The European Media Freedom Act. A Redoubt for Pluralism in an Increasingly Concentrated Landscape

Adelaida Afilipoaie & Heritiana Ranaivoson

Abstract

Concentration in the media sector has long been recognised as posing potential risks to pluralism. However, it was not until the Regulation (EU) 2024/1083 (the European Media Freedom Act, hereafter, EMFA) entered into force on 7 May, 2024, that "media pluralism" was addressed in an EU regulation. Notably built on the Audiovisual Media Services Directive (AVMSD), the EMFA seeks to address several key challenges to media pluralism by establishing a set of rules and mechanisms to promote media pluralism and independence. However, as it lacks a specific legal basis to intervene on cultural matters, it tends to use the reasoning of internal markets to do so. Examining the EMFA more closely, it quickly becomes apparent that its main focus is on news media, which is also revealed through the analysis of its Art. 22, placed at the core of this chapter. The obligatory involvement of National Regulatory Authorities (NRAs) in media merger assessments and the addition of the so-called "media pluralism test" are not without challenges, starting from the potential and vague recognition of video-sharing platforms (VSPs) and very large online platforms (VLOPs) as media service providers, as well as the reference to accounting for the "online environment" in the assessments and the extension to the somewhat symbolic involvement allocated to the NRAs. Although assessments under Art. 22 seem more suitably fitted to mergers involving traditional media, the reference to VSPs and VLOPs as potential media service providers invites more aspirational avenues. Nevertheless, the EMFA appears to advance transparency obligations, harmonising certain aspects pertaining to media merger assessments based on media pluralism reasoning, and recognising the key role played by NRAs in upholding national media laws and pluralism objectives.

1. Introduction

Media pluralism is widely recognised as a precondition of contemporary democracies (European Commission et al, 2022a). This multi-faceted notion combines the plurality of media ownership and sources (Valcke, 2011) with the diversity of content produced, distributed, and eventually consumed by citizens (Helberger, Karppinen and D'Acunto, 2018). Among the many goals of pluralism are the aims to foster political agreements, increase transparency, empower civil society, mitigate social conflicts, and pressure legal institutions to adhere to the rule of law. Pluralism attunes with editorial independence – both of which are necessary conditions for free information. Governance, regulatory frameworks, and ownership patterns within the media landscape play a crucial role in dictating how information is produced, distributed, and consumed (Karppinen, 2013).

However, media industries are characterised by high levels of concentration, with profound social, cultural, and political implications (Peruško, 2010; Mancini, 2018). Trappel and Meier (2022) argued that the consolidation trend among both the media and telecom companies has endangered the flows of information, diversity, and pluralism of views and opinions, thereby heightening social inequality. Yet, the relationship between media concentration and pluralism is ambiguous (Ranaivoson, 2019). Harcourt and Picard (2009, p. 4) argued that "the normative assumption that greater diversity of content and greater pluralism will exist when there is less concentration seems common sense. However, the explicit link of concentration to lower diversity of content and pluralism has never been established". Haraszti (2011, p. 14) referred to media pluralism as "everything from media types, interests such as ownership and control over the media, political and cultural viewpoints, and regional concerns, all of which have to be communicated or accessed through the media". There are several dimensions of media pluralism, including internal and external aspects. Reporters Sans Frontiers (2016) defined internal pluralism as the plurality of voices, analyses, expressed opinions, and issues within an outlet or organisation, and external pluralism as encompassing the number of outlets, disparate types of media, and the coexistence of privately and publicly owned media. Another dimension is viewpoint diversity, which, in contrast to internal pluralism, refers to the presence of different and competing perspectives across multiple media outlets, encompassing the entire media system. However, viewpoint diversity is not necessarily a consequence of external pluralism, nor is external pluralism required to secure it.

There are alternative ways to ensure that a concentrated market remains pluralistic, (e.g., competition or media law, support mechanisms, financial incentives, etc.). However, Helberger (2018) and Muñoz Larroa (2019) pointed out that the issue does not actually lie with the existence of a lack of diversity of supply and content, but rather with the diversity of media content that audiences are exposed to due to content filtering, the prioritisation and suppression of content, and recommendation algorithms which reinforce filter bubbles. These phenomena may reduce exposure diversity, a concept that deals with audiences' exposure to, consumption of, and engagement with a plurality of content. This concept was initially proposed by Napoli (1997) and has reappeared in more recent debates concerning media pluralism, concentration, and online platform power (Helberger, 2018; Seipp et al, 2023).

Moreover, in the borderless digital world, the principles of democracy and pluralism face both great opportunities and new challenges. For instance, Brogi et al (2021) argued that a greater number of players is not equivalent to an increased plurality, because online platforms emphasise specific content types and sources tailored to each individual user, which significantly influences their information choices. The power exercised by the so-called "internet information gatekeepers", who control information flows and "impact participation and deliberation in democratic culture" (Laidlaw, 2010, p. 266), is one of the reasons behind the heightened interest in promoting and protecting pluralism, as reflected in recent EU initiatives.

However, the EU lacks the explicit authority to regulate media, which forms part of the field of culture and is thus under the sole competence of the Member States, whose holding of regulatory prerogatives over their media sector has resulted in a fragmented regulatory approach (European Commission et al, 2022a). Although the EU does not have the exclusive legal basis to regulate the media sector, Art. 6 of the Treaty (TFEU) (Treaty on the Functioning of the European Union, 2012), confers the EU with the competence to "carry out actions to support, coordinate or supplement the actions of the Member States". Besides, the EU has the power to adopt laws to ensure that the internal market can function in such a way as to achieve that objective. To do so, it had to use Art. 114 TFEU[1] to propose the EMFA. This allowed the European Commission (hereafter,

1 Art. 114 TFEU is primarily used for harmonising regulations across the EU Member States in areas that affect the free movement of goods, services, capital, and people within the EU.

the Commission) to respond to the calls it had been receiving from other EU institutions for the past four decades for EU-wide regulatory action to address barriers to the functioning of the internal media market and to promote pluralism while safeguarding independence in the media market. However, except for the Council Directive 89/552/EEC (1989) Television Without Frontiers (TWFD) and its successor, Directive (EU) 2018/1808 (2018) Audiovisual Media Services Directive (AVMSD), the Commission's intervention remained outside secondary EU law.[2]

Art. 1 of the EMFA highlights that its scope is to "lay down common rules for the proper functioning of the internal market for media services", thus highlighting the threat posed by the fragmented national regulations as a prime reason for its intervention. Along these lines, the EMFA argues that the fragmentation of media ownership rules and the restrictions found at the national level can hinder media market players' operation and expansion across borders. Different approaches to media pluralism and editorial independence also hamper free movement, as does the occasionally-biased allocation of economic resources, such as public funds. However, the EMFA's recitals, alongside the Explanatory Memorandum (European Commission, 2022b) and the Recommendation (European Commission, 2022) accompanying the Regulation, repeatedly and explicitly refer to the objective of protecting the freedom of the media, freedom to provide (media) services, media pluralism, and editorial independence. In essence, the EU wishes to regulate pluralism and media freedom to respond to democratic threats, but, in so doing, it advances tortured arguments about regulating pluralism for economic reasons.

Beyond its recitals, the EMFA places media pluralism at its core, particularly in its Section 5 – Requirements for well-functioning media market measures and procedures – which was inspired by the issues identified following a public call for evidence[3] consultation (European Commission, 2021). Section 5 proposes to protect media pluralism by highlighting Mem-

2 In the context of the EU legal system, the Commission operates within two main types of law: primary law (i.e., foundational treaties and legal agreements that establish the EU, its institutions, and the overall legal framework) and secondary law (i.e., regulations, directives, decisions, recommendations, and opinions).

3 Among these respective issues, 81% of the 900 contributors found the safeguards for media independence and pluralism unsatisfactory. Therefore, academic institutions, companies, business associations, citizens, non-governmental organisations (NGOs), public authorities, and trade unions agreed to the need for regulatory convergence and cooperation between independent media regulators.

ber States' obligation to designate NRAs to assess the impact of media market concentrations on media pluralism and editorial independence. These NRAs – potentially designated among existing media regulators – are to conduct a separate assessment from the merger review conducted by the National Competition Authorities (NCAs). In certain cases (and as discussed further in Section 5), the NRAs will be assisted by the European Board for Media Services (the Board) and the Commission. As stipulated in Art. 8, the Board is established as a replacement and successor of the European Regulators Group for Audiovisual Media Services (ERGA) – which had a narrower scope for action limited to audiovisual media services only – and is composed of NRA representatives.

The remainder of the chapter discusses the following. First, we define the EMFA and its objectives. Second, we introduce Section 5 on media concentration and the link/risk to pluralism and independence. Once done, with the help of the Media Plurality Monitor's (MPM) market plurality indicators and the Commission's Recommendation accompanying the EMFA, we dissect Art. 22(2) lit. (a) to lit. (e). An outcome of this analysis is the identification of some of the necessary information that could help NRAs with their assessments.

2. Safeguarding media pluralism at the EU level

Starting in the 1980s, various EU Green Papers and Opinions have launched discussions on the possibility of coordinating certain media provisions at the EU level, including talks on safeguarding pluralism. In 1985, the Economic and Social Committee (that is, the EU's consultative body) stated that regulating the media structure should rest with the Member States so as to ensure that pluralism of information and opinions in the Union would not be threatened. The Commission then placed the protection of pluralism in the hands of the Member States, arguing that national arrangements can safeguard pluralism. In 1992, the Commission adopted a Green Paper on "Pluralism and media concentration in the single market. An assessment of the need for Community action", as a response to the Parliament's request to the Commission to propose measures aimed at preventing concentrations in the media sector from endangering media pluralism (Commission of the European Communities, 1992). Yet, the Commission saw no need for a Community legislation[4] to safeguard pluralism, arguing that national regulatory frameworks would be better positioned to do so. The Commission's stance may have been influenced by how media policies fall under the jurisdiction of Member States – the latter generally being extremely hesitant to relinquish such jurisdiction. Still, at the EU level, coordination and harmonisation of various media-related provisions were agreed upon and established in the 1989 TWFD and its (revised) successor, the AVMSD. Both Directives linked media pluralism to competition, as unfair competition and concentration were recognised as threats to media pluralism.

