved a turnover of more than EUR 5 million, the so-called transaction threshold of Article 35(1a) GWB applies if the consideration for the acquisition exceeds EUR 400 million and the target undertaking has substantial operations in Germany.

eight times the amount of the turnover achieved must be taken into account when calculating whether these thresholds are met.

As far as foreign trade is concerned, the *Bundesministerium für Wirtschaft und Energie* (Federal Ministry for Economic Affairs and Energy – BMWi) can, according to Article 55 of the *Außenwirtschaftsverordnung* (Foreign Trade and Payments Ordinance – AWV),<sup>170</sup> assess whether there will be a likely threat to the public order or security of the Federal Republic of Germany or of another member state of the European Union if a non-EU resident directly or indirectly acquires a domestic company or directly or indirectly acquires a stake within the meaning of Article 56 AWV in a domestic company.<sup>171</sup> Acquisitions, including by EU residents, are also subject to such an assessment if there are indications that an abusive approach or a transaction circumventing the law has been undertaken not least in part to avoid an assessment. According to Article 55a(1)(6) AWV, within the assessment of a likely threat to public order or security, it can in particular be considered whether the domestic company is a company of the media industry which contributes to the formation of public opinion and is characterised by particular topicality and reach. Article 56(1)(1) AWV states that, following the acquisition of the stake, the direct or indirect voting rights of the acquirer in the domestic company must amount to or exceed 10% of the voting rights.<sup>172</sup> According to Article 56(3) AWV, if a non-EU citizen obtains an effective stake in the control of the domestic company in another way, this is equal to the aforementioned relevant share of the voting rights.<sup>173</sup>

Article 58(1) AWV states that, in response to an application by the acquirer, the BMWi must certify that it does not object to an acquisition within the meaning of Article 55 if there is no objection to the acquisition with regards to the public order or security of the Federal Republic of Germany, of another EU member state, or in relation to projects or programmes of Union interest within the meaning of Article 8 of Regulation (EU) 2019/452. If there are no such concerns, the BMWi must clear the acquisition in accordance with Article 58a AWV. According to Article 59 AWV, the BMWi can prohibit the direct acquirer from making an acquisition within the meaning of Article 55 within four months of the full submission of documentation relevant to the assessment, or issue instructions to the parties involved in the acquisition and the companies affiliated to them in order to uphold public order or security in the Federal Republic of Germany or another EU member state or in

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<sup>170</sup> *Außenwirtschaftsverordnung* (Foreign Trade and Payments Ordinance) of 2 August 2013 (Federal Law Gazette I p. 2865), *op. cit.*, last amended under Article 32 of the Act of 23 June 2021 (Federal Law Gazette I p. 1858), *op. cit.*

<sup>171</sup> According to Article 55(1a) AWV, such an acquisition also takes place if a non-EU resident acquires a definable part of a domestic company or all the essential operating equipment of a domestic company or of a definable part of the operation of a domestic company which is needed to maintain the operation of the company or of a definable part of the operation.

<sup>172</sup> Under Article 56(2)(1) AWV, this rule applies in the case of an acquisition of further voting rights if, prior to the acquisition, the direct or indirect voting rights of the acquirer in the domestic company amount to or exceed a share of voting rights within the meaning of subsection 1 and as a result of the further acquisition the total share of voting rights of the acquirer amounts to or exceeds 20%, 25%, 40%, 50% or 75%.

<sup>173</sup> This is particularly the case if the acquisition of voting rights by a non-EU citizen entails (1) the assurance of additional seats or majorities in supervisory bodies or the management, or (2) the granting of veto rights in the case of strategic business or personnel decisions, which extend beyond the influence imparted by the share of voting rights in a manner that thereby or together with the voting rights makes possible a participation in the control of the domestic company.

relation to projects or programmes of Union interest within the meaning of Article 8 of Regulation (EU) 2019/452.<sup>174</sup>

According to Article 53(1)(5) MStV, a broadcasting licence may only be granted to a natural or legal person who has their residence or seat of establishment in the Federal Republic of Germany, another EU member state, or another state of the European Economic Area (EEA) and can be pursued by court. Article 53(2) sentence 2 MStV stipulates that a provider with the legal form of a public limited company may be granted a licence only if the statutes of the public limited company specify that the shares may be issued only as registered shares or non-voting shares.

As part of the constitutional requirement for broadcasters to be separate from the State, Article 53(3) MStV stipulates that a licence must not be granted to legal persons of public law with the exception of churches and universities, their legal representatives and senior staff, nor to political parties and voter associations.<sup>175</sup> These rules also apply to foreign public or state institutions. They are supplemented by state law provisions prohibiting political parties and voter associations from exercising influence on media companies.<sup>176</sup> According to a 2008 BVerfG ruling, the legislator may prohibit political parties from having a direct or indirect holding in private broadcasting companies if it enables them to have a determining influence on programming design or programme content. However, it stated that an absolute ban on political parties holding shares in private broadcasting companies could not be lawfully justified under the freedom of broadcasting.<sup>177</sup>

According to Article 55(2) MStV, the state media authority competent to grant licences for providers of national broadcasting services must, where necessary, request information and the submission of further documents, which, in particular, extend to:

*1. a description of the direct and indirect interests in the applicant as defined in Article 62 and of the capital and voting rights in the applicant and associated companies as defined in the German Stock Corporation Act;*

...

*3. the articles of association and the statutory provisions of the applicant;*

*4. agreements existing among the parties holding a direct or indirect interest in the applicant within the meaning of Article 62 relating to the joint provision of broadcasting as well as to trustee relationships and relationships that are significant pursuant to Articles 60 and 62;*

*5. a written statement of the applicant to the effect that the documents and information pursuant to nos. 1 to 4 have been provided in full.*

According to Article 55(3) MStV, if circumstances which lie outside the scope of the MStV have some relevance for the licensing procedure, the applicant must provide an explanation

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<sup>174</sup> Regarding this investment screening, see Ukrow J., Ress G., in Grabitz E., Hilf M., Nettesheim M., *Das Recht der Europäischen Union*, C.H. Beck, Munich, 2021, Art. 63 TFEU para. 193, 355, 392.

<sup>175</sup> The same applies to affiliated enterprises as defined in Article 15 of the *Aktiengesetz* (Stock Corporation Act).

<sup>176</sup> The same applies to affiliated enterprises as defined in Article 15 of the *Aktiengesetz* (Stock Corporation Act).

<sup>177</sup> Federal Constitutional Court decision 121, 30 (50 ff.),

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2008/03/fs20080312\\_2bvf000403.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2008/03/fs20080312_2bvf000403.html).

for these circumstances and provide the necessary evidence. In so doing, the applicant must exhaust all legal and actual possibilities. The applicant may not claim that he or she is unable to provide explanations or evidence if, according to the circumstances, he or she could have made possible to do so.

According to Article 55(4) MStV, the obligations pursuant to Article 55(2) and (3) apply to natural persons and legal entities or partnerships holding a direct or indirect interest in the applicant within the meaning of Article 62 MStV, who represent an undertaking associated with the applicant, or who may exercise influence on the applicant in some other manner within the meaning of Articles 60 and 62 MStV.

If those required to provide information or to submit documents do not fulfil their obligations within a period set by the competent state media authority, the licence application may be refused under Article 55(5) MStV.

The section of the state media treaty devoted to “ensuring plurality of opinion” (paragraphs 59 to 68), which is mainly television-focused, contains a whole series of rules designed to prevent the emergence of a dominant influence on public opinion, including transparency requirements relating to media ownership. According to Article 60(2) sentence 1, if the television services attributable to an undertaking reach an annual average audience share of 30% of all viewers, a dominant power regarding the formation of opinion is assumed. The same applies for an audience share of 25% if the undertaking holds a dominant position in a related market relevant for the media<sup>178</sup> or an overall assessment of its activities in television and in media-related markets shows that the influence on the formation of opinion obtained as a result of these activities corresponds to that of an undertaking with a 30% audience share (Article 60(2) sentence 2).<sup>179</sup> If an undertaking has acquired dominant opinion-forming power with the services attributable to it, no licence may be issued for further services attributable to this undertaking, nor may the acquisition of further attributable participations in broadcasters be approved as unobjectionable (Article 60(3)).

Determining which broadcast services and other media activities are attributable to an undertaking depends on its ownership structure. The criteria for attributing services are set out in Article 62 MStV.<sup>180</sup> According to Article 63 MStV, the competent state media authority

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<sup>178</sup> Since a Federal Administrative Court ruling of 29 January 2014 (case no. 6 C 2.13 – BVerwGE 149, 52, <https://www.bverwg.de/290114U6C2.13.0>), this media concentration law has been practically irrelevant because, in view of audience shares, it can only be used to limit a merger between the two largest broadcasting groups, RTL and ProSiebenSat.1.

<sup>179</sup> Under an additional provision in Article 60(2) sentence 3 MStV, in the calculation of the relevant audience share, two percentage points are deducted from the actual audience share if window services are included and three percentage points if broadcasting for third parties is included. Window programmes contribute to programme diversity.

<sup>180</sup> According to Article 62(1) sentence 1 MStV, all services that an undertaking provides itself or that are provided by another undertaking in which it has a direct interest of 25% or more of the capital or voting rights are attributed to this undertaking. Furthermore, according to Article 62(1) sentence 2, all services are attributed to it which are provided by undertakings in which it has an indirect interest insofar as those undertakings are affiliated undertakings within the meaning of Article 15 of the Stock Corporation Act and hold a share of 25% or more of the capital or voting rights of a broadcaster. If, as a result of an agreement or otherwise, several undertakings cooperate in such a manner that they can jointly exert a dominant influence over an undertaking

must be notified in writing of any planned change in participation rights or other influences prior to their implementation. Notifications must be made by the broadcaster and by parties holding a direct or indirect interest in the broadcaster within the meaning of Article 62 MStV. The competent state media authority may confirm that no objections exist to such changes only if a licence could still be issued under such changed conditions. If a planned change is implemented for which confirmation cannot be given, the licence must be revoked. For minor changes to participation rights or other types of influence, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media – KEK) may issue directives detailing exemptions concerning the obligation to report changes.<sup>181</sup>

According to Article 79 MStV, an infrastructure-bound media platform such as cable television network<sup>182</sup> may only be operated by those who meet the requirements of Article 53(1) MStV. Moreover, a provider of a media platform, a provider of a user interface<sup>183</sup> or an authorised representative appointed by said provider must meet these requirements. Providers who intend to provide a media platform or user interface must notify the competent state media authority of this at least one month prior to putting the platform into operation. The same applies in the event of substantial changes.

The regional media laws of the *Länder* also contain various specific ownership restrictions that apply to non-nationwide radio and television broadcasters and press companies. Some of these rules limit the number of radio and television channels which a company is allowed to operate in the region concerned. Most state media laws also contain provisions on cross-ownership of press and broadcasting companies in order to prevent so-called “dual monopolies”, in other words cross-media ownership with the potential of a

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holding an interest, each of them shall be deemed to be a dominant undertaking. According to Article 62(2), an interest pursuant to Article 62(1) sentence 1 also exists if an undertaking is able either by itself or together with others to exert a comparable influence on a broadcaster. Furthermore, a comparable influence exists if an undertaking or an undertaking already attributable to it for other reasons pursuant to Article 62(1) or 62(2) sentence 1 (1) regularly provides programming for a significant proportion of the broadcasting time of a broadcaster or (2) by virtue of contractual agreements, stipulations in the statutory provisions and in the articles of association or in any other manner holds a position which makes the fundamental decisions of a broadcaster concerning the design, acquisition and production of programming subject to its approval. According to Article 62(3), the attribution pursuant to Article 62(1) and (2) must also include undertakings established outside the scope of the MStV. Under Article 62(4), the analysis and assessment of comparable influences on a broadcaster within the meaning of Article 62(2) must also take into account existing family relationships and apply the principles of commercial and fiscal law.

<sup>181</sup> See Guidelines on Article 63(6) MStV on exemptions from the obligation to report minor changes to participating interests or other types of influence of 11 May 2021, [https://www.kek-online.de/fileadmin/user\\_upload/Rechtsgrundlagen/Richtlinien\\_Leitfaeden/Richtlinie\\_der\\_KEK\\_nach\\_63\\_Satz\\_6\\_MStV.pdf](https://www.kek-online.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/Richtlinie_der_KEK_nach_63_Satz_6_MStV.pdf).

<sup>182</sup> A media platform is defined in Article 2(2)(14) MStV as any form of telemedia, insofar as it combines broadcasting, broadcast-like telemedia (i.e. on-demand audiovisual and audio media services) or telemedia in accordance with Article 19(1) MStV (so-called ‘online press’) into an overall offer specified by the provider. Online video libraries, which are categorised as broadcast-like telemedia, are therefore not media platforms. The same applies, for example, to the media libraries of broadcasters that only provide on-demand access to their own content. Infrastructure-related media platforms are television cable networks.

<sup>183</sup> A user interface is defined in Article 2(2)(15) sentence 1 MStV as “the textually, visually or acoustically conveyed overview of offers or content from one or more media platforms which is used for the orientation and direct selection of offers, content or software-based applications, which essentially enable direct control of broadcasting, broadcasting-like telemedia or telemedia in accordance with Article 19(1)”.

dominant position in both the local and regional press and the local or regional broadcasting sector.<sup>184</sup>

#### 5.2.2.4. Disclosure methods

The information required under media law must be sent in writing to the appropriate state media authority. For providers of nationwide television services, the KEK provides a form for the submission of a declaration of completeness for the application.<sup>185</sup> Similar forms are provided by many state media authorities to radio broadcasters and providers of non-nationwide television services as part of the licensing process.

Article 55(6) MStV requires those obliged to provide information and to submit documents during the licensing procedure to notify the competent state media authority, without delay, of any change with regards to the relevant circumstances which may have occurred since the application was submitted or since the licence was issued. Notwithstanding any other notification requirements, the broadcaster and the parties holding a direct or indirect participation in the broadcaster within the meaning of Article 62 MStV are required under Article 55(7) to submit a statement to the competent state media authority upon expiry of the calendar year without delay, indicating whether and to what extent any change has occurred within that calendar year with regard to relevant participation and facts for an attribution pursuant to Article 62. The publicly accessible KEK media database<sup>186</sup> contains information on ownership structures of radio, television, press and internet-based companies. According to Article 58 MStV, beyond the scope of application of Regulation (EU) 2016/679, information on personal and material circumstances of a natural or legal person or of a partnership, and trade or business secrets which have been entrusted, or have become known to the state media authorities, their executive bodies (the ZAK<sup>187</sup> and KEK), their employees or third parties commissioned by them in carrying out their duties, may not be disclosed without authorisation.<sup>188</sup>

#### 5.2.2.5. Supervision and monitoring of the rules

Compliance with the transparency obligations imposed under competition law as part of the merger control is monitored by the *Bundeskartellamt* (Federal Cartel Office) and the

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<sup>184</sup> Under Article 44(6) SMG, for example, broadcasting licences may not be granted to applicants that, through their ownership of one or more daily newspapers in the distribution area, hold a dominant market position within the meaning of Article 18 GWB, own the majority of the capital or voting rights in such a company or in which such companies own more than one third of the capital or voting rights or otherwise significantly influence programming, as well as persons who hold managerial positions in such a company.

<sup>185</sup> <https://www.kek-online.de/service/downloads>.

<sup>186</sup> <https://www.kek-online.de/medienkonzentration/mediendatenbank#/>.

<sup>187</sup> *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision).

<sup>188</sup> In antitrust proceedings, even those involving a small number of applicants, arguments over access to information are very costly and tie up substantial resources for the regulatory authorities. Regardless of the number of applicants, the parties concerned (especially the parties to the proceedings, but also third parties in some cases) must be heard before inspection rights can be granted. In such proceedings, it is often necessary to check numerous files to see whether business secrets or personal data, for example, need to be blacked out; see *Bundeskartellamt* (Federal Cartel Office), *Erfolgreiche Kartellverfolgung*, Bonn, 2016, p. 30.

state competition authorities in accordance with Articles 35 ff. and 54 ff. GWB. Compliance with the transparency obligations imposed under media law is monitored by the relevant state media authority.<sup>189</sup> With regard to nationwide broadcasters, the state media authorities refer to the ZAK for licensing matters and the KEK for issues relating to securing plurality of opinion, as provided under Article 105 MStV.

If an application is made for the authorisation of a denied concentration in the nationwide distribution of television programmes by private broadcasters, the KEK's opinion should be obtained in accordance with Article 42(5) sentence 2 before the Federal Minister for Economic Affairs and Energy decides on the application.

In fulfilling their tasks, the state media authorities cooperate with the Federal Cartel Office in accordance with Article 111(1) MStV. Upon enquiry of the Federal Cartel Office, they must provide findings which the federal competition authority requires in order to fulfil its tasks. This applies equally to the cooperation between the state media authorities and the state competition authorities. Article 50f(2) GWB requires the competition authorities to cooperate with the state media authorities and the KEK.

The governing structure of the state media authorities also reflects the constitutional requirement for the separation of the media from the state. The MStV's provisions regarding the ZAK and the KEK take this into account.

#### 5.2.2.6. Penalties and legal consequences

A breach of the transparency rules set out in competition and foreign trade legislation can lead to the denial of a planned merger or media company takeover. Under media law, such a breach can result in the refusal to grant a broadcasting licence or clearance certificate. In addition, failure to meet the transparency obligations in Articles 55(6) and (7), 63(1) and 79(2) MStV can, according to Articles 115(1) sentence 2 nos. 6, 7, 9 and 24 and 115(2) MStV, be penalised as an administrative offence by a fine of up to EUR 500 000.

### 5.2.3. Other developments

Further transparency obligations are set out in Article 2b of the federal *Telemediengesetz* (Telemedia Act), implementing the provisions of Articles 2(5b) and 28a(6) of the AVMSD as amended by Directive (EU) 2018/1808. These provisions require the responsible state media authorities to maintain lists of audiovisual media service providers and video-sharing platform providers established in Germany, or for which Germany is deemed to be the country of establishment. The relevant authority sends these lists of audiovisual media service providers and video-sharing platform providers, as well as any updates thereto, to the highest federal authority responsible for culture and media, which then forwards these lists to the European Commission.

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<sup>189</sup> According to Article 106(1) sentence 1 MStV, the body with jurisdiction for national offers is the state media authority of the state in which the broadcaster or provider concerned has its registered office, residence or, in the absence of this, the state where it permanently resides.

An amendment to the GWB has also attracted attention with regard to digital platforms: the *Bundeskartellamt* can issue a decision declaring that an undertaking which is active to a considerable extent in multi-sided markets and networks within the meaning of Article 18(3a) GWB is of paramount, cross-market significance for competition.<sup>190</sup> The amended GWB therefore takes into account the highly dynamic nature of the digital economy and the rapid growth of large digital platforms. The *Bundeskartellamt* can now, in order to protect competition, prohibit such undertakings from engaging in certain types of conduct. This can significantly curb the market power of the large platforms. In particular, the new Article 19a GWB can be used to prevent companies from favouring their own offers or the impeding of other companies from entering the market by processing data relevant for competition. It is also unlawful, i.a., to demand benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand, in particular to demand the transfer of data or rights which are not absolutely necessary for the purpose of presenting these offers. The German legislator is an international pioneer in this respect. Similar instruments are also being discussed in connection with the EU Digital Services Package, although this legislative process is still in its infancy.<sup>191</sup>

### 5.3. ES - Spain

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#### 5.3.1. Media ownership transparency in constitutional law

The Spanish Constitution contains a single reference to transparency; however, it is related exclusively to government and public administration. Article 105.b of the Spanish Constitution (1978)<sup>192</sup> states that: “The law shall regulate: [...] the access of citizens to administrative files and records [from Government], except as they may concern the security and defense of the State, the investigation of crimes and the privacy of individuals”. Therefore, there is no explicit or related constitutional provision to regulate the transparency of media ownership.

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<sup>190</sup> When declaring that an undertaking is of paramount significance for competition across markets, account should be taken in particular of (1) its dominant position in one or several market(s), (2) its financial strength or its access to other resources, (3) its vertical integration and its activities in otherwise related markets, (4) its access to data relevant for competition, and (5) the relevance of its activities for third-party access to supply and sales markets and its related influence on the business activities of third parties.

<sup>191</sup> See

[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19\\_01\\_2021\\_GWB%20Nouvelle.html?jsessionid=DCBA787B3687CDE336B5AA58905941AA.2\\_cid362?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Nouvelle.html?jsessionid=DCBA787B3687CDE336B5AA58905941AA.2_cid362?nn=3591568).

<sup>192</sup> *Spanish Constitution (1978)*; [https://www.boe.es/eli/es/c/1978/12/27/\(1\)/con](https://www.boe.es/eli/es/c/1978/12/27/(1)/con)

## 5.3.2. Media ownership transparency rules in domestic law

### 5.3.2.1. Overview

Spanish regulation concerning transparency on media ownership is only applied to audiovisual communications providers by the *Ley 7/2010, General de la Comunicación Audiovisual* (General Law 7/2010 of Audiovisual Communication).<sup>193</sup> According to Article 6.1 of this Law, it is compulsory for audiovisual communication service providers<sup>194</sup> and holders of significant shares in audiovisual communication service providers to report related ownership data from 2010 onwards. For this purpose, a specific public registry for these providers at the Ministry of Economic Affairs and Digital Transformation was created.<sup>195</sup> This registry was regulated by the Royal Decree 847/2015, of 28 September 2015, regulating the National Registry of Audiovisual Communication Service Providers and the prior communication procedure for the start of activity.<sup>196</sup> The Registry records are accessible on the website of the Ministry for consultation by any natural or legal person, public administration or institution of any nature<sup>197</sup>. They contain contact information, ownership structure and audiovisual services operated with a detailed description of each of them and a list of fines if any.

There are no specific transparency requirements for media companies different from audiovisual communications service providers such as press or Internet companies. However, general ownership information is available at the National Companies Registry (Registro Mercantil), which is publicly accessible. A fee is levied for each request for company information (EUR 18,50) and it is difficult to find out who is really behind each company as the data are not provided in open and reusable format.

Finally, it should be noted that the regulation concerning media ownership transparency in the audiovisual sector dates to the years 2010 and 2015. However, Spain is on course to implement the 2018 AVMS Directive. There is a draft of a new Audiovisual Law<sup>198</sup> to implement the new AVMSD 2018 provisions, which was discussed through two public consultations in 2020 and 2021. The draft includes a whole chapter on the requirements, definitions, public access, and other aspects of the national registry of audiovisual communication services providers, which include on-demand audiovisual media services and video-sharing platform providers as required by the Directive. The draft

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<sup>193</sup> *Ley 7/2010, General de la Comunicación Audiovisual* (General Law 7/2010 of Audiovisual Communication), <https://www.boe.es/eli/es/l/2010/03/31/7/con>

<sup>194</sup> An audiovisual communication service provider is defined by Article 2.1 of Ley 7/2010 as follows: “The natural or legal person who has effective control, that is, the editorial direction, over the selection of programs and contents and their organisation in a channel or in a program catalog. The lessee of an audiovisual communication licence will be considered a service provider.”

<sup>195</sup> <https://sedeaplicaciones.minetur.gob.es/RuedaListadosPublicos/>.

<sup>196</sup> *Real Decreto 847/2015, de 28 de septiembre, por el que se regula el Registro Estatal de Prestadores de Servicios de Comunicación Audiovisual y el procedimiento de comunicación previa de inicio de actividad* <https://www.boe.es/eli/es/rd/2015/09/28/847/con>

<sup>197</sup> *Registro público estatal de prestadores de servicios de comunicación audiovisual*, <https://sedeaplicaciones.minetur.gob.es/RuedaListadosPublicos/>

<sup>198</sup> [https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion\\_publica/audiencia/ficheros/210628-APL-Com-Audiovisual-2.pdf](https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion_publica/audiencia/ficheros/210628-APL-Com-Audiovisual-2.pdf).

must still pass through the entire parliamentary process, so some articles and provisions could be different in the final version.

