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COMUNICACIÓN Y SOCIEDAD  
Vol. XXIV • Núm. 2 • 2011 • 41-75

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## Políticas de comunicación y protección del pluralismo en la Unión Europea y Estados Unidos

### *Communication Policies and the Protection of Pluralism in the European Union and the United States*

Recibido: 31 de marzo de 2011  
Aceptado: 9 de mayo de 2011

**RESUMEN:** Este texto describe y analiza el marco reglamentario y la política actual de protección del pluralismo en Estados Unidos y en diversos países de la Unión Europea (Alemania, Francia, Reino Unido, Holanda, Italia y España). Los datos obtenidos

**ABSTRACT:** This article describes and analyses the regulatory frameworks and the current pluralism protection policies in the United States and several countries of the European Union (Germany, France, the United Kingdom, the Netherlands, Italy and

permiten plantear una valoración cualitativa, gracias al análisis comparativo, donde se identifican ciertas semejanzas y también algunas diferencias significativas. Así, se observa que la protección del pluralismo es un referente común en las políticas de comunicación de estos países. No obstante, el marco reglamentario y normativo presenta diferencias, según el contexto social, geográfico y comunicativo, y la aplicación de dichas políticas presenta variaciones temporales en función del proceso de liberalización del mercado audiovisual.

**Palabras clave:** políticas de comunicación, pluralismo, concentración de audiencia, Estados Unidos, Unión Europea.

*Spain). The data obtained allowed a qualitative assessment to be carried out, through a comparative analysis, in order to identify certain similarities and some significant differences. Thus, it was found that pluralism protection is a common denominator in the communication policies of these countries. However, regulatory and legislative differences depend on social, geographical and media contexts, and time variations in the application of policies depend on audiovisual media market liberalisation processes.*

**Keywords:** Communication policies, pluralism, audience concentration, United States, European Union.

## 1. Introduction<sup>1</sup>

### 1.1. Object of study

The defence and protection of pluralism (ideological, political, social, cultural) in media systems is a basic principle in democratic countries. Indeed, it constitutes a key factor in the organisation and operation of the media, as contained in the postulates of normative theories on the democratic-liberal model<sup>2</sup>. According to Denis McQuail, the so-called ‘theory of press freedom’ or ‘classical liberal theory’ is based on freedom –of expression, of opinion, of information– as a legitimating principle of coexistence in the face of an irrational, absurd control of information, which characterised the organisation of media models under authoritarian regimes.

<sup>1</sup> The research and documentation for this article is part of the project “Pluralism and multimedia groups in Spain: audience concentration” (CSO2008-01049) funded by the Ministry of Science and Innovation (Plan Nacional RDI 2009-2011). This project is directed by Carles Llorens, Ph.D., at the Autonomous University of Barcelona.

<sup>2</sup> These theories have been compiled and formulated by Denis McQuail on the basis of various debates on and contributions to the operation and organisation of media systems in democratic countries. Cfr. McQUAIL, Denis, *Mass Communication Theory. An Introduction*, Sage, London, 1987.

In the United States, after World War II, a debate emerged about the media's social responsibility. This was a relevant reflection in view of the increasingly commercial nature of the media system, and it intended to put economic rights (freedom of enterprise, of the market and of private property) on the same level as rights to freedom of expression, of the press and of information, understood as being a public service for the benefit of citizens. In other words, the media business should be compatible with the fulfilment of the media's social duties and with the citizens' legitimate aspiration to have access to free, rigorous and independent information. These ideas, which are condensed by McQuail<sup>3</sup> in the so-called 'theory of social responsibility', demand a social commitment from the media system to inform public opinion to enable it to choose freely from a range of options. Both democracy and pluralism once again.

Several decades later, at the height of the Cold War, new demands to improve the operation of democracy were made in the United States and democratic Europe: faced with a foreseeable bureaucratised model, in which, through the two-party system, the alternation of the main political parties sweetens parliamentary representation systems, the need to recover the essence of democratic participation was considered, through a model encompassing the postulates of a broad social base, the expression of political and cultural diversity, and the contemplation of the legitimate aspirations of minority groups. According to McQuail<sup>4</sup>, that is how the so-called 'democratic-participant theory' would develop, spurred on by cultural, social and political movements displaying their discontent with a democratic functioning that distances itself from the grassroots level and its foundations: respect for difference, access to all options through the institutional public realm, the expression of ideas without the constraints of self-censorship and pressures from the powers that be.

In short, the prolific normative debate that arisen out of the democratic-liberal system concludes that the free confrontation of ideas through social communication mechanisms that shape –and are shaped by– the public realm, allows for the furtherance of knowledge of a reality –material and symbolic at one and the same time– on which ideas of progress and social welfare rest. Through a free, rational exchange of different points of view, the procurement of agreement and consensus of a social and political nature becomes feasible, which in turn allows and facilitates the progress and development

<sup>3</sup> *Ibidem.*

<sup>4</sup> *Ibidem.*

of democracy. Hence the importance that the promotion and protection of pluralism acquires as a substantial element in democratic communication policies.

As a consequence, the design, development and application of communication policies in the United States and countries of the European Union place a great deal of importance on the defence of pluralism as an irreplaceable cog in the democratic machinery of public opinion, as well as its connection with the active defence of the right to information and freedom of speech. Both this need and this importance would become greater as a result of the international media system's concentration, deregulation and globalisation, which gained pace in the early 1980s. Together with the technological, liberalising and privatising thrust of Western democracies, a critical review of today's normative instruments on matters of defence and promotion of pluralism becomes necessary.

## 1.2. *Theoretical framework and methodology*

The theoretical framework of this research project falls within the field of the Political Economy of Communication, the heir to a long tradition of critical studies and one that has become a useful tool for understanding the role of the media in today's society, since it takes account of the changing quality of its object of study, as well as the intention to consider research from a realistic, inclusive and non-reductionist perspective<sup>5</sup>.

In fact, when studying the evolution of these media systems, a conflict arises between commercial and market dynamics on the one hand, and trends focusing more on educational, social and public service aspects on the other. This dialectic, the media's and the cultural industry's tendencies towards the marketisation and commercialisation of their content, and the transnationalisation of companies that shape the global communication structure have been key concerns in the field of Political Economy. Among this theory's present-day challenges and priorities, which have been analysed and systematised by Zallo, there is a need for new approaches to and paradigms for cultural and communication strategies and policies that stress diversity and equality<sup>6</sup>.

<sup>5</sup> Cfr. MOSCO, Vincent, *The Political Economy of Communication: Rethinking and Renewal*, Sage, London, 1996.

<sup>6</sup> Cfr. ZALLO, Ramón, "Retos actuales de la economía crítica de la comunicación y la cultura", in ALBORNOZ, Luis (comp.), *Poder, medios, cultura. Una mirada crítica desde la economía política de la comunicación*, Paidós, Buenos Aires, 2011, p. 40.

Therefore, the objective of this proposal is to analyse the level of pluralism protection in American and European communication policies, taking account of the tensions (contained in the European Audiovisual Policy and in normative developments on communication in the United States) between the economic level and the political-social level, as well as the need for balance between economic forces and interests and the articulation of democratic communication policies.

The study aims to describe and analyse the regulatory frameworks defining the current pluralism protection policies in the United States and several countries of the European Union: in particular, the case studies refer to Germany, France, the United Kingdom, the Netherlands, Italy and Spain. These countries were chosen because they provide examples of the three models –democratic, liberal and polarised pluralist– in the classification put forward by Hallin and Mancini in their book *Comparing Media Systems. Three Models of Media and Politics*<sup>7</sup>. This allows data to be collected, through uniform parameters, on the specific application of these policies in each country, and a qualitative assessment to be carried out, through a comparative analysis, in order to highlight the most significant similarities and differences. Thus, it was concluded that pluralism protection is a common denominator in the communication policies of all these countries. However, there were found to be legal differences depending on social, geographical and media contexts, as were time variations in the application of policies depending on audiovisual media market liberalisation processes.

Thus, the study focuses on two transversal issues: the first refers to the importance placed on pluralism protection in the afore-mentioned countries and the advent of pluralism regulation, and the second analyses the specific measures contemplated to ensure that pluralism is indeed protected and how such measures evolve, by paying particular attention to new trends: the relaxation of rules and regulations, and limits on audience concentration processes.

In order to attain these objectives, the article presents also the results of in-depth interviews with officials of independent audiovisual regulatory authorities –mainly board members with an expertise in the area of pluralism– in five European Union countries and the United States: Conseil Supérieur de l'Audiovisuel (CSA) (France), Kommission zur Ermittlung der Konzentration im Medienbereich (KEK) (Germany), Autorità per le Garanzie nelle Comunicazioni (Agcom) (Italy), Commissariaat voor de Media (CvdM)

<sup>7</sup> HALLIN, Daniel & MANCINI, Paolo, *Comparing Media Systems. Three Models of Media and Politics*, Cambridge University Press, 2004.