To return to the same 1992 paper, the Commission recognised the importance of media ownership restrictions for safeguarding pluralism, explicitly nuancing that they cannot be replaced by applying general competition law – and, in particular, merger control. This was due to competition law having been established from an economic perspective. The Court of Justice of the European Union (CJEU), when dealing with case decisions, has repeatedly postulated that the assessment of concentrations must be done in accordance with the "economic outcome attributable to the concentration which is more likely to ensue" (Venit, 2013, p. 127). Art. 21(4) of the Regulation (EC) 139/2004, referred to as the EC Merger Regulation (The Council of the European Union, 2004) allows Member States to include in their merger assessments additional measures to protect legitimate interests, such as media plurality, as well as other public interests that must be recognised by the Commission. Although not focused on creating pluralism and diversity in the media, merger control can indirectly contribute to it by ensuring the proper functioning of competition in the internal market and the decentralisation of market power in the hands of the many, which reduces the control and power one entity can exercise over opinion-forming.

As the responsibility of media policies was placed in the hands of the Member States, current media-specific policies greatly vary across them – as shown in our prior research (Afilipoaie and Ranaivoson, 2023), where

4 Community legislation refers to the body of laws created under the framework of the former European Communities – which were part of the precursor organisations to the European Union, such as the European Economic Community (EEC) and the European Coal and Steel Community (ECSC). These laws were binding across Member States and essential for implementing and regulating the common policies of the Communities.

we systematically mapped all the media-specific policies and regulations, including national competition laws across all Member States, to identify the measures limiting media ownership.[5] These rules focus on "traditional" media, and rarely encompass online platforms. This reality, reinforced by the legacy media for EU regulatory interventions in the digital landscape to ensure a regulatory level playing field and fairer competition (Enli et al, 2019), fructified with the EU spearheading its digital regulatory agenda, thus paving the path for harmonisation.

In terms of the special assessments of media merger measures, we have previously highlighted (Afilipoaie and Ranaivoson, 2022) that half of the Member States involve their NRAs in national media concentration assessments, who conduct their analyses solely on pluralism grounds.[6] However, in that same research, we criticised the effectiveness of such a system, as, except for certain Member States,[7] the NRA's assessment and opinion is mostly non-binding, and easily outweighed by authorities with higher powers. As we will see, the EMFA is unlikely to change this limitation, as neither the NRAs', the Board's, nor the Commission's opinions in these cooperative assessments are legally binding. Notwithstanding, it attempts to harmonise the current situation, as all Member States must establish such a cooperation procedure and conduct their assessments based on given criteria. The EMFA goes far beyond the special requirements for the media merger assessments at the forefront of this chapter. Concisely summarised by Cabrera Blázquez (2022, p. 3), these objectives are:

- "to ensure that media companies can operate in the internal market subject to consistent regulatory standards, including as regards media freedom and pluralism,
- ensure that EU citizens have access to a wide and varied media offering both offline and online,

5 Following this mapping, we propose a typology of measures with various limits, including media ownership restrictions, special assessments of media mergers, and measures restricting capital control and the actors allowed to own media companies. The latter safeguards (as much as is possible) media companies' independence from various forms of capture (i.e., media or state capture) (Dragomir, 2019; Schiffrin, 2021).

6 Involving NRAs alongside NCAs in these assessments creates a decentralised and more holistic cooperative assessment system where the concentrations are reviewed not only on competition grounds, but also on the basis of pluralism.

7 However, even in these Member States, the NRAs rarely oppose NCAs' decisions and make use of their binding power (see the country cases in European Commission et al, 2022a).

- safeguard the editorial independence and independent management of the media, which is a precondition of media freedom and of the integrity of the internal market,
- foster undistorted competition between media companies by ensuring a transparent and fair allocation of state resources".

3. The European Media Freedom Act (EMFA)

The EMFA (The European Parliament and the Council, 2024) – which entered into force on 7 May, 2024[8] – was first announced as an initiative during Commission President Ursula von der Leyen's State of the Union address in 2021.[9] The EMFA proposal builds upon the European Democracy Action Plan presented in December 2020, the latter of which aims to support free and independent media, enhance media resilience, ensure transparency in media ownership across the EU, and create safer working conditions for all media professionals.

The EMFA was born from the need to tackle four main identified problems in the internal market: (i) fragmentation of national rules on media pluralism; (ii) insufficient cooperation and convergence among independent media regulators; (iii) public and private interference in the ownership, management, and operation of media outlets; and (iv) lack of media pluralism safeguards, including those found online (Cabrera Blázquez, 2022). Not only does the EMFA lay down the first-ever EU harmonised rules on media freedom and independence, but it does so in the form of a directly applicable Regulation.

8 While the EMFA entered into forced on 7 May, 2024, it is only applicable from 8 August, 2025 onwards, with some exceptions to Art. 3, Art. 4(1) and (2), Art. 6(3), Arts. 7–13, Arts. 14–17, and Art. 28 applying at various dates before 8 August, 2025, and Art. 20 applying from 8 May, 2027. The difference between the dates of entry and applicability is that, in the first case, the regulation has legal existence, but is not enforceable. This means that, before the date of applicability, obligations or privileges can neither be exercised nor enforced. The in-between period is meant to allow time for parties to, among other actions, prepare their systems, processes, procedures, and documentation for compliance with the new rules.

9 The address also announced the call for evidence for an impact assessment and the Council of the European Union's conclusions on safeguarding a free and pluralistic media system, and on strengthening the promotion of European audiovisual industry.

The EMFA includes 78 recitals, followed by 29 articles structured into 4 chapters.[10] The matters covered include, but are not limited to, the protection of editorial freedom and independence of media service providers, thereby safeguarding journalistic sources and confidential communications against intrusive surveillance (Art. 4); the adequate and stable funding, and independent functioning of, public service media providers (Art. 5); the development of national media ownership databases containing information on media service providers (Art. 6); the protection of online media content produced according to professional standards against unjustified takedowns (Art. 18); the user's right to customise the media offering on devices and interfaces, enabling them to modify the default settings to reflect their own preferences (Art. 20); transparency obligations for providers of audience measurement systems (Art. 24); and the assessment of media market concentrations (Art. 22), on which our chapter focuses.

Upon the EMFA's initial publication, it was accompanied by a non-binding Recommendation establishing several voluntary best practices collected from the sector and geared at promoting editorial independence and greater ownership transparency (European Commission, 2022). Media service providers were encouraged to draw inspiration from the non-exhaustive catalogue of voluntary measures aimed at improving their resilience, and Member States were prompted to take actions to promote media ownership transparency.

3.1 Explaining Section 5 of the EMFA

As highlighted in Recital 63, the EMFA sets out a common framework for assessing media market concentrations across the Union to ensure that media service providers operate in an internal market with reduced obstacles. Moreover, Recital 6 underlines that the insufficient tools for regulatory cooperation between NRAs or bodies could negatively affect this market. To safeguard media pluralism, some Member States have taken regulatory measures, but, in so doing, have contributed to the divergence of approaches. As mentioned in Recital 7, this has increased he risks of endangering

10 Chapter I includes the general provisions (Arts. 1–2), Chapter II incorporates the rights and duties of media service providers and recipients of media services (Arts. 3-6), Chapter III covers the framework for regulatory cooperation and a well-functioning internal market for media services (6 sections comprising Arts. 7–25), and Chapter IV includes the final provisions (Arts. 26–29).

free movement in the internal market. Under this reasoning, Recital 7 highlights the need to harmonise certain aspects of national rules related to media pluralism and editorial standards. According to prior research (Afilipoaie and Ranaivoson, 2022), when NRAs and ministries intervene in media merger assessments, they do so based on media pluralism and often public interest, which are merely mentioned in national laws and rarely explained (Afilipoaie and Ranaivoson, 2022). This lack of definitions and criteria, coupled with various heterogeneous assessment frameworks, results in increased uncertainly for the merging parties. Therefore, Section 5 of the EMFA, titled 'Requirements for well-functioning media market measures and procedures', aims to harmonise these divergent approaches. The section consists of three articles. Art. 21 addresses the justification and proportionality of national measures, and outlines the reasoning behind the Board's and the Commission's interventions. Alongside providing an appeal mechanism, Art. 21 also obliges Member States to set out in advance clear timeframes for the procedures and applications of any legislative, regulatory, or administrative measure, which must be reasoned, transparent, objective, and non-discriminatory. Art. 22 deals with NRAs' assessments of national media market concentrations and the roles and procedures therein. Art. 23 gives the Board and the Commission the power to cast their opinions on media market concentrations in the absence of such assessments when the concentration is likely to affect the functioning of the internal market for media services.

3.2 The EMFA's approach to media pluralism and the link with the Media Plurality Monitor

The EU has long been committed to promoting media pluralism, recognising it as vital for the functioning of democratic societies. It has sought to ensure that media across the continent remains free, independent, and diverse through combining legal frameworks, financial programs and such monitoring tools as the MPM (European Commission, n.d.), the EU's most prominent initiative. The MPM is conducted by the Centre for Media Pluralism and Media Freedom (CMPF) at the European University Institute (EUI), co-financed by the EU. The CMPF publishes yearly reports on the four main areas of risk to media: basic protection of media freedom, market plurality, political independence, and social inclusiveness. More specifically, in this chapter, we use the MPM's market plurality indicators. As with the evolution of the MPM, the indicators evolve and adapt to the challenges of the digital age.

This risk-based approach of the MPM also informs the EU Rule of Law reports, particularly the chapter on media pluralism and freedom (European University Institute, 2022). This is worth mentioning as 22(d) of the EMFA encourages NRAs to consider the reports' findings in their assessments. Moreover, the MPM's findings are notably cited in Recital 7 of the EMFA. According to Elda Brogi (2020, p. 3), the scientific coordinator of the CMPF:

> The peculiarity of the MPM is that it does not prefer a notion of media pluralism; instead, it builds on the different national and European traditions and definitions to elaborate a set of indicators that tend to cover all possible aspects involved in the definition of media pluralism in a broad European sense [...] It relies on a broad definition of media pluralism that entails legal, economic, and socio-political aspects. It therefore takes a holistic approach that considers all the different nuances of the definition of media pluralism.

Similarly, while the EMFA does not define the term *media pluralism*, it does exemplify through its non-legally binding Recital 64 that media pluralism refers to "the possibility to have access to a variety of media services and media content which reflect diverse opinions, voices and analyses". Recital 29 states that media pluralism can be promoted by "producing a wide range of content that caters to various interests, perspectives and demographics and by offering alternative viewpoints and programming options, which provides a rich and unique offering". Generally speaking, media ownership concentration is perceived as a threat to media pluralism, as it results in the market being controlled by the few, resulting in less competition, which can, in turn, lead to content homogenisation, reduction in the range of viewpoints, and increased political and commercial influence, all of which ultimately influence the formation of public opinion. Art. 22 takes a similar stance, arguing that media concentrations could significantly impact media pluralism and editorial independence.