### 5.3.2.2. Providers subject to the regulations

The 2010 and 2015 regulations are only applied to audiovisual media service providers. Press publishers' companies and Internet media companies are not covered by these audiovisual ownership transparency obligations as they are not audiovisual communication providers. This requirement on transparency is applied to any transnational, national, regional or local audiovisual media service provider which decides to start operations in Spain, and which consequently needs to make a prior communication to the Ministry of Economic Affairs and Digital Transformation and to register in the National Registry of Audiovisual Communication Service Providers. The draft of the new law imposes transparency obligations on audiovisual media services and on video-sharing platform providers.

### 5.3.2.3. Scope and content of the rules

#### 5.3.2.3.1. 2010 Regulation

As a general principle, Article 6.1 of the Law 7/2010 establishes a right to transparent audiovisual communication: "Everyone has the right to know the identity of the audiovisual communication service provider, as well as the companies that are part of its group and its shareholders. For this purpose, it is considered that the provider is identified when it has a website in which it states: the name of the service provider; the address of establishment of it; e-mail and other means to establish direct and rapid communication; and the competent regulatory or supervisory body." Later, Article 33 descends more into details. It defines and describes the information requirements imposed on audiovisual communication service providers. They must register in a public State or regional registry, in accordance with the corresponding scope of coverage of the broadcast. The holders of significant shares in audiovisual communication service providers must also register in those registries, indicating the percentage of capital they hold. A definition of significant participation is also included in the law: it is understood to be a participation which represents, directly or indirectly, 5% of the share capital or 30% of the voting rights or a lower percentage if it is used to designate several directors representing more than half of the members of the company's administrative body within the 24 months following the acquisition. Moreover, in accordance with commercial law, shares or other securities owned or acquired by entities belonging to the same group of companies in a concerted manner or forming a decision unit, or by individuals, shall be considered owned or acquired by the same natural or legal person. Finally, Article 33.4 states that competent audiovisual State and regional authorities must articulate a channel that ensures the necessary coordination between the State registry and the regional registries.

As explained above, the National Registry was regulated in more detail in 2015 by the Royal Decree 847/2015, of 28th September, completing the Law 7/2010. Article 12 of the Royal Decree enumerates the information required by each audiovisual service provider:

- a) name and surnames or, where appropriate, name or company name and nationality of the provider;
- b) tax identification number of the provider (NIF), or equivalent documentation in case a non-Spanish provider;
- c) registered office of the provider;
- d) name, surname, national identity document or passport of the legal representative and document accrediting the representation capacity;
- e) address and e-mail address of the representative of the audiovisual communication service provider;
- f) address in Spain for the purpose of notifications from the audiovisual communication service provider;
- g) name and surnames or, where appropriate, name or business name, including the tax identification number of the holders of significant participations in the capital stock, indicating the corresponding percentages, both directly and indirectly. Likewise, the number of shares per shareholder with significant stakes must be indicated;
- h) documentation proving the creation of the legal entity;
- i) administrative bodies of the company if the service provider is a legal entity, and subsequent modifications;
- j) documentation accrediting the participation of the audiovisual communication service provider and/or its partners in the capital or in the voting rights of other providers;
- k) documents accrediting the legal acts and businesses that imply the transmission, disposition or encumbrance of the shares referred to in the previous letter or the transfer or promise of transfer of shares, participations or equivalent titles that have the effect of direct or indirect acquisition of a company whose object is the provision of an audiovisual communication service.

Notwithstanding the above, the National Registry doesn't ask for information about other important aspects of the companies like shareholdings in other non-audiovisual services sector-related companies, the main sources of income of the media company, details of political and other affiliation of the owners or information on management or newsroom structures.

#### 5.3.2.3.2. Draft of the new audiovisual law

The draft of the new audiovisual law, which implements the 2018 AVMSD directive, includes new requirements regarding information to be included in the National Registry and extends them to on-demand audiovisual media services like Netflix, video-sharing

service providers like YouTube, and podcast providers.<sup>199</sup> First, the number of female members of the company's board is required. Second, it is mandatory to offer to the public a direct contact point with the editorial team or manager. Third, a new definition of significant participation is also made in this draft: the current 2010/17 Law sets this at 5%, whereas the new draft lowers the threshold to 3% (Art. 37). Another important change is the making of this information more accessible to society beyond the national registry (Art. 41): there is a new obligation on the part of all operators to make basic company information easily accessible on a corporate website. Specifically, the following information is requested:

- a) name and registered office, contact details, including e-mail, as well as whether the entity for profit or not or whether it is owned by another State;
- b) competent audiovisual supervisory authority;
- c) individuals or legal entities who are ultimately holders of editorial responsibility or authors of the editorial content;
- d) natural or legal persons that are owners or holders of significant shares;
- e) an indication of how the right of complaint and the right of reply are ensured.

#### 5.3.2.4. Disclosure methods

As explained, the backbone of the Spanish transparency mechanism is the National Registry of Audiovisual Communication Service Providers. The information is made public through a specific and public webpage of the Ministry of Economic Affairs and Digital Transformation<sup>200</sup> and therefore the information is available exclusively online. Audiovisual communication service providers must provide notification, within a month, of any modification that affects the information contained in the registry and it must be accompanied by supporting documentation (Art. 22 and 23 Royal Decree 847/2015). These modifications are made through a specific online platform and are monitored by the Spanish government.

#### 5.3.2.5. Supervision and monitoring of the rules

Currently the Ministry of Economic Affairs and Digital Transformation monitors and supervises the implementation of transparency of audiovisual media service providers, even if the first version of the Law 7/2010 established that a future independent audiovisual regulatory authority should be in charge of carrying out this task. However, Spain decided to create instead a macro-independent regulator, the National Commission of Markets and Competition (CNMC) in 2013,<sup>201</sup> the competences of which include some audiovisual matters. However, it did not incorporate the monitoring and supervising of the National Registry of audiovisual media service providers. According to the seventh additional provision of the CNMC's law, these supervision and control functions were taken on by the

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<sup>199</sup> Anteproyecto de Ley General de Comunicación Audiovisual;  
[https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion\\_publica/audiencia/ficheros/210628-APL-Com-Audiovisual-2.pdf](https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion_publica/audiencia/ficheros/210628-APL-Com-Audiovisual-2.pdf).

<sup>200</sup> <https://sedeaplicaciones.minetur.gob.es/RuedaListadosPublicos/>.

<sup>201</sup> *Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia.*  
<https://www.boe.es/eli/es/l/2013/06/04/3/con>

government, specifically, by the predecessor of the current Ministry of Economic Affairs and Digital Transformation.

The draft of the new law of audiovisual communication, which updates the 2010 Law to implement the 2018 AVMSD directive, doesn't include any significant changes concerning the operation of the Registry, even if Article 38.3 opens a door for future updates and amendments as it establishes that future regulation will put in place the organisation and operation of the Registry.

#### 5.3.2.6. Penalties and legal consequences

According to Law 7/2010, if an audiovisual media service provider doesn't fulfill the obligation to register in the National Registry or provides false data, this is considered a very serious infraction (Art. 57.11). As such, a fine of EUR 500,001 to EUR 1 million for television audiovisual media providers can be imposed, whereas radio broadcasters can be fined between EUR 100,001 and EUR 200,000 (Art. 60.1). It has to be said that no fines have been imposed to our knowledge for failure to register by any AVMS provider.

However, the draft of the new law of audiovisual communication details in more depth these infractions and qualifies them as serious rather than very serious and therefore, the fines are lower than under the current Law 7/2010. The infractions related to transparency of media ownership occupy the first three paragraphs of the draft law's Article 156:

*A serious infringement is:*

- 1. Failure to comply with the obligation set forth in Article 36.2 [obligation to provide the National Registry with information on ownership structure, the number of women on the board and contact with the editor-in-chief] to keep the information in the corresponding registry up to date in relation to the significant holdings [definition] provided for in Article 37.*
- 2. Failure to comply with the publication obligations regarding ownership structure provided for in Article 41 [name and registered office, contact details, competent audiovisual supervisory authority, individuals or legal entities who are ultimately holders of editorial responsibility or authors of the editorial content, natural or legal persons that are owners or holders of significant shares and ensuring the right of complaint and the right of reply].*
- 3. The absence of registration in the registry provided for in Article 38 by the providers of the audiovisual communication services, the providers of the aggregation service of audiovisual communication services,<sup>202</sup> and the video-sharing service providers through platforms.*

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<sup>202</sup> Article 2.15 of the *Anteproyecto de Ley General de Comunicación Audiovisual* defines a provider of the aggregation service of audiovisual communication services as the natural or legal person that offers in an aggregate way, through electronic communications networks, audiovisual communication services of third parties to users.

[https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion\\_publica/audiencia/ficheros/210628-APL-Com-Audiovisual-2.pdf](https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion_publica/audiencia/ficheros/210628-APL-Com-Audiovisual-2.pdf).

Regarding sanctions, serious infraction fines (Art. 158.2) are more specific and progressive than those in Law 7/2010. In the case of providers of linear television, audiovisual communication services, television on demand services and providers of video-sharing platform services, if the previous year's income in the Spanish audiovisual market is below EUR 2 million, then the fine can be a maximum EUR 10 000; if the turnover was below EUR 10 million but higher than EUR 2 million, then the fine can be a maximum EUR 50 000; if the turnover was below EUR 50 million but higher than EUR 10 million, then the fine can be a maximum EUR 250 000. Finally, if the audiovisual media service provider's Spanish turnover in the previous year was above EUR 50 million, then the fine can be up to 0.5% of that amount. In the case of radio providers and podcasters, the fine can be a maximum EUR 50 000.

### 5.3.3. Other developments

The transparency of ownership of AVMS providers in Spain will be improved with the implementation of the AVMS Directive into Spanish law. A new General Law on Audiovisual Communication is ready to start the parliamentary process of approval. If finally ratified, it will establish new transparency ownership requirements which will be extended to on-demand audiovisual media services and video-sharing platforms. Moreover, operators will have to make that information more accessible to society through their websites to improve the current non-user-friendly interface of the National Registry. Even if the ownership transparency of audiovisual media providers is already quite high in Spain and will be further improved if the new law is adopted, the challenge is still how to offer that amount of complex information in a significant way to the public in order to improve the debate and discussion on media ownership and its consequences for media discourse. The current National Registry contains an important amount of information, however sometimes the classification and filter options are incomplete and unclear.

## 5.4. FR - France

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### 5.4.1. Media ownership transparency rules in constitutional law

France has not formally implemented the provisions of Article 5(2) of the Audiovisual Media Services Directive (AVMSD) allowing Member States to oblige media service providers under their jurisdiction to make accessible information concerning their ownership

structure, including the beneficial owners.<sup>203</sup> However, some measure of transparency on ownership structure is already guaranteed under the French Freedom of Communication Act of 30 September 1986, as modified, and its implementing decrees.

Under French constitutional law, the general principle of pluralism, derived from the principle of freedom of expression, implies some kind of control by the regulator of the ownership structure of certain categories of mass medias. This is translated mainly through general regulations concerning the provision of audiovisual media services (AVMS) and through specific merger control regulations, which involve specific ownership restrictions for AVMS. The relevant provisions apply to providers' services subject to authorisation, licence or declaration. They mostly provide for a disclosure of the relevant information to the broadcasting authority. As of January 1, 2022 the *Autorité de régulation de la communication audiovisuelle et numérique* (Arcom)<sup>204</sup> is established as successor to the *Conseil supérieur de l'audiovisuel* (CSA). Information can be accessed, however, by the general public.

These regulations do not apply to video-sharing platforms (VSP). The regulation of digital media and platforms does not provide for similar obligations.

## 5.4.2. Media ownership transparency in domestic law

The law of audiovisual communication in France is governed by several fundamental principles, the effectiveness of which has been strengthened since the adoption of the Act of 30 September 1986, as modified (the "Freedom of Communication Act").<sup>205</sup> The case law of the French Constitutional Council (*Conseil constitutionnel*) provides an important source for the construction and application of these principles. Three of them are at the heart of audiovisual regulation: the fundamental principle of freedom of audiovisual communication (freedom of expression),<sup>206</sup> and two of its corollaries: the principle of pluralism<sup>207</sup> and the

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<sup>203</sup> The provisions of Article 5(1) were implemented in Article 43-1 of the Act of 30 September, 1986, by Ordinance n° 2020-1642 of 21 December 2020, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042722588>.

<sup>204</sup> Law n° 2021-1382 of 25 October 2021 on the regulation and protection of access to cultural works in the digital age..

<sup>205</sup> Law n° 86-1067 of 30 September 1986 « relating to freedom of communication », <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000512205/>.

<sup>206</sup> Stated, *inter alia*, in Article 11 of the Declaration of Human Rights (Déclaration des droits de l'homme et du citoyen) of 26 August 1789, which provides: "The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by law", <https://www.legifrance.gouv.fr/contenu/menu/droit-national-en-vigueur/constitution/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789>.

<sup>207</sup> Consecrated by the Constitutional Council, and mentioned in Article 34 of the French Constitution, which provides that it is up to the legislator to set forth the rules on "freedom, pluralism and independence of media". This is the main purpose of Law n°2016-1524 of 14 November 2016 "aiming at reinforcing the freedom, the independence and pluralism of medias", <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033385368/>.

general principle of media independence.<sup>208</sup> The Constitutional Council has not derived a general principle of transparency of media ownership from these principles. However, some measure of transparency is required in order to achieve, for certain media, the objective of pluralism, as construed by the French Constitutional Council.

In an audiovisual context, the principle of pluralism covers two principles. A principle of “internal pluralism” guarantees expression of the different currents of thoughts or opinions in the programmes of AVMS. Pluralism is usually referred to in the Freedom of Communication Act as referring to internal pluralism. But the principle of pluralism also covers “external pluralism”, which guarantees the diversity of media providers. In a decision of 18 September 1986 on the Freedom of Communication Act,<sup>209</sup> the French Constitutional Court held that the Act, as adopted by Parliament, did not comprise sufficient provisions to guarantee the constitutional requirement of pluralism in the audiovisual and communication sectors. As a result, the legislator introduced a complex anti-concentration scheme in the Law of 30 September 1986, which will be described below, and which implies transparency and control of ownership structure of the relevant services.

The constitutional principle of independence of audiovisual media does not have the same reach in the private sector and in the public audiovisual sector. The question of the independence of private media from political power is a matter of freedom of expression. The question of independence from private interests, involving, where appropriate, state intervention to guarantee it, is more delicate. In the case of private operators, absolute independence is not possible, and a principle of independence that is too strongly affirmed would clash with other fundamental principles, in particular the right to property and the freedom to conduct a business; it would also infringe on freedom of expression, and more specifically on editorial freedom. The balance is struck here in the form of ethical principles, affirmed by law for the main audiovisual media services, relating to the independence of information programmes (or principle of neutrality), and by rules of transparency in advertising and sponsorship. For the rest, independence is ensured indirectly by the rules applicable to pluralism (anti-concentration rules).

#### 5.4.2.1. Transparency rules for authorised and licensed media services

As mentioned, France has not formally implemented the possibility offered by Article 5(2) of the AVMS Directive to oblige media service providers under its jurisdiction to make accessible information concerning their ownership structure, including the beneficial owners. General rules, including those applicable to the identification of service providers on electronic networks, do require the provision of limited information about ownership structure and control. AVMS subject to authorisation or license (convention), or operating under a declaration regime, must disclose more detailed information on their ownership and control structure, under the control of the broadcasting authority.

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<sup>208</sup> Since Constitutional Council decision n°89-259 DC of 26 July 1989, <https://www.conseil-constitutionnel.fr/decision/1989/89259DC.htm>.

<sup>209</sup> Decision n°86-217 DC, <https://www.conseil-constitutionnel.fr/decision/1986/86217DC.htm>.

#### 5.4.2.1.1. The generally applicable rules (licensed and unlicensed services)

Article 43-1 of the Law of 30 September 1986, amended by Ordinance No. 2020-1642 of 21 December 2020, requires any publisher of an audiovisual communication service, that is, any publisher of a television service, radio service, or AVMS, to make permanently available to the public:

- its name or business name, information regarding its registered office, and the names of its legal representative and its three main partners;
- its contact details, including e-mail address and website address;
- the name of the director of the publication and that of the editor;
- the list of publications published by the legal person and the list of other audiovisual communication services it provides;
- the rate applicable when the service gives rise to remuneration;
- and the information that its service is subject to the Law of 20 September 1986 and to the control of the Arcom.

It therefore includes some form of information about ownership structure, in the form of information on the “three main partners” of the publisher. This provision was introduced in 2004. The Act does not specify the modalities of this making available to the public, but Article 5 of the Directive specifies that this access must be “easy”, which most certainly implies the application of the standards provided for by the Law of 21 June 2004 “for confidence in the digital economy” (CEN Law),<sup>210</sup> which implements the provisions of the e-commerce Directive on point.

Video service providers (VSPs) are subject to the rules applicable to online public communication services, as are the websites of publishers used for access to their television and radio services. Therefore, their publishers must comply with the identification rules laid down in Article 6 of the CEN Law, implementing Article 5 of the e-Commerce Directive. The list of information to be provided does not include information on the ownership structure of the services provider. The same is true for information required on commercial and business communication under standard corporate or consumer law.

#### 5.4.2.1.2. Transparency of ownership structure in the context of licensed services

AVMS subject to authorisation (licence) must disclose their ownership and control structure in the declaration made to apply for a licence. In addition, the service provider must obtain approval from the Arcom in the event of a change in the direct or indirect control of the company holding the authorisation.

These rules apply to services subject to authorisation for use of terrestrial frequencies, that is, terrestrial television services and terrestrial radio services, but also to services subject to licence or under a declaration regime.

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<sup>210</sup> Law n° 2004-575 of 21 June 2004, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164/>.

The definition of direct or indirect control, which is referred to in the relevant texts, is found in Article L. 233-3 of the Commercial Code,<sup>211</sup> which provides:

*I. - For the purposes of sections 2 and 4 of the present chapter, a company is deemed to control another company:*

*1 When it directly or indirectly holds a fraction of the capital that gives it a majority of the voting rights at that company's general meetings;*

*2 When it alone holds a majority of the voting rights in that company by virtue of an agreement entered into with other partners or shareholders and this is not contrary to the company's interests;*

*3 When it effectively determines the decisions taken at that company's general meetings through the voting rights it holds;*

*4 When it is a partner in, or shareholder of, that company and has the power to appoint or dismiss the majority of the members of that company's administrative, management or supervisory structures.*

*II. - It is presumed to exercise such control when it directly or indirectly holds a fraction of the voting rights above 40% and no other partner or shareholder directly or indirectly holds a fraction larger than its own.*

*III. - For the purposes of the same sections of the present chapter, two or more companies acting jointly are deemed to jointly control another company when they effectively determine the decisions taken at its general meetings.*

#### Terrestrial television and radio services

The applications for authorisation to broadcast on digital terrestrial television (DTT) must indicate, *inter alia*, the origin and amount of the financing planned as well as the composition of the capital of the applicant, the management bodies and the assets of the company, and of the company which controls it within the meaning of Article L. 233-3 of the Commercial Code above. If the declaration is submitted by an association, it must include the list of its managers and members. The use of a straw man (*prête-nom*) is prohibited,<sup>212</sup> under penalty of criminal sanctions.<sup>213</sup> Only legal persons can apply for a licence.

Under Article 42(3) of the Freedom of Communication Act, the authorisation may be withdrawn, without prior notice, in the event of a substantial change in the data on the basis of which it was issued, in particular in the event of changes in the composition of the share capital or management bodies and in the arrangements for financing the publisher.

In addition, any publisher of terrestrial television services must obtain approval from the Arcom in the event of a change in the direct or indirect control, within the meaning of Article L. 233-3 of the Commercial Code, of the company holding the authorisation. Such approval shall be the subject of a reasoned decision and shall be issued taking into account

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<sup>211</sup> As modified up to Ordinance n°2015-1576 of 3 December 2015.

<sup>212</sup> Act of 30 Sept. 1986, Art. 35.

<sup>213</sup> Act of 30 Sept. 1986, Art. 74.

the publisher's compliance, during the two years preceding the year of the application for approval, with its contractual obligations relating to the programming of the service.<sup>214</sup>

In order to allow the necessary controls, the licenses (convention) of television services<sup>215</sup> require the publishers to inform the Council:

- Immediately, of any change in the amount of their share capital as well as any change in the distribution relating to 1% or more of the share capital or voting rights. The amendment shall be assessed in relation to the last allocation communicated to the Council.
- As soon as they become aware of it, of any change of control as well as any change in the distribution relating to 5% or more of the share capital or voting rights of the company or companies that control, where applicable, the holding company, within the meaning of Article 41-3 of the Law of 30 September 1986 as amended as well as of the possible intermediary company or companies. The amendment shall be assessed in relation to the last allocation communicated to the Council. In the case of companies whose shares are admitted to trading on a regulated market, the publisher shall inform the Council of any crossing of the thresholds for participation in their share capital, as soon as they become aware of it, under the conditions provided for in Article L. 233-7 of the French Commercial Code and, where applicable, by their statutes.
- At the request of the Council, the detailed composition of the share capital and voting rights of the holding company and of the company or companies exercising control, where applicable, over the holding company.

The regime for radio services is similar to the one described for television services.

#### Television and radio services which do not operate on terrestrial frequencies (cable, satellite, web)

These services do not have to obtain authorisation to broadcast, since they do not operate terrestrial frequencies assigned by the Arcom. However, they must enter into a licence agreement (convention),<sup>216</sup> subject to exceptions allowing mere declarations, which sets forth their various obligations as broadcasters.

As a matter of principle, and subject to limited exceptions, publishers of television services must enter into a licence agreement (convention) with the Arcom if their annual budget is more than EUR 150 000 and must file a mere declaration if their annual budget is less than EUR 150 000.<sup>217</sup> Publishers of radio services must conclude a licence agreement

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<sup>214</sup> However, Article 42-3 of the Broadcasting Act prohibits the Council from approving a change in the control of a publishing company of a DTT service occurring within five years of the issue of the authorisation, except in the event of economic difficulties threatening the viability of that company. Where the change in control relates to a national DTT service and where that change is likely to significantly alter the relevant market, the approval shall be preceded by an impact study, in particular an economic impact assessment, made public with due regard for business secrecy.

<sup>215</sup> An authorisation is associated with a licence.

<sup>216</sup> For television services, Act of 30 September 1986, Art. 33-1.

<sup>217</sup> Ibid.

(convention) with the Arcom if their annual budget is greater than or equal to EUR 75 000 and must file only a declaration if their annual budget is less than EUR 75 000.

The licence agreements (conventions) and the declaration of television services must include information about the legal status of the publisher, and information as to the publisher's ownership structure, that is:

- if it is a company, “the amount and distribution of its capital and of the voting rights”,
- if it has another status, the origins of its financing.

Similar requirements apply to licences (conventions) and declarations for radio services.

The licences provide for a duty to inform the Arcom without delay of any change in capital structure. Failure to comply with these obligations (including incorrect information) may carry sanctions under the Broadcasting Act (which could, in theory, prompt the withdrawal of the licence).

### Distributors of services

Distributors of services<sup>218</sup> serving 100 or more households are subject to declarations with the broadcasting authority.<sup>219</sup> They are required to declare “the amount and distribution of (their) capital and the voting rights attached to it for companies”.<sup>220</sup> On 1 January each year, service distributors shall inform the Arcom of modifications made in this respect.<sup>221</sup>

### On-demand audiovisual media services

The provision of on-demand audiovisual media services was not subject to any formality until Law No. 2013-1028 of 15 November 2013, which instituted a prior declaration procedure. Ordinance n° 2020-1642 of 21 December 2020 implementing Directive 2018/1808/EU created a licensing regime for services whose turnover is greater than an amount fixed by decree.<sup>222</sup> Decree n° 2021-793 of 22 June 2021<sup>223</sup> sets this threshold at EUR 1 million. This rule does not apply to catch-up television services. The licensing regime is also not applicable to on-demand services of public broadcasting companies. The Decree entered into force on 1 July, 2021, and the licence agreements with existing services should

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<sup>218</sup> Defined in article 2-1 of the Broadcasting Act as persons who establish contractual relations with AVMS publishers in order to constitute an offer of audiovisual communication services made available to the public by an electronic communications network (including those who constitutes such an offer through contractual relations with other distributors).