(Netherlands), Office of Communications (Ofcom) (United Kingdom) and the Federal Communications Commission (FCC) (United States).

The first main objective of the interviews, conducted between September 2009 and April 2010, was to gather information from regulatory authorities about communication policies in the country, particularly those referring to the protection of pluralism and the existence of mechanisms that limit audience concentration. To that end, the following sets of questions were posed:

1. General information about current legislation: What laws / basic regulations shape communication policy in the country? Do you consider that communication policies currently applied in your country are uniform and well-structured, and that regulation covers all the constituent parts of the media system? If appropriate, what aspects / elements of the communication model lack regulation under current legislation?

2. Protection of pluralism under current legislation: What do you understand by pluralism? How could pluralism be defined on the basis of current legislation on this matter? What criteria were taken into consideration when defining pluralism? Does current legislation take account of “internal” pluralism in the media, or does a notion based on “external pluralism” of the communication system prevail? Are there any laws guaranteeing political or ideological pluralism in your country’s media? Do you consider the protection of pluralism to be an important aspect of the country’s communication regulation? What are the main difficulties for designing / drafting regulations guaranteeing and protecting pluralism?

3. Audience concentration as a pluralism regulating mechanism: Does the regulatory authority consider concentration to be a potential threat to diversity and pluralism? If no such measures exist, are you considering including regulations to limit concentration? What criteria are applied to define excessive media concentration or a dominant position in the communication market? Was the criterion of audience concentration taken into account when regulating the defence of pluralism in the country’s communication system?

As a result of the qualitative analysis carried out on the interview results, we’ll explain how the creation, development, functions and objectives of independent regulatory authorities are directly linked to pluralism protection. In fact, the comparative study undertaken highlights that the promotion, control and monitoring of pluralism in the media system are not only some of the basic tasks of such authorities, but also their main reason for being<sup>8</sup>.

<sup>8</sup> For further reading on issues connected with pluralism and concentration based on the same interviews, Cfr. ALMIRON, Núria et al., “Pluralism Protection and Regulatory Au-

Numerous studies have been carried out previously on the connection between pluralism protection and concentration. Among others, the most noteworthy are reports by the Council of Europe<sup>9</sup> –which has a long tradition of studies on pluralism– or those by the European Commission (report on the European regulatory situation published in 2007 or the proposal for key indicators to evaluate the risks to pluralism published in 2009<sup>10</sup>). Pluralism has also been a topic of concern for the European Parliament, which has set out its views on this issue in numerous resolutions and studies (one of the most interesting ones was produced by the European Institute for the Media<sup>11</sup>), and for other institutions such as the European Audiovisual Observatory (which recently assembled a compilation of regulation on media concentration in various European countries<sup>12</sup>).

Further compilations worthy of note are the studies carried out by the independent regulatory authorities of the United Kingdom<sup>13</sup>, France (‘the Lancelot report’<sup>14</sup>), the Netherlands<sup>15</sup> and the United States (Federal Communications Commission), with various empirical reports about concentra-

thorities in 5 Countries of the European Union and in the United States”, paper presented at the IAMCR Conference 2010 *Communication and Citizenship*, Braga, Portugal, July 2010.

<sup>9</sup> Cfr. BRUCK, Peter A. et al., *Transnational media concentrations in Europe*, Council of Europe, Directorate General of Human Rights, Media Division, Advisory Panel on Media Diversity, Strasbourg, 2004; WARD, David, *The assessment of content diversity in newspapers and television in the context of increasing trends towards concentration of media markets. Final report on the study commissioned to Mr D. Ward by the MC-S-D*, Council Of Europe - Group of Specialists on Media Diversity, Directorate General of Human Rights, Media Division, Strasbourg, 2006.

<sup>10</sup> Cfr. EUROPEAN COMMISSION - DIRECTORATE-GENERAL INFORMATION SOCIETY AND MEDIA, *Independent Study on Indicators for Media Pluralism in the Member States-Towards a Risk-Based Approach*, Brussels, 2009; EUROPEAN COMMISSION, *Media pluralism in the Member States of the European Union. SEC (2007), 32*, Brussels, 16 January 2007.

<sup>11</sup> Cfr. EUROPEAN INSTITUTE FOR THE MEDIA (EIM), *Final report of the study on the information of the citizen in the EU: obligations for the media and the institutions concerning the citizen’s right to be fully and objectively informed*, EIM, Düsseldorf, 2004.

<sup>12</sup> Cfr. NIKOLTCHEV, Susanne (ed.), *Television and Media Concentration. Regulatory models on the national and the European level*, European Audiovisual Observatory, Strasbourg, 2001.

<sup>13</sup> Cfr. OFCOM, *Review of Media Ownership Rules*, 2006.

<sup>14</sup> Cfr. MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION, *Rapport Lancelot: les problèmes de concentration dans le domaine des médias*, 2005, [http://www.ddm.gouv.fr/IMG/pdf/rapport\\_lancelot.pdf](http://www.ddm.gouv.fr/IMG/pdf/rapport_lancelot.pdf), accessed 30 January 2011; LLORENS, Carles, “The Lancelot Report and the Debate on Media Pluralism and Concentration in France”, *Quaderns del CAC*, 23-24, 2006, pp. 211-220.

<sup>15</sup> Cfr. WARD, David, *A mapping study of media concentration and ownership in ten European countries*, Commissariaat voor de Media, Hilversum, 2004.

tion. Academic contributions on the study of concentration and pluralism are also numerous<sup>16</sup>.

## 2. Advent of pluralism regulation and main regulatory trends

As pointed out, pluralism protection is one of the common denominators in all the countries included in the study, especially at a rhetorical level. Expressing it in specific measures, with the consequent establishment and development of a specific set of rules and regulations, is indeed much more complex.

Thus, in a parallel fashion, each country has developed regulation that seeks to protect pluralism, both internal and external, mainly through anti-trust limits. Each case is specific, but the trend identified relates to the development of the audiovisual media sector –and particularly with the liberalisation process insofar as external pluralism is concerned.

<sup>16</sup> Cfr. IOSIFIDIS, Petros, “Pluralism and Concentration of Media Ownership: Measurement Issues”, *Javnost the public*, 17 (3), 2010, pp. 5-22; JUST, Natasha, “Measuring Media Concentration and Diversity: New Approaches and Instruments in Europe and the US”, *Media, Culture and Society*, 31, 2009, pp. 97-116; NOAM, Eli, *Media Ownership and Concentration in America*, Oxford University Press, New York, 2009; HARCOURT, Alison & PICARD, Robert, “Policy, Economic, and Business Challenges of Media Ownership Regulation”, *Journal of Media Business Studies*, 6 (3), 2009, pp. 1-17; DOYLE, Gillian, “Structure and Development of Media Ownership in Europe”, in HEINRICH, J. & KOPPER, G. (eds.), *Media Economics in Europe*, Vista, Dortmund, 2006, pp. 121-137; DOYLE, Gillian, *Media Ownership*, Sage, London, 2002; NAPOLI, Philip (ed.), *Media Diversity and Localism: Meaning and Metrics*, Lawrence Erlbaum Associates, Mahwah, NJ, 2007; NAPOLI, Philip, “Audience Measurement and Media Policy: Audience, Economics, the Diversity Principle, and the Local People Meter”, *Communication, Law and Policy*, 10 (4), 2005, pp. 349-382; BECERRA, Martín & MASTRINI, Guillermo, *Periodistas y magnates. Estructura y concentración de las industrias culturales en América Latina*, Prometeo, Buenos Aires, 2006; DWYER, Tim et al., *Content, Consolidation and Clout: How Will Regional Australia Be Affected by Media Ownership Changes?*, Communications Law Centre, Melbourne, 2006; GUSSE, Isabelle, *Diversité et indépendance des médias*, PUM, Montreal, 2006; BAKER, Edwin, *Media concentration and democracy: why ownership matters*, Cambridge University Press, New York, 2006; ARIÑO, Mónica, “Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gap”, *Communications & Strategies*, 54, 2004, pp. 97-128; LLORENS, Carles, “Media concentration”, *Quaderns del CAC*, 16, 2003, pp. 45-54; SÁNCHEZ-TABERNERO, Alfonso & CARVAJAL, Miguel, “Media Concentration in the European Market. New Trends and Challenges”, *Media Markets Monographs*, 3, 2002, pp. 1-163.