The harmonisation propositions stipulated in Art. 22(2) lit. (a) to lit. (e) share strong similarities with the MPM's risk indicators related to market plurality. These include sub-indicators concerning the transparency of media ownership, plurality of media providers, plurality in digital markets, media viability, and editorial independence from commercial and owners' influence (European University Institute, 2024). In light of the above, the MPM should be considered a highly useful instrument for more deeply understanding Art. 22 of the EMFA, especially in terms of the criteria proposed for the pluralism test, as it considers many of the same problems.

3.3 Delving into Art. 22 of the EMFA: assessment of media market concentrations

This chapter focuses on Art. 22, the first section of which (1) highlights the obligation for Member States to lay down (in their national laws) substantive and procedural rules to allow for the assessment of media market concentrations that could significantly impact media pluralism and editorial independence. Thus, it is up to the Member States to decide the significance of this criteria for themselves. Moreover, Art. 22(2) presents an exhaustive list of elements in lit. (a) to lit. (e) which NRAs must include in their assessments. The purpose of these elements is to harmonise the criteria used by the NRAs, colloquially referred to as the "pluralism tests". Art. 22(3) to (6) lays down the roles and procedures of the Board's and Commission's involvement in these assessments. For clarification, we here delve into the occasionally vague and obscure elements of the assessments proposed in Art. 22(2).

The roots of Art. 22 lay in the results of the study on online media plurality and diversity (European Commission et al, 2022a), which highlighted the lack of cooperation systems in media merger assessments across the EU. Building on the above-mentioned study – to which we served as contributors – we identified various cooperation typologies and represented them hierarchically as a power pyramid, with Ministries and NCAs occupying more powerful positions than NRAs, which typically have non-binding advisory competencies in most legislations (Afilipoaie and Ranaivoson, 2022). According to our research, due to NRAs' opinions being generally non-binding, they do not significantly influence the final decisions. Art. 22 does not specify whether the assessment is binding or not, leaving it up to the Member States to decide the powers allocated to NRAs. Nevertheless, this power hierarchy will likely remain.

Art. 22 introduces a requirement for Member States without a cooperative assessment system in place to designate an NRA responsible for, or substantively involved in, the assessment, and to establish substantive and procedural rules in national law. Art. 22(2) harmonises these assessments based on exhaustive criteria, offering some legal certainty to the merging parties, as Art. 22(1)(d) and (e) stipulates that the Member States shall "set out in advance objective, non-discriminatory and proportionate criteria for notifying such media market concentrations and for assessing the impact on media pluralism and editorial independence [...] and specify in advance the timeframes for completing such assessments".

Under the EMFA, these regulatory cooperative assessments of media market concentrations[11] apply if the latter can significantly impact media pluralism and editorial independence. Under the EMFA, a media service provider is an individual or legal entity that professionally engages in providing a media service, with editorial responsibility over the content. This means that they decide what content is included, organised, presented, or distributed within their media services. The EMFA applies to traditional players[12] as well as to digital platforms, such as streaming and on-demand services.[13]

Exactly how the EMFA considers VSPs (e.g., YouTube) could revive a heated debate about their editorial control, or lack thereof. There have been long debates concerning the "neutral" conduct of VSPs across academic circles. While VSPs have consistently declared that they simply host content on their platforms and have no editorial control, academic research has stated otherwise (see, for example, Napoli and Caplan, 2017; Picard and Pickard, 2017; Beckett, 2019; Barwise and Watkins, 2018). Moreover, Mansell (2015, p. 3) argued that online platforms are not "neutral 'conduits' for traffic and hosts for content creators [...] [t]hey have the power to influence what ideas citizens are able to find easily and whether the notion of a public sphere for democratic dialogue can be sustained into the future as the media ecology increases in complexity". In 2018, when the AVMSD was last revised, Art. 1(1)(aa) explicitly defined VSPs as having no editorial control over the content uploaded by their users. Besides, more recently, VSPs seemed to have won the debate in judgements by the CJEU. According to Frank Peterson v. Google LLC and Others, and Elsevier Inc. v Cyando AG. (2021) – joined cases concerning the liability of online platforms for

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11 Art. 2(15) of the EMFA defines media concentrations as involving at least one media service provider or one online platform providing access to media content.

12 For example, TV and radio broadcasters, such as the BBC or VRT; news media organisations, including their print and digital versions (e.g., *The Guardian* or *Le Monde*); and digital native media, whose online communication is the primary focus, such as Business Insider or Politico.

13 Netflix or Hulu are two examples, both producing or curating such editorial content as documentaries and deciding on the organisation of their catalogues.

copyright infringements carried out by their users – platforms could qualify as "neutral" hosts (Reda and Selinger, 2021).

However, through Recital 11 and the definition of a media market concentration under Art. 2(15), the EMFA combines VSPs and VLOPs[14] (e.g., Facebook) under the definition of a media service provider, thereby giving NRAs the task of reviewing the mergers involving these platforms under the pluralism test. Recital 11 of the EMFA reads that "[i]n the digital media[15] market, video-sharing platform providers or providers of very large online platforms could fall under the definition of media service provider" if they exercise editorial control over a section or sections of their services.[16] Nevertheless, NRAs often face uncertainty over categorising VSPs and VLOPs as media service providers, which can constrain their participation in the assessment.

4. Analysis of Art. 22(2) lit. (a) to lit. (e)

4.1 Art. 22(2)(a)

> [...]the expected impact of the media market concentration on media pluralism, including its effects on the formation of public opinion and on the diversity of media services and the media offering on the market, taking into account the online environment and the parties' interests in, links to or activities in other media or non-media businesses.

Art. 22(1) stipulates that NRAs should only conduct the pluralism test (following the elements proposed in Art. 22(2) in media market concentrations that could significantly impact media pluralism and editorial independence. Albeit abstract, lit. (a) proposes that NRAs should follow these specific

14 Art. 33 of the Regulation (EU) 2022/2065 (2022) Digital Services Act (DSA) classifies platforms with over 45 million monthly users in the EU as VLOPs and have to abide by certain obligations. According to the Commission (2024), as of 19 September, 2024, there were 23 designated VLOPs under the DSA.

15 Digital media is any form of media that uses electronic devices for distribution (see Recital 3 of the EMFA).

16 Recital 11 mentions the key role that VSPs and VLOPs play in organising content using automated means or algorithms, but this characteristic does not seem to be explicitly considered a form of editorial control. Yet, through this automated organisational control, such platforms shape the visibility of content and decide on its distribution, thus controlling the actual architecture in which users consume content (Helberger, 2020; van Drunen, 2021). In a platform context, it is clear that editorial control transcends the traditional editorial practices in the editorial rooms.

avenues for their impact assessments, which include references to the online environment. By definition, a concentration arises where there is a change of control on a lasting basis resulting from the merger of two or more previously independent companies or parts of companies. Lit. (a) suggests that some (significant) change of control can impact the formation of public opinion and diversity. By breaking down lit. (a), the pluralism test covers aspects related to two interrelated points: (i) ownership and (ii) diversity and opinion-formation power.

4.1.1 Ownership and beyond

The first point, "the parties' interests in, links to or activities in other media or non-media businesses", includes matters of ownership, links to governmental institutions, interest groups, any capital holdings, and political links and activities. Horizontal,[17] vertical,[18] cross-media,[19] and conglomerate concentrations[20] are different forms of media ownership concentration that describe how the control of media outlets and resources is structured within a market. Different forms of media ownership raise different concerns to media pluralism and competition. For example, the matter of cross-media ownership has long been debated in academia, as this type of ownership can lead to a concentration of power that enables one entity to influence the distribution of information. Accordingly, Harcourt and Picard (2009) argued that limitations to cross-media ownership are necessary to curb excessive power over public opinion. When the media is concentrated in the hands of a few, the risk of content homogenisation increases (Hendrickx and Ranaivoson, 2019), which affects the range of information and perspectives available, and thus ultimately shapes public opinion. However, Evens and Donders (2018, p. 107) noted that "diversification through cross-media ownership allows broadcasters or distributors to reduce risks and benefit from economies of scope", arguing that such restrictions should be kept to a

17 A horizontal merger occurs when a company, such as a newspaper, acquires an outlet of the same type of media, such as another newspaper.

18 A vertical merger occurs when a company controls different stages of the production and distribution process within the same media industry, such as a newspaper that acquires a printing press.

19 A cross-media merger occurs when a company, such as a newspaper, acquires different types of media outlets, such as a television station or a radio channel.

20 A conglomerate media merger occurs when a larger conglomerate that owns businesses in various industries acquires a media company.

minimum, especially considering the challenges posed by online platforms that traditional media must navigate. While cross-media ownership can lead to scale, efficiencies, synergies, and a broader audience reach, it can also raise concerns over the reduced diversity of viewpoints and media concentration, prompting many Member States to regulate it so as to protect media pluralism and democracy at large.

In the virtual sphere, ownership departs from the traditional media landscape and is characterised by unprecedented scale and concentration, data-driven strategies, global reach, platform dominance, decentralised content creation, regulatory challenges, and novel economic models. This means that NRAs must also take those "online environment" characteristics into account when conducting their assessments. To conduct such ownership measurements, cooperation between the merging parties and the national authorities, alongside reporting transparency, is key.

In the online environment, an ownership assessment extends beyond direct ownership (e.g., capital shares) or reach (e.g., market or audience shares) and spans to indirect financial support and technological dependencies, which tend to fall outside of the scope of traditional regulatory tools (Fanta and Dachwitz, 2020). Seipp et al (2023, p. 1558) stated that, considering the platform context and the new tools available with which to reshape audience attention, "ownership is no longer concerned with owning shares or control over cable networks or programme content but is more about ownership or control over data, algorithms, and infrastructures". Afilipoaie, Donders and Ballon (2022) noted that more recent online platform merger assessments consider data, patents, API interoperability, and gatekeeping as signs of power. The MPM's indicators have been fine-tuned to account for the everchanging digital environment, such as by including risk indicators for cross-media concentration online.[21] In this case, concentration metrics focus on revenues (e.g., subscriptions, membership, donations, advertising, public funding) rather than audience shares due to the latter's heterogeneity, lack of methodological transparency, and incomparability across entities and markets.

