

# CM2113

## PROMOTING AND SAFEGUARDING MEDIA PLURALISM THROUGH EU LAW

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Media pluralism is indispensable for a well-functioning democracy. Yet, the EU has been unable to effectively counter illiberal trends in an increasing number of Member States, even if they are widely perceived as jeopardising media pluralism. Contrary to other areas of the rule of law, the European Commission has not brought any infringement case relating to media pluralism as a rule of law issue before the CJEU. The European Commission justifies its legal inaction with an insufficient legal toolbox and stating that it is, in fact, making the most of the tools at its disposal. We question this assumption and outline existing avenues for EU legal action to protect media pluralism in this report.

 **Meijers  
Committee**

Standing committee of experts on international  
immigration, refugee and criminal law

## 1. Introduction

There is consensus among EU institutions and Member States that media pluralism is indispensable for a well-functioning democracy. Media pluralism forms one of the four pillars in the European Commission's Rule of Law Reports.

Yet, the EU has been unable to effectively counter illiberal trends in an increasing number of Member States, even if they are widely perceived as jeopardising media pluralism. Only in 2021 did the European Commission first launch a media infringement procedure against Hungary by sending it a letter of formal notice after it silenced Klubradio, the country's last remaining major independent radio station.<sup>1</sup> Recently, the Commission also tweeted concerns about Poland's new bill on media ownership.<sup>2</sup> Contrary to other areas associated with the rule of law, such as impartiality of the judiciary, the European Commission has not brought any infringement case relating to media pluralism as a rule of law issue before the EU Court of Justice. The European Commission commonly justifies its legal inaction by pointing to the need to strengthen its legal toolbox and by positing that it is, in fact, making the most of the tools at its disposal.

This brief questions both these assumptions. The Meijers Committee – a collective of lawyers, judges and academics based in the Netherlands – respectfully submits that despite guaranteeing free and plural media not forming a core EU competence, the European Commission could and should be much more prolific in taking legal action in response to attempts by some Member State governments to stifle media freedom. The brief explains that such legal action can be based on multiple Treaty provisions and secondary legal instruments. Although infringement proceedings are by their nature ill-suited to address systematic rule of law deficiencies in Member States, they can have a meaningful impact when employed on a more systematic basis than is currently the case. This is also recognised by the European Commission and in legal scholarship.<sup>3</sup>

The present brief aims at outlining existing avenues for EU legal action to protect media pluralism. It is meant to assist the European Commission, but also Member States, in deciding how to respond to transgressions of media freedom within the European Union. Our brief describes EU regulatory activities relating to media (sections 2-4), summarises trends relating to media pluralism in selected Member States (section 5) and analyses how EU legal action may help counter such trends (6). The analysis concludes with a brief set of recommendations.

## 2. Media in EU law

Safeguarding a free and pluriform media landscape does not have a direct basis in the EU treaties. EU competence over media policy draws from a range of treaty provisions relating to EU citizenship and the functioning of the single market, reflecting the complex nature of media as goods and services while recognising their fundamental public function in

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<sup>1</sup> See the Commission's [infringement package](#) of June 2021.

<sup>2</sup> Tweet of Didier Reynders of 12 August 2021, <https://twitter.com/dreynders/status/1425837866978975745?s=20>.

<sup>3</sup> For an overview, see: M. Schmidt and P. Bogdanowicz, 'The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU', 55 *Common Market Law Review* (2018), 1061-1100. Also see P. Pohjankoski, 'Rule of law with leverage: Policing structural obligations in EU law with the infringement procedure, fines, and set-off', 58 *Common Market Law Review* (2021), 1341-1364.

democratic, pluralistic societies. Media come within the ambit of EU competences on EU citizenship, particularly the right to vote in European Parliament and municipal elections (Art. 20), the free movement of goods, capital, persons and services (Arts. 28, 30, 34, 35, 45–62 TFEU), competition policy (Arts. 101–109), education and culture (Arts. 165–167), industry (Art. 173) and common commercial policy (Art. 207). Media are therefore an integral part of the single market and, as such, are covered by a range of EU legislative instruments that rely on different legal bases in the Treaties, including the Audiovisual Media Services Directive, the European Electronic Communications Code and the Digital Single Market Directive.<sup>4</sup>

All EU policies relating to media must respect the basic freedoms of the EU Charter, including Articles 11, 16 and 39–40 on the freedom of expression and information, the freedom to conduct a business and the right to vote in European Parliament and municipal elections. Freedom, democracy and pluralism belong to the Union’s foundational values (Art. 2 TEU). With a view to the “the democratic, social and cultural needs of each society and to the need to preserve media pluralism”, Protocol 29 to the Treaties provides that the market freedoms do not prejudice the establishment of public broadcasting services in so far as such funding does not affect competition to an extent contrary to the common interest.