<sup>219</sup> Decree n°2005-1355 of 31 October 2005, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000449374/>.

<sup>220</sup> Decree, art. 8(2°).

<sup>221</sup> Decree, art. art. 12.

<sup>222</sup> This applies to services established in France. The Decree also created an optional licensing regime for services not established in France but targeting audiences in France (art. 9).

<sup>223</sup> Décret n° 2021-793 du 22 juin 2021 relatif aux services de médias audiovisuels à la demande, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043688681>.

be entered into before 1 November, 2021. It is likely that these licences will include clauses on ownership structure similar to those found in licences for television and radio services.

#### Video service providers (VSPs)

As mentioned, these services are not subject to specific formalities under the Freedom of Communication Act. In particular, they are not subject to a declaration procedure or to a licensing scheme. The same is true under standard regulations. In addition, media and standard regulations do not provide for an obligation to disclose to the public the ownership structure of their publishers.<sup>224</sup> Some measure of information on ownership can be accessed through generally applicable rules on publicity of corporations, with the limits associated with these regulations. For companies incorporated in France, this information is mostly restricted to by-laws and is thus insufficient to determine the actual control of the company.

VSPs are covered by the provisions of Law n° 2018-1202 of 22 December 2018 “*relative à la lutte contre la manipulation de l’information*” (“against manipulation of information”), which aims at curbing the spread of false information during election campaign periods.<sup>225</sup> The mechanism concerns “online platform operators” within the meaning of Article L. 111-7 of the Consumer Code whose activity exceeds a fixed threshold of number of connections on French territory. This threshold has been set at five million unique visitors per month, per platform, calculated on the basis of the last calendar year<sup>226</sup>. The law imposes, during the three months preceding the first day of the month of general elections and until the date of the final ballot, information and transparency obligations<sup>227</sup>. The operators of the platforms concerned must in particular provide users with “fair, clear and transparent information on the identity of the [natural or legal] person (...) on behalf of which, where applicable, it has declared to act, and which pays the platform a remuneration in return for the promotion of information content related to a debate of general interest”. This information does not extend to information as to ownership of the service.

#### 5.4.2.2. Disclosure methods

As mentioned, the Law of 30 September 1986 contains rules designed to preserve pluralism in the audiovisual field, or at least to guarantee a framework conducive to the preservation of a certain independence or autonomy of publishers. They consist of complex rules limiting

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<sup>224</sup> It being specified that the name and contact details of the publisher of the service must be disclosed under the general identification rules applicable to all website operated for professional purposes.

<sup>225</sup> *Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information* (“against manipulation of information”), <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000037847559/>.

<sup>226</sup> Art. D. 102-1-II of the French Election Code, created by Decree n° 2019-297 of April 10, 2019. See Code electoral, <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070239/>.

<sup>227</sup> Art. L. 163-1 of the French Election Code, created by Law n° 2018-1202 of 22 December 2018. See Code electoral, <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070239/>.

the participation of the same person in the capital of audiovisual communication companies, and in specific anti-concentration mechanisms<sup>228</sup>.

These rules apply irrespective of any quantifiable effect of the concentrations on the market, and certain thresholds are set very low. They imply transparency regarding ownership of the concerned service. The relevant information is mainly disclosed in the applications for authorisations and licenses, or in the declaration files, under the control of the French broadcasting authority, the Arcom.

#### 5.4.2.3. Penalties and legal consequences

In order to enable the Council to exercise its control, any natural or legal person who comes to hold any portion greater than or equal to 10 % of the capital or of the voting rights at the general meetings of a company holding an authorisation is required to inform it thereof within one month of the crossing of these thresholds<sup>229</sup>; failing to comply with these obligations carries criminal penalties.<sup>230</sup>

## 5.5. GB - United Kingdom

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### 5.5.1. Media ownership transparency in constitutional law

The United Kingdom is unusual in not having a written constitutional document with guarantees of media freedom. It does nevertheless possess a constitution, established over the course of the country's history by common law, statutes, conventions and practice.<sup>231</sup> The Human Rights Act 1998 incorporated the European Convention on Human Rights (ECHR) into domestic law and remains in force since 2 October 2000. The Act makes it unlawful for public authorities to act in a way that is incompatible with Convention rights<sup>232</sup> and requires the courts to interpret all legislation in a manner consistent with the Convention "so far as it is possible to do so".<sup>233</sup> Being a public body, the Office of

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<sup>228</sup> The law lays down three sets of rules: capital holding, anti-concentration "monomedia", and anti-concentration "plurimedia". These rules do not apply to the public sector. They are supplemented by a series of interpretative provisions in Article 41(3), relating to the criteria and concepts used (holder, publisher, national service, etc.), which we will not describe here.

<sup>229</sup> Act of 30 September 1986, Art. 38.

<sup>230</sup> Act of 30 September 1986, Art. 75 (a fine of EUR 18 000, for natural persons and the de jure or de facto directors of the legal persons concerned who have not provided the information requested).

<sup>231</sup> For a recent summary of the position, see the Supreme Court judgment in *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)* [2019] UKSC 41, para. 39, <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf>.

<sup>232</sup> Human Rights Act 1998, section 6, <https://www.legislation.gov.uk/ukpga/1998/42/contents>.

<sup>233</sup> *Ibid.*, section 3.

Communications (Ofcom), the authority for the UK communications industries, is bound by the 1998 Act, and many of its adjudications in respect of broadcasting content explicitly reference the importance of freedom of expression. Although transparency of media ownership is not expressly recognised as a principle in domestic constitutional law, the broadcasting regime shows that there is some concern over the availability of information about media ownership as an essential component of media pluralism, which is itself an important prerequisite for the meaningful realisation of the positive obligations on the state derived from Article 10 of the ECHR.

## 5.5.2. Media ownership transparency rules in domestic law

### 5.5.2.1. Overview

The UK generally enjoys an active and diverse media sector, with a strong public service broadcast tradition and several commercial television and radio services distributed via a range of platforms.

In this report, we take ‘transparency’ to mean the public availability and accessibility of accurate and up-to-date data concerning ownership and control arrangements of a media outlet. Media-specific rules that explicitly require direct disclosure of ownership details to the public are limited in the UK. However, the regulatory framework is complemented by disclosure provisions that indirectly address and improve media ownership transparency, that is to say through measures established to provide information to Ofcom and company registers, and control media concentrations. These direct and indirect transparency rules are considered separately here. Moreover, as the penultimate section of this report shows, disclosure requirements are backed by rigorous sanctions mechanisms to encourage compliance and manage non-compliance with media owners’ obligations.

#### a) Specific media ownership transparency

The new Audiovisual Media Services Regulations SI 2020/1062 (the AVMS Regulations)<sup>234</sup> implemented certain provisions of the revised AVMS Directive 2018/1808 into UK law (and amended the Broadcasting Acts 1990 and 1996, and the Communications Act 2003).<sup>235</sup> The Regulations came into force partly on 1 November 2020 and fully on 6 April 2021. Some direct disclosure requirements arise from Ofcom’s notification system in relation to on-demand programme services (ODPS) and video-sharing platform (VSP) services, which reflect the extensions of EU level regulation. The revised AVMS Directive requires that basic information concerning the name, contact details and supervisory institution for AVMS providers under the jurisdiction of an EU member state are made directly and permanently accessible to the service recipients. The Directive extended the scope of this requirement by making it optional for member states to determine whether, and to what extent,

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<sup>234</sup> AVMS Regulations 2020, <https://www.legislation.gov.uk/uksi/2020/1062/made>.

<sup>235</sup> The 1990 and 1996 Acts are available at <https://www.legislation.gov.uk/ukpga/1990/42/contents> and <https://www.legislation.gov.uk/ukpga/1996/55/contents> respectively. The Communications Act 2003 is available at: <https://www.legislation.gov.uk/ukpga/2003/21/contents>.

information about a provider's ownership structure, including their beneficial owners,<sup>236</sup> should be accessible to users. The UK government did not consider it necessary to go beyond the minimum requirements laid down by the Directive, even though the majority of responses to its consultation (albeit few specifically addressing this issue) were in favour of introducing additional measures. The News Media Association, which promotes the interests of the UK national, regional and local newspapers (in print and online), argued against the introduction of further measures in respect of transparency of newspaper ownership. The government noted the existence of general transparency requirements.<sup>237</sup>

#### b) General transparency of ownership

Beyond the obligations in relation to ODPS and VSP required by the Directive, the UK relies on the existing non-media specific transparency requirements, in other words disclosure rules, in respect of company ownership under Part 21A of the Companies Act 2006 (a substantial part of which came into effect on 1 October 2007).<sup>238</sup> The Act requires, among other things, companies to keep a register of persons with significant control over them (see "Content and extent of the rules" below). The Companies House register (see "Methods of disclosure" section) is also a publicly accessible source of data on the UK business population which offers detailed ownership information. However, forming a broad picture on the general media market in this way would be work-intensive and time-consuming. The question may also arise as to whether the "specific nature"<sup>239</sup> of audiovisual media services, and particularly their impact on how people form opinions, supports a more robust level of transparency than other companies.

#### c) Indirect transparency measures

There are also media-specific reporting procedures that make ownership data visible or verifiable, but predominantly to the dedicated media supervisory authority, not the general public. Ofcom's framework for licensing a range of broadcasting services to be legally provided in the UK involves one such procedure.<sup>240</sup> Licensees are required to disclose ownership details and advise Ofcom of subsequent changes, to enable the regulator to assess whether ownership prohibitions are being complied with (see further below).

The three general pieces of legislation which (alongside competition law that prevents anti-competitive agreements and abuses of a monopoly position) provide for this are the Communications Act 2003 (in effect since 25 July 2003), the Broadcasting Act 1990 (in effect since 1 January 1991) and the Enterprise Act 2002 (in force since 7 November 2002). There are four types of specific restrictions, collectively referred to as the 'media ownership rules':

- The national Cross-Media Ownership Rule limits the accumulation of media interests across broadcasting and newspapers.<sup>241</sup>

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<sup>236</sup> AVMS Directive, Art. 5(2).

<sup>237</sup> Government Response to Public Consultation on the Government's Implementation Proposals, 2019, <https://www.gov.uk/government/consultations/requirements-for-video-sharing-platforms-in-the-audiovisual-media-services-directive/outcome/audiovisual-media-services-government-response-to-public-consultations-on-the-governments-implementation-proposals>.

<sup>238</sup> Companies Act 2006, <https://www.legislation.gov.uk/ukpga/2006/46/contents>.

<sup>239</sup> AVMS Directive, Recital 16.

<sup>240</sup> Broadcasting Act 1990, op. cit., Parts I-III and Sch. 2 (Restrictions on the Holding of Licences). Broadcasting Act 1996, op. cit., sections 5 and 44(1). Communications Act 2003, op. cit., section 235(3)(b).

<sup>241</sup> Communications Act 2003, op. cit., Sch. 14; Broadcasting Act 1990, Sch. 2, para. 5A.

- The Channel 3 Appointed News Provider Rule requires the regional Channel 3 licensees to appoint a single news provider among them that is not under the control of political or religious bodies<sup>242</sup>
- The Media Public Interest Test (MPIT) allows the Secretary of State to intervene in media mergers involving a broadcaster and/or a newspaper operator.<sup>243</sup>
- The Disqualified Persons Restrictions rule prevents certain persons / legal entities from holding any (or certain types of) broadcast licences, unless Ofcom determines otherwise, for example political parties, local authorities or religious bodies.<sup>244</sup>

Ofcom also has an ongoing duty to remain satisfied that broadcast licensees are “fit and proper”<sup>245</sup> to hold a broadcast licence, taking into account even non-broadcasting activities of the wider corporate group.<sup>246</sup> Taken together, these rules aim to prevent undue influence over public opinion by any media owner. Ofcom’s latest review of the media ownership rules concluded that they would need to be “fundamentally reviewed”,<sup>247</sup> including changes to who provides the news.<sup>248</sup> However, the issue of transparency of media ownership did not receive attention in these policy discussions.

### 5.5.2.2. Providers subject to the regulations

The regulatory framework (including ownership restrictions) treats broadcasting, press and video on demand as distinct activities. Following the end of the Brexit transition period, UK legislation derived from the AVMS Directive continues in force as retained EU law except where provisions no longer work because the UK exited the EU, in which case that retained

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<sup>242</sup> Communications Act 2003, sections 280 and 281.

<sup>243</sup> Enterprise Act 2002, sections 42(2) and 54, <https://www.legislation.gov.uk/ukpga/2002/40/contents>. In such cases, the Competition and Markets Authority (CMA), which has a merger control function as part of its duty to promote competition for the consumers’ benefit, is responsible for the competition assessment; Enterprise and Regulatory Reform Act 2013, section 25(3), <https://www.legislation.gov.uk/ukpga/2013/24/section/25/enacted>. For an analysis of recent decisions on national competition and antitrust authorities regarding media providers, see “Media Pluralism and Competition Issues”, *IRIS Special 2020-1*, pp. 61-66.

<sup>244</sup> Broadcasting Act 1990, Sch. 2; see for example Ofcom’s decision of February 2021 to revoke the licence of a Chinese news network (China Global Television Network), partly because of its affiliation with the Chinese Communist Party: see IRIS 2021-3:1/25 at <http://merlin.obs.coe.int/article/9105>. Ofcom retains discretion to determine that it is appropriate for a particular person or religious body to hold a licence; guidance is available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0028/88219/Guidance-for-religious-bodies.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0028/88219/Guidance-for-religious-bodies.pdf).

<sup>245</sup> Broadcasting Act 1990, sections 3(3) and 86(4), Broadcasting Act 1996, sections 3(3) and 42(2), Communications Act 2003, section 235(3)(a). See also Ofcom’s FAQs on the ongoing “fit and proper” requirement on broadcast licensees: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0013/41152/fandpfaq-update.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0013/41152/fandpfaq-update.pdf).

<sup>246</sup> See e.g., Ofcom’s assessment of Sky’s competence in the wake of the phone-hacking by News Corporation newspapers (20 September 2012), paras. 40 and 47, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/32485/bskyb-final.pdf?utm\\_medium=email&utm\\_source=updates&utm\\_campaign=fit-proper-decision](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/32485/bskyb-final.pdf?utm_medium=email&utm_source=updates&utm_campaign=fit-proper-decision).

<sup>247</sup> Ofcom’s report to the Secretary of State, “The Operation of the Media Ownership Rules Listed Under Section 391 of the Communications Act 2003”, 2018, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0030/127929/Media-ownership-rules-report-2018.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0030/127929/Media-ownership-rules-report-2018.pdf). At the time, the government had not yet published its “Online Harms White Paper”.

<sup>248</sup> Ofcom consultation, “The Future of Media Plurality”, <https://www.ofcom.org.uk/consultations-and-statements/category-2/future-media-plurality-uk>.

legislation was amended. There are some concerns around interpretation, particularly in respect of assessing the nature of services that meet the threshold for inclusion in scope of regulation and under UK jurisdiction.

a) Specific media ownership transparency

Part 4A of the Communications Act 2003 on ODPS (which are defined with reference to a cumulative set of criteria based on the terms of the AVMS Directive) is retained in an amended form in light of Brexit.<sup>249</sup> Specific criteria in the new Part 4B of the 2003 Act determine whether a service meets the definition of a VSP and is within UK jurisdiction.<sup>250</sup> Part 4B was introduced under the AVMS Regulations to implement the revised AVMS Directive. It came into effect on 1 November 2020.<sup>251</sup>

ODPS and VSP providers in UK jurisdiction are obliged to formally notify Ofcom of their service (see next section). The notification obligations under both regimes place the onus on service providers to self-assess whether they fall within the scope. In December 2020, the UK government announced<sup>252</sup> its intention for the requirements on UK-established VSPs to transition to, and be superseded by, the Online Safety Bill,<sup>253</sup> once it comes into force. It is anticipated that the new regulatory framework will apply to a wider range of online services, including services that are not established in the UK. Ofcom will be named as the regulator in legislation and will operate the VSP regime until it is no longer in force.

b) General transparency of ownership

The UK has measures in place to ensure a certain amount of transparency in company ownership. As mentioned in the “Overview” section, the Companies Act 2006 requires companies, including media organisations, to identify and keep a register of persons with significant control over them (see “Content and extent of the rules” below).

c) Indirect transparency measures

Broadcasting operators are subject to several licensing and disclosure obligations. The main licensable activities are: television broadcasting services<sup>254</sup> (e.g. those provided by ITV companies, Channels 4 and 5); television licensable content services (TLCS, i.e. linear AVMS);<sup>255</sup> digital television programme services (DTPS);<sup>256</sup> and local digital television

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<sup>249</sup> Communications Act 2003, Part 4A, ss. 368A and 368ZA; the Broadcasting (Amendment) (EU Exit) Regulations 2019 SI 2019/224, Sch. 1, Part III, <https://www.legislation.gov.uk/ukxi/2019/224/contents>.

<sup>250</sup> Communications Act 2003, Part 4B, sections 368S(1) and 368S(2).

<sup>251</sup> Some aspects of the regime (e.g. the requirement to notify Ofcom and pay a fee) took effect at later dates (see below).

<sup>252</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944310/Online\\_Harms\\_White\\_Paper\\_Full\\_Government\\_Response\\_to\\_the\\_consultation\\_CP\\_354\\_CCS001\\_CCS1220695430-001\\_V2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944310/Online_Harms_White_Paper_Full_Government_Response_to_the_consultation_CP_354_CCS001_CCS1220695430-001_V2.pdf).

<sup>253</sup> <https://www.gov.uk/government/publications/draft-online-safety-bill>.

<sup>254</sup> Communications Act 2003, section 362.

<sup>255</sup> Ibid., section 232.

<sup>256</sup> Broadcasting Act 1996, section 19(3).

programme services (L-DTPS).<sup>257</sup> Restricted Television Service Event (RTSL-E) licences are also available.<sup>258</sup>

The Broadcasting Amendment Regulations<sup>259</sup> (in force since 31 December 2020) changed the authorisation system in the UK to a country-of-destination system requiring television services available in the UK to be licensed and regulated by Ofcom.<sup>260</sup> However, the changes implemented mean that broadcasters in states that are members of the European Convention on Transfrontier Television (ECTT) do not need an Ofcom licence to broadcast into the UK. Thus, the country-of-origin principle is retained in relation to ECTT countries.<sup>261</sup> Irish language services continue to be received in Northern Ireland without the requiring of an additional Ofcom licence, honouring commitments under the Good Friday Agreement.<sup>262</sup> Ofcom will consequently not receive information about ownership in respect of these services.

### 5.5.2.3. Scope and content of the rules

#### a) Specific media ownership transparency

ODPS providers who meet the updated definition<sup>263</sup> are required to notify Ofcom at least 10 working days before their service commences and advise the regulator if they intend to cease the notified service or make significant changes to it.<sup>264</sup> Notification disclosures include the provider's contact details, the jurisdiction under which they operate, the nature of the service and its target users, sources of revenue, retail outlets or platforms through which the ODPS is made available to consumers (e.g. apps, websites etc.) and which are under the provider's direct control. ODPS operators must also comply with any requirement to provide information (incl. copies of programmes) to Ofcom<sup>265</sup> and complete an annual return confirming that the information previously supplied remains accurate. ODPS must supply users with their name, address, electronic address, a statement that they are under the jurisdiction of the UK and details of the appropriate regulatory body (i.e. Ofcom),<sup>266</sup> so that users know where to direct any complaints. Such disclosures help provide standard information and basic management details of the media organisation which can in turn

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<sup>257</sup> Local Digital Television Programme Services Order 2012 SI 2012/292.

<sup>258</sup> Broadcasting Act 1990, sections 42A and 42B.

<sup>259</sup> Broadcasting (Amendment) (EU Exit) Regulations 2019, op. cit., as amended by Regulation 5 of The Audiovisual Media Services (Amendment) (EU Exit) Regulations 2020 SI 2020/1536.

<sup>260</sup> Communications Act 2003, section 211, as amended.

<sup>261</sup> Services provided by EEA broadcasters that were authorised to broadcast into the UK under the country-of-origin principle in the AVMS Directive were exempt from the licensing requirements for six months from the end of the Brexit transition period to give non-ECTT members in the EEA time to acquire a licence.

<sup>262</sup> Explanatory Memorandum to The Broadcasting (Amendment) (EU Exit) Regulations 2019, para. 2.4., [https://www.legislation.gov.uk/ukxi/2019/224/pdfs/ukxiem\\_20190224\\_en.pdf](https://www.legislation.gov.uk/ukxi/2019/224/pdfs/ukxiem_20190224_en.pdf).

<sup>263</sup> Communications Act 2003, sections 368A and 368ZA. ODPS that operated before 1 November 2020 and did not meet the previous definition of an ODPS but meet the updated definition are now required to notify Ofcom too.

<sup>264</sup> Ibid., section 368BA.

<sup>265</sup> Ibid., section 368O.

<sup>266</sup> Ibid., section 368D.

facilitate searches from other sources, like company registers. However, there is a question as to whether they provide sufficient ownership information to the public.

The VSP notification regime closely follows the existing model for ODPS. VSP providers are required to notify Ofcom of their intention to provide a service at least 10 working days before its launch.<sup>267</sup> Although the new regulations applying to UK-established VSPs came into force on 1 November 2020, providers of such services in the UK jurisdiction were not legally obliged to submit a formal notification of their service until 6 April 2021. Separate notifications are required where providers operate both an ODPS and a VSP service. An intention to cease provision of the notified service and significant changes to it must be notified too.<sup>268</sup> The notification information includes: an identification of the service in question (incl. its name); the UK commencement date of the service; the service provider's details (incl. their company number where applicable); a public contact as well as a notification and compliance contact; and a brief description of the nature of the service (incl. funding sources, how it meets the statutory criteria and how it is made available). Similar to ODPS, VPS providers must publish on a publicly accessible part of their service's website their name, address and email, a statement that they are under the UK jurisdiction and details of the appropriate regulatory body.<sup>269</sup>

#### b) General transparency of ownership

Under the Companies Act 2006, the following information must be submitted to the registrar with an application to register a company:<sup>270</sup> the memorandum of association; the proposed company name; the type of company and its intended principal business activities; its liability status; details of the registered office; proposed officers; a statement of founding capital and initial shareholdings; a statement of guarantee; persons with significant control (PSCs);<sup>271</sup> and a statement of compliance with the 2006 Act and the articles of association. Changes to this data need to be registered too. The UK also requires annual accounts to be filed, potentially providing a more detailed insight into a company. The PSC regime (facilitated through the publicly available PSC register, see below) is aimed at increasing transparency of company ownership. It makes it possible to ascertain beneficial ownership, and thus who really controls a media company. However, even if this public registry exists, detailed information on ultimate beneficial ownership may not be easily established, as inclusion of this is not mandatory.

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<sup>267</sup> Ibid., section 368V.

<sup>268</sup> Ibid., section 368V(2).

<sup>269</sup> Ibid., section 368Y(2).

<sup>270</sup> Companies Act 2006, s. 9. Companies House Form IN01:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/946155/IN01-V8.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946155/IN01-V8.0.pdf).

<sup>271</sup> Ibid., Part 21A, s. 790M. Broadly speaking, an individual will constitute a person with significant control if they hold (directly or indirectly) more than 25% of the shares or voting rights in the company or the right to appoint/remove the majority of the board of directors; see guidance here:

<https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships>.