The MPM also enquires about the financial structure reporting obligations in both the media and digital sectors. However, transparency obligations of financial and ownership structures, especially for digital native news media, are practically inexistent, as these are not captured by existing national laws (Ranaivoson and Rozgonyi, 2023). Moreover, there

21 That does not include aggregators, social networks, and intermediaries.

are no media ownership restrictions in the online media sector, and no transparency obligations in terms of structural and financial disclosures. These aspects thus make it challenging for NRAs to consider the online environment.

4.1.2 Diversity and opinion-formation power

The second and third points, "diversity of media services and the media offering on the market", address internal and external pluralism, focusing on the risks of market concentration affecting public opinion – despite there being no straightforward connection. Media is recognised for its public opinion-forming power, which directly impacts citizens' democratic participation and societal well-being (Harcourt and Picard, 2009). Accordingly, traditional media, such as broadcasting, radio, and newspapers, became highly regulated. However, in the online world, the dangers of influencing people's opinions increase manifold because of the greater risks posed by "knowledge (data) and the tools to command and organize online attention, and the ability to use that data and algorithmic tools for persuasion" (Helberger, 2020, p. 846). Moreover, the speed and reach of (dis)information circulation top those of traditional media. This is why Helberger (2020) described social media platforms as "wielders of considerable opinion power" (p. 843), but lacking the accountability of legacy broadcasters (Moore, 2016).

The shift in media power dynamics (van Dijck, Poell and de Waal, 2018) reduced the role of traditional gatekeepers, such as journalists and editors, who once decided on the content most relevant to the public. Instead, these decisions are in the hands of technology companies that, with the help of data and algorithms, shape user profiles and direct information flows, with implications for how news is produced, distributed, and consumed. Thus, the dynamics of opinion power are shifting in favour of powerful online entities (Dodds et al, 2023; Kristensen, 2023). Simon (2022) added that artificial intelligence (AI) adoption will further increase news organisations' dependence on platforms.

Despite the risks for the diversity of services and offerings, Recital 64 of the EMFA reads that "[a]n important criterion to be taken into account is the reduction of competing views within that market as a result of the media market concentration". This alludes to the fact that NRAs can positively assess media mergers if internal pluralism (i.e., competing views) is maintained, even if external pluralism (i.e., the number of outlets) is reduced.

This aligns with Picard and Zotto (2015, p. 62), who opined that "pluralism is about sustaining representation of different political viewpoints and forms of cultural expression within a society", which is not necessarily dependent on the number of existing outlets. This belief resonates with Barnett (2010b), who, over a decade ago, suggested a switch from a structural regulation (that prevents greater ownership concentration) to a content regulation strategy, which imposes substantial public interest obligations on the content output of media businesses in return for a more relaxed corporate environment. Therefore, to lead to a positive NRA assessment, the merging parties should demonstrate how their internal pluralism (i.e., opinions, voices, and analyses) will be safeguarded post-merger. Although foregrounding internal, over external, pluralism represents a relatively novel approach, the discussion changes when online platforms are added to the equation. With only a few dominant platforms, concerns emerge about their effects on external plurality (i.e., platform market concentration and the sustainability of news media considering platform dominance), internal diversity (content moderation, ranking, and recommendation systems), exposure diversity, and the degree to which users independently make information choices today (Brogi et al, 2021). These factors must be considered in media concentration assessments as they reflect the realities of the online environment.

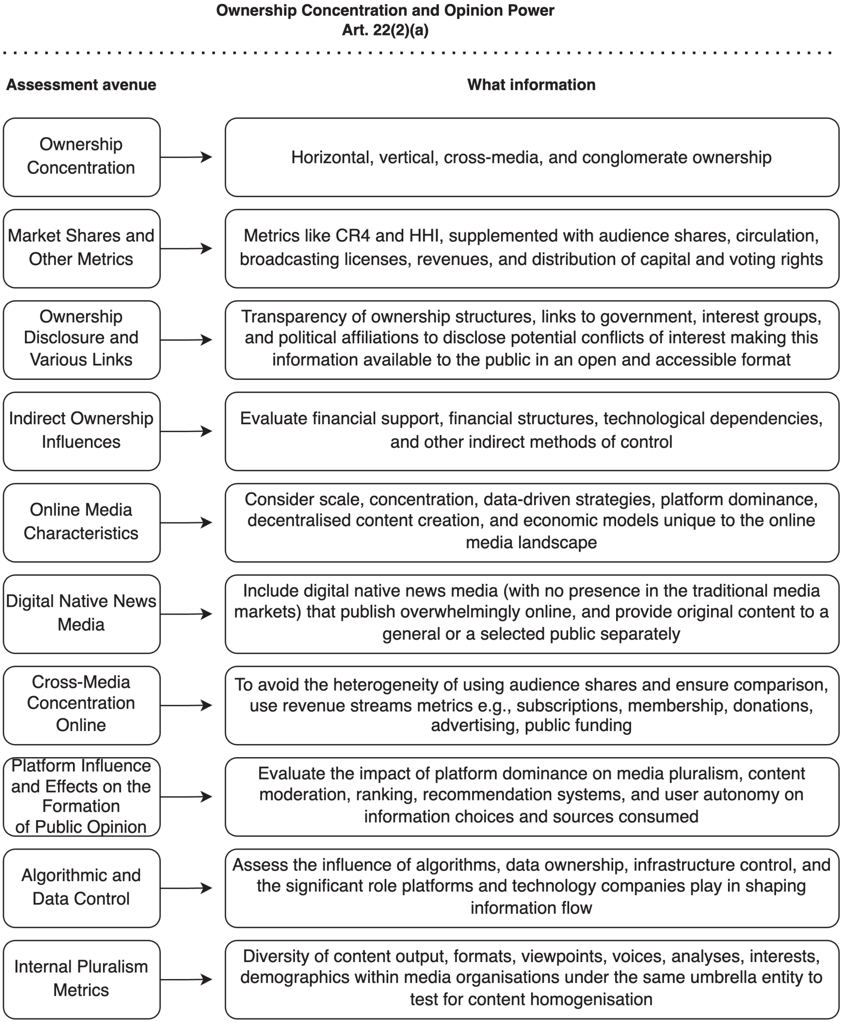

Figure 1. Overview of the necessary information to assess the ownership concentration and opinion power. Source: Authors

4.2 Art. 22(2)(b)

> "the safeguards for editorial independence, including the measures taken by media service providers with a view to guaranteeing the independence of editorial decisions." (Art. 22(2)b EMFA)

4.2.1 Editorial independence

Picard and Zotto (2015) argued that, beyond media ownership, the real concern is interference with democratic and social processes. Journalists play a crucial role in the functioning of a democratic society by informing and influencing public opinion. However, commercial interests and owners' influence can threaten editorial independence, as highlighted in Art. 22(2(b).

Structural ownership does not quite paint the whole picture, with indirect influences, such as financial support, also representing ways to exercise control. The MPM's "transparency of media ownership" indicator underlines that ownership information of news media, including digital native news media, should be publicly accessible so as to more easily expose potential conflicts of interest, political affiliations, and the "ultimate beneficial owners" (UBO)[22] of the media entity. The public has the right to know who has the capacity to influence editorial production and interfere with the journalistic profession, and the right to use this information in the selection of outlets (Reporters Sans Frontiers, 2016). Many Member States have restricted the categories of actors who can own media entities to prevent their politicisation.[23] While regulations and restrictions can safeguard tools for media sectors, editorial independence can also be ensured via self-regulatory measures, such as codes of conduct or ethics, editorial guidelines, and charters, as well as by excluding media owners from the editorial decisions.

22 Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, also referred to as the Anti-Money Laundering directive (AML), introduced UBO registers, which are databases containing information about persons who ultimately own or control the customer and/or the natural person on whose behalf a transaction is being conducted. The UBO is always a natural person.

23 Restrictions often involve public administration personnel, family members, and board members of the public service media (PSM), NCAs, and NRAs (European Commission et al., 2022a). These restrictions are a defensive mechanism against media and state capture (Dragomir, 2019).

Nevertheless, Art. 22(2)(b) gives media service providers a relatively free hand to take the measures they deem appropriate.

4.2.2 Editorial independence in practice

There are various risks to editorial independence. The MPM's risk indicator, "Editorial independence from commercial and owners influence", assesses risks by examining the regulatory safeguards in place in the appointment and dismissal procedures of editors-in-chief, ensuring their independence from the media entity's commercial interests. On this matter, the Recommendation emphasises the role of internal independent bodies in protecting the editors-in-chief's autonomy. The MPM also assesses the risk of commercial interference and considers the safeguards implemented to deter journalists from basing their editorial decisions on commercial interests. This is covered in the Recommendation, which also mentions that editorial content should be separated and clearly distinguishable from advertising and promotional content. The MPM's variables also include the existence and effectiveness of measures separating editorial and journalistic content from marketing, advertising, and other commercial activities inside the same news organisation.

The same MPM risk indicator directly refers to Art. 6(3)(b) of the EMFA on the "duties of media service providers" to enquire whether their owners must disclose any potential conflicts of interest that could affect editorial content. It questions whether owners or other commercial entities abstain from influencing editorial decisions. In the digital sphere, commercial influence includes clickbait content and self-promotion. The Recommendation further include safeguards related to the human, consultation, and participation rights of journalists to allow newsroom workers to be involved in management decisions (among others), all which are part of a toolbox of voluntary measures for media companies to consider. These are linked to Art. 22(2)(e), which allows parties to propose commitments to prevent and address concerns raised by NRAs. However, transparency and effective enforcement are critical.