### 3. Past legislative initiatives on media pluralism

Attempts at legislative harmonisation of standards on media pluralism have long since been on the EU agenda. In 1992, the European Commission published a green paper in response to concerns of European Parliament about disappearing newspapers and mergers and acquisitions taking place within various media sectors.<sup>5</sup> Although the Commission made multiple attempts in the 1990s to regulate the concentration of media ownership, no legislation was adopted. A 1996 proposal for a draft directive on media pluralism was defeated after opposition by broadcasters and publishers and a number of Member States.<sup>6</sup> European Parliament repeated calls for specific EU legal safeguards for media pluralism in resolutions adopted in 2004<sup>7</sup>, 2008<sup>8</sup>, 2013<sup>9</sup>, 2018<sup>10</sup> and 2020<sup>11</sup>. These resolutions were not followed up. In 2007, the Commission considered that “[t]he various consultations led to the conclusion that at present it would not be appropriate to submit a Community initiative on pluralism.”<sup>12</sup> Although the 2018 recast of the Audiovisual Media Services Directive strengthens the powers

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<sup>4</sup> Directive 2010/13/EU, amended by Directive (EU) 2018/1808; Directive (EU) 2018/1972; Directive (EU) 2019/790.

<sup>5</sup> COM(92) 84 final.

<sup>6</sup> See extensively, B. Klimkiewicz, ‘Media Pluralism: European Regulatory Policies and the Case of Central Europe’, EUI Working Paper RCAS No. 2005/19. Also see European Parliament Written Question No. 1660/97 by Alexandros Alavanos to the Commission on ‘Concentration of ownership of media organizations in Europe and pluralism.’

<sup>7</sup> European Parliament resolution of 22 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) ([2003/2237\(INI\)](#)).

<sup>8</sup> European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union ([2007/2253\(INI\)](#)).

<sup>9</sup> European Parliament resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU ([2011/2246\(INI\)](#)).

<sup>10</sup> European Parliament resolution of 3 May 2018 on media pluralism and media freedom in the European Union ([2017/2209\(INI\)](#)).

<sup>11</sup> Motion for a European Parliament Resolution on strengthening media freedom: the protection of journalists in Europe, hate speech, disinformation and the role of platforms ([2020/2009\(INI\)](#)).

<sup>12</sup> European Commission, Media Pluralism in the Member States of the European Union, Commission Staff Working Document, 16 januari 2007, SEC(2007) 32.

and independence of national regulatory authorities, European Parliament's proposal to oblige Member States to be transparent about media ownership structures was changed into a facultative clause ("may").<sup>13</sup> The European Commission launched infringement proceedings against 23 Member States and the United Kingdom for failure to transpose the new directive before 19 September 2020.<sup>14</sup>

The Regulation on a general regime of conditionality for the protection of the Union budget (Reg. 2020/2092) refers to "pluralistic law-making" but not to media freedom or pluralism. There appears to be agreement that violations of media freedom cannot be defined as "breaches of the principles of the rule of law" in the meaning of Art. 3 of that Regulation.<sup>15</sup>

Resistance against regulatory initiatives on media pluralism at EU level is explained not only from vested political and commercial interests. Media landscapes in the Member States are highly diverse, involving a variety of regulatory systems and organising models. Regulation must maintain a fragile balance between the interests of citizens, companies and states. A common regulation for all Member States was described in a study for European Parliament as "overwhelmingly complicated in 27 Member States".<sup>16</sup> Nonetheless, since early 2021, the European Commission, recognising that its "toolbox to intervene in the area of media freedom is limited", is seriously considering the drafting of a "media freedom act", which should counter the "growing and worrying politicisation of the media in some Member States".<sup>17</sup>