Therefore, it was found that the United States, whose audiovisual media model has been private and commercial practically from the start<sup>17</sup>, centres its concerns on the allocation of frequencies –a scarce public asset– and dividing the territory into markets, with the specific objective of fostering diversity and localism through competition. Right from the start, these three concepts signalled the differences that would be found when comparing the United States to European countries: the geographical vastness of the country and its division into federal states fuels the need to seek out ‘local’ differences, which are reflected in the defence of localism and not just diversity (not pluralism<sup>18</sup>); the consequent division into ‘markets’ (Designated Market Areas or DMAs); and finally, though by no means least, the trust placed in competition (and, implicitly, in private property and commercial funding) as the cornerstone of all media systems. Situated in this context, and since the approval of the *Communication Act of 1934*, several debates have arisen around the need to preserve diversity through limits on the ownership of radio and/or television stations. The first constraints emerged during the 1940s and 1950s, and were completed in the 1970s; these also extended to the press.

In Europe, the first country to break the public broadcasting monopoly was the United Kingdom in the mid 1950s –significantly, it is one of the countries, alongside the United States, to be classified within the liberal model by Hallin and Mancini<sup>19</sup>. This led to legislation reflecting pluralism protection<sup>20</sup>. This was also expressed in limits on media ownership from the

<sup>17</sup> Cfr. SEGOVIA, Ana, “Organismos de regulación y control de las comunicaciones: el caso de la FCC”, *Revista Latina de Comunicación Social*, 64, 2009, pp. 526-539, [http://www-revistalatinacs.org/09/art/43\\_842\\_ULEPICC\\_15/52Segovia.html](http://www-revistalatinacs.org/09/art/43_842_ULEPICC_15/52Segovia.html), accessed 2 February 2011; SEGOVIA, Ana, “Aviso para navegantes. Concentración y privatización de las comunicaciones en los Estados Unidos”, in QUIRÓS, Fernando & SIERRA, Francisco: *Crítica de la Economía Política de la Comunicación y la Cultura*, Comunicación Social Ediciones y Publicaciones, Sevilla, 2001.

<sup>18</sup> This was one of the greatest conceptual difficulties when undertaking the comparative study of American and European communication policies. In the United States, the term ‘diversity’ is used instead of ‘pluralism’, which undoubtedly introduces certain nuances when considering the country’s pluralism protection legislation and mechanisms. In our opinion, it is more in keeping with the meanings of the free market and the fostering of competition as a means of achieving it.

<sup>19</sup> *Ibidem*.

<sup>20</sup> From the time the 1954 Act was approved, it could be said that there was a twofold concern about pluralism. First, the Act severed the monopolistic power of the BBC: it conceived pluralism as competition and, therefore, as external pluralism. Indeed, it defended the industry’s arguments, which rather were more liberal than democratic. Second, the new network of broadcasters that emerged, Independent Television (ITV), was heavily regulated as a Public

1990s, when liberalisation was extended –BSkyB and Five began operating in the British television market in 1990 and 1997, respectively. The *Broadcasting Act 1990* and especially the *Broadcasting Act 1996* responded to ownership concerns.

Something similar happened in Spain: the need to respect pluralism was reflected in the first normative instrument on broadcasting, the *Estatuto de Radio y Televisión de 1980*. Specific regulation, with the first anti-trust limits, was applied to the development of the private radio market (*Ley de Ordenación de las Telecomunicaciones de 1987*) and to the liberalisation of the television market (*Ley de Televisión Privada de 1988*).

However, the expansion of the audiovisual media sector in other European countries, as was the case in Italy, France and Germany, led to anti-trust measures being taken not only in this sector, but also on press ownership.

In Italy, concern for pluralism emerged following the decision taken by the Constitutional Court in 1981<sup>21</sup>, which demanded legislation to protect pluralism. The decision should be understood as a reaction to governmental or legislative inaction in the light of the proliferation of pirate radio stations in the 1970s, the time when the current media magnate and Italian Prime Minister Silvio Berlusconi's preference for the real estate business turned to the media business, with the acquisition –and transformation– of the cable-TV station TeleMilano. An Act was not approved until 1990 (*Legge 6 agosto 1990, n. 223*), which also became known as the 'Polaroid Act' because it was limited to 'taking a snapshot' of the situation that already existed, allowing a single operator to own 25% of national radio and television channels. Regarding the press, *Legge 25 febbraio 1987, n. 67*, amending *Legge 5 agosto 1981, n. 416*, established that no publishing company could control more than 20%

Service Broadcaster (PSB) under the authority and supervision of the Independent Television Authority, renamed the Independent Broadcasting Authority under the Act liberalising radio in 1972. In addition, it had a specific mandate to reflect and broadcast the United Kingdom's regional diversity from the start (Cfr. HUMPHREYS, Peter, *Mass media and media policy in Western Europe*, Manchester University Press, Manchester, 1996, p. 131). Supervised thus by an independent authority, the public service spirit was transferred to commercial operators, and a concern for internal pluralism could also be seen in that approach. This gesture would mark media regulation in the United Kingdom, since even today the commercial operators ITV, Channel 4, S4C and Five are subject to public service duties, such as providing regional news services. One such duty is, "To make us aware of different cultures and alternative viewpoints, through programmes that reflect the lives of people and other communities both within the UK and elsewhere" (Public Service Purpose 4, defined in Ofcom's *Second Public Service Broadcasting Review: Putting Viewers First*, 2009, p. 123).

<sup>21</sup> Cfr. HUMPHREYS, Peter, *Mass media and...*, *op. cit.*, p. 179.

of daily press circulation. In the case of regional or interregional circulation, the percentage was raised to 50%.

When analysing the German case, it is first of all necessary to refer to article 5 of the Federal Constitution (*Grundgesetz*), which guarantees freedom of expression and freedom to receive information, both of which are fundamental to the creation of public opinion. Further, it explicitly mentions television broadcasting, indicating that for a commercial television system to exist, it is also necessary for a public service –guaranteeing a basic, universal service– to exist.

In addition, the Constitutional Court's participation in pluralism regulation is key in Germany, since it has determined that freedom of expression and freedom to receive information is not exclusively subjective. Rather, it is an objective guarantee and, to that end, it is necessary to ensure that the media system (broadcasting) functions properly. This means that a balanced diversity and plurality of content must be guaranteed, as must the opportunity for companies to participate in the market –without interfering in the media's autonomy by doing so. On the basis of this interpretation by the Constitutional Court, broadcasting regulation includes measures to control the impact of media concentration on the formation of public opinion (*Meinungsmacht*) and to guarantee pluralism. Given that each *Land* has its own powers to regulate broadcasting, in 1991 the *Länder* decided to establish agreements with the force of law to avoid discoordination or significant differences between the measures adopted by each state. This agreement has been amended on numerous occasions to adapt it to the sector's evolution. The last amendment (12<sup>th</sup>) came into effect in June 2009.

The normative instrument dealing with this issue is the *Rundfunkstaatsvertrag* (RstV, Inter-State Broadcasting Contract/Agreement), which resorts to television audience reach as the criterion for analysing the market situation. Article 26 of the RstV stipulates that if a broadcaster, across all the channels on which it broadcasts (there is no limit on broadcast licence ownership), exceeds a mean annual audience of 30%, it must take the necessary measures to reduce its impact on public opinion. Furthermore, it establishes that if a company, across all of its stations, exceeds a mean annual audience of 25%, the competent authority (KEK) will proceed to assess whether, through its participation in important markets connected with broadcasting –and this is where the press and magazine sector appears, as do others such as television commercials and broadcast rights– that company has an impact on public opinion greater than 30%.

That is why the KEK (Kommission zur Ermittlung der Konzentration im Medienbereich) –created in 1997 by the third amendment of the RstV, the

objective of which was to have an independent regulatory institution to assess the concentration of television broadcasting and associated markets—did not allow the Springer group (with a determining participation in the press and magazine market) to acquire the television stations of the bankrupt Kirch company.

In France, the fundamental Act for the daily press is *Loi n° 86-897 du 1 août 1986. Portant réforme du régime juridique de la presse*, which emerged after the liberalisation of the audiovisual media market had begun and shortly before one of France's public television channels (TF1) had been privatised. This Act was approved to halt the control of national and regional printed press by a specific group, Groupe Hésant Médias, which, in the 1980s, already boasted control over 30% of national printed press circulation, although the Act did not achieve its objective. In it, there are several stipulations about news transparency and the legal regime for printed press publishing companies. The most defining trait of this Act was the limit on circulation that it established for daily political and general news publications: a single owner is not allowed to accumulate more than 30% of the whole country's circulation with publications of this type. Regarding the audiovisual media regime, the afore-mentioned Act was complemented by *Loi n° 86-107 du 30 septembre 1986* on the freedom of communication. Amended 50 times since then, with the latest amendment in 2009 (*Ordonnance n° 2009-1019 du 26 août 2009 portant extension et adaptation outre-mer des dispositions relatives à la télévision numérique terrestre*), this is the fundamental Act for audiovisual media and the one that creates the CSA (Conseil Supérieur de l'Audiovisuel).