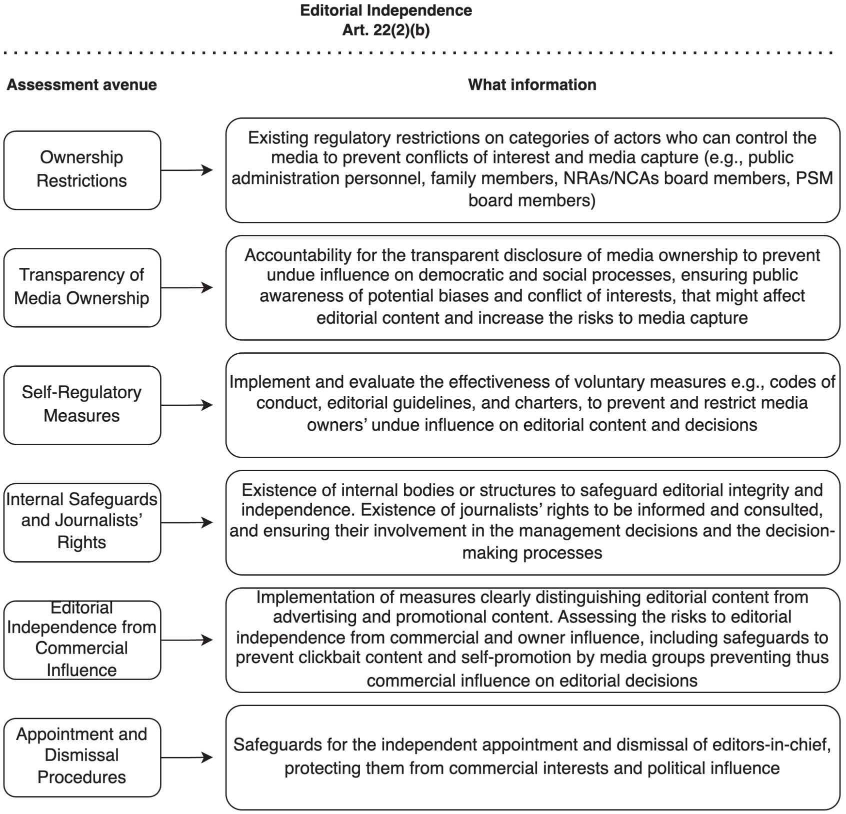

Figure 2. Overview of the necessary information to assess the editorial independence. Source: Authors

4.3 Art. 22(2(c)

> "whether, in the absence of the media market concentration, the parties involved in the media market concentration would remain economically sustainable, and whether there are any possible alternatives to ensure their economic sustainability." (Art. 22(2)c EMFA)

4.3.1 Economic sustainability

Mergers and acquisitions often present the only viable option for survival (Barnett, 2010a; Evens and Donders, 2018). Barnett (2010a) highlighted that, to protect pluralism and diversity, regulators need to ensure that the structures themselves do not go extinct in the first place. Art. 22(2)(c) alludes to a similar idea, as it is possible that, without the merger, the less economically viable outlet might cease to exist – a risk that NRAs will have to consider in their verdict, which could make them more susceptible to approve it, despite the merger leading to more concentration.

Economic sustainability in the media sector enhances market entry, competition, and supply diversity, which in turn supports demand diversity and democratic principles. The news sector's sustainability depends on its ability to invest, innovate, and monetise data and content. Traditional media's two-sided business models, based on audience and advertising revenues, face pressure from digital platforms. Furthermore, the widespread availability of free online news has decreased consumers' willingness to pay for news content (European Commission, 2023). These structural changes have strained news media's business models, requiring them to find ways to adapt and diversify their income streams for longevity. Yet, the current layoffs and revenue reductions, in both the number of companies and their investments (Kim et al, 2021; Peterson and Dunaway, 2023), suggest that this task is far from easy.

4.3.2 Assessment of economic sustainability

Evaluating the economic sustainability of both the acquirer and acquiree (i.e., the parties to the transaction), can be a challenging process as it depends on a variety of internal and external factors.[24] The MPM considers the sustainability of the news media production as a pre-requisite for media pluralism and diversity. One of the three media viability indicators looks at revenue trends, measuring viability by analysing (among other aspects) advertising, subscriptions, crowdfunding, donations, and State funding trends.[25] Brogi and Sjøvaag (2023) identified contextual advertising[26] as

24 Such factors are dependent on market conditions, future innovation, competition, business models, and short- vs. long-term profitability, among others.

25 The MPM considers these revenue trends separately for the audiovisual, radio, newspaper and press agencies, digital native media, and local media.

26 Contextual advertising involves displaying advertising based on the content of the webpage the user is viewing. Contrary to targeted advertising, the method does not rely on tracking user behaviour, but rather aligns with the context of the content being consumed. Research by the Commission (2023) suggests that such content-based advertising can lead to increased revenue for news media organisations.

an alternative to targeted advertising, the latter being based on users' personal data. The use of alternative revenue sources, such as crowdfunding, paywalls, subscriptions, donations, and philanthropy, suggest that media outlets are hoping to find viable business models. Investment in innovative business models and AI tools for journalism and experimenting with content innovation in the newsrooms[27] are further signs of the sustainability and resilience of media organisations.

The second media viability indicator employed by the MPM addresses the employment and salary trends of journalists, which serves as a proxy for the quality of information supply. Layoffs and salary cuts may indicate a struggling media outlet. A reduced personnel could ultimately become too overburdened to keep pace with the work, which could lead to an output of lower quality.

The third way to assess an entity's viability is by considering the existence of public financial incentives to support media pluralism, correct market failures, and ensure diverse viewpoints.[28] Brogi and Sjøvaag (2023) stated that direct, transparent, objective, and predictable government support tools,[29] alongside indirect support measures,[30] are crucial for the sustainability of news media. All Member States offer some form of direct or indirect support to their news media, and some have started to extend this support to online news media as well (European Commission et al, 2022a). Considering the challenges of online platforms faced by media outlets, Brogi and Sjøvaag (2023) discussed novel, economically oriented

27 Based on the categories proposed by Posetti (2018) for the Oxford Reuters Journalism Innovation Project, innovations could consider experimentation with storytelling and reporting (e.g., reassessing what constitutes a story), audience engagement (e.g., moving beyond clicks and shares to audience participation), new content distribution strategies (e.g., beyond social platforms and search engines), technology and products (e.g., newsroom-borne tools and solutions), people and culture (e.g., skills development and training), organisation and structure, leadership and management (e.g., support from the top that permits innovation), structural innovations (e.g., workflows, reporting lines, interdepartmental collaboration), and other forms of non-business-related innovations. These MPM uses these categories in their yearly questionnaire to identify newsroom innovation.

28 To avoid market distortions, such national public support is closely overseen by the Commission, as stipulated in Art. 107 TFEU, which generally prohibits State aid unless exceptionally justified (Buts and Jegers, 2012).

29 Subsidies or support for distribution are common.

30 Favourable taxation schemes in the forms of reduced VAT and other fiscal incentives, such as targeted tax breaks, are among such indirect support measures.

policy support approaches.[31] To ensure that NRAs are aware of the possible struggles of media outlets, it should ask the merging parties to submit the information pertaining to their economic (in)viability as part of their notification documentation.

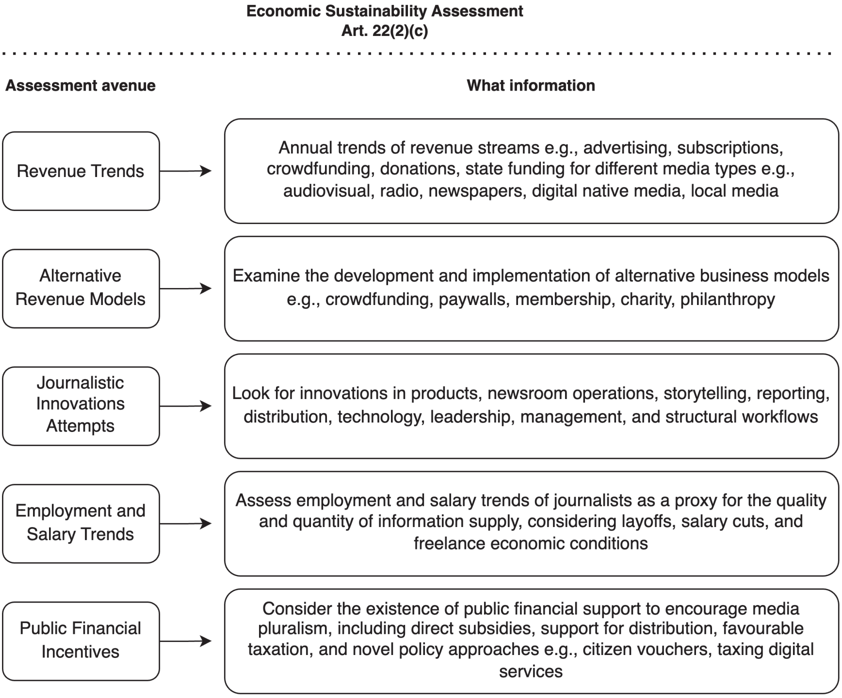

Figure 3. Overview of the necessary information to assess the economic sustainability. Source: Authors

4.4 Art. 22(2)(d)

> "where relevant, the findings of the Commission's annual rule of law report concerning media pluralism and media freedom." (Art. 22(2)d EMFA)

31 Their suggestions include the allocation of vouchers to citizens to support their preferred news media by purchasing subscriptions, allowing them to claim tax benefits for supporting their chosen outlet (this could especially be the case when the outlet has a non-profit status), or taxing digital services to redirect these funds to support public interest journalism.

At the request of the European Parliament, since 2020, the Commission's annual Rule of Law report presents a synthesis of the rule of law situation in the EU, which includes media freedom and pluralism among its four main topics (Directorate-General for Justice and Consumers, 2020). These reports rely on various information sources, and often cite the empirical findings of the MPM country reports. As seen above, the MPM's indicators serve as a baseline for explaining the possible pluralism and independence tests envisaged by lit. (a), (b), and (c), suggesting that the EMFA was built on and informed by the EU's long-standing commitment to monitor, protect, and promote media pluralism.

Initially, the EMFA proposal did not reference the Rule of Law reports as part of the NRAs' pluralism test. However, the European Parliament amended Art. 22(2) in order for NRAs to include, where relevant, its findings. Both the MPM and the Rule of Law reports consider similar risk indicators and the existing media regulatory frameworks[32] implemented by the Member States. The revealed threats are recognised as creating and maintaining vulnerabilities, as well as elevating the risks to media pluralism, editorial independence, and fair competition (Fathaigh, 2020). Both the MPM and the Rule of Law reports contain recommendations for improvements, which are readdressed to inspect the progress in the following country reports.

Despite the value of these reports, EU auditors and lawmakers have voiced their concerns over their lack of transparency and accountability, including their susceptibility to political influence, thus potentially limiting the Rule of Law reports' reliability (Griera, 2024). Additionally, the general nature of these reports may lack the specificity needed for thorough media concentration assessments, making Art. 22(2)(d) more symbolic than substantive. The figure below includes the considerations accounted for in the chapter on media freedom and pluralism of the Rule of Law Reports, which NRAs can consult "where relevant".

32 For an overview of the existing media ownership rules across all the Member States, see Afilipoaie and Ranaivoson (2023).