### c) Indirect transparency measures

Under the Disqualified Persons Restrictions, certain persons are disqualified from holding a licence<sup>272</sup> and the licence application form requires disclosure of group structures so this can be checked. “Fit and proper”<sup>273</sup> tests are also carried out for new and amended licences, asking for a range of relevant ownership information, including any matters which may influence Ofcom’s judgement of the applicant’s fitness.

Ofcom typically requests media providers to disclose:<sup>274</sup> where the company carries out its activities and the method of delivery of the proposed service; applicant details and company registration number (where applicable); sources of funding, to ensure that the applicant is not disqualified from holding a licence (e.g. where the funder is a political body); information about entities with which the applicant is affiliated, and who “controls”<sup>275</sup> the applicant. A body corporate applicant will need to disclose details of its directors, designated members, and participants as well as shareholders. Where the applicant is a partnership or other unincorporated body, details of the partners and governing members of the applicant need to be made available respectively. Other eligibility requirements (e.g. bankruptcy and insolvency etc.) as well as a description of the nature of the programme service and its target audience need to be given too.

Finally, Ofcom is required to review the effects (or likely effects) of any change of ownership.<sup>276</sup> A television licence holder must notify the regulator of any change in the shareholdings, interests, directors, or persons having control of anyone who holds a broadcasting licence or anybody that either controls that licensee or is an associate of (or a participant in) that licensee.<sup>277</sup> Ofcom’s review may result in new or varied licence conditions to preserve aspects of the service that might be prejudiced by the change of control.<sup>278</sup> Depending on the outcome of the review, the regulator may amend the content requirements of the licence. Ownership information is also checked through an annual validation process, which allows the licensee to confirm any changes in the last calendar year.

#### 5.5.2.4. Disclosure methods

There is currently no purpose-built, consolidated and centralised database enabling the public to easily obtain a comprehensive picture of who owns all media outlets (whether broadcast, print or online). To the extent that the information is available, it is presented in a piecemeal fashion.

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<sup>272</sup> Broadcasting Act 1990, Sch. 2.

<sup>273</sup> Ibid., sections 3(3) and 86(4), Broadcasting Act 1996, sections 3(3) and 42(2), Communications Act 2003, section 235(3)(a).

<sup>274</sup> Licences are awarded pursuant to an application procedure set by Ofcom; Broadcasting Act 1990, section 3 and Communications Act 2003, section 235.

<sup>275</sup> For the definition of ‘control’ of media companies, see: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/45292/media\\_statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/45292/media_statement.pdf).

<sup>276</sup> Communications Act 2003, sections 351-356.

<sup>277</sup> Communications Act 2003, sections 351 and 353.

<sup>278</sup> Communications Act 2003, sections 352 and 354.

#### a) Specific media ownership transparency

To satisfy their obligation to notify, ODPS providers must submit notification forms to Ofcom (either electronically or by post) detailing the information outlined earlier.<sup>279</sup> VSPs notification forms must be submitted via a dedicated web portal on Ofcom's website.<sup>280</sup> A list of currently regulated ODPS services, which includes the service's name, the service provider name and their contact details, is made publicly available by Ofcom.<sup>281</sup> However, the list of notified VSP services is not available yet. The Audiovisual Media Services (Amendment) Regulations 2021 will amend s. 368U of the Communications Act 2003 to require Ofcom to maintain "on a publicly accessible part of [its] website"<sup>282</sup> an up-to-date list of VSP providers it regulates and document its reasons for determining jurisdiction. When a VSP service is notified, only the provider's name, the type of service and their public contact details will be published on Ofcom's website using the details supplied in the notification form.

#### b) General transparency of ownership

Media ownership transparency is a functional consequence of company ownership disclosure requirements. Companies' data and copies of documents are publicly available through the searchable Companies House register,<sup>283</sup> which enables the identification of the owner for all types of company. In the UK, beneficial owners are also listed on companies' own records and the publicly accessible PSC register at Companies House. Although such domestic rules can enhance media ownership transparency, it is questionable whether these (often technical) details can enlighten public discourse on who effectively controls a media organisation without other comparative data to help contextualise the information.<sup>284</sup>

#### c) Indirect transparency measures

Although Ofcom requires television broadcast licensees to submit (and later update) detailed ownership information,<sup>285</sup> only the names of services, licensees' contact details and standard licensing information are published on Ofcom's website.<sup>286</sup> The regulator also publishes on its website a monthly round-up of recent licensing activities regarding

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<sup>279</sup> The notification form is available at <http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/notification.rtf>.

<sup>280</sup> <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/vsp-regulation/notify-to-ofcom>.

<sup>281</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0021/67710/list\\_of\\_regulated\\_video\\_on\\_demand\\_services.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0021/67710/list_of_regulated_video_on_demand_services.pdf). Ofcom must establish and maintain a list of persons providing an ODPS under the Communications Act 2003, section 368BZA.

<sup>282</sup> Regulation 13. This statutory instrument is at the time of writing undergoing parliamentary scrutiny, <https://www.legislation.gov.uk/ukdsi/2021/9780348220582>.

<sup>283</sup> <https://www.gov.uk/get-information-about-a-company>.

<sup>284</sup> At the time of writing, the UK government has announced reforms to enhance the role of Companies House and increase the transparency of UK corporate entities following concerns that the UK's framework is open to misuse; see Department of BEIS, "Corporate Transparency and Register Reform: Consultation on improving the quality and value of financial information on the UK companies register", 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/942160/Consultation\\_on\\_improving\\_the\\_quality\\_and\\_value\\_of\\_financial\\_information\\_on\\_the\\_register.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942160/Consultation_on_improving_the_quality_and_value_of_financial_information_on_the_register.pdf).

<sup>285</sup> Application forms and required supporting documents typically need to be submitted to Ofcom electronically.

<sup>286</sup> <https://www.ofcom.org.uk/manage-your-licence/tv-broadcast-licences/current-licensees>.

broadcast TV stations, including a list of new licensed services, licence revocations or transfers, and name changes.<sup>287</sup>

Some protection mechanisms for trade secrets are in place through confidentiality requests. In the broadcasting context, licensees can indicate in their applications what types of information provided they consider confidential. Some information (or part thereof) may nevertheless be disclosed if requested under the Freedom of Information Act (FOIA) 2000. ODPS and VSP providers can also request that part (or all) of a notification form is treated as confidential, subject to the same FOIA limitations. Freedom of information legislation can thus provide another basis for obtaining information from media regulators but reliance on such requests may be cumbersome.

#### 5.5.2.5. Supervision and monitoring of the rules

Ofcom, the independent regulatory body overseeing the communications industry, is charged with monitoring media ownership rules. The regulator is the dedicated authority overseeing the notification regime for ODPS and VSP providers deemed to be established in the UK. Ofcom also conducts periodic reviews of public service broadcasting and ownership rules and reports its conclusions or recommendations to the Secretary of State.<sup>288</sup> In terms of the general transparency measures, the Companies House and its Registrar are tasked with maintaining the integrity of the register.<sup>289</sup>

#### 5.5.2.6. Penalties and legal consequences

For Ofcom to fulfil its statutory duties, complete and accurate information must be submitted for review: this applies to the specific media transparency rules as it does to the licensing and media ownership rules. Statutory sanctions, including financial penalties,<sup>290</sup> may be imposed if it appears to Ofcom that an ODPS or VPS provider has failed to provide notification of an intended service prior to its commencement. Ofcom may issue an enforcement notification to require a service provider to take steps to remedy a failure to comply with the statutory requirements.<sup>291</sup> If such notification does not result in the remedying of a contravention, and Ofcom considers it necessary in the public interest, a direction to suspend the service may be made.<sup>292</sup>

Furthermore, if information is relevant to determining whether a licensee is a disqualified person, it is an offence to supply false information or withhold information with

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<sup>287</sup> <https://www.ofcom.org.uk/manage-your-licence/tv-broadcast-licences/updates>.

<sup>288</sup> Communications Act 2003, section 264 and 391.

<sup>289</sup> Proposals for conferring new powers to the Registrar (including a querying power to be used in cases of identified “errors and anomalies” in respect of information submitted to them or information already on the register) are currently being consulted upon; see Department of BEIS, “Corporate Transparency and Register Reform: Powers of the Registrar”, 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/942167/Registrar\\_s\\_Powers\\_Consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942167/Registrar_s_Powers_Consultation.pdf).

<sup>290</sup> Communications Act 2003, sections 368J and 368Z4.

<sup>291</sup> Ibid., sections 368I and 368Z10.

<sup>292</sup> Ibid., sections 368K and 368Z5.

the intention to mislead the regulator.<sup>293</sup> A conviction may result in a court order disqualifying the applicant from holding a licence for a specified period.<sup>294</sup> Providing misleading information may also be grounds for imposing a fine or shortening/suspending/revoking a broadcaster's subsequently granted licence.

The maximum financial penalty for commercial television, radio licensees and video on demand is GBP 250,000 or 5% of the provider's qualifying revenue,<sup>295</sup> whichever is greater, depending on the nature of the breach. For licensed public service broadcasters, the maximum payable financial penalty is 5% of their qualifying revenue.<sup>296</sup>

Finally, providing misleading or deceptive information to Companies House, or failing to provide annual updates, carries criminal penalties.<sup>297</sup>

### 5.5.3. Remarks and other developments

Media ownership transparency enables citizens to make better-informed interpretations of the sources of information they receive in an ever-expanding media landscape. Transparency of media ownership rules in the UK seems to be aimed more towards providing information to the communications authority than to the public. A link between providers' regulatory compliance with transparency requirements and the level of direct public awareness of media ownership appears to be absent. Disclosures directly to the public are more limited in scope and seem to be primarily imposed for consumer protection reasons (e.g. content complaints), rather than for meeting regulatory objectives. Traditional print media markets are not subject to strict disclosure requirements. Although transparency rules under company law supplement the existing regime, they are loosely related to media ownership transparency and have been designed with different regulatory goals in mind. The data available make it possible to some extent to identify the beneficial owners of media outlets but peeling back complex legal structures can present significant challenges. Sources of information are currently fragmented. Multiple searches may be required to establish links between different media operators, affiliated interests, indirect shareholdings etc. In its latest review of the existing media ownership rules, Ofcom provisionally concluded that the existing regime continues in part to support the broader policy goal of ensuring that media operate in the public interest.<sup>298</sup> However, changes are needed, according to the regulator, to better reflect the new features of the UK media landscape and news consumption in today's market. There is now a prospect for new regulatory interventions that could result in an overhaul of the key provisions in the Communications Act 2003, potentially further improving media ownership transparency in the long term.

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<sup>293</sup> Broadcasting Act 1996, section 144.

<sup>294</sup> *Ibid.*, section 145.

<sup>295</sup> See e.g. Communications Act 2003, sections 368J(3), 368J(4) and 368Z4.

<sup>296</sup> Ofcom's investigations and sanctions procedures are available at <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>.

<sup>297</sup> Companies Act 2006, section 1112.

<sup>298</sup> Ofcom, "The Future of Media Plurality", *op. cit.*, p. 3.

## 5.6. IE - Ireland

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### 5.6.1. Media ownership transparency in constitutional law

There is nothing in either Irish constitutional law or case law specifically referring to the need for transparency rules in relation to media ownership. The 1937 Irish Constitution (Bunreacht na hÉireann) does offer several protections for freedom of expression. Article 40.6.1(i) overtly guarantees the “right of the citizens to express freely their convictions and opinions”. Furthermore, although the right to information is not expressly recognised in the Constitution, the same Article 40.6.1(i) has been cited in Irish case law as inferring a right to freedom of information.<sup>299</sup>

The Irish Supreme Court has also held that the general protection of the “personal rights of the citizen” in Article 40.3.1 of the Constitution includes a right to communicate encompassing the right to convey one’s needs and emotions by words or gestures as well as by rational discourse. And, absence of constitutional guarantees notwithstanding, a comprehensive freedom of information (FOI) regime was introduced in Ireland in 1997 and updated in 2003 and 2014. The 2014 Act consolidated and modernised the law relating to access by members of the public to records of public bodies and non-public bodies in receipt of state funding.<sup>300</sup>

### 5.6.2. Transparency rules on media ownership in domestic law

#### 5.6.2.1. Overview

There is no statutory legislation in Ireland specifically and overtly requiring that media ownership should be transparent (except perhaps in the very specific circumstances of a media merger or acquisition). However, in practice, since autumn 2020 it is de facto the case that details regarding the beneficial ownership of virtually every media outlet active in the Irish market are publicly available. This is due to a combination of the effect of the provisions of the 2014 Competition and Consumer Protection Act<sup>301</sup>, the transposition into Irish law of the 4<sup>th</sup> and 5<sup>th</sup> European Anti-Money Laundering directives<sup>302</sup>, the licensing

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<sup>299</sup> See for example Hedigan J with regard to *K (A Minor) v Independent Star* [2010] IEHC 500 (03 November 2010) [83], <https://www.bailii.org/ie/cases/IEHC/2010/H500.html>.

<sup>300</sup> Freedom of Information Act 2014, <http://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/pdf>.

<sup>301</sup> Competition and Consumer Protection Act 2014, <http://www.irishstatutebook.ie/eli/2014/act/29/enacted/en/pdf>.

<sup>302</sup> Criminal Justice (Money Laundering and Terrorists Financing) (Amendment) Act 2021, <http://www.irishstatutebook.ie/eli/2021/act/3/enacted/en/pdf>.

procedures of the Broadcasting Authority of Ireland and the 2019 decision by the Broadcasting Authority of Ireland (the audiovisual services media regulator in Ireland) to fund the creation of , a publicly accessible online database of media ownership.<sup>303</sup>

None of these constitutes a response to the Audiovisual Media Services Directive (AVMSD). Even the decision to fund the online database of media ownership primarily grew out of responsibilities imposed upon the Broadcasting Authority of Ireland by the 2014 Competition and Consumer Protection Act.

#### 5.6.2.2. Providers subject to the regulations

Section 74 of the Competition and Consumer Protection Act 2014 instructs the Broadcasting Authority of Ireland (the BAI) to prepare a report describing the ownership and control arrangements for undertakings carrying on a media business in the state.

Section 28A(1)(b) of the 2002 Act (as inserted by Section 74 of the 2014 Act) defines “media businesses” as follows:

- (a) the publication of newspapers or periodicals consisting substantially of news and comment on current affairs, including the publication of such newspapers or periodicals on the internet,*
- (b) transmitting, re-transmitting or relaying a broadcasting service,*
- (c) providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service, or*
- (d) making available on an electronic communications network any written, audio-visual or photographic material, consisting substantially of news and comment on current affairs, that is under the editorial control of the undertaking making available such material.*

In effect then, Section 74 covers print, broadcast and online media businesses and goes well beyond the audiovisual businesses which are the focus of the AVMSD. (However, as noted below, in some regards, Section 74 falls short of meeting all the criteria for maintaining up-to-date, universally available data on media ownership envisaged by the AVMSD.)

With regard to the legislation transposing the 4<sup>th</sup> and 5<sup>th</sup> European Anti-Money Laundering directives into Irish law, the regulations relating to transparency of company ownership apply to ALL companies established under the Companies Act 2014<sup>304</sup> or Industrial and Provident Societies Acts 1893 to 2014, media-related or otherwise.

#### 5.6.2.3. Scope and content of the rules

This section considers how the variety of laws and regulatory practices operate with regard to making media ownership transparent.

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<sup>303</sup> Press release of the BAI (11 November 2020), <https://www.bai.ie/en/bai-launches-online-media-ownership-database/>.

<sup>304</sup> <http://www.irishstatutebook.ie/2014/en/act/pub/0038/index.html>.

## 1. The Competition and Consumer Protection Act 2014

The 2014 Act influences transparency of media ownership in two ways. The first relates to the specific circumstances of a media merger or acquisition. Section 28A(1) defines a media merger as a “merger or acquisition in which 2 or more of the undertakings involved carry on a media business in the State” or “in which one or more of the undertakings involved carries on a media business in the State and one or more of the undertakings involved carries on a media business elsewhere”. The next section (28B(1)) requires that the undertakings involved in a media merger or acquisition should provide in writing “full details, of the proposal to put the merger or acquisition into effect” to the Minister for Communications, Energy and Natural Resources. What constitutes “full details” is not specified. However, the Act overtly requires the Minister to consider the implications of any given media merger/acquisition for plurality within the state. Specifically, in considering whether to allow a media merger to proceed, the Minister should consider:

- a) the likely effect of the media merger on plurality of the media in the state;
- b) the undesirability of allowing anyone undertaking to hold significant interests within a sector or across different sectors of media business in the state;
- c) the consequences for the promotion of plurality of the media in the state of intervening to prevent the media merger or attaching conditions to the approval of the media merger.

Given this, it is very hard to see how “full details” could exclude information regarding the beneficial ownership of the undertakings involved. (This appears to be confirmed by the requirement in section 28B(3) of the Act that the undertakings provide “full information” to the Minister in relation to how the media merger concerned may “impair plurality of the media in the State”.)

Beyond this, Section 74 of the Act 2014 instructs the Broadcasting Authority of Ireland (the BAI) to prepare a report describing the ownership and control arrangements for undertakings carrying on a media (online and legacy) business in the state. The section states that

- (1) The Broadcasting Authority of Ireland shall, not later than one year from the date of the commencement of this section, and every 3 years thereafter, prepare a report which shall—*
- (a) describe the ownership and control arrangements for undertakings carrying on a media business in the State,*
  - (b) describe the changes to the ownership and control arrangements of such undertakings over the previous 3 years, and*
  - (c) analyse the effects of such changes on plurality of the media in the State.*

Furthermore, the same section states that the Broadcasting Authority of Ireland should publish this report on the Internet. In effect then the description of such ownership and control arrangements have constituted a single source of information on the global ultimate ownership / beneficial ownership of every significant media business (including news media ownership) operating within the state. This data has been made available via two BAI-published reports based on research conducted by London-based consultants

Communications Chambers. These reports cover the periods from 2012-14 and 2015-17 respectively. (A third report is in progress at time of writing – June 2021.) The reports are published on the website of the BAI.<sup>305</sup>

Furthermore, since August 2020, these reports have been augmented by the existence of the [mediaownership.ie](http://mediaownership.ie) resource. Commissioned by the BAI and compiled by the School of Communications at Dublin City University (i.e., this researcher) the site constitutes a publicly accessible Media Ownership Monitor website which is updated annually.

Notably, however, the 2014 Act does not expressly require that media undertakings should disclose their ownership details for the purposes of this research. It simply assumes that such information will be available to the BAI or to whichever company is subcontracted to carry out the research. In this regard, the experience of the current authors in collating of the data populating the [mediaownership.ie](http://mediaownership.ie) database is instructive. Although the vast majority of media undertakings were actively cooperative with the research, one or two declined to share their ownership data. As it currently stands there is no legal obligation upon media outlets to share their ownership data for this purpose.

## 2. The 4<sup>th</sup> and 5<sup>th</sup> European Anti-Money Laundering directives

Article 30(1) of Directive (EU) 2015/849<sup>306</sup> of the European Parliament and of the Council of 20 May 2015 (aka the Fourth Anti-Money Laundering Directive) states that “Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership”.

The Fifth Anti-Money Laundering Directive (Directive (EU) 2018/843<sup>307</sup> of the European Parliament and of the Council of 30 May 2018) augmented Article 30(1) as follows:

*Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held. Member States shall ensure that breaches of this Article are subject to effective, proportionate and dissuasive measures or sanctions.*

Furthermore, the directive added a requirement that

*Member States shall require that the beneficial owners of corporate or other legal entities, including through shares, voting rights, ownership interest, bearer shareholdings or control*

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<sup>305</sup> BAI Report “Ownership and Control Policy (2012)” (26 April 2012), <https://www.bai.ie/en/2355/>; BAI Report on Ownership and Control of Media Businesses in Ireland 2015-2017, [http://opac.oireachtas.ie/AWDData/Library3/Corrected\\_20181030\\_Ownership\\_Control\\_Report\\_2015-2017\\_Final\\_135343.pdf](http://opac.oireachtas.ie/AWDData/Library3/Corrected_20181030_Ownership_Control_Report_2015-2017_Final_135343.pdf).

<sup>306</sup> Fourth Anti-Money Laundering Directive, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=DE>.

<sup>307</sup> Fifth Anti-Money Laundering Directive, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=DE>.

*via other means, provide those entities with all the information necessary for the corporate or other legal entity to comply with the requirements in the first subparagraph.*

Until 2016, there was no requirement under Irish company law for any company (public or private), media-related or otherwise, to disclose who held the beneficial interest in shares. All companies were obliged to maintain a register of shareholders under company law and members of the public had the right to request sight of same. However, those registers contained the name of the entity that held legal rather than beneficial interests in the shares.

In November 2016, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (SI No 560 of 2016)<sup>308</sup> were published. They required all Irish companies to obtain and maintain accurate information in respect of their beneficial owners and to put a beneficial ownership register in place. In effect this means private companies had to maintain a register of “substantial interests” (any shareholding equal to or above 25% of the total) in a company. This register was available from the Irish Companies Records Office for a small fee. This setup was superseded in 2019 by the establishment of a separate Central Register of Beneficial Ownership (RBO) which was separate from the Companies Records Office. The RBO grew out of European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (Statutory Instrument 110 of 2019)<sup>309</sup> which in turn transposed elements of the 4<sup>th</sup> Anti-Money Laundering Directive into Irish law.

The 2019 regulations specifically require any “corporate or other legal entity incorporated in the State” (i.e. all companies formed and registered under the Companies Act 2014<sup>310</sup> or Industrial and Provident Societies Acts 1893 to 2014) to provide the following information:

- the name, date of birth, nationality, and residential address of each beneficial owner;
- a statement of the nature and extent of the interest held, or the nature and extent of control exercised, by each such beneficial owner, and
- the PPS number [social security number] of each such beneficial owner.

Full access to the RBO data is not universal. “Tier One” entities (including An Garda Síochána, the Financial Intelligence Unit (FIU) Ireland, the Revenue Commissioners, the Criminal Assets Bureau (CAB), the Central Bank of Ireland, the Department of Justice & Equality, the Property Services Regulatory Authority (PSRA), the Law Society of Ireland and the General Council of the Bar of Ireland) have unrestricted access. Those in “Tier Two” (including the general public) have somewhat restricted access. However, this still entitles the general public to know the name, month and year of birth, nationality and country of residence of a beneficial owner. Tier Two also includes a statement of the nature and extent

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<sup>308</sup> European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016, S.I. No. 560 of 2016, <http://www.irishstatutebook.ie/eli/2016/si/560/made/en/pdf>.

<sup>309</sup> European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019, S.I. No. 110 of 2019, <http://www.irishstatutebook.ie/eli/2019/si/110/made/en/pdf>.

<sup>310</sup> <http://www.irishstatutebook.ie/2014/en/act/pub/0038/index.html>.

of the beneficial interest held or control exercised. In effect then those in Tier Two are only precluded from seeing the day of birth, and the residential address of the beneficial owner along with some details relating to when precisely they were acquiring their interest in the outlet in question. Tier One also includes information regarding the individual who filed data on behalf of companies included in the RBO.

Thus, although the 2019 regulations do not specifically create a requirement for transparency of media ownership, their application does extend to media outlets registered as companies or provident societies.<sup>311</sup>

#### 5.6.2.4. Disclosure methods

Section 28M(2)-(3) of the Competition and Consumer Protection Act 2014 requires the Minister for Communications to make the three-yearly report on media ownership available to the Irish parliament and to publish it on the Internet “as soon as practicable”.

The Media Ownership Ireland database is freely accessible to anyone with Internet access via [mediaownership.ie](http://mediaownership.ie) and is currently updated annually. However, the frequency of updating is simply the current practice as contractually agreed between those maintaining the database and the funder (i.e. the BAI). It is therefore not a regulatory requirement.

Beyond this, as noted above, in the event of a media merger, the undertakings involved must notify the Minister for Communications, Energy and Natural Resources of all relevant details including ownership, more or less immediately. There is no requirement that these details be made public however and it possible that the Minister may simply issue a letter permitting the merger to proceed without publishing the details of it.