The definition of pluralism can be found in article 29 of the 1986 Act. Furthermore, on the basis of this Act, French legislation dealt with both external pluralism (limits on ownership, on the number of licences, on audience reach and on audience) and internal pluralism. The importance that the CSA places on internal pluralism is reflected in one of its main reports on the topic, in which it defines pluralism exclusively in internal terms and stresses the 'Principle of Political Pluralism'<sup>22</sup>. The CSA has applied this principle since 1 September 2009 to respect the plural expression of currents of thought and opinion on radio and television. It is a quantitative principle that obliges channels to allocate the time spent on coverage of political actors in a specific way. To preserve the afore-mentioned internal pluralism, the CSA has the legal duty to deliver summaries of calculated

<sup>22</sup> Cfr. CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL, "Réflexions sur les modalités du pluralisme", 2006.

coverage times to parliament every month. All of this points to the importance that the CSA places on the protection of internal pluralism (in fact, the committee charged with the matter is called ‘Pluralism and Electoral Campaigns’), although the defence of external pluralism can also be found among its functions<sup>23</sup>.

In the Netherlands, the concept of pluralism is linked to the public broadcasting system. The public operator (Publieke Omroep) is formed by a main operator (Nederlandse Omroep Stichting or NOS), which is charged with generalist programming: news, sports broadcasts and major events, and a group of operators representing various aspects and traditions of Dutch society. They all share the broadcast time of the three public television channels and six public radio stations. The NOS is an autonomous body of the Government of the Netherlands, and it acts as the overall manager and coordinator of public service broadcasting. In addition, it has two independent arms: the NPS, a foundation that produces cultural content and content for minorities, and the STER, a body that manages advertising across all public channels. The rest of the operators broadcasting on public channels are civil-society private associations. This model of fostering pluralism in the media is based on placing public broadcasting in the hands of civil society, through associations that operate as broadcasters: any collective, legally organised as an association, can apply for a licence to obtain a certain number of broadcast hours on the public broadcasting system (depending on the number of members).

However, the processes of concentration and internationalisation that have taken place in the private media sector have given rise to some concerns in the regulatory authority about the level of media concentration in the market and its impact on pluralism and the formation of democratic public opinion: “In 2000, the Dutch Media Authority was given the new task of monitoring media concentration. Since 2002, the Mediamonitor of the Dutch Media Authority has published annual reports about the public information supply with a specific focus on the effects of media concentration on the diversity and independence of that information”<sup>24</sup>. Furthermore, a *Temporary Act on Media Concentration* was approved in 2007, which, in principle, was extended to 2012. However, it was repealed in late 2010 after the new, more liberal government came to power.

<sup>23</sup> Cfr. ALMIRON, Núria, “Regulation of pluralism in France. Context, analysis and interpretation”, *Revista Latina de Comunicación Social*, 65, 2011, pp. 472-487.

<sup>24</sup> COMMISSARIAAT VOOR DE MEDIA, *Mediamonitor. The Dutch Media in 2010*, Hilversum, 2011, p. 6.

As a partial conclusion for this section, it should be noted that those countries expressing greater concern for internal pluralism in their rules are France and the Netherlands, although measures to protect it exist in every country analysed: for example, Italy's *Par Condicio* law –applied to various programmes with political content– and the ‘equal time’ or ‘equal opportunities provision’ in the United States –applied during electoral periods. In Germany, internal pluralism is only protected in measures such as the one stipulating that when a broadcaster focusing on news programme broadcasts exceeds a mean annual audience of 10%, it should reach an agreement, within a period of six months, to offer part of its broadcast time to third parties; or when a broadcaster not focusing on news programme channels exceeds a mean annual audience of 20%, it should offer broadcast time to third parties in the channel of greatest importance in the market (Article 31 of the RstV).

### 3. *New trends in the regulation of pluralism protection*

Thus, it was found that the most generalised trend regarding the protection of pluralism –both external and, to a lesser extent, internal– is a degree of relaxation and deregulation, which also extends to the constraints on cross-media ownership, which are becoming fewer and fewer. The other trend to which reference shall be made is the ever more frequent emergence of audience concentration as a technique to avoid concentration.

Regarding the first trend, the one connected with anti-trust measures, including cross-ownership, it is apparent in all the countries analysed. Once again, it was found that the American case leads the way, with the United Kingdom following a close second, since their respective deregulation phases began in the early 1980s; for the rest of the countries analysed, their respective deregulation phases began in the 1990s and particularly in the 2000s.

Some examples of the removal of constraints on concentration in the countries studied are given below:

- In the United States, the FCC began to have concerns about ownership concentration shortly after it was created in 1934. Those concerns gave rise to a series of rules on both multiple and cross-ownership, which were basically developed in the 1940s, 1950s and 1970s. There was a break in this trend in the 1980s, firstly with changes relating to multiple ownership. The *Rules and Regulations Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations* set a limit of seven AM radio stations, seven FM radio stations and seven television broadcast stations. Effective as from 1953, it was amended by the *1984 Multiple Ownership Order*, which raised the number to 12. In 1985, the FCC reconsidered its position. Realising that a simple

quantitative limit did not suffice, it established –for television only– a limit of 25% of audience reach for a single owner. Regarding cross-ownership, the FCC’s interest –from very early on– in fostering pluralism in similar coverage areas led it to set limits in this respect (referring to the ownership of several media in the same market). As a result, in 1970 it approved the one-to-a-market rule, which banned the ownership of radio and television stations in the same market (although there are some exceptions). It went on to add press to the rule in 1975. From 1989, these rules have been dismantled, a process that can be considered ongoing, since the 1996 *Telecommunication Act* obliges the FCC to review the established rules on ownership to determine whether they are still necessary for the purposes of competition and public interest. For example, the FCC released Notice of Inquiry (NOI) on 25 May 2010 as part of the 2010 quadrennial review of its media ownership rules. In recent decades, the ownership of several radio networks, of several television networks, of radio and television networks, and radio/television plus press has gradually been permitted, even in the same market (DMA), depending its characteristics<sup>25</sup>.

• In the United Kingdom, as Humphreys<sup>26</sup> points out, the *Communications Act 2003*:

completed the incremental deregulation of media ownership rules conducted by the Conservatives through the 1990s. In particular, their 1996 Broadcasting Act, following a 1994–5 review of cross-media ownership, replaced the traditional approach of placing quite strict limits on accumulations of interests within and between licensed television services with a new scheme based on a measurement of audience share that allowed for a considerable consolidation of the ITV sector.

The *Broadcasting Act 1990* introduced limits on licence ownership and cross-ownership. For example, regarding licence ownership, it stipulated that a single operator could only have a national Channel 3, Channel 5 or national radio licence; two in the case of regional Channel 3 and 20 in the case of local radio services. Regarding cross-ownership, it established mono-media and cross-media limits, both with a 20% rule. In the case of cross-ownership of

<sup>25</sup> Cfr. SEGOVIA, Ana, “Organismos de regulación...”, *op. cit.*; SEGOVIA, Ana, “Aviso para navegantes...”, *op. cit.*

<sup>26</sup> HUMPHREYS, Peter, “Media Freedom and Pluralism in the United Kingdom (UK)”, in CZEPEK, Andrea, HELLWIG, Melanie & NOVAK, Eva (eds.), *Press Freedom and Pluralism in Europe*, Intellect, 2009, p. 206.

printed press and electronic media, the 20% rule was also applicable. In 1996, the new *Broadcasting Act* introduced some considerable changes, such as setting the market share (circulation for newspapers) and audience concentration (share for television) criteria. Limits on ownership were added to and combined with these criteria, so that, in the case of television, no single company could exceed 15% of the annual audience share. Public interest tests were also introduced for cross-ownership of newspapers and electronic media.

- In Germany, before establishing the limits mentioned in the previous section, there were more specific constraints on shareholdings in and ownership of radio and television stations. Until 1996, no single owner could own more than 50% of a television channel with a licence to broadcast nationally or of a news channel, and could not be present in two or more television stations and in two or more radio stations. These limits were removed in the RstV ratified in autumn 1996, and a new control instrument was imposed: the limit on television audience concentration was set at a maximum of 30% of the national audience and, in some cases, at 25% if there was an important impact on public opinion<sup>27</sup>.