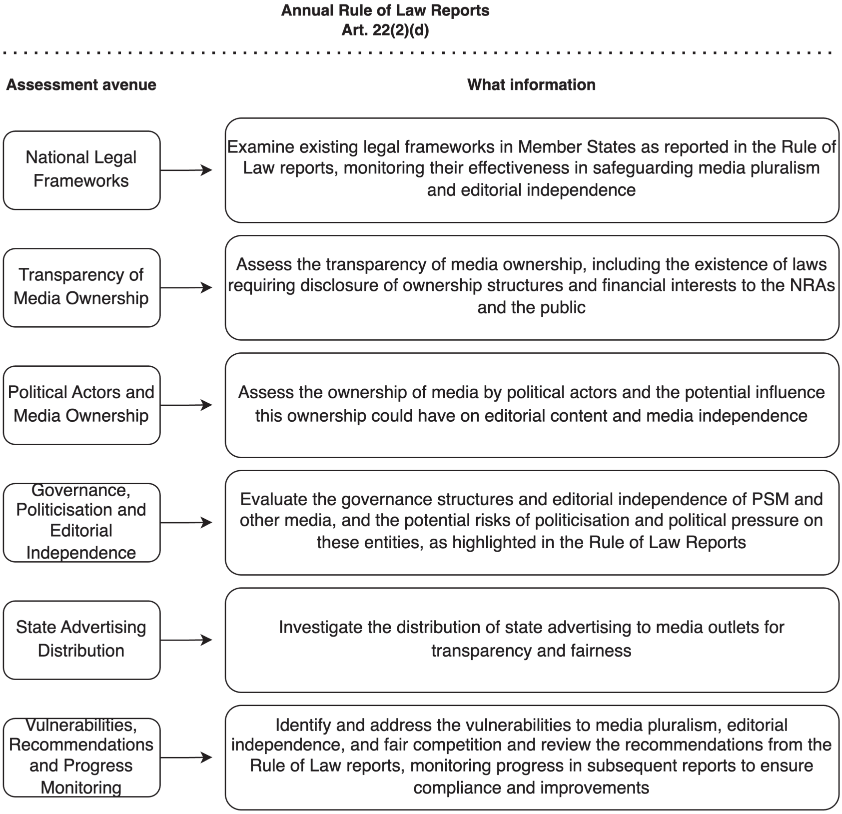

Figure 4. Overview of the Rule of Law Reports' information that could be used "where relevant". Source: Authors

4.5 Art. 22(2)(e)

> "where applicable, the commitments that any of the parties involved in the media market concentration might offer to safeguard media pluralism and editorial independence." (Art. 22(2)e EMFA)

The original EMFA proposal contained no references to possible commitments (also known as remedies) as enshrined in lit. (e). Commitments are essential in competition law cases in both ex-ante and -post[33] reviews. In

33 Ex-post (or, antitrust) assessments are usually made amidst instances of abuse of dominance or evidence of cartels and collusion. These ex-post investigations are usu-

the context of merger assessments, conducted ex-ante, commitments ensure that companies partaking to the merger take certain actions to ensure that the merger will not harm competition. The merging parties can, at their own initiative, offer these remedies, or the authority conducting the assessment can ask for commitments as a precondition for the merger's approval.[34,35] The Commission's (2022) Recommendation lacks guidance on what constitute acceptable commitments.[36] However, as each merger case differs, so will the commitments proposed by the merging entities or required by NRAs.

The analyses of lit. (a) and (b) presented in this chapter allude to potential commitments. For example, in the protection of editorial independence, as seen in the explanation of lit. (b), editorial content is recommended to be separated and clearly distinguishable from advertising and promotional content. The Recommendation encourages media service providers to promote the participation of editorial staff members (or their representative bodies) in the decision-making process.[37] Thus, internal reconfigurations, guidelines, and transparent steps in the decision-making process could be proposed as commitments in the eventuality of NRAs' concerns.

Lit. (a) mentions that, in their analyses, NRAs shall consider the online environment, and the concentration's effects on pluralism, diversity, and the formation of public opinion. The wording of lit. (a), where it speaks of

ally triggered by complaints, whistleblowers, or suspicious behaviour. In these cases, investigations occur after the company's anticompetitive conduct has taken place. Such commitments often accompany fines and the cessation of infringing activities.

34 The notifying parties to a merger must sign a document containing commitments to be respected for an agreed-upon period. Usually, these commitments do not exceed 10 years.

35 For example, in the case of the M.8124 Microsoft/LinkedIn merger, alongside other commitments, Microsoft agreed to not oblige Windows PC original equipment manufacturers (OEM) to install LinkedIn on the PCs for a period of five years. The commitments sufficed to obtain the Commission's approval.

36 For example, the Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market provides a non-exhaustive list of possible commitments in case the Commission finds the subsidy to be possibly distortive.

37 Such involvement is proposed in certain cases and could take the form of information rights (i.e., changes to the composition of the management board, replacing the editor-in-chief, major changes to the legal form or the ownership of the media service provider), consultation rights (i.e., when appointing a new editor-in-chief and agreeing on an applicable consultation procedure), participation rights (i.e., members of the editorial staff being allowed to participate in management by electing representatives in the managing board), or a combination thereof.

"taking into account the online environment", is very broad, yet we make use of the Council of Europe's (2018) Recommendation,[38] which points out that media content is "increasingly managed, edited, curated and/or created by internet intermediaries", meaning that Member States must recognise the varying degrees in which those internet intermediaries impact media pluralism using automated processes and encourage these players to act. These actions points include improving transparency in automated processes and assessing and improving these automated processes to ensure that users are exposed to a broad diversity of media content. Although a Recommendation document at the time, this wishful thinking has now been laid down in EU regulation. Art. 27 of the DSA on recommender systems' transparency, requires all online platforms using such systems to explain, in their terms and conditions, the parameters[39] used in their recommender systems and make available a functionality that allows the service's recipient to select and modify their preferred option.[40] Although only applicable to VLOPs and VLOSEs, this explainability requirement goes hand in hand with the systemic risk assessment stipulated in Art. 34 of the DSA,[41] as these platforms must assess the risks of "any actual or foreseeable negative effects for the exercise of fundamental rights, in particular [...] to freedom of expression and information, including the freedom and pluralism of the media enshrined in art. 11 of the Charter" (Charter of Fundamental Rights of the European Union, 2016) and mitigate such risks.[42]

38 CM/Rec(2018)1 on media pluralism and transparency of media ownership.

39 Under Art. 27(2), these explanations shall include at least: (a) the most significant criteria for determining the information suggested to the recipient of the service; and (b) the reasons for the relative importance of those parameters.

40 This provision aims to help users comprehend how specific information is prioritised for them and how their online behaviour impacts the recommendation of products, services, or content. However, a paradox exists between this transparency goal and the reality, meaning that users often skim or ignore online terms and conditions, which are typically lengthy and complex, thus limiting the efficacy of this notice policy (Obar and Oeldorf-Hirsch, 2020).

41 Art. 34(2) DSA identifies the factors influencing such systemic risk, which are: a) the design of their recommender systems and any other relevant algorithmic system; b) their content moderation systems; c) the applicable terms and conditions and their enforcement; d) systems for selecting and presenting advertisements; and e) data related practices of the provider. For more information on risk assessment in the DSA, see Chapter 4 'The Digital Services Act: Online Risks, Transparency and Data Access' by Marie-Therese Sekwenz and Rita Gsenger.

42 These risk assessments must occur at least every year and in any event prior to deploying functionalities likely to have a critical impact on the risks identified.

These provisions can serve as inspiration for potential commitments attached to concentration notifications, which also target legacy media and smaller online platforms. Nevertheless, effective enforcement mechanisms must be in place to ensure that the commitments are upheld.

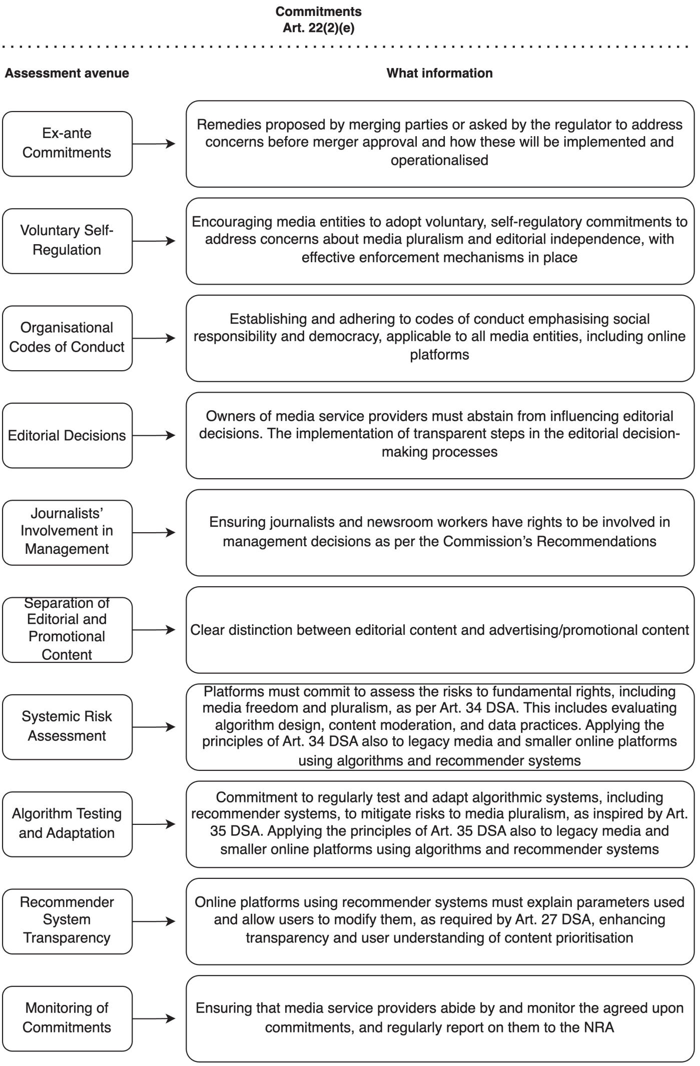

Figure 5. Overview of some of the commitments that could be proposed "where applicable". Source: Authors

5. Conclusion

Art. 1 of the EMFA claims that its main purpose is the proper functioning of the internal market for media services. However, the reality is that the EMFA is the EU's regulatory response to the threats surrounding media freedom and pluralism. Moreover, the Commission needed to use Art. 114 of the TFEU and its internal market argument as a legal basis for its regulatory intervention, thus making these tortured arguments about regulating pluralism for economic reasons. Not only does the EMFA lay down the first-ever EU-harmonised rules on media pluralism and independence, transparency of media ownership, allocation of state advertising to media service providers, and protection of journalistic sources and journalists' rights, but it does so in the form of a directly applicable Regulation. Considering the general and vague elements proposed for consideration by Art. 22(2) lit. (a) to (e), this chapter has explained how these elements of the media pluralism test (under Art. 22) may appear. This has been achieved by building on the MPM's market plurality indicators and the Recommendation accompanying the EMFA.