Access to information relating to the beneficial ownership of companies from the Central Register of Beneficial Ownership appears to be exclusively online via [www.rbo.gov.ie](http://www.rbo.gov.ie). Members of the public with a debit or credit card can purchase an RBO record in PDF form relating to a given undertaking. Each record costs €2.50 to access. In effect then accessing RBO data is conditional on having access to the Internet, a bank/credit card account and a capacity to pay.

#### 5.6.2.5. Supervision and monitoring of the rules

Given that, strictly speaking, there are no media-specific rules to monitor or supervise, there is no body with absolute responsibility to monitor compliance with media transparency obligations. The BAI subcontracts the preparation of its three-year report on media ownership (as required by the 2014 Competition and Consumer Protection Act) to a private firm through an open public tendering process. Similarly, the preparation and maintenance of the annual updates to the [mediaownership.ie](http://mediaownership.ie) database is subcontracted to an outside entity (again, currently, the current author). However, neither subcontractor has the legal power to insist that all media outlets should reveal their beneficial ownership. The BAI's

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<sup>311</sup> A provident society usually comprises the owners of small businesses who become part of a larger body but still operate independently; therefore they work to receive mutual benefits from the society.

licensing process requires applicants for broadcasting franchises to make their ownership transparent. De facto, then, all BAI-licensed commercial and community broadcasters (which includes every non-public service media broadcaster operating from Ireland) must reveal this information and it would in turn be made available to the subcontractors referred to immediately above if required.

As regards the RBO process, Regulation 5(6) of the European Union (Anti-Money Laundering: Beneficial Ownership Of Corporate Entities) Regulations states that companies and societies must make their internal register of beneficial owners available for inspection to any member of the Garda Síochána (the Irish police force), the Revenue Commissioners, a “competent authority” (e.g. the Central Bank of Ireland), the Criminal Assets Bureau, or an inspector from the Irish Office of the Director of Corporate Enforcement. Sanctions for failing to do so are outlined below.

#### 5.6.2.6. Penalties and legal consequences

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 provide that relevant entities which fail to register their beneficial ownership shall be subject to a class A fine on summary conviction (i.e. up to EUR 5 000) or on conviction upon indictment, to a fine of up to EUR 500 000. Failure to register may also be sanctioned by imposition of a 12-month prison sentence.

### 5.6.3. Other developments

It should be acknowledged that, while media ownership and in particular concentration of media ownership has been a significant policy issue in Ireland in the 21<sup>st</sup> century (as indeed it was in the last two decades of the 20<sup>th</sup> century), accessing information about media ownership has rarely been identified as a particular problem. In part this is due to the small size of the Irish media market. Even if one included all newspaper and periodical publications, paid for or free, there are probably fewer than 300 in total and there are fewer than 100 broadcasters even including all local and community outlets. This, combined with the intimate nature of Irish society, has combined to ensure that accessing information about media ownership even if through informal channels has not represented an insurmountable obstacle.

Against this, the combined effect of the media ownership reporting obligations contained in the 2014 Competition and Consumer Protection Act and the local obligations created by the EU’s Anti-Money Laundering directives have nonetheless made accessing media ownership information much more straightforward. In particular, the data collection sponsored by the BAI, in compiling data on cross-media ownership, has made it easier to identify structures of media concentration that while perhaps previously understood in the abstract, were not always entirely transparent.

It should also be acknowledged that, even where it identifies instances of multiple or cross-media ownership, the BAI-supported research concentrates on a fairly narrowly defined media sector. It does not identify instances where media outlet ownership is held

in the same hands as ownership of, for example, advertising agencies, print distribution or the provision of news agency services. Thus, for example, since February 2021, *Bauer Media* has directly owned five Irish radio stations. This is reflected in the BAI-supported databases. However, neither database makes any reference to the fact that *Bauer Media* also provides national and international news agency services to virtually every local radio station in Ireland. While not suggesting that the provision of such services is problematic, it does constitute a concentration of media content provision not captured in the publicly available databases.

In effect then, while quite comprehensive within their respective remits, it might be argued that the databases do not fully capture the implications of media ownership in Ireland. Specifically, the databases make no reference to:

- information on holdings of owners that are closely linked to the media outlet service or the other owners, whether legal or natural persons (e.g., family members, board members who are also media owners, co-owners of companies in which the media owners have a stake);
- information on the main sources of income of the media company;
- details of political and other affiliations of the owners;
- information on management structures and editors-in-chief.

This does not make Ireland unusual by international standards, but it suggests that there remains substantial scope for expanding the range of publicly available information relating to media ownership.

## 5.7. IT - Italy

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### 5.7.1. Media ownership transparency in constitutional law

Article 21 of the Italian Constitution clearly sets out the principle of transparency of media ownership by providing that: “The law may introduce general provisions for the disclosure of financial sources of periodical publications”.<sup>312</sup>

The principle of transparency of media ownership serves two closely connected purposes: on the one hand, it enables the disclosure of the actual financial means of media companies, their real owners, and the existing connections between the various media operators, so as to enable the identification of the natural persons to whom the companies

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<sup>312</sup> Costituzione della Repubblica Italiana, <https://www.senato.it/documenti/repository/istituzione/costituzione.pdf>. See the English translation of the Italian Constitution prepared by the Italian Senate: [http://www.senato.it/application/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST\\_INGLESE.pdf](http://www.senato.it/application/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST_INGLESE.pdf).

active in the media sector actually belong; on the other, transparency of media ownership fulfils the citizens' right to information and enables the monitoring of compliance with anti-concentration limits.

The principle of transparency, together with that of pluralism,<sup>313</sup> must therefore be considered as a fundamental principle of the media sector under Italian constitutional law. The Italian Constitutional Court has held that "the introduction of a high degree of transparency of the ownership structures and financial statements of the media companies is always necessary to ensure the correct functioning of a mixed system [of information, i.e., one including private and public media companies] since transparency is paramount to protect pluralism and therefore has a constitutional significance".<sup>314</sup>

## 5.7.2. Transparency rules on media ownership in domestic law

### 5.7.2.1. Overview

Law no. 249 of 1997 (hereafter: the AGCOM Statute)<sup>315</sup> established the Italian Communications Authority (hereafter: AGCOM)<sup>316</sup> and entrusted it with the Single Registry for Communications Operators (SRCO),<sup>317</sup> which comprises different categories of data regarding the players active in the media sector.

AGCOM laid out the detailed provisions governing the functioning of the SRCO in a regulation attached to its Resolution no. 666/08/CONS,<sup>318</sup> as amended in subsequent Resolutions (hereafter: the SRCO Regulation).<sup>319</sup>

The purpose of the SRCO is to enable that Authority to carry out its oversight and regulatory enforcement powers vis-à-vis the media companies, in line with the principles of transparency and administrative simplification. Moreover, the SRCO seeks to ensure the transparency of media ownership structures and to enable the application of anti-concentration rules, the protection of pluralism, and the enforcement of the statutory limits on foreign shareholdings.

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<sup>313</sup> See, generally, Mastroianni/Arena, *Media Law in Italy*, 2014, 36 et seq.

<sup>314</sup> Italian Constitutional Court, judgement no. 826 of 1988, <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1988&numero=826>.

<sup>315</sup> Legge 31 luglio 1997, n. 249 - Istituzione dell'Autorita' per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1997-07-31:249>.

<sup>316</sup> <https://www.agcom.it>.

<sup>317</sup> <https://www.agcom.it/registro-degli-operatori-di-comunicazione>.

<sup>318</sup> Delibera n. 666/08/CONS - Regolamento per l'organizzazione e la tenuta del Registro degli operatori di comunicazione, <https://www.agcom.it/documents/10179/539083/Delibera+666-08-CONS/fd85ab2c-c014-49bd-b70b-64e5929ea9f9?version=1.5>.

<sup>319</sup> See AGCOM Resolutions nos. 556/12/CONS, 565/14/CONS, 565/13/CONS, 566/13/CONS, 1/17/CONS, 492/16/CONS, 235/16/CONS, 308/16/CONS, and 402/18/CONS.

A complementary function to that of the SRCO is performed by the Economic System Report (ESR),<sup>320</sup> established by AGCOM Resolution no. 397/13/CONS,<sup>321</sup> as amended by Resolutions no. 235/15/CONS,<sup>322</sup> no. 147/17/CONS<sup>323</sup> and no. 161/21/CONS.<sup>324</sup> While the SRCO seeks to identify media operators and their ownership structure, the ESR seeks to ensure a comprehensive assessment of their economic activity.

Under the ESR, media operators active in certain sectors are required to submit an annual report, encompassing their accounting and non-accounting data, so as to enable AGCOM to carry out a portion of its statutory obligations, such as the determination of the value of the Integrated Communications System (ICS),<sup>325</sup> the enforcement of anti-concentration limits (technical, economic and diagonal or cross-ownership) and the ascertainment of dominant positions that may be detrimental to media pluralism.<sup>326</sup>

### 5.7.2.2. Providers subject to the regulations

As per Article 2 of the SRCO Regulation, the following entities are currently required to register with the SRCO: network operators; audiovisual and radio media service providers, associated interactive service providers or conditional access service providers; radio broadcasters; advertising agencies; companies producing or distributing radio and television programs; national press agencies; publishers of daily newspapers, periodicals or magazines; subjects engaging in electronic activity; companies providing electronic communications services.

The 2017 Budget Law (Law no. 232 of 2016)<sup>327</sup> requires enrolment in the SRCO also for call centers, which are required to disclose all the associated national telephone

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<sup>320</sup> <https://www.agcom.it/informativa-economica-di-sistema-ies>.

<sup>321</sup> Delibera n. 397/13/CONS - Informativa Economica di Sistema, <https://www.agcom.it/documents/10179/540073/Delibera+397-13-CONS/25164970-7592-4eca-af58-488679c1f7f2?version=1.0>.

<sup>322</sup> Delibera n. 235/15/CONS - Modifiche alla delibera n. 397/13/CONS del 25 giugno 2013 "Informativa Economica di Sistema", <https://www.agcom.it/documents/10179/1770941/Delibera+235-15-CONS/631c8e00-8f0c-4c29-a6cb-426ea92772fe?version=1.0>.

<sup>323</sup> Delibera n. 147/17/CONS - Modifiche alla delibera n. 397/13/CONS del 25 giugno 2013 "Informativa Economica di Sistema", <https://www.agcom.it/documents/10179/7278186/Delibera+147-17-CONS/a26ea4d3-5220-4401-b22e-11e70010beda?version=1.0>.

<sup>324</sup> Delibera n. 161/21/CONS - Modifiche alla delibera n. 397/13/CONS del 25 giugno 2013 "Informativa Economica di Sistema", <https://www.agcom.it/documents/10179/23032042/Delibera+161-21-CONS/fd84e0db-986b-4495-8408-fe29c1edcf37?version=1.0>.

<sup>325</sup> The ICS is a relevant market defined by the legislature which encompasses revenues from the following activities: newspapers and magazines, yearly and electronic publishing, radio and audiovisual media services, cinema, outdoor advertising, communication initiatives for products and services, and sponsorship, <https://www.agcom.it/sistema-integrato-delle-comunicazioni-sic>.

<sup>326</sup> For an overview of those provisions, see Arena, IT - Italy, in IRIS Special 2020-1: Media pluralism and competition issues, pp. 73-80; Mastroianni/Arena, Italy, in Nikoltchev (ed.), IRIS Special 2012, Converged Markets – Converged Power? Regulation and Case Law, pp. 114 ff., <https://rm.coe.int/1680783bf4>.

<sup>327</sup> Legge 11 dicembre 2016, n. 232 - Bilancio di previsione dello Stato per l'anno finanziario 2017 e bilancio pluriennale per il triennio 2017-2019 (16G00242), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2016-12-11:232!vig=2021-06-18>.

numbers (including toll-free numbers, premium numbers, mobile numbers, and numbers for geographic services).

Most recently, pursuant to Article 1, paragraphs 515-517 of the 2021 Budget Law (Law no. 178 of 2020),<sup>328</sup> also "providers of online intermediation services and online search engines" are subject to enrolment in the SRCO.

The entities subject to ESR reporting requirements include: media service providers (audiovisual, linear and non-linear, and radio media service providers); network operators (operating both on digital terrestrial and satellite platforms); suppliers of associated interactive services or conditional access services; subjects carrying out radio broadcasting activity; advertising agencies; national press agencies; publishers (including online publishers) of daily newspapers, periodicals or magazines, other periodical and annual publications and other editorial products; providers of online intermediation services and providers of online search engines.

Moreover, the ESR disclosure requirement also applies to companies, irrespective of their place of establishment, which draft the consolidated budget of the above entities.

### 5.7.2.3. Scope and content of the rules

As per Article 5 of the SRCO Regulation, all the entities subject to enrolment in the SRCO are required to disclose, at the time of registration (i.e. within 60 days from the beginning of their activity), and every year in case of changes, their Social Security Number, their corporate or business name, their registered office, their corporate mission, their ownership structure (including a list of all shareholders and controlling or controlled companies), and their activity (e.g. network operators, media service providers, publisher, advertising agency, etc.).

As per Article 14 of the SRCO Regulation, access to benefits, aid, and subsidies under the current legislative framework are conditional upon enrolment in the SRCO. At the moment, more than 19,000 entities are listed in the SRCO. The public can access the SRCO through a search engine on AGCOM's website.<sup>329</sup>

Entities subject to ESR disclosure obligation must annually provide: general corporate information (business name, legal nature, VAT Code, number of employees or journalists, registered office, contact information, contact person, controlling company, etc.), revenues for the last fiscal year, and, in case of revenues exceeding EUR 1 million, a detailed revenue breakdown for each of the relevant business activities (e.g. publishing, broadcasting, online advertising etc.).

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<sup>328</sup> Legge 30 dicembre 2020, n. 178 - Bilancio di previsione dello Stato per l'anno finanziario 2021 e bilancio pluriennale per il triennio 2021-2023 (20G00202), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2020-12-30:178>.

<sup>329</sup> The SRCO search engine is available at: <https://www.agcom.it/elenco-pubblico>.

#### 5.7.2.4. Disclosure methods

As from 16 October 2021, undertakings subject to SRCO disclosure requirements may discharge their reporting obligations through an online portal, by providing the necessary online credentials with a National Services Card.<sup>330</sup> Moreover, Article 25 of the SRCO Regulation empowers the Regional Communications Committees to receive SRCO enrolment applications and to issue, upon request, certificates of enrolment in the SRCO.

Undertakings subject to ESR disclosure obligation must fill in the form attached to AGCOM Resolution no. 397/13/CONS and send it to AGCOM via a dedicated portal every year between 1 July and 30 September.<sup>331</sup>

#### 5.7.2.5. Supervision and monitoring of the rules

AGCOM's Investigation and Registry Service (IRS) is empowered to monitor compliance with SRCO and ESR disclosure obligations. The IRS may carry out spot checks as well as audit on the basis of reports.

The IRS may access other databases and may rely on the enforcement powers of the Special Unit for Broadcasting Publishing of the Italian Financial Police (*Guardia di Finanza*).<sup>332</sup>

Should the IRS establish facts or situations different from those resulting from companies' SRCO reports, AGCOM may update the relevant SRCO entries *ex officio*, by giving prior notice to the companies concerned.<sup>333</sup>

#### 5.7.2.6. Penalties and legal consequences

Infringements of the SRCO and ESR disclosure obligations are subject to the provisions set out in Article 1, paragraphs 29 and 30, of AGCOM's Statute. In particular, as per paragraph 29 thereof, individuals who willfully provide inaccurate economic data or facts whose disclosure is required by the law are subject to imprisonment of between one and five years. As per paragraph 30 thereof, failure to comply with the disclosure obligation by the relevant deadline can result in a fine up to EUR 100,000.

Moreover, as per paragraph 31, failure to comply with AGCOM's injunctions may lead to fines up to EUR 250,000. Also, as per paragraph 32, repeat offenders may be subject to a compulsory suspension of their business activity for up to six months or to the withdrawal of their broadcasting authorisation or concession.

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<sup>330</sup> <https://www.agcom.it/sistema-telematico-del-roc>. The Carta Nazionale dei Servizi or CNS is a device (i.e. a smart card or USB stick) that contains a personal authentication 'digital certificate'.

<sup>331</sup> <https://servizionline.agcom.it/>.

<sup>332</sup> Article 16(1) of the SRCO Regulation.

<sup>333</sup> Article 16(2) of the SRCO Regulation.

The Regulation attached to AGCOM Resolution no. 410/14/CONS,<sup>334</sup> as subsequently amended,<sup>335</sup> lays down detailed provisions for infringement procedures which may lead to the imposition of administrative fines.

AGCOM Resolutions imposing fines for failure to comply with disclosure requirements are relatively infrequent. Fines for isolated violations are usually modest: for instance, AGCOM Resolutions no. 588/14/CONS<sup>336</sup> and 587/14/CONS<sup>337</sup> imposed a fine of EUR 1,032 on a company for failing to submit one of their yearly SRCO reports.

### 5.7.3. Other developments

As far as video-sharing platforms are concerned, under Article 28a(6) of Directive 2010/13 as amended by Directive 2018/1808 (hereafter: the AVMS Directive),<sup>338</sup> Member States shall establish and maintain an up-to-date list of the video-sharing platform providers established or deemed to be established on their territory and shall communicate that list, including any updates thereto, to the Commission. In turn, the Commission shall ensure that such lists are made available in a centralised database, which shall be accessible to national regulatory authorities or bodies.

On 22 April 2021, the Italian Parliament enacted the Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2019-2020 (2019-2020 European Delegation Law),<sup>339</sup> empowering the Italian Government to implement, inter alia, Directive 2018/1808. In this connection, Article 3 of the 2019-2020 European Delegation Law clarified that, to that end, the Italian Government is authorised to lay down a Consolidated Law on Digital Media Services

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<sup>334</sup> Delibera n. 410/14/CONS - Regolamento di procedura in materia di sanzioni amministrative e impegni e Consultazione pubblica sul documento recante «Linee guida sulla quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità per le garanzie nelle comunicazioni», <https://www.agcom.it/documents/10179/1476050/Delibera+410-14-CONS/8fd65b05-7223-439e-a630-631078135c77?version=1.13>.

<sup>335</sup> See AGCOM Resolutions nos. 581/15/CONS, 529/14/CONS, and 451/20/CONS.

<sup>336</sup> Delibera n. 588/14/CONS - Ordinanza-ingiunzione nei confronti della società Euromidia s.r.l. per la violazione degli articoli 11 e 13 dell'allegato A alla delibera n. 666/08/CONS del 26 novembre 2008, recante "Regolamento per l'organizzazione e la tenuta del registro degli operatori di comunicazione" e successive modificazioni, di cui al procedimento sanzionatorio n. 17/14/ISP, <https://www.agcom.it/documents/10179/1859873/Delibera+588-14-CONS-14-CONS/5a1fd28c-cd83-4232-90fd-959ee75b575b?version=1.1>.

<sup>337</sup> Delibera n. 587/14/CONS - Ordinanza-ingiunzione nei confronti della società Netgate s.r.l. per la violazione degli articoli 11 e 13 dell'allegato A alla delibera n. 666/08/CONS del 26 novembre 2008, recante "Regolamento per l'organizzazione e la tenuta del Registro degli operatori di comunicazione" e successive modificazioni, di cui al procedimento sanzionatorio n. 10/14/ISP, <https://www.agcom.it/documents/10179/1859873/Delibera+587-14-CONS/b3e7f6a6-9fb6-47c1-8cd9-d56b89529f95?version=1.1>.

<sup>338</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

<sup>339</sup> Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2019-2020, [www.gazzettaufficiale.it/eli/id/2021/04/23/21G00063/sg](http://www.gazzettaufficiale.it/eli/id/2021/04/23/21G00063/sg).

(CLDMS) to update the provisions of the Consolidated Law on Audiovisual and Radio Merida Services (CLARMS),<sup>340</sup> also with reference to video-sharing platforms, so as to take into account the latest developments in markets and technology.

To date, the Italian Government has not yet adopted a Legislative Decree to implement Directive 2018/1808 as empowered by the 2019-2020 European Delegation Law, but it is expected to do so by the end of 2021.

## 5.8. PL - Poland

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### 5.8.1. Media ownership transparency in constitutional law

The Polish Constitution of 1997<sup>341</sup> contains provisions on freedom of expression and information (Art. 54), and freedom of the media (Art. 14), as well as on the body responsible for safeguarding freedom of speech, the right to information and the public interest in broadcasting (Art. 213) – the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji* [KRRiT]). None of these provisions explicitly refer to transparency of media ownership. The crucial constitutional provision for transparency of public life and concerning citizens' right to information on activities of public authorities and persons holding public functions (Art. 61) is applicable also to “self-governing economic or professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury”. It does not apply to other entities, including private providers of media services.

There are however some elements in the Constitution that may be relevant for the rules on transparency of media ownership. While the Constitution guarantees freedom of expression and information (Art. 54) among other freedoms, rights and duties of a human being and citizen (Chapter II), it contains the additional provision on freedom of the media (Art. 14) in Chapter I on principles of the State. Consequently, freedom of the media is understood also as one of the constitutional principles of the State system. This freedom, as explained by the Constitutional Tribunal, includes three main aspects: 1) freedom to establish media; 2) freedom to conduct media activity; 3) freedom to shape ownership

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<sup>340</sup> Legislative Decree No. 177/2005, as subsequently amended, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig=2021-06-18>.

<sup>341</sup> The Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej), of 2 April 1997, Official Journal (Dziennik Ustaw – Dz. U.) No 78, item 483, with amendments. The consolidated text (in Polish): <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf>. English translation: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

structure of media.<sup>342</sup> The last aspect is related to media pluralism, essential for the public debate. Beneficiaries of freedom of the media are defined as “the press and other means of social communication”. The element of “social communication” serves to distinguish mass communication from individual communication, but is also seen as indicating the social importance of the media. As explained by the Supreme Court: “... providers of media services play an important role in democratic society, which is highlighted in particular in Art. 14 of the Constitution (...). Their role is not limited to economic activity and profit-making, but includes also informing citizens on important events, opinion-forming, delivery of entertainment and contribution to development and promotion of culture. Media, often called means of mass communication, have therefore a significant impact on shaping views, attitudes, habits and customs of individuals.”<sup>343</sup> The addressee of the duty to safeguard freedom of the media is the State. This means, first, its negative duty of no-interference, in other words to abstain from actions limiting this freedom, but it may also mean the positive duty to take action, in case freedom of the media is practically endangered.<sup>344</sup> Such actions may include regulatory steps aimed at safeguarding media pluralism, including counteracting excessive concentration on the media market and/or safeguarding transparency of media ownership. Also, the position of the constitutional broadcasting regulatory body (KRRiT) should be seen in the light of these duties of the State. The principle of freedom of the media, as freedom of expression, is not an absolute one and may be subject to limitations, based on other constitutional rules, principles and values, in particular the principle of proportionality (Art. 31.3 of the Constitution).<sup>345</sup>

## 5.8.2. Transparency rules on media ownership in domestic law

### 5.8.2.1. Overview

Transparency rules dedicated specifically to media ownership in Polish law existing before implementation of Directive 2018/1808 amending the EU's Audiovisual Media Services

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<sup>342</sup> Judgement of the Constitutional Tribunal of 9.11.2010, K 13/07, Orzecznictwo Trybunału Konstytucyjnego – Zbiór Urzędowy (OTK ZU) 9A/2010, item 98,

<https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%2013/07>.

<sup>343</sup> Judgement of the Supreme Court of 18.10.2019, I NSK 60/18,

<http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/1%20NSK%2060-18-1.pdf>.