- In Spain, the liberalisation of the audiovisual media market set the first limits on ownership for the radio and television sector. The 1987 Act (*Ley de Ordenación de las Telecomunicaciones de 1987*) set some limits on radio station ownership, and the 2005 Act (*Ley 10/2005*) subsequently increased them. Regarding television, the first constraints on the percentage ownership of a channel increased from the initial 25% set in 1988 Act (*Ley 10/1988 de Televisión Privada*) to 49% in 1998, only to be removed in 2002<sup>28</sup>. In addition, in 2003 a percentage limit on shareholding (5%) was established to consider the illegality of holding shares in more than one licence-holding company. Moreover, the digital transition and the consequent increase in the number of television channels allowed one person or company to control up to two digital multiplexes (*Real Decreto 1/2009*, subsequently incorporated into the *Ley General de Comunicación Audiovisual de 2010*)<sup>29</sup>.

<sup>27</sup> Cfr. LLORENS, Carles, *La concentración de medios de comunicación y pluralismo: la acción de la Unión Europea*, Doctoral Thesis, Universidad Autónoma de Barcelona, Barcelona, 2001, p. 341.

<sup>28</sup> Cfr. SEGOVIA, Ana, "Las contradicciones del sistema y los cambios legislativos en el ámbito comunicacional en España", V *ENLEPICC*, Salvador de Bahía, 2005, <http://www.rp-bahia.com.br/biblioteca/pdf/AnaSegovia.pdf>, accessed 2 February 2011.

<sup>29</sup> Cfr. SEGOVIA, Ana & LUJÁN, Luis, "Concentración y pluralismo en España ante el cambio digital", *AE-IC Congreso Comunicación y desarrollo en la era digital*, Málaga, 2010, <http://www.ae-ic.org/malaga2010/upload/ok/130.pdf>.



• In Italy, the rules and regulations on concentration have gradually been liberalised on the basis of limiting market concentration only. As pointed out earlier, audiovisual media legislation started with *Legge 6 agosto 1990, n. 223*, designed according to the needs of the media group controlled by Berlusconi. Thus, it set the limit at 20% “of the available resources for the entire media sector, including those for the print media, advertising, and the licence fee for the public broadcaster”<sup>30</sup>, specifying, in the case of television, that it was forbidden to own more than three national channels: exactly the number of channels operated by RAI and Fininvest. In 1994, the article in the Act referring to these ownership limits (Article 15.4) was declared unconstitutional. As a consequence, a new Act was approved in 1997. *Legge 31 luglio 1997, n. 249*, “set new anti-trust limitations forbidding national broadcasters from controlling more than 30% of the available resources in the television sector or utilizing more than 20% of the analogue national television channels”<sup>31</sup>, with the duty to transfer the exceeding channels to other platforms (satellite or cable). However, as Padovani clearly points out, it failed to set a deadline for the migration (that therefore never took place: Berlusconi’s return to power led to the approval of a new Act in line with his interests)<sup>32</sup>. The so-called ‘Gasparri Act’ (*Legge 3 maggio 2004, n. 112*) “established that no single operator could access more than 20% of total available resources, but significantly enlarged the ‘relevant market’ out of which this percentage ought to be calculated [...]”<sup>33</sup>, including printed press, electronic publishing, the Internet, radio and television, cinema... and even sponsoring and advertising. It should not be forgotten that the *Testo unico de la Radiotelevisione de 2005* set a deadline (21 December 2010) for one of the rules on cross-ownership of audiovisual media and the press. In particular, Art. 43.12 stated that broadcasters that have more than one channel cannot buy shares in companies publishing daily newspapers or create new companies in the field of daily newspapers. In contrast, the limit on newspaper and television ownership was retained, which depended on the circulation reached in the

<sup>30</sup> PADOVANI, Claudia, “Pluralism of Information in the Television Sector in Italy: History and Contemporary Conditions”, in CZEPEK, Andrea, HELLMWIG, Melanie & NOVAK, Eva (eds.), *Press Freedom and Pluralism in Europe*, Intellect, 2009, p. 296.

<sup>31</sup> *Ibidem*.

<sup>32</sup> *Ibidem*. In fact, a decision by the Constitutional Court in 2002 set the deadline for the transfer of a free-to-air channel to a pay-TV platform at 31 December 2003. However, a few days earlier, on 24 December, a decree issued by Berlusconi’s government annulled the duty imposed by the Court.

<sup>33</sup> PADOVANI, Claudia, *op. cit.*, p. 298.

press market (Article 15 (1) *Legge 6 agosto 1990, n. 223*: A single publishing company holding more than 16% of the national circulation cannot hold any television licence. If the share is more than 8% of the national circulation, then it can hold only one television licence. If the share is less than 8%, the company has the right to hold up to two licences).

- In the Netherlands, the first limits were set in 1988, when control of a maximum of 25% of press market circulation was permitted. The *Temporary Act on Media Concentration*, which became effective on 13 June 2007, was much more exhaustive, since it increased that percentage to 35% and relaxed the rules on cross-ownership: media groups could not have more than 35% of the press market. But if the three markets –press, radio and television– were taken as the reference, then a single limit of 90% out of a total of 300% was established. When a media group operated in two markets only, the limit was 90% out of a total of 200%. These percentages were only applied to mergers and acquisitions, so they could effectively be greater if audiences increased as a result of the success of the content offered. However, this Act has recently been repealed and, therefore, these limits have disappeared, once again evidencing the liberalising trend mentioned in the previous section.

- In France, anti-trust regulation is highly complex. The afore-mentioned 1986 Act has undergone approximately 50 amendments in 25 years. Given that the French case sets audience concentration limits as a measure for ensuring pluralism alongside ownership limits and other indicators, these shall be analysed in greater depth in the following section. Here, it is sufficient to point out that, in line with one of the latest amendments to the Act made in 2009, a shareholder cannot own more than 49% of the share capital or voting rights in a national terrestrial television licence-holding company whose mean annual audience, for both analogue and digital broadcasts, exceeds 8% of the total television audience. The original Act did not allow participation in more than one licence but, later on, when the possibility of participating in several was introduced, 2.5% of the share was established as the limit<sup>34</sup>).

Regarding the second of the trends, the ‘audience concentration’ criterion has gradually been introduced into regulation for the defence and protection of pluralism. Thus, since the 1980s, this criterion has gradually given rise to legislation in the countries studied: the United States in 1985, Germany in 1991 and the United Kingdom in 1996 –subsequently amended<sup>35</sup>. A little

<sup>34</sup> Cfr. LLORENS, Carles, “The Lancelot Report and...”, *op. cit.*

<sup>35</sup> Since 2003, the potential audience criterion has only been applied indirectly to studies of local radio concentration.

later, other countries incorporated this criterion: France in 2000, the Netherlands in 2007 and Spain in 2009, among others. Before continuing, it is important to distinguish between three different audience concepts: ‘audience share’ is the percentage of television audience watching a particular programme at a given time; ‘audience reach’ is the percentage of population watching a particular programme at a given time; ‘potential audience’ is the percentage of population able to watch a particular programme at a given time.

More space shall be given over to the German case, since its main criterion for pluralism protection is specifically referred to this issue (television audience reach for analysing the market situation and determining the dominant position of broadcasters on public opinion). Control over television, and not other media, is justified by its suggestive capacity, its reach (broadcast) and its capacity to provide live information (news). As pointed out in the previous section, Article 26 of the RstV establishes a maximum percentage for the mean annual audience (30% share) and, should that figure be exceeded, the measures that need to be taken to avoid an undue impact on public opinion.

The measures are applied with the consensus of broadcasting companies and the KEK, the commission responsible for controlling media concentration. Three measures are contemplated:

1. To force broadcasting companies to divest operations to ensure that the audience for their channels as a whole is lower than 30%.

2. To force important media-related markets to divest operations to reduce their impact on public opinion.

3. To offer part of their broadcast time to third parties (Article 31) or to create a programming advisory board (*Programmebeirat*) comprising representatives of relevant social groups to oversee programming diversity and plurality (Article 32).

To assess mean annual audience, certain discounts are made if broadcasters apply the following measures to guarantee diversity and pluralism:

1. If they have regional programming windows that have territorial autonomy, a 2% discount is made.

2. If they free-up broadcast time so that third parties (broadcasters) can broadcast their content, a 3% discount is made.

If the afore-mentioned percentages are exceeded and an investigation is launched to assess the impact of a company / media group / broadcaster on public opinion, the company or companies involved cannot apply for a new television licence and cannot make any changes to their shareholdings. However, even if they have not reached the afore-mentioned percentages, the KEK may decide to launch an investigation –after a request to do so by

an independent regulatory authority— if it considers that there is a threat to public opinion.