#### 4. Other initiatives: monitoring and funding

The EU has become increasingly active in setting non-binding standards and in monitoring. In 2007, the Commission first initiated a strategy on media pluralism.<sup>18</sup> This resulted in the establishment in 2011 of an independent expert group, the High Level Group on Media Freedom and Pluralism (HLG), which considered the main responsibility for maintaining media freedom and pluralism to lie with the Member States, but found the EU competent to intervene when a Member State restricts media pluralism.<sup>19</sup> A Media Pluralism Monitor to systematically (and annually) measure media pluralism in the Member States was set up in cooperation with the Commission and is co-funded by the EU since 2014.<sup>20</sup> In 2014, the Commission established the European Regulators Group for Audiovisual Media Services (ERGA) to ensure a consistent implementation in all Member States and to exchange best practices. In 2015, the Commission subsidised the launch of the European Centre for Press and Media Freedom (ECPMF), an NGO whose goal is to stop regression of press freedom in the EU. The Multiannual Financial Framework includes funding for projects promoting media pluralism, and the amount is set to increase under the MFF 2021-2027.

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<sup>13</sup> Art. 5(2) Audiovisual Media Services Directive.

<sup>14</sup> [Press release](#) European Commission of 23 Nov. 2020.

<sup>15</sup> K.L. Scheppele, R.D. Kelemen and J. Morijn, '[The EU Commission has to Cut Funding to Hungary: The Legal Case](#)', 7 July 2021, Brussels: study for the Greens/EFA.

<sup>16</sup> Study for the EP LIBE Committee, A comparative analysis of media freedom and pluralism in the EU Member States, 2016, p. 32.

<sup>17</sup> [Speech](#) of Commissioner Breton to European Parliament, 19 April 2021.

<sup>18</sup> Commission Staff Working Document, 'Media pluralism in the Member States of the European Union' SEC(2007) 32, 16 January 2007.

<sup>19</sup> The Report of the High Level Group on Media Freedom and Pluralism, 'A free and pluralistic media to sustain European democracy', January 2013, p. 3.

<sup>20</sup> Reports available [here](#).

Media pluralism was included as one of four pillars in the 27 country chapters of the 2020 and 2021 Rule of Law Reports of the Commission.<sup>21</sup> These reports form the basis of the new Rule of Law Mechanism – an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law.

## 5. Media pluralism in selected Member States

As observed above, media pluralism in the EU is increasingly monitored. All EU Member States are subject to annual monitoring in EU-linked initiatives such as the Media Pluralism Monitor and the more recent Rule of Law Reports of the European Commission.<sup>22</sup> NGOs, including Reporters without Borders, the European Federation of Journalists and the European Journalism Observatory, also regularly report on media freedom within the European Union. Jointly, these reports paint the following picture of the situation of media pluralism in selected Member States. The selection is not wholly arbitrary.

### Hungary

Hungary dropped from 12<sup>th</sup> place in the 2005 World Press Freedom Index (shared with countries like Sweden and New Zealand) to 92<sup>nd</sup> in 2021. Only one other Member State, Bulgaria, is currently ranked lower (#112).<sup>23</sup> According to the European Commission 2020 Rule of Law Report, 80% of Hungary's news media market is controlled by pro-government media, which are funded by state advertising. Transparency of media ownership is not regulated in sector-specific legislation. The merger of more than 470 media outlets through the creation of the KESMA media conglomerate in November 2018, which has since been consistently government-friendly, was exempted from scrutiny by competition and media authorities. Moreover, remaining independent media outlets face systemic obstruction and intimidation.<sup>24</sup> The European Commission's 2021 Rule of Law Report reiterates those concerns and warns about the intimidation and obstruction that independent journalists and media outlets are currently facing.<sup>25</sup>

Reports by different NGOs and media freedom organisations paint an even darker picture of the Hungarian media landscape.<sup>26</sup> Although the Hungarian state controls the public broadcaster (radio as well as TV) and the MTI news service, the problem with media concentration in Hungary is that most of the private media is owned by oligarchs and businesses loyal to Fidesz and Prime Minister Orbán – leaving little space to independent and critical media. Orbán funded government-friendly media and cut state advertising in media that were not supportive of the Fidesz government. Private advertisers were threatened with losing state contracts if they chose to advertise in independent and free press.<sup>27</sup> Independent (private) media were bankrupted and bought up by oligarchs or otherwise adversely affected by regulatory changes (such as laws limiting the number of

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<sup>21</sup> Reports available [here \(2020\)](#) and [here \(2021\)](#).