The EMFA explicitly stresses the essential role played by the NRAs in upholding media pluralism objectives and editorial independence safeguards by providing them with an active participatory role in the assessment of national media mergers; considering the non-binding opinion of the NRAs, the actual impact of the pluralism tests on the final media merger decisions remains to be seen. Effective oversight requires high levels of trust and transparency, and robust monitoring and intervention powers for NRAs. Thus, to exercise their role, NRAs' independence becomes even more paramount. For NRAs to conduct thorough pluralism tests, access to accurate and up-to-date data is crucial. However, NRAs face significant challenges in monitoring (especially online) media pluralism due to legal, technical, and sometimes practical obstacles.[43] These challenges can be mitigated through open communication and trust between NRAs and the merging parties. NRAs can directly ask the media service providers participating in a merger for the required information and track the companies'

43 These include obstacles related to the country-of-origin principle (see Art. 3 Directive 2000/31/EC, shortly the "e-Commerce Directive"), the high cost of qualitative data analysis, and the frequent absence of necessary data. The lack of such data is due to fluctuating audience numbers, a lack of harmonised measurement metrics, unreported data, and data often being held by large private entities.

structural changes through the continuous maintenance of dedicated public repositories.

Although Art. 22 represents a step in the right direction, the light regulatory approach falls short in several areas. Although it aims to harmonise the pluralism test, the elements stipulated in the legislation are left unclear, leaving room for interpretation, which, in turn, could result in a non-unified approach of Member States. The reference to accounting for the online environment remains undefined in the EMFA, leaving NRAs with considerable uncertainties. To add to these, considering current legislation and case law, the possibility to treat VSPs and VLOPs as media service providers can strike one as wishful thinking – at least for now. As per the Recommendations, it seems that, generally speaking, the EMFA is largely reliant on voluntary measures. This reliance, coupled with media service providers' willingness to self-regulate, poses significant challenges. Continuous ex-post monitoring to ensure compliance is resource-intensive, underscoring the necessity for automatic self-reporting mechanisms. Finally, the EMFA fails to address the matter of exposure diversity – a critical aspect of media pluralism also highlighted by the Council of Europe (2018), since merely having diverse media service providers does not guarantee their content reaching, and being consumed by, the audience.

The introduction of a common framework for the media pluralism tests and the involvement of NRAs in media concentration assessments is a positive development, acknowledging the importance of a diverse and independent media for democracy. The willingness to cooperate, voluntary measures, organisational codes of conduct, and a social responsibility to democracy should be at the forefront of all media entities, including online platforms. While the EMFA's measures are less bold than anticipated, they advance the much-needed ownership transparency measures, address the allocation of state advertising, and introduce an additional scrutiny layer to media mergers based on non-economic considerations. In so doing, unwanted practices could be deterred and the accountability of media service providers increased.

References

Afilipoaie, A., Donders, K. and Ballon, P. (2022) 'The European Commission's approach to mergers involving software-based platforms: towards a better understanding of platform power', *Telecommunications Policy*, 46(5) [Online]. Available at: https://doi.org/10.1016/j.telpol.2021.102288.

Afilipoaie, A. and Ranaivoson, H. (2022) 'Assessing media mergers and acquisitions: the power pyramids of regulatory cooperation', *Journal of Digital Media & Policy*, 15(1), pp.7-26.

Afilipoaie, A. and Ranaivoson, H. (2023) 'EU and the complex, nation-dependent web of media ownership regulation in Europe: the role of media ownership rules in limiting market concentration' in Ranaivoson, H., Broughton Micova, S. and Raats, T. (eds.) *European audiovisual policy in transition*. London: Routledge, pp.113–134.

Barnett, S. (2010a) 'Media ownership policy in a recession: redefining the public interest', *Interactions: Studies in Communication & Culture*, 1(2), pp. 217–232.

Barnett, S. (2010b) *What's wrong with media monopolies? A lesson from history and a new approach to media ownership policy*. London School of Economics [Online]. Available at: https://www.lse.ac.uk/media-and-communications/assets/documents/research/working-paper-series/EWP18.pdf (Accessed: 5 February 2023).

Barwise, P. and Watkins, L. (2018) 'The evolution of digital dominance: how and why we got to GAFA' in Moore, M. and Tambini, D. (eds) *Digital dominance: the power of Google, Amazon, Facebook, and Apple*. Oxford: Oxford University Press, pp. 33–54. Available at: https://global.oup.com/academic/product/digital-dominance-9780190845124?cc=be&lang=en&# (Accessed: 5 October 2022).

Beckett, C. (2019) *New powers, new responsibilities. A global survey of journalism and artificial intelligence*. London School of Economics [Online]. Available at: https://blogs.lse.ac.uk/polis/2019/11/18/new-powers-new-responsibilities/ (Accessed: 19 September 2022).

Brogi, E. (2020) 'The Media Pluralism Monitor: conceptualizing media pluralism for the online environment', *Profesional de la Información*, 29(5), pp. 1–7.

Brogi, E., Carlini, R., Nenadić, I., Parcu, P. L. and de Azevedo Cunha, M. V. (2021) 'EU and media policy: conceptualising media pluralism in the era of online platforms. The experience of the Media Pluralism Monitor' in Parcu, P.L. and Brogi, E. (eds.) *Research handbook on EU media law and policy*. Cheltenham: Edward Elgar Publishing, pp. 16–31.

Brogi, E., & Sjøvaag, H. (2023). *Good practices for sustainable news media financing*. Council of Europe [Online]. Available at: https://rm.coe.int/msi-res-2022-08-good-practices-for-sustainable-media-financing-for-sub/1680adf466 (Accessed: 27 September 2024).

Buts, C. and Jegers, M. (2012) 'The effect of "state aid" on market shares: an empirical investigation in an EU Member State', *Journal of Industry, Competition and Trade*, 13(1), pp. 89–100.

Cabrera Blázquez, F.J. (2022) *The proposal for a European Media Freedom Act*. Council of Europe [Online]. Available at: https://rm.coe.int/note-emfa/1680a9af14 (Accessed: 27 September 2024).

'Charter of Fundamental Rights of the European Union' (2016) *Official Journal of the European Union* C202, 7 June, pp. 389-405 [Online]. Available at: http://data.europa.eu/eli/treaty/char_2016/oj (Accessed: 26 January 2025).

Commission of the European Communities (1992) *Pluralism and media concentration in the internal market*. Publications Office of the European Union [Online]. Available at: https://op.europa.eu/en/publication-detail/-/publication/be71ea95-61ab-44d3-9b14-2d7cb82d8d81/language-en (Accessed: 27 September 2024).

'Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector' (2022) *Official Journal of the European Union* L245, 22 September, pp. 56-65. Available at: http://data.europa.eu/eli/reco/2022/1634/oj (Accessed: 27 September 2024).

'Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities' (1989) *Official Journal of the European Union* L298, 17 October, pp. 23-30 [Online]. Available at: http://data.europa.eu/eli/dir/1989/552/oj (Accessed: 26 January 2025).

Council of Europe (2018) *Recommendation CM/Rec(2018)11 of the Committee of Ministers to Member States on media pluralism and transparency of media ownership*. Council of Europe [Online]. Available at: https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680790e13%22],%22sort%22:[%22CoEValidationDate%20Descending%22]} (Accessed: 27 September 2024).

'Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)' (2004) *Official Journal of the European Union* L24, 29 January, pp.1-22. Available at: http://data.europa.eu/eli/reg/2004/139/oj (Accessed: 26 January 2025).

'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' (2018) *Official Journal of the European Union* L303, 28 November, pp. 69-92. Available at: http://data.europa.eu/eli/dir/2018/1808/oj (Accessed: 26 January 2025)..

Directorate-General for Justice and Consumers (2020) *2020 Rule of law report – communication and country chapters*. European Commission [Online]. Available at: https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en (Accessed: 27 September 2024).

Dodds, T., de Vreese, C., Helberger, N., Resendez, V. and Seipp, T. (2023) 'Popularity-driven metrics: audience analytics and shifting opinion power to digital platforms', *Journalism Studies*, 24(3), pp. 403–421.

Dragomir, M. (2019) *Media capture in Europe*. Media Development Investment Fund [Online]. Available at: https://www.mdif.org/wp-content/uploads/2019/07/MDIF-Report-Media-Capture-in-Europe.pdf (Accessed: 12 August 2022).

Van Drunen, M. (2021) 'Editorial independence in an automated media system', *Internet Policy Review*, 10(3) [Online]. Available at: https://doi.org/10.14763/2021.3.1569 (Accessed: 26 January 2025).

Enli, G., Raats, T., Syvertsen, T. and Donders, K. (2019) 'Media policy for private media in the age of digital platforms', *European Journal of Communication*, 34(4), pp. 395–409.

European Commission (2021) *European Media Freedom Act: commission starts consultations with call for evidence*, *PRESS RELEASE*. European Commission [Online]. Available at: https://digital-strategy.ec.europa.eu/en/news/european-media-freedom-act-commission-starts-consultations-call-evidence (Accessed: 27 September 2024).

European Commission (2022b) *Explanatory memorandum of the European Media Freedom Act*. EUR-Lex [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0457 (Accessed: 27 September 2024).

European Commission et al (2022a) *Study on media plurality and diversity online: final report*. Publications Office of the European Union [Online]. Available at: https://data.europa.eu/doi/10.2759/529019 (Accessed: 9 December 2022).

European Commission et al (2023) *Study on the impact of recent developments in digital advertising on privacy, publishers and advertisers*. Publications Office of the European Union [Online]. Available at: https://data.europa.eu/doi/10.2759/294673 (Accessed: 26 January 2025).

European Commission (2023). *The European media industry outlook*. European Commission [Online]. Available at: https://digital-strategy.ec.europa.eu/en/library/european-media-industry-outlook (Accessed: 27 September 2024).

European Commission (2024) *Supervision of the designated very large online platforms and search engines under DSA*. European Commission [Online]. Available at: https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses (Accessed: 23 September 2024).

European Commission (no date) *Monitoring media pluralism in the digital era*. European Commission [Online]. Available at: https://digital-strategy.ec.europa.eu/en/policies/monitoring-media-pluralism (Accessed: 27 September 2024).