For its part, Article 27 of the RstV specifies that, to calculate the mean annual audience, only German-language television channels shall be taken into account. This issue has become a topic of debate due to the importance of some foreign-language channels. Article 28 of the RstV sets minimums of 25% for shareholdings and voting rights to ascertain whether a broadcaster belongs to a company or media group, thus enabling it to be included in the calculation of its mean annual audience. Article 29 of the RstV establishes that all shareholding changes must be communicated to the KEK, which will issue an assessment of them.

In the case of France, legislation introduces a mechanism for audiences with the aim of nuancing and complementing the limitations and defects of the anti-trust rules and regulations, which are based solely on the ownership (capital) of companies and the number of licences granted. On this issue, the French regulatory authority contemplates the following:

Indeed, the strengthening, by law, of provisions formulated in terms of potential or real audience share, or business turnover share of the various markets, would offer the advantage of bringing the French system closer to systems applied by its various European partners and, above all, would prove to be better suited to market evolutions<sup>36</sup>.

To establish media concentration levels, factors such as the concentration of capital, licences, population and audiences are taken into account (circulation in the case of printed press). Each of these elements has a protection mechanism by law<sup>37</sup>.

The audience concentration criterion used in France is potential audience. The main disadvantage lies in calculation and control difficulties or, in other words, how audiences can be reliably measured and controlled in all media. To overcome this defect, potential audience is the criterion that helps to complete the rest of the indicators applied: it is considered to be another criterion, but not the most important one. The CSA understands that the mechanisms limiting potential audience and audience reach are complementary, the main ones being ownership and licences; combining them all leads

<sup>36</sup> CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL, "Le CSA, le pluralisme et la concentration des médias", *La Lettre*, n° 185, 2005, [http://www.CSA.fr/actualite/dossiers/dossiers\\_detail.php?id=27758&chap=2641](http://www.CSA.fr/actualite/dossiers/dossiers_detail.php?id=27758&chap=2641), accessed 30 January 2011.

<sup>37</sup> *Loi n° 86-107 du 30 septembre 1986 relative à la liberté de communication.*

to an increase in the level of guarantees. However, this combination of criteria makes things very complex. The reason lies in legal consistency. As stated by Almiron<sup>38</sup>, “Given that since 1986 the law has undergone about 50 amendments, it should be noted that the current legal text, due to its length and multiple additions, is susceptible to multiple interpretations, as it is complex and contradictory”.

In the Netherlands, the specific and temporary legal framework applied to media concentration was repealed in late 2010 and, as a consequence, the few limits that existed on media group ownership and annual audience percentages disappeared. The *Temporary Act on Media Concentration* was approved in 2007 with the aim of measuring pluralism and the level of media concentration through annual studies (Mediamonitor), which were delivered to the Ministry of Education, Culture and Science. This Act relaxed the rules on cross-ownership and commissioned the analysis of the evolution of mergers and the financial control of the media market’s economic conditions to the *Commissariaat voor de Media* (CvdM).

Regarding audience concentration, there were few –and indirect– references, since the afore-mentioned legislation considered all three media types equally, with no weighting depending on the proportion of the markets. Thus, the mean audience for a media group was calculated on the basis of the totalling percentage audience share in each of the markets: television, radio and press. Nor was the increased use of media such as the Internet or mobile television considered.

The Dutch Audience Research Foundation measures the calculation method for mean audience share for television, and its partner organisation does the same for radio listening. The method was to add the percentage devoted to channels of a particular supplier of the total time devoted to television watching (radio listening) in a year. The market share is measured on the level of title/channel, and all titles/channels are later aggregated on the level of the supplier (e.g. RTL4 + RTL5 + RTL7 = total audience share for supplier RTL). For newspapers there are no audience share measures, only reach per title (not time spent reading). Therefore, circulation is used to determine the audience share. The reach of each title is used just for monitoring purposes<sup>39</sup>.

<sup>38</sup> ALMIRON, Núria, “Regulation of pluralism in France. Context, analysis and interpretation”, *Revista Latina de Comunicación Social*, 65, 2011, pp. 472-487, [http://www.revistalatinacs.org/10/art3/913\\_Pompeu/35\\_AlmironEN.html](http://www.revistalatinacs.org/10/art3/913_Pompeu/35_AlmironEN.html), accessed 30 January 2011.

<sup>39</sup> These data were obtained from questions put to representatives of the *Commissariaat voor de Media* (CvdM).

Given the characteristics detailed in section two, a particular feature in the United States is legislation based on differences between markets or DMAs. Thus, since 1985, it has taken account of constraints on television station ownership both quantitatively and qualitatively. In other words, the potential audience that could be reached (the percentage was initially set at 25%, then increased in 1996 to 35% and increased again to the current 39%) is added to the numerical limit –which will end up disappearing<sup>40</sup>.

Likewise, the limits based on real audience are only taken into consideration at very specific times and when the market fulfils a number of specific characteristics with respect to the number of existing voices and media. For example, a television duopoly is permitted in markets where at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the market after the combination, taking into account that at least one of the stations in the combination is not ranked among the top four stations in terms of audience share. And, in the case of cross-ownership of press and audiovisual media, certain specific conditions have to be met, such as: when a daily newspaper seeks to combine with a radio station in a top 20 designated market area (DMA), or when a daily newspaper seeks to combine with a television station in a top 20 DMA and (1) the television station is not ranked among the top four stations in the DMA and (2) at least eight independent ‘major media voices’ remain in the DMA<sup>41</sup>.

It is therefore possible to see how, in this country, the audience concentration criterion is applied to avoid dominant positions in the different local markets or DMAs.

In Spain, as already mentioned, the 1988 Act (*Ley 10/1988 de Televisión Privada*) was the central axis of the policy to protect television pluralism through the diversity of ownership. The latest amendment relaxing ownership constraints, made by Royal Decree in 2009<sup>42</sup> –and which subsequently

<sup>40</sup> The 210 markets that currently exist have a percentage assigned to them depending on the population they cover, which is the one added for the purposes of potential audience (for example, the New York market, situated in first place, is the equivalent of just over 6.5%, whereas Denver is 1.3%).

<sup>41</sup> A ‘major media voice’ includes full-power commercial and non-commercial television stations and major newspapers. In the latest review of the rules on ownership, the Commission concluded that such sources are generally the most important and relevant outlets for news and information in local markets. Cfr. FEDERAL COMMUNICATIONS COMMISSION, *Quadrennial Review Order*, 2006, <http://www.fcc.gov/ownership/2006-rules.html>, accessed 5 March 2011.

<sup>42</sup> *Real Decreto-ley 1/2009, de 23 de febrero, de medidas urgentes en materia de telecomunicaciones.*

became an Act, also introduced the new trend referred to as ‘audience concentration’, since it allowed state-wide licence-holding television service companies to merge when the mean audience of their channels as a whole was lower than 27% of the total audience over the 12 consecutive months prior to an acquisition. With this change, there was a shift from a system based on limiting ownership concentration to a system based on state-wide audience concentration, since the constraints remained in force both regionally and locally<sup>43</sup>.

For its part, the United Kingdom introduced audience concentration as a limit very early on, in 1996 legislation. Thus, among other constraints on television, this legislation established that if an operator reached 15% of the annual audience share, it could not have two or more licences for Channel 3 and 5, satellite or digital services. Neither could it exceed 20% of the shareholding in two or more operators owning licences for these services, nor own a licence and have a shareholding of more than 20 % in other operators. In the case of radio, the 15% limit was applied in relation to a system of points awarded in accordance with the potential audience (no-one alone could have two or more licences to which more than 15% of the total points in a specific area could be attributed). For cross-ownership, a 20% rule was followed, in the same way as for television. If an owner of a national newspaper controlled at least 20% of the market, then that owner could not have a licence for Channel 3 or 5, national or local radio, or exceed 20% of the shareholding in a national or regional Channel 3 service or in Channel 5.

All of these provisions were mostly eliminated by the *Communications Act 2003* and by the *Digital Economy Act 2010*, since the constraints based on television audience share were removed and only some of the constraints on cross-media ownership (newspapers and television) were retained. In the case of local markets, the 2010 Act empowered Ofcom to develop proposals that the regulator had put forward in November 2009: to remove constraints on radio concentration, only leaving the constraints on press, radio and television cross-ownership.

Following the pressure exerted by the Conservative-Liberal Democrat coalition government, which came to power in 2010, Ofcom pronounced that it was in favour of removing the final constraint, claiming that plu-

<sup>43</sup> Cfr. LLORENS, Carles, “Spain’s Media Concentration Policy: A Patchwork Crucial to the Understanding of the Spanish Media System”, *International Journal of Communication*, vol. 4, 2010, pp. 844-864, <http://ijoc.org/ojs/index.php/ijoc/article/view/791/462>, accessed 30 January 2011.

ralism, although it would be limited, would ultimately be compensated by the BBC's regional stations and by the new local television stations that the government wanted to promote<sup>44</sup>.