<sup>22</sup> Note above. The media pluralism monitor is available [here](#).

<sup>23</sup> Rankings available [here](#).

<sup>24</sup> SWD/2020/316 final.

<sup>25</sup> European Commission, 2021 Rule of Law Report – Country Chapter Hungary.

<sup>26</sup> See for example the report by WAN-IFRA called *Capturing Them Softly – Soft Censorship and State Capture in Hungarian Media*, available at <https://www.cima.ned.org/wp-content/uploads/2015/02/CIMA-Hungary%20Updated.pdf>

<sup>27</sup> Read more about this in this article by Kim Lane Scheppele which draws a picture of a crisis to media freedom in Hungary that has been going on for years: <https://krugman.blogs.nytimes.com/2012/03/14/hungarys-free-media/>

media outlets owners could own). This resulted in the collapse of many independent media outlets and made the work for independent and free media increasingly difficult.

It thus appears that – and this is being copied by some other Member States, see below – Hungary’s strategy to assert political control over the media is multi-pronged, comprehensive and deliberate. It consists of enlargement of the market share of state-controlled (public) media, political appointments of national regulatory authorities, takeovers of independent (private) media by state-owned companies or oligarchs and other business partners close to Fidesz, systematic harassment of independent media outlets and journalists (such as dismissal and the launching of court cases), the granting and withdrawing of licenses and distorting the level playing field of media by systematically advertising state-friendly outlets.

The previous European Commission launched a series of rule of law-related infringement actions against Hungary, but none of them concerning the dismantling of media freedom and pluralism by the Hungarian government since 2010. As a case in point: the European Commission decided not to bring infringement proceedings in the KESMA case. It considered the case to fall outside the Commission's jurisdiction under the EU Merger Regulation as “it is not contrary to EU law that national merger regimes allow national authorities to take into account public interest considerations when reviewing mergers”.<sup>28</sup>

The Commission received a state aid complaint in 2016 (No. 45463) concerning the lack of independence, transparency and accountability of the Hungarian public service broadcaster (PSB) and the anti-competitive effects of its funding by Hungary. In November 2018, state aid complaint no. 53108 was lodged with the Commission regarding the distribution of state advertising to media outlets in Hungary. Although Commissioner Jourová has publicly voiced concern over channelling state funds to pro-government or propaganda outlets, other departments in the same Commission did not act on either of these complaints.<sup>29</sup>

During the corona pandemic, independent journalists were also obstructed from gaining access to public information as the government adjusted the deadline for handling access to public documents requests. Journalists were kept from spreading information about the extent of the corona crisis to prevent the spreading of misleading information about the pandemic through its emergency legislation.<sup>30</sup> This emergency law was subsequently turned into a permanent amendment to the criminal code, which allowed the government to withhold crucial information about the state of the pandemic in Hungary. Intimidation and threats against journalists also increased, and especially female journalists experience gender-based violence, death threats and harassment online. The Pegasus scandal has recently revealed that several Hungarian investigative journalists had their phones infiltrated with Pegasus software that turned their cellphones into spying devices for the Hungarian government.<sup>31</sup>

In June 2021, the Commission sent a letter of formal notice – the first step of the infringement procedure – to Hungary for failure to comply with the Electronic Communication Code<sup>32</sup>, following the Hungarian Media Council's decisions to reject Klúbrádio's application on the

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<sup>28</sup> European Parliament Question Reference [E-006152/2018\(ASW\)](#).

<sup>29</sup> See [letter](#) to Vestager of 2 Sep. 2020; and [letter](#) to Vestager and Jourová of 26 Feb. 2021.

<sup>30</sup> European Centre for Press and Media Freedom, Hungary’s Two Pandemics – COVID-19 and Attacks on Media Freedom, 17 June 2020, available under <https://www.ecpmf.eu/hungarys-two-pandemics-covid-19-and-attacks-on-media-freedom/>

<sup>31</sup> Shaun Walker, *Viktor Orbán using NSO spyware in assault on media, data suggests*, The Guardian, <https://www.theguardian.com/news/2021/jul/18/viktor-orban-using-nso-spyware-in-assault-on-media-data-suggests>, 18 July 2021.