European University Institute (2022) *The Media Pluralism Monitor informs the EU Commission's Rule of Law Report*. Centre for Media Pluralism and Media Freedom [Online]. Available at: https://cmpf.eui.eu/rule-of-law-report-eu-commission-mpm2022/ (Accessed: 27 September 2024).

European University Institute (2024) *MPM 2024 Questionnaire*. Centre for Media Pluralism and Media Freedom [Online]. Available at: https://cmpf.eui.eu/wp-content/uploads/2024/07/Questionnaire_MPM2024.pdf?sequence=1&isAllowed=y (Accessed: 27 September 2024).

Evens, T. and Donders, K. (2018) *Platform power and policy in transforming television markets*. Cham: Springer International Publishing.

Fanta, A. and Dachwitz, I. (2020) *Google, the media patron. How the digital giant ensnares journalism*. Otto Brenner Foundation [Online]. Available at: https://www.otto-brenner-stiftung.de/fileadmin/user_data/stiftung/02_Wissenschaftsportal/03_Publikationen/AH103_Google_EN.pdf (Accessed: 27 September 2024).

Fathaigh, R.Ó. (2020) *First annual report on the Rule of Law in the EU, including media pluralism and freedom*, *IRIS legal observations of the European Audiovisual Observatory*. IRIS Merlin [Online]. Available at: https://merlin.obs.coe.int/article/9010 (Accessed: 27 September 2024).

‘Frank Peterson v. Google LLC and Others and Elsevier Inc. v. Cyando AG’ (2021) Joined Cases C-682/18 and C-683/18. *EUR-Lex* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0682 (Accessed: 27 September 2024).

Griera, M. (2024) *EU Commission’s rule of law reporting lacks transparency, auditors say*. Euractiv [Online]. Available at: https://www.euractiv.com/section/politics/news/eu-commissions-rule-of-law-reporting-lacks-transparency-auditors-say/ (Accessed: 27 September 2024).

Haraszti, M. (2011) *Media pluralism and human rights*. Council of Europe [Online]. Available at: https://rm.coe.int/16806da515 (Accessed: 24 September 2024).

Harcourt, A. and Picard, R.G. (2009) Policy, economic, and business challenges of media ownership regulation’, *Journal of Media Business Studies*, 6(3), pp. 1–17.

Helberger, N. (2018) Challenging diversity: social media platforms and a new conception of media diversity’ in Moore, M. and Tambini, D. (eds) *Digital dominance: the power of Google, Amazon, Facebook, and Apple*. Oxford: Oxford University Press, pp. 162–186.

Helberger, N. (2020) ‘The political power of platforms: how current attempts to regulate misinformation amplify opinion power’, *Digital Journalism*, 8(6), pp. 842–854.

Helberger, N., Karppinen, K. and D’Acunto, L. (2018) ‘Exposure diversity as a design principle for recommender systems’, *Information, Communication & Society*, 21(2), pp. 191–207

Hendrickx, J. and Ranaivoson, H. (2019) ‘Why and how higher media concentration equals lower news diversity – the Mediahuis case’, *Journalism* 22(11) [Online]. Available at: https://doi.org/10.1177/1464884919894138 (Accessed: 26 January 2025).

Karppinen, K. (2013) *Rethinking media pluralism*. New York: Fordham University Press.

Kim, M., Stice, D., Stice, H. and White, R. M.(2021) ‘Stop the presses! Or wait, we might need them: firm responses to local newspaper closures and layoffs’, *Journal of Corporate Finance*, 69 [Online]. Available at: https://doi.org/10.1016/j.jcorpfin.2021.102035.

Kristensen, L.M. (2023) ‘Audience metrics: operationalizing news value for the digital newsroom’, *Journalism Practice*, 17(5), pp. 991–1008. Available at: https://doi.org/10.1080/17512786.2021.1954058 (Accessed: 26 January 2025).

Laidlaw, E.B. (2010) ‘A framework for identifying Internet information gatekeepers’, *International Review of Law, Computers & Technology*, 24(3), pp. 263–276 [Online]. Available at: https://doi.org/10.1080/13600869.2010.522334 (Accessed: 26 January 2025).

Mancini, J. (2018) *Considering non-price effects in merger control – background note by the Secretariat*. OECD [Online]. Available at: www.oecd.org/daf/competition/non-price-effects-of-mergers.htm (Accessed: 7 October 2021).

Mansell, R. (2015) ‘Platforms of power’, *Intermedia*, 43(1), pp. 20–24 [Online]. Available at: http://eprints.lse.ac.uk/61318/ (Accessed: 5 October 2022).

Moore, M. (2016) *Tech giants and civic power*. CMCP, Policy Institute, King's College London [Online]. Available at: https://doi.org/10.18742/PUB01-027 (Accessed: 26 January 2025).

Muñoz Larroa, A. (2019) 'Industrial organization of online video on demand platforms in North America: between diversity and concentration', *The Political Economy of Communication*, 7(2), pp. 79–104 [Online]. Available at: https://www.polecom.org/index.php/polecom/article/viewFile/113/336 (Accessed: 7 February 2023).

Napoli, P.M. (1997) 'Rethinking program diversity assessment: an audience-centered approach', *Journal of Media Economics*, 10(4), pp. 59–74.

Napoli, P.M. and Caplan, R. (2017) 'Why media companies insist they're not media companies, why they're wrong, and why it matters', *First Monday*, 22(5) [Online]. Available at: https://doi.org/10.5210/FM.V22I5.7051 (Accessed: 26 January 2025).

Obar, J.A. and Oeldorf-Hirsch, A. (2020) 'The biggest lie on the internet: ignoring the privacy policies and terms of service policies of social networking services', *Information, Communication & Society*, 23(1), pp. 128–147.

Peruško, Z. (2010) 'The link that matters: media concentration and diversity of content' in Klimkiewicz, B. (ed.) *Media freedom and pluralism: media policy challenges in the enlarged Europe*. Budapest: Central European University Press, pp. 261–273 [Online]. Available at: https://books.openedition.org/ceup/2184?lang=en (Accessed: 7 October 2021).

Peterson, E. and Dunaway, J. (2023) 'The new news barons: investment ownership reduces newspaper reporting capacity', *Annals of the American Academy of Political and Social Science*, 707(1), pp. 74–89.

Picard, R.G. and Pickard, V. (2017) *Essential principles for contemporary media and communications policymaking*. Reuters Institute for the Study of Journalism [Online]. Available at: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Essential%2520Principles%2520for%2520Contemporary%2520Media%2520and%2520Communications%2520Policymaking.pdf (Accessed: 20 March 2019).

Picard, R.G., and Zotto, C.D. (2015) 'The dimension of ownership and control of media' in Valcke, P. Sükösd, M. and Picard, R.G. (eds) *Media pluralism and diversity*. Palgrave Macmillan UK, pp. 54–66.

Posetti, J. (2018) *Time to step away from the 'bright, shiny things'? Towards a sustainable model of journalism innovation in an era of perpetual change*. Reuters Institute for the Study of Journalism [Online]. Available at: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2018-11/Posetti_Towards_a_Sustainable_model_of_Journalism_FINAL.pdf (Accessed: 25 September 2024).

Ranaivoson, H. (2019) 'Online platforms and cultural diversity in the audiovisual sectors. A combined look at concentration and algorithms' in Albornoz, L. and García Leiva, M.T. (eds) *Audio-visual industries and diversity*. Liège: Routledge, pp. 100–118.

Ranaivoson, H. and Rozgonyi, K. (2023) 'The Audiovisual Media Services Directive and the effectiveness of media transparency requirements' in Ranaivoson, H., Broughton Micova, S. and Raats, T. (eds) *European audiovisual policy in transition*. Oxford: Routledge, pp. 135–153.

Reda, F. and Selinger, J. (2021) 'YouTube/Cyando – an important ruling for platform liability – Part 1', *Kluwer Copyright Blog* [Online]. Available at: https://copyrightblog.kluweriplaw.com/2021/07/01/youtube-cyando-an-important-ruling-for-platform-liability-part-1/ (Accessed: 25 September 2024).

'Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)' (2022) *Official Journal of the European Union* L277, 27 October, pp.1-102 [Online]. Available at: http://data.europa.eu/eli/reg/2022/2065/oj (Accessed: 26 January 2025).

'Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) (Text with EEA relevance)' (2024) *Official Journal of the European Union* L series, 17 April, pp. 1-37 [Online]. Available at: http://data.europa.eu/eli/reg/2024/1083/oj (Accessed: 26 January 2025).

Reporters Sans Frontiers (2016) *Contribution to the EU public consultation on media pluralism and democracy*. European Commission [Online]. Available at: https://ec.europa.eu/information_society/newsroom/image/document/2016-44/reporterssansfrontiers_18792.pdf (Accessed: 27 September 2024).

Schiffrin, A. (ed.) (2021). *Media capture*. New York; Chichester: Columbia University Press.

Seipp, T.J., Helberger, N., de Vreese, C. and Ausloos, J. (2023) 'Dealing with opinion power in the platform world: why we really have to rethink media concentration law', *Digital Journalism*, 11(8), pp. 1542–1567.

Simon, F.M. (2022) 'Uneasy bedfellows: AI in the news, platform companies and the issue of journalistic autonomy', *Digital Journalism*, 10(10), pp. 1832–1854.

Trappel, J. and Meier, W.A. (2022) 'Soaring media ownership concentration: comparing the effects of digitalisation on media pluralism and diversity' in Trappel, J. and Tomaz, T. (eds.) *Success and failure in news media performance: comparative analysis in the Media for Democracy Monitor 2021*. Gothenburg: Nordicom, University of Gothenburg, pp. 147–164 [Online]. Available at: https://doi.org/10.48335/9789188855589-7 (Accessed: 26 January 2025).

'Treaty on the Functioning of the European Union' (2012) *Official Journal of the European Union* C326, pp. 47-390 [Online]. Available at: http://data.europa.eu/eli/treaty/tfeu_2012/oj (Accessed: 26 January 2025).

Valcke, P. (2011) 'Looking for the user in media pluralism regulation: unraveling the traditional diversity chain and recent trends of user empowerment in European media regulation', *Journal of Information Policy*, 1, pp. 287–320.

Van Dijck, J., Poell, T. and de Waal, M. (2018) *The Platform Society*. New York: Oxford University Press.

Venit, J.S. (2013) 'The scope of EU judicial review of commission merger decisions' in Lowe, P. and Marquis, M. (eds.) *European competition law annual 2010: merger control in European and global perspective*. Oxford: Hart Publishing, pp. 113–131 [Online]. Available at: https://cadmus.eui.eu/handle/1814/25916 (Accessed: 30 January 2023).