Finally, in Italy, as pointed out, the constraints are applied on the basis of concentration understood basically as 'market concentration' and not in terms of audience.

Therefore, 'audience concentration' is generally understood as an assessment criterion and/or a political criterion. For the countries analysed in the study, it emerges as a highly important criterion in Germany, and is used in combination with other criteria in France. However, in the Netherlands, Spain, the United Kingdom and the United States, it is used either restrictively or very restrictively –and not at all in Italy<sup>45</sup>.

#### 4. Regulatory authorities' assessments

As mentioned at the beginning of this article, one of the fundamental objectives and the main reason why independent regulatory authorities exist is to promote, control and monitor pluralism in the media system. However, the interviews conducted with the representatives of these institutions overwhelmingly showed that dissatisfaction and scepticism prevailed when it came to assessing their tasks.

This dissatisfaction may be connected with the lack of powers to set the limits that they have to apply, or with the lack of effectiveness due to the fact that their decisions can be overturned, vetoed or annulled, depending on the case. Another important aspect mentioned in the interviews is that they operate within legal frameworks that are subject to change, thus making it difficult to maintain a certain degree of consistency in the application of pluralism protection policies.

In the United States for example, representatives of the FCC (Federal Communications Commission) mentioned the uncertainty arising from the implementation of a number of measures because, and particularly so in recent years, the commission's decisions have ended up being settled in

<sup>44</sup> The Department of Culture, Media and Sport (DCMS) included deregulation as one of the key points of the proposal to reform the media regulatory regime (see Section 3 of the document [http://www.culture.gov.uk/images/publications/SRP\\_DCMS\\_150710.pdf](http://www.culture.gov.uk/images/publications/SRP_DCMS_150710.pdf), accessed 15 March 2011). This reform included the Spending Review submitted in October 2010 by the coalition government to cut the national debt, and it also included a complete overhaul of Ofcom.

<sup>45</sup> Cfr. ALMIRON, Núria et al., "Pluralism Protection and Regulatory Authorities...", *op. cit.*



the courts. The Telecommunication Act of 1996 stipulates that regulation should be reviewed periodically to ascertain whether it is still necessary. In these reviews, the main problem is how to quantify the level of pluralism, and the fundamental concern is market concentration.

The FCC is responsible for concentration regulation, but Congress can intervene and approve additional measures or amendments. From the interview conducted, it became clear that the FCC recognises that media concentration has increased in the last 10-15 years. However, the interviewees added that the situation would be worse without the current regulation.

The problems underscored in Italy are related to internal coordination, which also tends to diminish the effectiveness of approved rules and measures. Agcom (Autorità per le Garanzie nelle Comunicazioni) is the public body responsible for monitoring the media and telecommunications, though it does not have the power to regulate or establish measures to protect and promote pluralism. Consequently, while it has never made any proposals on regulating media concentration, it has indeed done so in other areas, such as the proposal to make the sanctioning procedure more efficient.

Contrary to the preconceived idea of “legislative chaos”, the interviewees asserted that the criteria for measuring media concentration are now very detailed, and that rules are now in place regarding the procedure that needs to be followed. In addition, Agcom has commissioned the compilation and systematisation of media industry data from 1999, an operation that the authority itself has been performing since 2002.

In Germany, the commission for the control of media concentration (KEK, Kommission zur Ermittlung der Konzentration im Medienbereich) acts at the request of each Land’s independent regulatory authorities of the media. Its decisions are binding, though they can be vetoed by the KDLM (Conference of Directors of State Regulatory Authorities) by a three quarters majority. The subordination of both issues has become one of the main topics of debate in the KEK, which demands greater autonomy and power to take initiatives to improve its effectiveness.

In the case of Germany, the main critical element that the interviewees underscored was the regulatory authority’s political dependence and lack of operational power. According to the assessments gathered, the protection and defence of pluralism is very important in Germany, and such issues are actually enshrined in its Constitution. Communication law also focuses on the promotion of pluralism to a considerable extent. In fact, this regulatory authority was specifically created to control pluralism connected with media concentration and the impact of the latter on public opinion. Regarding future challenges, its members identified the following main topics as issues that

need to be resolved in the coming years: giving the KEK powers to sanction, improving the provision of and access to data in order to effectively control concentration, and enhancing effectiveness when it comes to identifying a company or companies that is or are actually dependent on a broadcaster.

Regarding the elaboration of regulation, representatives of the KEK felt that greater administrative robustness and determination were required, given the relationships and links that are often forged among media groups and political parties or regional governments. It is also very complex and difficult to control or even limit the growth of media groups while simultaneously aiming to ensure that they remain competitive in the international arena. However, most of the difficulties lie in its effective application: for example, they underscored the complexity of effectively controlling relationships between companies and ascertaining the composition of a media group.

The French regulatory authority is called the Conseil Supérieur de l'Audiovisuel (CSA), which has a political pluralism and electoral campaigns committee. Members of the CSA asserted that, in the body's evolution, pluralism regulation has been its reason for being and its main function. The defence and protection of pluralism are, therefore, priority objectives in French communication regulation. In a second phase, cultural and social aspects are regulated, as is the protection of vulnerable audiences, while financial and technological regulation is the third phase. The pluralism that the CSA defends is defined as the protection of an intermediate state located between the channels' freedom of communication and the obligation to observe established rules.

Besides legal issues, other criteria for defining pluralism were mentioned in the interview, such as giving preference to new actors entering the market, giving priority to candidates with links to local communities, and guaranteeing internal pluralism by offering the highest possible number of opinions. Reference was also made to technology as the main difficulty related to pluralism protection. For example, on the Internet, there are websites that publish electoral polls in advance of the legally established time, and some journalists use the Internet as a source of information without comparing and contrasting it, since they are subject to the dictates of the now and the immediate.

The abundance and complexity of legislation on the matter was also underscored as an obstacle to pluralism. The main contradiction that can be found in the CSA is that, on the one hand, it aims to control media groups to prevent concentration –the Socialist party in opposition even speaks of completely disassociating media groups from other industrial interests– and, on the other, it aims to create strong French media groups that are able to compete internationally.

In the United Kingdom, external pluralism shapes the basic doctrine of Ofcom (Office of Communications), though internal pluralism can also be found in its self-regulation codes, which establish due impartiality and rigour in the media, especially on public issues or matters of political and economic debate. While authority for designing and elaborating drafts to regulate pluralism in the media falls to the government, in the interview conducted, the introduction of a more flexible mechanism was positively highlighted; that of reviewing the rules from time to time on the basis of Ofcom reports in order to keep up with the pace of change.

As a pluralism regulation mechanism, Ofcom officials acknowledged that the use of ownership concentration criterion was useful because it falls within the scope of the regulator, though they pointed to several problems that the criterion throws up: it is not sufficient to measure other types of concentration, such as information sources and the degree of independence of editorial control.

From the interview, it became clear that there are two parallel debates in the United Kingdom: the debate on deregulation and the debate on public service broadcasting. Regarding deregulation, it was felt that some degree of deregulation was necessary because the market is better placed to provide consumers with a variety of services. Regarding public service broadcasting, the assumption is that the market alone cannot ensure sufficient supplies of public service content to meet the needs of United Kingdom citizens and, as a result, several options are included to guarantee such content, as well as content of a local and regional nature: the survival of local television services or a new alternative, proposed by Ofcom, which would include independently-funded news consortia (IFNCs).

The Dutch regulatory authority, the Commissariaat voor de Media (CvdM), places greater importance on external pluralism –the variety of options and offerings in public and commercial broadcasting– than on internal pluralism. Regarding the assessments made in the interview, worthy of note is the defence of the concept of political pluralism generated by the public broadcasting system, which guarantees civil society’s access to the media on the one hand, and the expression of their ideas on the other.

According to the interviewees’ statements, they did not come up against any particular difficulties when designing and elaborating rules on media concentration and pluralism, although they felt that agreements should be entered into with operators in order to develop and implement the new regulation. Also taken into account were new debates arising in the European Union, such as the size or the funding of the public broadcasting system, or the level of competition between public and commercial broadcasting. The

CvdM is now working towards developing and implementing rules applicable to online media and the Internet.