<sup>344</sup> Judgement of the Constitutional Tribunal of 30.10.2006, P 10/06, OTK ZU 9A/2006, item 128, <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=P%2010/06>

<sup>345</sup> E.g., while the registration of the press was recognised as proportional, as serving the “information and economic order” (judgement of the Constitutional Tribunal of 20.02.2007, P 1/06, OTK ZU 2A/2007, item 11, <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=P%201/06>), penal sanctions in case of failure to comply with this duty were found disproportional and hence unconstitutional (judgement of the Constitutional Tribunal of 14.12.2011, SK 42/09, OTK ZU 10A/2011, item 118 <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=SK%2042/09>).

Consequently the sanction was reduced to a fine (Art. 45 of the Press Law as amended in 2013).

Directive (AVMSD) were rather limited and related mainly to registration of the press and licensing of broadcasting, as well as to identification of media services (*impressum*).

According to the Press Law of 1984 (with amendments),<sup>346</sup> publishing a daily newspaper or a magazine requires registration in a district court of a registered office of the publisher.<sup>347</sup> The registration system, applicable to daily newspapers and magazines (also in electronic form), is aimed mainly at protecting press titles. It also results in including in a register the data concerning editors-in-chief, and seats and addresses of editorial offices and publishers.<sup>348</sup> Registries are available to the public, but until recently, in order to obtain access, it was necessary to visit a reading room of a relevant court. The self-regulatory initiative of press publishers significantly enhanced the transparency of the register. Since July 2020 it has been made available on the Internet, at the website of the Press Club, combining data from courts' registries and the International Standard Serial Number (ISSN) register as updated by the National Library.<sup>349</sup>

The Press Law moreover provides for the *impressum* duty requiring information identifying *inter alia* the publisher, editorial office and editor-in-chief in a visible place on every copy of a printed periodical, news agency, or similar press prints.<sup>350</sup> This duty applies *mutatis mutandis* to radio and television recordings and to newsreels.<sup>351</sup>

The Broadcasting Act (BA) of 1992<sup>352</sup> includes Art. 14a, added in 2011 as the implementation of Art. 5 of the AVMSD, which concerns identification of a programme and its broadcaster. According to Art. 14a BA, the broadcaster must ensure easy, direct and permanent access to information that allows the programme service and its broadcaster to be identified by viewers/listeners, in particular access to the following information: 1) the name of the programme service; 2) the last name, name or full business name of the broadcaster; 3) the address of its registered office; and 4) contact details, including mailing address, email address and website. The broadcaster must also identify the KRRiT as the authority competent for issues connected with radio and television broadcasting. Similar obligations were imposed on providers of on-demand audiovisual media services in Art. 47c BA. The revision of the BA implementing Directive 2018/1808 extends these obligations also to providers of video-sharing platforms (VSPs).<sup>353</sup> Moreover the data identifying media

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<sup>346</sup> The act of 26.01.1984 – Press Law, consolidated text: Dz. U. of 2018, item 1914, <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19840050024/U/D19840024Lj.pdf>.

<sup>347</sup> Art. 20 para. 1 of the Press Law.

<sup>348</sup> Art. 20 para. 2 of the Press Law; regulation of the Minister of Justice of 9.07.1990 on the register of daily newspapers and magazines, Dz. U. No 46, item 275, with amendments.

<sup>349</sup> <http://pressclub.pl/rejestr-dziennikow-i-czasopism/>.

<sup>350</sup> Art. 27 para. 1 of the Press Law. Also data on place and date of publishing, name of the printing house, ISSN and numbering are required.

<sup>351</sup> Art. 27 para. 2 of the Press Law.

<sup>352</sup> The Broadcasting Act of 29.12.1992, consolidated text: Dz. U. 2020, item 805; <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19930070034/U/D19930034Lj.pdf>; English translation: [http://www.archiwum.krrit.gov.pl/Data/Files/public/Portals/0/angielska/Documents/Regulations/ustawa-o-radiofonii-i-telewizji-2016-eng\\_en.pdf](http://www.archiwum.krrit.gov.pl/Data/Files/public/Portals/0/angielska/Documents/Regulations/ustawa-o-radiofonii-i-telewizji-2016-eng_en.pdf).

<sup>353</sup> Art. 47m BA - as added by the act of 11.08.2021 amending the BA (implementing Directive 2018/1808).

services subject to the disclosure obligation should include also first names and family names of persons who are members of bodies of the providers of such services.<sup>354</sup>

Provision of more detailed information regarding ownership of broadcasting organisations is related to the licensing procedure with the KRRiT. Such information is legally relevant due to two kinds of requirements applicable in licensing of broadcasting. The first concerns the limitation of 49% of the share of foreign entities, in companies to which KRRiT may grant a broadcasting licence, with the exception of entities from EEA countries.<sup>355</sup> The second is related to (limited) anti-concentration rules applicable at the stage of granting a broadcasting licence, its possible revocation and mergers resulting in transfer of rights emanating from the licence. KRRiT shall not grant a licence “if the transmission of a programme service by the applicant could result (...) in the applicant achieving a dominant position in mass media in the given area”.<sup>356</sup> The licence may be revoked if the broadcaster gains a dominant position or another entity takes over control of the operations of the broadcaster.<sup>357</sup> In similar circumstances KRRiT shall refuse consent for transfer of rights under the broadcasting licence in case of a merger.<sup>358</sup> Consequently, provisions concerning requirements for an application for a broadcasting licence provide for the obligation of an applicant to deliver documentation regarding members of executive, supervisory and controlling bodies of the applicant company, including their citizenship and residence, as well as on ownership structure of the applicant company, including a list of shareholders with indication of their shares, and information on shareholders regarding their shares in and/or membership in bodies of other companies, and also on their citizenship and residence.<sup>359</sup> Broadcasters shall notify the Chairman of KRRiT of any changes to the data provided in the application for a broadcasting licence, within 14 days.<sup>360</sup> These obligations are aimed at making it possible for the KRRiT to exercise its competences, rather than to guarantee media ownership transparency to the general public, as the Broadcasting Act does not provide for publication of these data.

The major changes in regulatory standards of (audiovisual) media ownership transparency were introduced by the revision of the Broadcasting Act implementing Directive 2018/1808. The amending act was adopted by Parliament on 11 August 2021<sup>361</sup> and entered into force on 1 November 2021.

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<sup>354</sup> With regard to broadcasters - Art. 14a para. 1 p. 2a, providers of audiovisual on-demand media services – Art. 47c para. 1 p. 2a (as added by the act of 11.08.2021 amending the BA).

<sup>355</sup> Art. 35 BA. This provision recently became a subject of controversy in the context of renewal of the broadcasting licence for the news channel TVN24, owned indirectly by Discovery, and the draft amendment to the BA (Art. 35) extending the foreign capital limit, so as to exclude EEA entities controlled by non-EEA entities – cf. the “Other developments” part.

<sup>356</sup> Art. 36.2.2 BA.

<sup>357</sup> Art. 38.2.3 and 4 BA.

<sup>358</sup> Art. 38a.3.2<sup>nd</sup> sentence BA.

<sup>359</sup> Regulation of KRRiT of 4.01.2007 on contents of an application for the granting of a broadcasting licence and detailed procedure in case of the granting or revoking of a licence for transmission or retransmission of radio and TV programmes, Dz. U. 2007, No 5, item 41, with amendments.

<sup>360</sup> Art. 37b BA.

<sup>361</sup> The act of 11.08.2021 amending the Broadcasting Act and the Act on Cinematography, Dz. U. 2021, item 1676, <https://dziennikustaw.gov.pl/D2021000167601.pdf> – cf. Articles 14a, 47c, 47m of the BA. The revision

The act implementing the revised AVMSD added to the Broadcasting Act similar sets of provisions on transparency of ownership with regard to broadcasters, providers of on-demand audiovisual media services and providers of video-sharing platforms, with effects also for transparency of printed press owned by providers of media services or VSPs.

Given the limited scope and importance of the (above-presented) rules relevant for transparency of media ownership before the implementation in 2021 of Directive 2018/1808, further remarks only concern the provisions that are part of the revision of the Broadcasting Act implementing the Directive, unless marked otherwise.

#### 5.8.2.2. Providers subject to the regulations

The transparency obligations added in 2021 to the Broadcasting Act cover the following three categories of entities: 1) broadcasters of radio and/or television programme services;<sup>362</sup> 2) providers of audiovisual on-demand media services;<sup>363</sup> 3) providers of video-sharing platforms.<sup>364</sup> The subjective scope of the obligations goes beyond the scope of Art. 5.2 of the revised AVMSD, in the sense that they cover also radio (audio) broadcasters and providers of VSPs. Indirectly the obligation applies partly also to press publishers, as all three categories of obligated entities have a duty to make available information on daily newspapers and magazines published by them or by entities belonging to the same capital group.

With regard to the territorial scope of transparency obligations, the BA does not provide for any exclusion (e.g. of regional or local media), which means that the obligations apply to all broadcasters, on-demand AV media service providers and VSPs providers under Polish jurisdiction, as defined in the BA<sup>365</sup>, in implementation of the jurisdiction criteria in the AVMSD.

#### 5.8.2.3. Scope and content of the rules

The scope of information that broadcasters, providers of on-demand AV media services and providers of VSPs are obliged to make transparent depends partly on the legal form in which they run their businesses. Those acting in the form of a commercial company have the obligation to make available information on the first names, family names and/or commercial names of:

- 1) general partners – in case of a general partnership;
- 2) general partners – in case of a limited partnership;

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was adopted on the basis of the governmental proposal of 30.06.2021, available with the statement of reasons and impact assessment at:

<https://orka.sejm.gov.pl/Druki9ka.nsf/0/A0C68963FC1190C7C125870400393C4F/%24File/1340.pdf> . The governmental works driven by the Ministry of Culture, including the public consultations, are documented on the official website of the legislative services: <https://legislacja.rcl.gov.pl/projekt/12337952>.

<sup>362</sup> Art. 14a BA.

<sup>363</sup> Art. 47c BA.

<sup>364</sup> Art. 47m BA.

<sup>365</sup> Art. 1a BA.

- 3) general partners and shareholders whose shares exceed 5% of the share capital of the provider – in case of a partnership limited by shares;
- 4) shareholders whose shares exceed 5% of the share capital of the provider – in case of a company limited by shares;
- 5) shareholders whose shares exceed 5% of the share capital of the provider – in case of a joint-stock company and simplified joint-stock company.<sup>366</sup>

The threshold of 5% was introduced due to the limited impact of minor shareholders in relevant commercial companies on their activities.<sup>367</sup>

Broadcasters, providers of on-demand audiovisual media services and providers of VSPs shall also make available data identifying beneficial owners of the provider in question disclosed in the Central Register of Beneficial Owners.<sup>368</sup> This register is operated on the basis of the act on counteracting money laundering and financing terrorism,<sup>369</sup> implementing EU Directive 2015/849<sup>370</sup> and serving application of several EU regulations in this field.<sup>371</sup> The obligation to disclose data in the register applies to a wide range of entities: 1) general partnerships; 2) limited partnerships; 3) partnerships limited by shares; 4) companies limited by shares; 5) simplified joint-stock companies; 6) joint-stock companies; 7) trusts operating in Poland; 8) limited liability partnerships; 9) European economic interest groupings; 10) European companies; 11) co-operatives; 12) European co-operatives; 13) associations (registered); and 14) foundations.<sup>372</sup> The data subject to notification include data identifying: 1) obligated entities and 2) beneficial owners, as well as members of bodies or partners entitled to representation.<sup>373</sup> The notion of beneficial owner is defined as each physical person directly or indirectly in control of a client through entitlement, resulting from legal or factual circumstances, allowing for a decisive impact on acts or activities of the client, or each physical person on whose behalf the economic activity or transaction is being conducted, including defined physical persons listed separately in relation to corporate entities and trusts (similarly to Art. 3 p. 6 of the Directive 2015/849).<sup>374</sup>

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<sup>366</sup> With regard to broadcasters - Art. 14a para. 1a, providers of audiovisual on-demand media services – Art. 47c para. 1a, providers of VSPs – Art. 47m para. 2 of the BA.

<sup>367</sup> The governmental proposal for the act amending the Broadcasting Act and the Act of Cinematography, 30.06.2021, the statement of reasons, p. 11, <https://orka.sejm.gov.pl/Druki9ka.nsf/O/AOC68963FC1190C7C125870400393C4F/%24File/1340.pdf>.

<sup>368</sup> With regard to broadcasters - Art. 14a para. 1b, providers of audiovisual on-demand media services – Art. 47c para. 1b, providers of VSPs – Art. 47m para. 3 of the BA.

<sup>369</sup> The act of 1.03.2018 on counteracting money laundering and financing of terrorism, consolidated text: Dz. U., 2021, item 1132, with amendments, called “anti-money laundering Act”, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000723/U/D20180723Lj.pdf>; cf. Articles 55-71a.

<sup>370</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council, and Commission Directive 2006/70/EC, OJ EU L 141, 5.6.2015, p. 73, OJ EU L 156 of 19.06.2018, p. 43, OJ EU L 334 of 27.12.2019, p. 155.

<sup>371</sup> Listed in footnote 1, point 2 of the anti-money laundering Act.

<sup>372</sup> Art. 58 of the anti-money laundering act.

<sup>373</sup> Art. 59 of anti-money laundering act.

<sup>374</sup> Art. 2.2.1 of the anti-money laundering act.

Finally, broadcasters, providers of on-demand audiovisual services and providers of VSPs have the obligation to make available the list of all media services, VSPs and daily newspapers and/or magazines provided or published by the provider in question or by the entities belonging to the same capital group (in the meaning of competition law).<sup>375</sup>

#### 5.8.2.4. Disclosure methods

The transparency disclosures provided for in the new provisions of Articles 14a para. 1a-1d, 47c para. 1a-1d and 47m para. 2-5 of the BA should be made available on websites of the obligated providers,<sup>376</sup> in a way that allows easy, direct and permanent access to the relevant information.

There is no specific provision on updates in this context. It may be argued that “permanent access” to information includes the duty of immediate updating or at least updating without undue delay. As regards the information disclosed in the Central Register of Beneficial Owners, the anti-money laundering act sets the deadline of seven days for disclosures and updates.<sup>377</sup>

As mentioned before, the updates on data provided to the KRRiT by broadcasters in the context of applying for a licence should be made within 14 days.<sup>378</sup> The applicant for a licence may request that information that is a trade secret be covered by a confidentiality clause, provided the applicant gives a comprehensive justification for the request and prepares a summary of the information that may be made available to other participants.<sup>379</sup>

#### 5.8.2.5. Supervision and monitoring of the rules

Monitoring and supervision of the above-presented rules on transparency of broadcasters, providers of audiovisual on-demand services and providers of VSPs belongs to the competences of the KRRiT. Its tasks include supervision of the operations of media service providers and providers of VSPs within the limits of powers granted to it under the BA.<sup>380</sup> The Chairman of KRRiT may require from such providers materials, documentation and information necessary to supervise a provider’s compliance with provisions of the BA,<sup>381</sup> as well as call upon a provider to cease practices infringing the act.<sup>382</sup> Acting by virtue of the KRRiT’s resolution, its chairman may issue a decision ordering cessation of such practices.<sup>383</sup>

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<sup>375</sup> With regard to broadcasters – Art. 14a para. 1c and 1d, providers of audiovisual on-demand media services – Art. 47c para. 1c and 1d, providers of VSPs – Art. 47m para. 4 and 5 of the BA.

<sup>376</sup> With regard to broadcasters – Art. 14a para. 1e, providers of audiovisual on-demand media services – Art. 47c para. 1e, providers of VSPs – Art. 47m para. 7 of the BA.

<sup>377</sup> Art. 60 of the anti-money laundering act. Saturdays, Sundays and public holidays are however excluded from the deadline (Art. 60 para. 2).

<sup>378</sup> Art. 37b BA.

<sup>379</sup> Art. 36d BA.

<sup>380</sup> Art. 6 para. 2 p. 4 BA (the revision implementing Directive 2018/1808 as of 1.11.2021 extended the provisions referred to in this and 3 following foot notes - to VSPs providers).

<sup>381</sup> Art. 10 para. 2 BA.

<sup>382</sup> Art. 10 para. 3 BA.

<sup>383</sup> Art. 10 para. 4 BA.

As mentioned, the KRRiT is a constitutional body.<sup>384</sup> The Constitution and the BA provide for certain safeguards of its independence.<sup>385</sup>

#### 5.8.2.6. Penalties and legal consequences

In case of non-compliance with transparency obligations, sanctions are provided for – these being fines imposed in the form of a decision of the Chairman of the KRRiT. With regard to broadcasters failing to comply with transparency obligations laid down in Art. 14a BA, the amount of a fine is up to 50% of the annual fee for the right to use the frequency allocated, to provide the programme service, while broadcasters who do not pay for the right to use the frequency will be liable for a fine of up to 10% of the revenues generated by the broadcaster in the preceding tax year.<sup>386</sup> In case of infringement of transparency obligations by a provider of an audiovisual on-demand media service or a provider of a VSP, a fine would be imposed in the amount of up to 20 times the average monthly remuneration.<sup>387</sup> The height of fines should be determined with “due consideration for the degree of harmfulness of the breach, the former operations” of the relevant provider and its “financial capacity”.

Further legal consequences resulting from monitoring of the implementation of the transparency requirements could be related to anti-concentration rules and/or limits of the share of foreign (non-EEA) capital in entities that may obtain a broadcasting licence, and relevant KRRiT competences regarding granting a licence, its revocation or consent for a transfer of the rights under the licence in case of a merger.

### 5.8.3. Other developments

In recent years media ownership (rather than transparency thereof) and concentration have become a political issue. In different statements, in particular around political/electoral campaigns, the idea of “repolonisation” of the media was raised and the need for more effective regulations concerning media concentration was expressed.<sup>388</sup> Regulatory-wise however the limited anti-concentration rules in the Broadcasting Act remain unchanged

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<sup>384</sup> Art. 213-215 of the Constitution.

<sup>385</sup> E.g. appointment in part by the Sejm (lower house of Parliament), Senate and President (Art. 214.1 of the Constitution, Art. 7.1. BA), ban on membership of KRRiT’s members in political parties (Art. 214.2 of the Constitution) and some other incompatibility restrictions (Art.8 BA), fixed term of office – 6 years (Art. 7.4 BA), ineligibility for the next full term (Art. 7.5 BA), restricted possibilities of dismissal (Articles 7.6 and 12.3-5 BA), and election of the chairperson by the KRRiT from among its members (Art. 7.2b BA).

<sup>386</sup> Art. 53 para. 1 BA.

<sup>387</sup> Art. 53c para. 1 and Art. 53e para. 1 BA.

<sup>388</sup> Cf. e.g. Wojciechowski K., “Media concentration in Poland”, *IRIS Special 2016-2, Media ownership – Market realities, regulatory responses*, EAO, Strasbourg, 2016, p. 114.

and the leading role of competition law (and the competition authority) in media mergers remains intact.<sup>389</sup>

However, in August 2021, following a draft by the group of parliamentarians from the governing party, the amendment to the Broadcasting Act was adopted by the *Sejm* (lower house of Parliament), which aimed at making the existing limitation of foreign ownership of companies eligible for a broadcasting licence stricter by application, also in case of indirect control.<sup>390</sup> The amendment was subsequently rejected by the Senate (higher house of Parliament).<sup>391</sup> The *Sejm* rejected the Senate's resolution.<sup>392</sup> However the President, in accordance with earlier suggestions, vetoed the amendment.<sup>393</sup> The revision was to provide for application of the foreign ownership limit of 49% also to the indirect capital share of foreign entities<sup>394</sup> and limit the eligibility for a licence of foreign entities established in the EEA to such companies which are not controlled by entities from outside the EEA.<sup>395</sup> The interim provisions set a deadline of 6 months for entities holding broadcasting licences to make their capital structures and/or articles of association compliant with the new rules.<sup>396</sup> These amendments were presented by their proponents as clarification of the existing rules, aimed to counteract their circumvention, to prevent entities from non-democratic countries taking control over broadcasters in Poland, and also to make the existing rules more coherent with regard to the treatment of Polish and foreign entities.<sup>397</sup> However the main current practical effect of these revised media ownership rules would be the impact on one of the major private broadcasters (TVN), owned via the EEA company by the US media conglomerate Discovery. Also, the timing of the draft revision coincided with the upcoming expiration of the broadcasting licence of TVN's news channel (TVN24), the renewal of which had been pending for long time, before it was finally granted by KRRiT for the next 10 years in September 2021.<sup>398</sup> In consequence, the revision was often called

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<sup>389</sup> Wojciechowski K., *op.cit.*, p. 105-114; Wojciechowski K., „Country reports: 5.6. PL – Poland”, *IRIS Special 2020-1, Media pluralism and competition issues*, EAO, Strasbourg 2020, p. 87-95. The main practical example of “repolonisation” is the takeover of Polska Press (a regional and local press group) by PKN Orlen (a state-controlled fuel and energy company) from German holding Verlagsgruppe Passau, cf. e.g. in English: [Poland's PKN Orlen says media takeover unchanged by court decision | Reuters](#)

<sup>390</sup> Act of 11 August 2021 amending the Broadcasting Act: [http://orka.sejm.gov.pl/opinie9.nsf/nazwa/1389\\_u/\\$file/1389\\_u.pdf](http://orka.sejm.gov.pl/opinie9.nsf/nazwa/1389_u/$file/1389_u.pdf), called in further footnotes “the BA revision”.

<sup>391</sup> Resolution of the Senate of 9 September 2021 on the act amending the Broadcasting Act (with the statement of reasons): <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1535>

<sup>392</sup> Vote on 17.12.2021.

<sup>393</sup> The decision was announced 27.12.2021; the motion to Sejm with statement of reason is dated 5.1.2022 - cf. <https://www.prezydent.pl/prawo/zawetowane/prezydent-zawetowal-ustawy-o-radiofonii-i-telewizji.47225>

<sup>394</sup> Art. 35.2.1 BA – as to be amended by the BA revision.

<sup>395</sup> Articles 35.3 and 40a.5 BA – as to be amended by the BA revision.

<sup>396</sup> Art. 2.1 of the parliamentary draft BA revision. In addition the broadcasting licences held by foreign entities covered by the revision and expiring during the 9 months following publication of the amendment would be extended for 7 months – according to art. 3 of the draft.

<sup>397</sup> The statement of reasons for the draft amending the Broadcasting Act, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/8COA008B82EDF7BFC125870C0053905C/%24File/1389.pdf>

<sup>398</sup> The licence was granted by the Chairman of KRRiT on 21.09.2021. The same day KRRiT adopted the (non-binding) resolution (230/2021) on “setting in order the rules for broadcasting (...) in Poland to the extend concerning (...) non-EEA entities”, stating that indirect ownership by non-EEA entities of broadcasters holding a licence is problematic and requires further regulatory, legislative and/or judiciary actions:

in public debates “*lex TVN*”. It led to public protests and even further political discussions. Critics of the revision saw it as diminishing media freedom and interfering with foreign investments.<sup>399</sup> The Presidential veto’s statement of reasons referred to the principle of media freedom (Art. 14 of Constitution) and to the protection of investments under the bilateral treaty concluded with the United States in 1990, as well as – in the context of interim provisions – to the principles of protection of interests in progress and acquired rights emanating from the rule of law principle (Art. 2 of the Constitution). At the same time, the President saw the need for making, in the future, the limitation of non-EEA foreign ownership of broadcasters also applicable to indirect control, provided that it was adopted in a transparent legislative procedure and with respect of existing investments.

It remains to be seen whether further legislative or judicial steps will be taken in the matter, and also how the regulatory practice of KRRiT will develop in the context of eligibility for a broadcasting licence in Poland of broadcasters with non-EEA ownership.

The media ownership in Poland may thus be the subject matter of further discussions and developments.

## 5.9. RU - Russian Federation

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### 5.9.1. Media ownership transparency in constitutional law

The Constitution of the Russian Federation establishes the basic guarantees connected to freedom of speech and the principles of information dissemination. Thus, in accordance with Article 29 of the Constitution, the following principles and rules are established:

- everyone shall be guaranteed the freedom of ideas and speech;
- propaganda or agitation instigating social, racial, national or religious hatred and strife shall not be allowed;
- no one may be forced to express their views and convictions or to reject them;
- everyone shall have the right to freely look for, receive, transmit, produce and distribute information by any legal means;
- the freedom of mass communication shall be guaranteed, censorship shall be banned.