In the Netherlands, pluralism protection is considered to be a principal aspect of media legislation and of communication policy application. Regarding concentration, these policies were strengthened in 2000 following the Mediamonitor reports produced by the CvdM and the approval of the Temporary Act on Media Concentration (2007), which allowed the various media markets and the processes of acquisitions and mergers between media groups to be controlled (as mentioned earlier, this Act has recently been repealed).

## 5. Conclusions

As outlined in the presentation, this article describes and analyses the regulatory frameworks and the current pluralism protection policies in the United States and several countries of the European Union (Germany, France, the United Kingdom, the Netherlands, Italy and Spain). The data obtained allow a qualitative assessment to be carried out, through comparative analysis, in order to identify certain similarities and some significant differences. Thus, it was found that pluralism protection is a common denominator in the communication policies of these countries. However, regulatory and legislative differences depend on social, geographical and media contexts, and time variations in the application of policies depend on audiovisual media market liberalisation processes.

### 5.1. Differences in legal frameworks

Despite the fact that European countries share common directives issued by European Union institutions and should transpose those directives into their national legislations, differences in the rules regulating basic aspects of the media system prevail; such is the case for pluralism. Greater concern for external pluralism was found in some cases: Germany, France and Spain, which take audience reach very much into account as an assessment criterion –especially the first two; and for internal pluralism in others: France, the Netherlands and Italy are countries that express the defence of internal pluralism in their rules and regulations. There are also differences in the organisation, composition, powers, functions and sanctioning abilities of the regulatory authorities analysed. As a result, a uniform approach to the defence of the value of pluralism is still a long way off.

It is therefore difficult to establish any uniform criteria for pluralism protection in the countries studied, since the globalisation of phenomena affecting the media model (for example, the threat that business concentration processes represent for the diversity of opinions and points of view in the media) is not accompanied by a response –which could also be global– by democratic communication policies.

### 5.2. *Differences in perceptions, traditions and use of language*

Another significant difference lies in the values used in and applied to the design of the rules and regulations analysed: political culture, social customs and traditions, different legal traditions, political approaches and even language generate a wide diversity of options when it comes to dealing with the topic of pluralism. For example, in the United States, the term ‘diversity’ –rather than pluralism– is used, since, in that country’s legislation on communication, greater importance is placed on localism, therefore taking account of available voices and media in each market. In Europe, there is a historical concern to control the dominant position of media groups (ideological, political) and to foster the democratic formation of public opinion. In this respect, it was found that audience concentration criteria are beginning to be applied as a pluralism protection mechanism.

However, there is a transversal element in almost every country: the judiciary’s intervention in order to give legitimacy to and interpret the rules of pluralism. Thus, for example, the judiciary in Italy has been involved in driving forward legislation on pluralism protection; in Germany it has played a key role in interpreting the law; and in the United States it has settled conflicts between the regulatory agency and other actors, even overturning some of the decisions or regulations approved by the FCC (*Prometheus Radio Project v. FCC*, 2004).

Also worthy of note is the difference between the audiovisual media model of the United States (private and commercial practically from the start, with very little implantation of public radio and television as a result) and the dual audiovisual media model of European Union countries (public and private). Besides the national particularities, the existence of public television in Europe situates the terms of the debate on pluralism on a different level. Thus, the defence of internal pluralism, a classic criterion applied in Europe to both public and private media, has given way to a new criterion: public media must provide an environment for diversity and private media create an environment for competition. Thus, the democratic value of pluralism now tends to be identified with the concept of external pluralism, which

in turn confuses the coexistence of two voices –public offering and private offering– with the existence of a diversity of voices.

### 5.3. *Impermanence: legal framework subject to review*

The media sector's link to the productive economy, its need to adapt and change to keep up with technology, and its marked dependence on political, social and cultural circumstances and junctures all together make the normative framework regulating the media a very fertile ground for impermanence. The large number of factors and interests that intervene in the regulation of the media means that de facto situations prevail over logic, rationality, forecasts and certain anticipated visions when it comes to legislating on such matters. The different political and economic situations in each country therefore explain why there is such a variety in the cases analysed. In nearly all of them, it was found that changes are being made; some have recently been implemented (Spain) or are in the process of being debated (United States), while others are subject to temporary regulations (Netherlands). Pluralism protection policies therefore tend to follow the general communication policy trend: regulation and legislation is made on the basis of a changing reality that, in turn, forces the rules to be amended. As a result, it was found that there are difficulties in implementing effective long-term measures and planning political action that is consistent with democratic postulates.

### 5.4. *The relationship between the advent of pluralism protection and audiovisual media market liberalisation*

In relation to the above, another conclusion that could be drawn is that there are close links between the advent of pluralism protection policies and audiovisual media market liberalisation processes rolled out in the countries analysed. Thus, the privatisation and concentration of media ownership or the transnationalisation of capital and financial flows have given rise to a political response that basically tries to halt to situations of dominant power that certain media groups may exert over markets, content and public opinion. It is mostly in that respect that the defence of pluralism emerges; protection mechanisms are used to guarantee free, democratic public opinion, one that is shaped by competing points of view. The clearest example of this link between the limits on concentration and guaranteeing free public opinion is the German case, where audience reach is specifically used to prevent a single media group from exerting a dominant influence over society.

### 5.5. *Regulatory authorities have a certain degree of organic dependence on governments (difficult to avoid, i.e. via funding or member election)*

The degree and level of independence that regulatory authorities have is another key issue when it comes to assessing policies aimed at fostering pluralism, since the circumstances and junctures affecting political power can occasionally interfere in the decisions taken on pluralism or in the practical application of pluralism in each of the countries. Despite legal cautions that try to impede the politicisation of these organisations, the mechanisms for electing and/or appointing chairpersons and members to them involve a more or less direct intervention by the respective government and/or parliament. Thus, it is a complicated matter to separate the development and application of pluralism policies from political toing and froing and parliamentary debate. This situation becomes even more complicated when there is a lack of any basic consensus among a country's political forces to approve and drive forward such policies –the Spanish case, for example– or when partisan criteria are clearly present in such policies –the Italian case, for instance.

### 5.6. *Difficulties reconciling pluralism as a socio-democratic value and concentration as a threat to economic/market expectations*

The analysis of indicators used to measure levels of pluralism suggests, by way of a conclusion, that account should be taken of both economic and socio-political aspects. Thus, pluralism protection as a democratic principle may come into conflict with economic principles based on the free market and competition. The dichotomy between internal pluralism and external pluralism, together with a greater emphasis placed on the latter concept by the policies analysed, indicates that the dominant trend consists in identifying a greater quantity of voices available (a large number of media) with a higher level of diversity and pluralism. Thus, protecting the market logic protects pluralism: if the markets functions, it provides diversity.

However, this argument conflicts with concentration processes and the dominant position –in relation to public opinion– of certain media groups in national and international markets. Thus, the emergence of limits based on audience reach as a mechanism is significant in the sense that it will need to be explored, tested and improved in years to come. Therefore, the previous argument should be nuanced: a functioning market cannot always provide diversity. In view of this eventuality, a democratic society must have and demand guarantees.

The analysis of pluralism protection policies shows that a muddle and/or some confusion has developed between these two aspects: on the one hand, there are industry pressures and, on the other, (good or bad) political intentions and pragmatism in the light of consummate facts. The industry's views and arguments are well known: the market provides diversity, internal pluralism should prevail, external pluralism is not important if there is internal pluralism, etc., and faced with that, it is necessary to rely on the design and effectiveness of communication policies that countries apply, to a lesser or greater extent, in order to halt economic concentration and dominant positions in the sector.

Nor does it appear reasonable to abandon the defence and application of internal pluralism in either the public or private media sectors. In fact, in those countries (France and Italy) where the partisan struggle has been much more pronounced and unstable, it was found that there is a trend towards establishing highly regulated pluralism protection mechanisms.

Irrespective of whether or not the market functions and provides a smaller or larger number of options and voices, what underlies the democratic principle of pluralism is the social benefit stemming from the use of the public realm as a place for encounter and consensus. However, the solution does not consist in imposing a policy that regulates content –in fact, historical examples have shown this to be ineffective<sup>46</sup>, but rather in promoting a culture of diversity and dialogue through the media. Thus, for example, the legislators and regulatory authorities are mired in various dilemmas: they have to smooth out tensions and conflicts between public and private bodies, and above all, they have to come up with anti-trust measures that do not jeopardise national groups that need to expand beyond their borders<sup>47</sup>.

It is clear that the greatest challenge facing the development and application of pluralism protection policies lies in the fit and difficult balance between social values and economic values, that is to say, between democratic criteria and market criteria.

<sup>46</sup> This is the case, for example of the 'fairness doctrine' in the United States, which was removed in 1987.

<sup>47</sup> This situation was made explicitly clear in the interviews conducted with experts from the KEK and the CSA.



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