The Constitution of the Russian Federation, however, provides for no regulations with regard to transparency of media ownership.

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<https://www.gov.pl/web/krrit/uchwala-krrit-w-sprawie-podjecia-dzialan-majacych-na-celu-uporzadkowanie-zasad-rozpowszechniania-programow-radiowych-i-telewizyjnych-w-polsce-w-zakresie-mozliwosci-dzialania-podmiotow-spoza-europejskiego-obszaru-gospodarczego> .

<sup>399</sup> For more details c.f. e.g.: A. Witkowska, [PL] “*Lex TVN*”. Is Media Independence in Poland Under the Threat?, IRIS 2021-8:1/2, <http://merlin.obs.coe.int/article/9297>.

Meanwhile, it ought to be noted that in the decision of the Constitutional Court of the Russian Federation No. 4-P of 17 January 2019<sup>400</sup> adopted regarding the complaint of *E. G. Finkelstein* on the limitation of his corporate rights of media ownership, the position set out in the judgement of the European Court of Human Rights of 7 July 2012 in the case of *Centro Europa 7 S.r.l. and Di Stefano against Italy*<sup>401</sup> was quoted, according to which a positive obligation to introduce adequate legislative and administrative bases complying with the requirements of clarity and certainty in order to guarantee effective pluralism in mass media and maintain the competitive environment in the audiovisual sector lies with the State. This position was aired with regard to the internal constitutional obligation of the Russian Federation. This very indirect position still points to the necessity of the provision of transparency of media ownership, although it was quoted by the Constitutional Court in a different context.

## 5.9.2. Media ownership transparency rules in domestic law<sup>402</sup>

### 5.9.2.1. Overview

The federal legislation of Russia does not contain special provisions regarding transparency of media ownership. Meanwhile, its separate norms of law connected to media ownership/co-ownership or audiovisual services are of a restrictive nature and involve a specific procedure for disclosing the information on such owners/co-owners, as well as a procedure of ownership agreement: these are Article 19.1 of the Law of the Russian Federation of 27 December 1991 No. 2124-I "О средствах массовой информации" ("On Mass Media") (as amended on 1 January 2021)<sup>403</sup> and Article 10.5 of the Federal Law of 27 July 2006 No. 149-FZ "Об информации, информационных технологиях и о защите информации" ("On Information, Informational Technologies and the Protection of Information") (as amended on 20 March 2021)<sup>404</sup>. Moreover, it ought to be noted that in

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<sup>400</sup> Постановление Конституционного Суда РФ от 17 января 2019 г. № 4-П "По делу о проверке конституционности статьи 19.1 Закона Российской Федерации "О средствах массовой информации" в связи с жалобой гражданина Е.Г. Финкельштейна, <https://www.garant.ru/products/ipo/prime/doc/72050606/>.

<sup>401</sup> Judgment by the European Court of Human Rights (Grand Chamber), 7 June 2012, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, nr. 38433/09, <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2238433%2F09%22%2C%22itemid%22%3A%22001-111399%22%7D>.

<sup>402</sup> The European Audiovisual Observatory has previously dealt with this topic in two publications, see Golovanov D., *The legal framework concerning foreign ownership in Russian media*, IRIS Extra, European Audiovisual Observatory, Strasbourg, 2018, <https://rm.coe.int/the-legal-framework-concerning-foreign-ownership-in-russian-media/16808ee8be> and Richter A., "Foreign agents" in Russian media law, IRIS Extra, European Audiovisual Observatory, Strasbourg, December 2020, <https://rm.coe.int/iris-extra-2020en-foreign-agents-in-russian-media-law/1680a0cd08>.

<sup>403</sup> Закон РФ от 27 декабря 1991 г. N 2124-I "О средствах массовой информации" (с изменениями и дополнениями) (Law of the Russian Federation of 27 December 1991 No. 2124-I "On Mass Media" (as amended on 1 January 2021)), <http://ivo.garant.ru/#/document/10164247/paragraph/282:0>.

<sup>404</sup> Федеральный закон от 27 июля 2006 г. N 149-ФЗ "Об информации, информационных технологиях и о защите информации" (с изменениями и дополнениями) (Article 10.5 of the Federal Law of 27 July 2006 No.

accordance with the Federal Law of 29 April 2008 No. 57-FZ "О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства" ("Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security")<sup>405</sup>, the types of activities that are of strategic importance for ensuring the country's defense and state security include, in particular: the implementation of television broadcasting in the territory within which the population constituting half or more of the size of the population of a subject of the Russian Federation lives; transactions as a result of which a foreign investor or a group of persons acquires the right to, directly or indirectly, dispose of more than 50% of the total number of the votes attributable to the voting stocks (shares) constituting the authorised capital of a business entity of strategic importance. Such activities require prior agreement from the authorising state authority.

Thus, the federal legislation of the Russian Federation contains separate requirements regarding the transparency of ownership of media and audiovisual services where this ownership is exercised by foreign persons.

#### 5.9.2.2. Providers subject to the regulations

In the scope described above, the obligation of ownership transparency applies to media (founders, editorial offices of mass media, broadcasting organisations) and audiovisual services (owners of audiovisual services). From a territorial perspective, the described requirements for media ownership and audiovisual services are limited to the Russian Federation.

In this regard it should be noted that:

- mass media shall be understood to mean a periodical printed publication, an online publication, a television channel, a radio channel, a television programme, a radio programme, a video programme, a newsreel programme, and any other form of periodical dissemination of mass information under a permanent name/title (Article 2 of the Law "О средствах массовой информации" ("On Mass Media"));
- an audiovisual service shall be understood to mean a site and (or) pages of a site on the "Internet", and (or) information systems, and (or) programs for electronic computers which are used to form and (or) organise distribution of a set of audiovisual works on the "Internet", access to which is provided for a fee and (or) subject to an advertising impression aimed at attracting the attention of consumers located in the territory of the Russian Federation, and accessed during the day by more than 100,000 users of the "Internet" located in the territory of the Russian

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149-FZ "On Information, Informational Technologies and the Protection of Information" (as amended on 20 March 2021)), <http://ivo.garant.ru/#/document/12148555/paragraph/3471:0>.

<sup>405</sup> Федеральный закон от 29 апреля 2008 г. N 57-ФЗ "О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства" (с изменениями и дополнениями) (Federal Law of 29 April 2008 No. 57-FZ "Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security"), <http://ivo.garant.ru/#/document/12160212/paragraph/3780:0>.

Federation (Part 1 of Article 10.5 of the Federal Law "Об информации, информационных технологиях и о защите информации" ("On Information, Informational Technologies and the Protection of Information"))).

### 5.9.2.3. Scope and content of the rules

In accordance with Article 19.1 of the Law "О средствах массовой информации" ("On Mass Media"),<sup>406</sup> a foreign state, an international organisation (as well as an organisation under their control), a foreign legal entity, a Russian legal entity (foreign share participation in the authorised capital of which exceeds 20%), a foreign citizen, a stateless person, a citizen of the Russian Federation with citizenship of another state, individually or collectively, does not have the right to own, manage or control, directly or indirectly (including through controlled persons or by means of ownership) more than 20% in aggregate of the shares (stocks) of any person who is a participant (member, shareholder) in the founding entity of a mass medium, the editorial office of a mass medium, or an organisation (legal entity) performing broadcasting.

The list of the documents certifying compliance with these requirements is approved by the regulation of the Government of the Russian Federation of 16 October 2015 No. 1107<sup>407</sup>. These include:

- certified copies of the constitutional documents of legal entities;
- an extract from the shareholder register, the participant list of a limited liability company;
- a document containing, in accordance with the legislation of the country of incorporation of the founders (participants) of a legal entity, information on the authorised (share) capital of a legal entity or shares in the authorised (share) capital;
- an extract from the trade register of the country of incorporation or other equivalent document in accordance with the legislation of the country of incorporation of the founder (participant) of a legal entity;
- a certified copy of an identity document (for individuals);
- a copy of a document confirming the submission of the notice that a citizen of the Russian Federation holds another citizenship or a residence permit or other valid document confirming their right to permanently reside in a foreign state (provided on the applicant's own initiative);
- documents evidencing direct or indirect control (if any).

This last point (documents evidencing direct or indirect control) in the Regulation of the Government of the Russian Federation is not detailed.

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<sup>406</sup> Закон РФ от 27 декабря 1991 г. N 2124-I "О средствах массовой информации" (с изменениями и дополнениями) ("On Mass Media"), <http://ivo.garant.ru/#/document/10164247/paragraph/636514:1>.

<sup>407</sup> Постановление Правительства РФ от 16 октября 2015 г. N 1107 "Об утверждении перечня документов, свидетельствующих о соблюдении учредителями (участниками) средств массовой информации, редакциями средств массовой информации, организациями (юридическими лицами), осуществляющими вещание, требований статьи 19.1 Закона Российской Федерации "О средствах массовой информации", <https://base.garant.ru/71220532/>.

In accordance with Article 19.2 of the Law “О средствах массовой информации” (“On Mass Media”), in the event that the editorial staff of a medium, a broadcaster or a publisher receive funds from a foreign state, an international organisation, a foreign organisation, a non-profit organisation performing the functions of a “foreign agent” in accordance with the legislation of the Russian Federation, a foreign citizen, a stateless person, as well as from a Russian organisation whose participants and (or) founders are the specified persons, the editorial office of a mass medium, a broadcaster or a publisher with a quarterly reporting period, must no later than the 10<sup>th</sup> day of the month following the reporting period provide information on the receipt of funds from the specified persons by accordingly notifying the federal executive authority that exercises the functions of control and supervision in the sphere of mass media, mass communications, information technology and communications.

The list of the documents certifying compliance with these requirements is approved by the regulation of the Government of the Russian Federation of 28 April 2016 No. 368. These include:

- the recipient’s name;
- the recipient’s account(s) details;
- information on the grounds for receiving funds;
- the payment document(s) details;
- copies of documents confirming the grounds for making a payment (payments) by the senders (if any);
- copies of documents confirming the receipt or credit of the sender’s funds;
- activities from the trade register of the country of incorporation or another equivalent document in accordance with the legislation of the country of incorporation of the founder (participant) of the sender’s legal entity.

In accordance with Part 7 of Article 10.5 of the Federal Law “Об информации, информационных технологиях и о защите информации” (“On Information, Informational Technologies and the Protection of Information”), a foreign state, an international organisation (as well as an organisation under their control), a foreign legal entity, a Russian legal entity, foreign share participation the authorised capital of which exceeds 20%, a foreign citizen, a stateless person, a citizen of the Russian Federation holding citizenship of another state, their affiliates, individually or collectively, owning an information resource which is used to distribute a set of audiovisual works on the “Internet” and the number of users of which in the territory of the Russian Federation is less than 50% of the total number of users of such an information resource, has the right to own, manage or control, directly or indirectly, more than 20% of shares (stocks) in the authorised capital of the owner of an audiovisual service provided there is an agreement regarding the specified ownership, management or control, with the government commission.

In accordance with Part 11 of Article 10.5 of the Federal Law “Об информации, информационных технологиях и о защите информации” (“On Information, Informational Technologies and the Protection of Information”), the list of the documents certifying compliance of the owner of an audiovisual service with these requirements is approved by the regulation of the Government of the Russian Federation of 22 November 2017 No. 1413. These include:

- certified copies of the constitutional documents of foreign legal entities with a translation into Russian certified in accordance with the procedure established by the legislation of the Russian Federation;
- the constitutional documents of Russian legal entities (provided on the applicant's own initiative);
- an extract from the shareholder register;
- the participant list of a limited liability company (provided on the applicant's own initiative);
- a document containing information on the authorised (share) capital of a legal entity or shares in the authorised (share) capital, in accordance with the legislation of the country of incorporation of the founders (participants) of the legal entity;
- an extract from the trade register of the state of incorporation or another equivalent document in accordance with the legislation of the state of incorporation of the founder (participant) of a legal entity;
- a copy of an identity document (for individuals);
- a copy of a document confirming submission of the notice that a citizen of the Russian Federation holds another citizenship or a residence permit or other valid document confirming their right to permanently reside in a foreign state (provided on the applicant's own initiative);
- documents evidencing direct or indirect control (if any);
- the decision of the government commission to agree ownership, management or control of more than 20% of the shares (stocks) in the authorised capital of the owner of an audiovisual service in the event that such a decision is required.

Moreover, the owner of an audiovisual service must disclose the following information:

- on the owner of an audiovisual service: for citizens of the Russian Federation, the surname, first name, patronymic (if any), registration address at the place of residence (stay) or address of the actual place of residence; for Russian legal entities, the full and abbreviated (if any) including corporate (if any) name, legal form of organisation, place of business address, taxpayer identification number, primary state registration number, surname, first name, patronymic (if any) of the head of a legal entity, other contact person of the organisation; for individual entrepreneurs, the surname, first name, patronymic (if any), registration address at the place of residence (stay), taxpayer identification number, primary state registration number of the individual entrepreneur; for foreign legal entities, the full and abbreviated (if any) name, state of incorporation, tax identifier and (or) an identifier in the trade register of the state of incorporation, place of business address; for foreign citizens, stateless persons, or citizens of the Russian Federation who hold citizenship of another state, the surname, first name, patronymic (if any), type, number and the country of issue of an identity document, registration address at the place of residence (stay) (if any), e-mail address, phone number, fax number (if any);
- on an audiovisual service: the name of an audiovisual service, the domain name of an information resource on the information and telecommunication network "Internet" which is used to distribute a set of audiovisual works (if any), the number

of users of an audiovisual service located in the territory of the Russian Federation (expressed as percentage of the total number of users).

#### 5.9.2.4. Disclosure methods

All information and documents are centrally submitted to the Federal Service for Supervision in the Sphere of Communications, Information Technology and Mass Communications (Roskomnadzor). The documents can be submitted in the form of hard copies or electronic media. By default, the information and the documents are only available to Roskomnadzor. The information should be updated on a regular basis (once a quarter or ad hoc – from the date of change in the ownership structure).

#### 5.9.2.5. Supervision and monitoring of the rules

The authority responsible for compliance with the aforementioned requirements is the Federal Service for Supervision in the Sphere of Communications, Information Technology and Mass Communications (Roskomnadzor). No special requirements for this federal service are provided for by the law. From the perspective of the hierarchical structure of the governmental authorities, Roskomnadzor reports directly to the Government of the Russian Federation.

The service itself is primarily of a passive nature: data verification submitted by the subjects, which are subject to control, as described above. However, Roskomnadzor also has other powers.

Thus, in accordance with Clause 6 of the Regulation of the Government of the Russian Federation of 16 March 2009 No. 228 “On the Federal Service for Supervision in the Sphere of Communications, Information Technology and Mass Communications”<sup>408</sup>, Roskomnadzor for the purposes of exercising its powers in the established sphere of activity has the right:

- in accordance with the established procedure, to request and receive the information needed for making decisions on the issues referred to its competence;
- to conduct necessary investigations with regard to issues referred to its competence;
- in accordance with the procedure and in the cases established by the legislation of the Russian Federation, to apply preventive and restraining measures in the established scope of activities aimed at preventing violations of the mandatory requirements in this sphere by legal entities and individuals, and (or) eliminating the consequences of such violations.

Moreover, in accordance with Clause 2 of Part 14 of Article 10.5 of the Federal Law “О Федеральной службе по надзору в сфере связи, информационных технологий и массовых коммуникаций” (“On Information, Informational Technologies and the

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<sup>408</sup> Постановление Правительства РФ от 16 марта 2009 г. N 228 “О Федеральной службе по надзору в сфере связи, информационных технологий и массовых коммуникаций” (с изменениями и дополнениями), <https://base.garant.ru/195117/>.

Protection of Information”), Roskomnadzor has the right to file an application to the court for access restriction regarding an audiovisual service if the owner of that service fails to comply with the requirements regarding disclosure of the information on foreign persons – co-owners of the audiovisual service in the manner described above.

In accordance with Article 31.7 of the Law “О средствах массовой информации” (“On Mass Media”), Roskomnadzor also has the right to apply to the court requesting to revoke a media licence in the event of failure to comply with the requirements regarding disclosure of the information on foreign persons – founders of media in the manner described above.

#### 5.9.2.6. Penalties and legal consequences

In accordance with Article 13.15.1 of the Code of Administrative Offenses of the Russian Federation, failure to submit or late submission by the editorial office of a mass medium, a broadcaster or a publisher of the information on the receipt of funds, the submission of which is provided for by the legislation of the Russian Federation on Mass Media, shall entail the imposition of an administrative fine on officials in the amount of RUB 30 000-50 000 ; on legal entities, of once to twice the amount of the funds received by the editorial office of a mass medium, a broadcaster or a publisher, and the information on the receipt of which must be submitted in accordance with the legislation of the Russian Federation on Mass Media. Repeated commission of the administrative offense described above shall entail the imposition of an administrative fine on officials in the amount of RUB 60 000-80 000 ; on legal entities, of three to four times the amount of the funds received by the editorial office of a mass medium, a broadcaster or a publisher, and the information on the receipt of which must be submitted in accordance with the legislation of the Russian Federation on Mass Media.

In accordance with Article 19.7.10-2 of the Code of Administrative Offenses of the Russian Federation<sup>409</sup>, failure of the owner of an audiovisual service to comply with the requirements of Roskomnadzor to eliminate detected violations of the legislation of the Russian Federation shall entail the imposition of an administrative fine on citizens in the amount of RUB 50 000-100 000; on officials, of RUB 200 000-400 000; on legal entities, of RUB 600 000 to 1 million. Repeated commission of the administrative offense described above shall entail the imposition of an administrative fine on citizens in the amount of RUB 200 000-300 000; on officials, of RUB 500 000-700 000; on legal entities, of RUB 1.5 to 3 million. This administrative scope also covers the cases of non-disclosure of the information on foreign ownership of an audiovisual service.

Moreover, as observed above, Roskomnadzor has the right to judicially impose other sanctions in the event of violation of the procedure of disclosure, non-disclosure or submission of false information on foreign ownership of media or an audiovisual service, these being:

- restriction of access to an audiovisual service in the Russian Federation;

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<sup>409</sup> "Кодекс Российской Федерации об административных правонарушениях" от 30.12.2001 N 195-ФЗ (ред. от 01.07.2021), [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_34661/12b1fd004937e30d015b03d5496a7d4c5b80c6f3/](http://www.consultant.ru/document/cons_doc_LAW_34661/12b1fd004937e30d015b03d5496a7d4c5b80c6f3/).

- suspension or revocation of a media licence.

### 5.9.3. Other developments

In general, it ought to be noted that the issue of ownership transparency of media and audiovisual services in the Russian Federation from the perspective of legislative control is expressed only as applied to foreign ownership. In these cases, specific mechanisms securing transparency of such ownership are provided for by the law. If ownership of media and an audiovisual service is not associated with the presence of a foreign element, then the issue of ownership transparency is not specifically expressed in Russian law.

## 6. Comparative analysis

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### 6.1. Introduction

The nine country reports in this IRIS Special issue cover six EU member states – France, Germany, Ireland, Italy, Poland and Spain – as well as the United Kingdom, a Council of Europe member that recently left the EU, and two other Council of Europe members – Switzerland and Russia. Of these, Switzerland, as an EFTA member, is closely linked to the EU economically through bilateral agreements.

The reporting countries cover the largest (media) markets and language areas in Europe. At the same time, they differ in terms of media ownership structures and concentration density, as evidenced, for instance, by a high media ownership concentration in the Italian market. The EU member Ireland is particularly interesting because it is home to the EU headquarters of many of the major international digital media players. In some of the reporting countries, private media ownership is subject to greater state control than in others, for example in Russia or Poland. Especially in Poland, this development is particularly dynamic and of topical relevance in view of the takeover of the largest print media group by an oil company with close links to the state and considering the current legislative activities concerning media ownership.

### 6.2. Media ownership transparency in constitutional law

As a rule, the principle of a pluralistic media system, as recognised as an element of Article 10 ECHR by the case law of the ECtHR, follows from freedom of speech and information as well as freedom of the press and the media, enshrined in the constitutional law of the reporting states. Almost everywhere, however, there are no specific constitutional provisions on media ownership transparency, just as there are none in primary EU law. The only exception in the reporting states is the Italian constitution, Article 21 of which explicitly affirms the principle of media ownership transparency. By contrast, the principle of transparency of public administration is to be found in many constitutions. Even in cases where no such principles are mentioned, relevant obligations and prohibitions that also promote transparency follow from constitutional law. This equally applies to the UK, which has no written constitution. Furthermore, there are examples of constitutional courts, such as the French Constitutional Council, that have emphasised the need for transparency to ensure that the principle of media pluralism is effective in practice.

### 6.3. Media ownership transparency rules in domestic law

Apart from constitutional law, the legal systems of most reporting states contain varying rules on media ownership transparency. Only Ireland has no specific statutory law provisions. In the other states covered, relevant provisions are to be found directly in media law and also follow from competition or anti-trust law, company law or foreign trade law. In Germany, media law itself does not come under the jurisdiction of the federal government but is a matter for the *Länder*, although federal business-related legislation is also relevant for the media, especially for the online sector. In Switzerland, too, much of the responsibility for media policy lies with the cantons. However, an obligation to disclose the ownership of print products is also laid down in federal legislation on media concentration and in criminal law. In addition to the legal obligations applying in Switzerland, there are media ethics rules contained in the Code of Journalists with relevant references to disclosures. The UK does not have many relevant media-specific regulations but additional direct or indirect disclosure obligations follow from rules of general applicability. In Italy, too, relevant additional regulations are to be found in resolutions by the supervisory authority. In Ireland, the lack of provisions of statutory law means that media ownership transparency is primarily ensured through administrative action by the authority responsible.

With regard to the EU member states and the UK, which has also implemented this instrument, it is necessary to highlight the AVMSD Directive, as amended by Directive (EU) 2018/1808. The implementation of this Directive in the member states has helped to shape the relevant provisions, although it recognises a margin of appreciation and leaves the introduction of the disclosure of media ownership to the member states. Accordingly, some states, such as the UK, have based their rules on the Directive's minimum requirements concerning the supply of information on an audiovisual media service provider, while others have laid down more extensive ownership information obligations in their legal systems. Some EU states have not yet completed the implementation process. Of the reporting states, these are Spain, Ireland and Italy.

The above-mentioned rules on the transparency of ownership structures generally apply to media companies, but not all types of media are equally affected by them in every state (see the next section on media subject to the regulations). Such transparency rules pursue objectives in the public interest. For example, preventing the concentration of ownership structures to ensure media diversity is a top priority. In addition, there is a need to ensure transparency concerning the interests behind media companies and to prevent the 'invisible' influence of individual interests and unsuitable players on a media market. Ultimately, the aim is also to prevent a media owner's undue influence on public opinion and to enable the free and independent formation of opinions. Furthermore, the intention is to ensure that those responsible meet the requirements for the granting of licences and the operation of the media service. In addition to these objectives, limits to media company ownership by third-country nationals in some of the reporting states generally determine the direction of domestic legislation, as in Poland concerning nationals of a non-EEA state or in Russia concerning nationals of any third country. At least in some of the reporting states, transparency obligations are also aimed at strengthening journalistic independence. In some cases, violations of disclosure obligations are also punishable under criminal law (relating to the media) (on the question of sanctions, see below.)

For these reasons, disclosure obligations, for example by means of an imprint, and registration obligations by means of registration of ownership, are also envisaged for media which can be offered without granting a licence. Insofar as the granting of licences is necessary, a precondition is the meeting of transparency requirements.

### 6.3.1. Providers subject to regulations

As far as the providers subject to the regulations are concerned, it is necessary to distinguish between the legal instruments that explicitly provide for the transparency of media ownership, and those from which such a rule may merely be implicitly inferred.

Provisions of competition law and company law apply to all companies and groups of companies operating either exclusively or partially in a (media) market and are not only limited to media companies. German antitrust law however provides for explicit exceptions to its application in the case of certain agreements between newspaper and magazine publishers. Provisions of the law relating to foreign trade are also not limited to media players but concern any company whose acquisition could affect the public order or the security of the reporting state or of another EU member state, or which could be detrimental to projects of EU interest.

This is different for the provisions of media law addressing public and commercial media companies. These generally include broadcasters, press companies (including online providers), telemedia such as intermediaries, online search engines, on-demand services or video-sharing platforms (VSPs), as well as infrastructure-based media platforms such as television cable networks. Not all media companies are always subject to such obligations. In Spain, for example, only AVMS providers are covered by the transparency rules, unlike press publishers and online media providers. On-demand services or VSPs, on the other hand, are exempt from relevant obligations in Switzerland and Russia, which, as non-EU states, do not have to comply with the AVMSD and which, at least so far, have not enacted comparable regulations. In France, too, VSPs are not covered as far as transparency of their ownership structures is concerned. In Russia, there are also *de minimis* requirements, according to which only “mass media” or online services with a minimum daily number of users are covered. Similar requirements can be found, for example, in the case of Swiss radio and television services with a limited reach or an annual operating expenditure below a set threshold, which are exempt from the obligations. In Russia, there is also the proviso that transparency requirements only apply in the case of foreign influence on a media company. In some countries, the target group is much broader. In Italy, for instance, advertising agencies, companies that produce or distribute radio or television programmes and national press agencies are included. In Spain, not only the main owners but also significant shareholders are subject to the regulations. When considering the applicability of the different national regulations to media companies, it should also be noted that, owing to the country of origin principle, television broadcasters only have to comply with the regulations of the member state under whose jurisdiction they fall. In the other reporting states, as well as in the UK as of 31 December 2020, the country of destination principle applies, but in the UK, this does not include states that have acceded to the Council of Europe’s European Convention on Transfrontier Television.

The various media players – “traditional” linear providers, online providers, press companies – are in many cases treated as different from each other in legal terms (if they are subject to relevant regulations at all), which manifests itself in different legal bases and in the fact that players are to a different extent, whether directly or indirectly, subject to the provisions concerned. In the UK, for example, whether or not digital providers fall within the scope of the rules depends on their own self-assessment. An important development in the legal bases is that the group of providers targeted is being constantly expanded to include online services. This has, for instance, already happened in the AVMS Directive, with the possibility for provisions to apply to all providers covered and is also envisaged in the UK in the draft Online Safety Bill.

### 6.3.2. Scope and content of the rules

As far as the substantive scope of the rules enacted in the reporting states is concerned, the disclosure of media ownership structures is typically required for the granting of licences by the regulatory authorities and is generally already necessary under company law for the registration of a company. In Italy, such disclosures are also a precondition for potential subsidies or other support. Distinctions are made between the different types of providers subject to the provisions, including with regard to their legal form and as to whether the rules only refer to a company registration or the granting of a licence. While media-specific data must be submitted for the latter, the information required for a (company) registration is typically more extensive, including for example details on the type of company, its business activities, the type of liability, nominal capital and shareholders or company management. In the case of shareholders or management, at least such personal data as an individual’s address, date of birth and nationality must be provided. In Ireland, for example, the shareholder’s Personal Public Service number (their national insurance number) must also be supplied. In the case of legal persons, further requirements are often imposed according to the shares they have issued.

An example of the different treatment of the various players can be seen in the UK, where on-demand services and VSPs are partly subject to different regulations compared to, for instance, television broadcasters. In EU/EEA states, broadcasting licences can only be granted to natural or legal persons resident or established there. In Germany, the non-governmental nature of broadcasting means that, irrespective of their origin, legal entities under public law and political parties/voters associations cannot be granted a licence, but there are exceptions to this rule. Similar restrictions exist in the UK. Extensive restrictions also apply in Russia, especially for “mass media”, while the requirements for Internet-based services are less strict. The responsibility for issuing licences lies with public authorities, which in Germany and Switzerland are located at the level of the federal states.

The information to be disclosed includes, in addition to the full names of natural persons or the company names of legal persons, contact data such as private and business addresses, telephone numbers and digital communication channels such as email addresses and websites. In the case of legal entities, a typical requirement is to list the administrative bodies and management as well as the identity of their members, direct and indirect shareholdings, and capital and voting rights of all the companies concerned or those

significantly involved, including their contact details. In some cases, it is also necessary to mention (significant) active and indirect shareholdings in other legal entities or the influence on them. Occasionally, articles of association and other agreements must also be produced. Further data that must be provided in some, but not all, reporting states include the nationality/nationalities of natural persons and their tax identification numbers or identity documents. As far as media business activities are concerned, it is necessary to mention the location, type, focus and target groups, the number of employees or journalists employed, sources of income and (detailed) information on the amount of income or information on previous insolvencies/bankruptcies. Especially in Russia, it is essential to submit proof of direct and indirect sources of income from third countries. In addition, further details, such as bank account data, the motivation for or reasons behind the financing and complete or detailed evidence of individual transactions must be provided. Even extracts from the register of companies of third-country participants from their countries of origin must be provided. Russia also requires documents that are to be submitted from third countries, such as articles of association, to be provided as certified copies in Russian. In Spain, it is envisaged that media law will in the future also require the proportion of women on the board of directors to be indicated. In the UK, on-demand services have to disclose their on-demand platforms/channels, such as apps or websites, in addition to the above-mentioned general information, and VSPs continue having to state their name, the commencement date of their service and the name of a person for the public to contact. The latter is increasingly becoming mandatory for VSPs in other reporting states. In Poland and Russia, VSPs are required to provide similar information and in Russia market shares also have to be disclosed.

Often, written statements indicating that the information provided is complete are required. Data changes must either be reported to the relevant authorities in advance or must at least be communicated later. For example, (significant) changes in ownership or control must be reported (D) or notified (CH, GB). Otherwise, licences granted may be revoked or amended depending on the effects of the changes. The relevant notification periods vary. In the UK, for example, in the case of on-demand services and VSPs they are 10 working days before the start of providing the service concerned, while in Germany the period for infrastructure-based media platforms is one month. For subsequent notifications, the deadlines are between one week (PL) and one month (CH, E) after changes have been made. In many cases, it must be confirmed at regular intervals that the data submitted is up to date. In Germany, Switzerland and the UK, for example, this must be done annually. There are also annual reporting obligations in Italy, where fundamental information must always be submitted whereas certain details need only be provided in the event of intervening changes in the data. In Russia, updates must be submitted quarterly.

In addition, there are regulations that set *de minimis* limits for the determination of dominant opinion forming power, for example with regard to the audience share of all broadcasting activities, such as television programmes, that can be attributed to a company on the basis of ownership interests subject to company law. In Germany, such market concentration constitutes an obstacle to the granting of a licence for additional programmes attributable to that company. In some cases, there are regulations aimed at preventing “double monopolies” in the form of the cross-ownership of press and

broadcasting companies, primarily at regional and local level, for example in most of the German *Länder*.<sup>410</sup>

In media sectors with no obligation to obtain a licence, there are also disclosure obligations in the form of requirements to publish imprint information, which may vary in terms of the details provided, although press products must either always or regularly contain a certain amount of information on the publishers responsible. However, there are also disclosure obligations aimed at benefitting users in the case of on-demand services and VSPs, which must provide contact details and mention the supervisory authority as a complaints body on their on-demand platforms/channels. Particularly in Spain but also elsewhere, far-reaching new requirements are about to be adopted in connection with the implementation of the AVMSD.

The transparency of media ownership is also very important in competition law, as can be seen in particular in the legal situation in Ireland, where the transparency requirement primarily follows from this body of law: knowing who a company's owners are is important to prevent the abuse of economic power and excessive restrictions on media diversity. These restrictions can, of course, also be brought about by changes in the market structure after a merger and without ownership transparency it is not possible to monitor mergers effectively with regard to their impact on media pluralism. In the EU, however, a member state's antitrust authorities are only authorised to examine a merger in a particular case if the European Commission is not responsible for doing so, which is the case when it falls below certain turnover thresholds. For the determination of these thresholds, transparency is once again a precondition. In Poland, broadcasters, on-demand services and VSPs are obliged to publish a list of all their media and press products, including products of the same corporate group, in order to identify a level of market power relevant under competition law. Similar rules exist in France.

In foreign trade law, transparency rules are relevant for determining whether third-country nationals – or, in the EU, non-EU nationals – own or exercise strategic control over a company. The relevant checks are especially important in the case of media companies that contribute to the formation of public opinion, not least in order to achieve the above-mentioned transparency goals. The applicable level of direct or indirect voting rights held by the acquirer after the acquisition ranges between 5% (E) and 40% (F) in the reporting states. These figures are laid down in media law in Spain and Russia, in company law in France and in foreign trade law in Germany (10%).

### 6.3.3. Disclosure methods

The transparency requirements in the reporting states to a large extent go hand in hand with media players' disclosure obligations not only towards the relevant supervisory authorities but also the public. The public, however, does not have equal and necessarily unrestricted access to the data everywhere. In some reporting states, a fee is payable to view certain data, and in the case of Spain this applies even to all data. Additionally, the

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<sup>410</sup> <https://rm.coe.int/media-ownership-market-realities-and-regulatory-responses/168078996c>.

information is not always made available in an open and reusable format. In Poland, access was, until 2020, only possible on the premises of competent courts. In Russia, on the other hand, the data are only available to the supervisory authority. Data pertaining to competition and foreign trade law are also generally withheld from the public. However, where there are obligations towards the public for the provision of information, these are met to a large extent by the relevant supervisory authorities or in some cases also by other state agencies or private parties commissioned for this purpose. In addition, media companies themselves are responsible for ensuring data accessibility.

In the licensing process, media companies must, in some countries such as Germany, conduct communications with the supervisory authorities in writing. However, electronic data transmission is now (also) often possible, for example through the relevant authorities' online portals. In the UK, both means of transmission are available to on-demand services; whereas VSPs must always register via an online portal of the supervisory authority. In Germany, media companies are provided with the appropriate forms by the institutions concerned. With regard to communicating changes and submitting regular reports, this is, among the reporting states, at least explicitly the case in Italy.

Media data are often made available to the public through online databases and registers of the responsible authorities– or, as it is the case in Ireland, of private organisations commissioned by the authorities. These provide information on, for example, responsible persons, contact details and shareholdings in relation to the various media players. In some cases, information is also provided through penalties imposed by supervisory authorities for breaches of transparency requirements. Where no general media-specific databases exist, as in the UK, basic information is available through general company registers. However, in the UK as well there is a list of on-demand services with key data compiled by the regulator, and such a list is in the planning for VSPs. Key data of licensees and an overview of the latter are also published on the authority's website and updated monthly. In Ireland, a report must be compiled and published online every three years by the responsible governmental department, outlining ownership and control structures for media companies operating in the country, changes to them during the reporting period and an analysis of their impact on media diversity. The media database is updated annually. Similar reports are required in Switzerland, where specialised online transparency services are also available.

As a rule, data communicated to the authorities is subject to restrictions on their public accessibility: information on a natural or legal person's personal or material circumstances or trade and business secrets that have been communicated are exempt from publication obligations. In individual reporting countries, such as Poland and the UK, the relevant applications must be made but do not necessarily have to be fully granted.

There are also the disclosure obligations on the websites of certain media players already outlined in the previous section, aiming to ensure simple, direct and permanent broad public access.

### 6.3.4. Supervision and monitoring of the rules

In most of the reporting states, the meeting of requirements under media law is monitored by the relevant supervisory authorities, which are always independent in the EU (whereas the Swiss regulator BAKOM is not independent). These authorities – which act, if necessary, in cooperation with the courts concerned, as is the case in Russia – also carry out tasks such as determining ownership in connection with the granting and withdrawal of licences as part of the supervision of media companies and fulfil the aforementioned publication obligations. In Germany, these authorities are located at the level of the *Länder* but avail themselves of coordinating services of federal institutions for matters of nationwide importance. The responsibility of the Ministry of Economic Affairs in Spain is particularly noteworthy. In Ireland, owing to the lack of specific regulations under media law, there is no genuine supervisory authority that carries out monitoring specific to media companies beyond the granting of licences. General supervision there is undertaken by various authorities responsible for the register of companies.

The relevant antitrust and registration authorities are responsible for ensuring that the requirements of competition law and company law are met. As far as the law on foreign trade is concerned, checks are carried out by the relevant central government agency. Where necessary, authorities responsible for ensuring compliance with media and competition law cooperate with one another. In Italy the supervisory authority also works with the financial police.

### 6.3.5. Penalties and legal consequences

As far as penalties are concerned, a distinction must first be made between breaches of transparency obligations in the licensing process and those that occur outside of this process, that is to say either after a licence has been granted or in situations where no licence is required. Breaches of competition law in particular also need to be mentioned.

Under media law, the primary threat faced is the refusal to grant a licence or the reduction/limitation of its validity in terms of time, the imposition of amendments or a decision to suspend or withdraw/revoke the licence. Clearance certificates, where required (as in Germany), can also be refused. The enforcement notices or orders with which the supervisory authorities in the UK and Switzerland first request media companies to cease their breach are more lenient. As a rule, breaches, which are predominantly classified as administrative offences and occasionally – such as in the UK or, under certain circumstances, in France – as criminal offences, are subject to the imposition of fines. The maximum fines are approximately RUB 3 million (Russian roubles, approx. EUR 35 000), EUR 250 000 (I), GBP 250 000 (approx. EUR 292 000) or (at most) 5% of the relevant turnover, whichever is higher (UK), EUR 500 000 (D) and EUR 1 million (E). Relative fines up to 10% of annual turnover can also be issued in Poland and Switzerland. In the UK, Italy and Russia, those concerned can also be excluded from the granting of licences altogether for a fixed period. In Ireland, breaches of transparency obligations under company law can result in a fine of up to EUR 500 000 and up to 12 months' imprisonment. In Italy, prison sentences of up to five years may be imposed.

In Switzerland, measures can also be taken against an existing media concentration that has resulted from breaches of transparency rules, for example by imposing obligations to grant broadcasting time to third parties or by adapting organisational and corporate structures of the company concerned.

Especially from Switzerland and Spain, it has been reported that no penalties have yet been imposed, while fines in Italy have so far always been moderate.

Breaches established in proceedings under competition or foreign trade law can lead to the refusal of a planned takeover or intended merger of media companies.

## 6.4. Outlook

Not least with regard to new media players, dynamic legal developments are still taking place in many reporting states. In Spain, Ireland and Italy, legislative processes that also relate to transparency obligations concerning media ownership are underway in the implementation of the AVMSD. In a separate development, legislative adjustments are also taking account of the dynamics of the digital economy and the growth of its large platforms. The EU's planned Digital Services Package is expected to bring about further relevant changes in the member states, depending on its final form. As the process is still in its early stages, a direct impact on the member states' legal systems is not to be expected for the time being. In Switzerland and the UK, new legislation can also be expected in areas relevant to the subject under discussion here. In many cases, planned changes to the legal provisions applying to these companies are also aimed at achieving greater transparency



## 7. Conclusions

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This IRIS Special issue deals with the question of what transparency requirements for media ownership follow from European law and from examples of national approaches. The analysis takes as its starting point the reasons why transparency requirements exist at all and how corresponding legal obligations are justified. Finally, the question will once again be raised: who actually benefits from transparent media ownership structures. The answers vary, as do the beneficiaries of such transparency.

First of all, there is society itself: where transparency serves to achieve its main goal of media pluralism, media consumers benefit from a diverse and balanced range of services that convey different opinions and positions, which do not focus on one-sided interests. In other words, transparency in this respect is what makes it at all possible to show the many different structures behind the media services. The competition associated with this also enhances the quality of the overall offering. Transparency thus enables consumers to check and monitor the media and also helps to strengthen their trust in the content made available to them.

Media companies and media organisations can also benefit from a transparent system. On the one hand, transparency contributes to a market environment characterised by open and fair competition, while on the other hand, the transparency and disclosure obligations imposed on media providers also enable them to demonstrate their own independence and can therefore also be used as indicators of a quality offering, which expands the range of content.

In particular, a transparent market mapping makes it easier for regulators and other state or supranational bodies to carry out their (supervisory) tasks. On the basis of the information and data to be disclosed to them, they can, for example, check compliance with licensing requirements under broadcasting legislation and grant or withdraw broadcasting licences in accordance with objective criteria if the initial situation changes. Likewise, decisions relevant to competition law, for instance on company mergers or abusive practices, can only be made when the necessary information is available. This is facilitated by reporting obligations, meaning that the finding does not rely on individual information requests in the investigation procedure. Transparent information on the provider also makes it easier and quicker to decide where to impose supervisory measures or, in cases in which they are applied, even where to direct criminal investigations or penalties.

In recent years, the introduction of extended transparency obligations has consequently received considerable attention, and general or specific transparency and

disclosure obligations have been introduced in numerous legal instruments. It is only possible to infer a general transparency principle directly from the EU treaties or the ECHR, but no media-specific principle. Nevertheless, there are different approaches of secondary EU law aimed at the disclosure of media companies' ownership structures. These are, however, not generally binding on EU member states and provide only partial possibilities for harmonisation. For example, the AVMS Directive stipulates that media service providers are subject to certain imprint information obligations, which relate in particular to the identification and contact details of the provider. It is not compulsory to impose additional disclosure obligations concerning the ownership of the media provider and thus showing the type and extent of any economic influence on the provider, but the Directive merely makes it possible to adopt such obligations. The member states are thus free to decide whether or not to enact such regulations. This approach shows that the particular importance of transparency regulations in the media sector – given the media's influence on the opinion-forming process – is increasingly being taken into account. Nevertheless, the non-binding nature of the provision means that member states can still maintain their lack of transparency rules in this sector, as in the case of the reporting state Ireland discussed in this issue. This is a consequence of the current state of EU law. It is therefore not possible to bring about a harmonised legal situation directly, at least within the EU.

Against the background of the constitutionally guaranteed freedom of information and freedom of the press, the objectives pursued by transparency rules in the media sector are gaining in significance. However, except for Italy, media ownership transparency is generally not explicitly recognised in the constitutional laws of the reporting states. Instead, in many cases, there are specific provisions of statutory law, partly in implementation of, or with reference to, corresponding EU legal acts.

Different approaches are therefore to be found in secondary EU law in fields that do not directly address the media sector, for example in the EU Money Laundering Directive and the GDPR, which is particularly relevant for media companies. In both, approaches to the transparency of ownership structures can be found and have an effect either directly or through implementation in the EU member states. However, the Money Laundering Directive is not specifically tailored to media service providers. The GDPR has a very specific scope of application, which also applies to other relevant legal acts such as the Copyright Directive or, in particular, the P2B Regulation with transparency obligations for online providers.

As far as mergers are concerned, EU competition law only applies above certain thresholds, so it is only applied in the “major” cases relevant to the Single Market. For matters involving competition law (and foreign trade law) below the threshold, the non-harmonised laws of the 27 member states apply. In this IRIS Special, in addition to some EU member states already mentioned (Ireland and Italy, as well as Germany, France, Poland and Spain), three other Council of Europe states (Russia, Switzerland and the United Kingdom) are also examined in more detail. Here, too, it is confirmed that independent approaches can be found in the respective legal systems, both in terms of media law and with regard to non-media-related transparency obligations, meaning that the legal situation across Europe presents a mixed picture.

It should be noted, however, that the development is currently still very dynamic with regard to transparency in the case of audiovisual media service providers. The process

of transposing the 2018 reform of the AVMSD into national law had not yet been completed at the time of this publication, and despite the lack of a mandatory transposition order in Article 5(2), some of the reporting states are planning to introduce transparency and disclosure obligations that go further than the mere requirement in Article 5(1) to supply a media service provider's details. Even outside the geographical scope of the Directive, some reporting states are being guided by its requirements, as has been shown in the case of the United Kingdom. Nevertheless, the overall situation in Europe will remain such that the addressees of the regulations and the scope of the information to be disclosed by the providers, beyond a core set of data that is required everywhere, can remain different from state to state, since the Directive leaves corresponding leeway and is only binding in a limited number of states. In particular, as far as on-demand services and video-sharing platform providers are concerned there are (still), in certain reporting states, exceptions to the disclosure obligations that apply to linear service providers, although the scope of application of the rules is increasingly being extended to them too.

The transparency of ownership structures can also have a limiting effect if, for example, there are strict regulations on what kind of foreign participation in media companies is permissible. In Poland and Russia in particular, as shown in this issue, the comprehensive regulations resulting from the disclosure obligation can lead to obstacles to the granting of a licence. In the report on the situation in Russia, it is pointed out that the relevant law places non-Russian providers in a worse position than domestic ones.

Differences arise not only in the case of the substantive provisions but also with regard to the monitoring and supervision of the rules. However, certain aspects are harmonised at least throughout the EU, such as the independence of the supervisory authorities responsible. For the non-EU member Switzerland, however, it has been pointed out that the state body responsible for compliance with the transparency requirements is not independently structured. Penalties for breaches of the transparency rules also vary: for providers subject to licensing, the refusal to grant a licence in the event of non-compliance with the conditions is equally possible as the suspension or permanent withdrawal of a licence already granted. The amount of the fines that can be imposed differs widely from one state to another. This is due to the fact that individual states can impose both turnover-based fines and fines without an upper limit. In some cases, there are even more severe consequences, such as the exclusion from future licensing procedures or prison sentences for those responsible.

The methods by which disclosure is achieved differ considerably. This is true in particular with regard to making the relevant data available to the public and less so in the case of obligations to submit reports to the authorities responsible. As far as informing the supervisory authorities is concerned, a digital option has not been introduced everywhere and communication is still required in writing. In many cases, however, communication via online portals is already standard practice. For the general public, access difficulties arise, for instance, because no media-specific databases can be accessed or because they are not complete or up to date. In some countries, the public has to rely on the general business registers, which often contain only limited data categories. In addition, a fee is sometimes payable for retrievals and, at least in Spain, the report indicates that the high fees can have a prohibitive effect on asserting the right to information. Moreover, disclosure to the public shows in some respects the conflict between the intention to ensure transparency and data

protection considerations, which can lead to individual items of information remaining inaccessible to the public in order to ensure greater data protection.

It is particularly important to emphasise that several current legislative processes in the EU are focusing on transparency and involve key provisions in this regard. This concerns on the one hand the much-debated Digital Services Package, with the proposed Regulations for a Digital Services Act and a Digital Markets Act, and on the other hand, planned rules for regulating artificial intelligence. As the proposals currently stand, the scope of application of the new rules would only refer to digital providers and those that work with artificial intelligence, and therefore not necessarily to media companies. In particular, they are not intended to be cross-media in nature.

The Council of Europe's various recommendations and declarations on media pluralism and media concentration are also far-reaching. Although not directly legally binding on Council of Europe member states, they can influence the public discourse and ultimately the national legislative processes.

In addition to transparency activities that are either guaranteed or promoted by state authorities, there are also private initiatives or officially commissioned third parties that make available and maintain the relevant databases, as is the case, for instance, for Ireland. In addition, there are players that are either affiliated with international organisations, such as the Council of Europe, or with research institutions such as universities, or that are established as non-governmental organisations. With their databases and reports, they constitute an important source of information for politicians, regulatory authorities, researchers and, last but not least, civil society. Relevant initiatives are often supported or initiated by the EU. With its call for tenders for a transparency project, the European Commission has signalled, in late 2020, that it would like to become even more involved in the area of disclosure obligations in the future, with the aim of promoting media freedom.

To paraphrase the quotation from Niklas Luhmann used in the introduction to this IRIS Special:

*If we know through the media what we know about our society, indeed about the world we live in, then we must also know about and from the media.*

The public watchdog itself needs its own watchdog: the “watchdog’s watchdog” is society, as Luhmann understood it, and it is thus all of us.



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