<sup>32</sup> Directive (EU) 2018/1972.



use of radio spectrum on highly questionable and disproportionate grounds, namely the radio stations alleged failure to comply with certain administrative obligations. It is all the more surprising that the Commission acted this late as this has been going on for nearly a decade already: Klúbrádio's licenses in the countryside were retracted some time ago, and just recently it lost its license for the Budapest region as well.

## Poland

Even though Poland's media landscape is still more diverse than Hungary's, the Polish government's plans to subjugate the judicial system and a growing tendency to target critical and free media through legal means do increasingly affect the freedom of media and media pluralism in Poland.<sup>33</sup> Since the Law and Justice government came to power in 2015, Poland has seen a decline in the World Press Freedom Index (it currently holds number 64 out of 180 – it used to be on number 18 as recently as 2015).<sup>34</sup> Apart from open assaults on journalists and media companies by politicians, Poland has also introduced laws restricting media pluralism.

After Law and Justice (PiS) came to power in 2015, public service media were turned into “national state media” through various new media laws. The boards of state media outlets were newly appointed. Five government loyalists have been appointed to the National Council of Radio Broadcasting (KRRiTV) and Television (which used to be an independent supervisory body). Moreover, a new body, “national media council,” was established that doubles on the KRRiTV's function in public media oversight and people loyal to the government had been also appointed there. Furthermore, state institutions and companies controlled by the ruling camp terminated their subscriptions of media critical of the government. They pulled out advertisements – including those on public tenders and public service announcements – from these outlets. This allowed the PiS to take control over public media services and private companies that follow their political views. A sudden withdrawal of advertising led some media outlets to a mass lay-off of journalists.

In December 2020, in an attempted move akin to what happened in Hungary with the creation of KESMA, the state-controlled oil company PKN Orlen, the largest in central and eastern Europe, purchased Polska Press and, effectively, a large majority of the regional media market in Poland.<sup>35</sup> The ruling PiS party also threatened media critical of government with a new media tax on advertising turnover for nonstate media outlets. This tax would disproportionately affect private media critical of the government.<sup>36</sup> However, no law has formally been adopted yet.

Although defamation is regulated sufficiently in private law, Article 212 of the criminal code entails a penalty of up to one year of imprisonment.<sup>37</sup> This provision may be abused to threaten journalists or exercise a chilling effect on them. The government has not repealed the provision, introduced in 1997, despite regular calls from human rights and media freedom monitoring bodies and NGOs. A significant rise in the number of SLAPPS – strategic lawsuits against public participation – have been recorded against newspapers critical of the

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<sup>33</sup> <https://rsf.org/en/poland>.

<sup>34</sup> [Press release](#) NFP of 21 April 2020, ‘Poland falls to lowest ever position in world press freedom index’.

<sup>35</sup> IPI 8 March 2021, ‘The Hungary model: How Poland copied illiberal tactics for weakening independent media’, available [here](#).

<sup>36</sup> *Politico.eu* 10 Feb. 2021, ‘Polish media suspend reporting to protest planned tax on advertising’.

<sup>37</sup> *European Federation of Journalists Blog* 24 March 2021, ‘Defamation lawsuit against Gazeta Wyborcza editor-in-chief by Polish Justice Minister must be dropped’.

government. Such lawsuits aim to financially and psychologically exhaust journalists, intimidate and silence independent media.<sup>38</sup>

Reporters Without Borders has observed a significant shift in the way the discourse about independent media is conducted in Poland, noting that “partisan discourse and hate speech” have become a characteristic feature of state-owned media which has turned into a government mouthpiece through getting rid of critical employees.<sup>39</sup> Statements such as the one by Prime Minister Mateusz Morawiecki claiming that “80 per cent of the Polish media belongs to our enemies” have further divided the journalistic landscape in Poland.<sup>40</sup>

The European Commission reiterated in its 2021 Rule of Law Report that the professional environment for journalists is deteriorating in Poland: measures to limit the political control over media outlets are insufficient, independent journalists are discouraged from covering protests and SLAPPs against journalists have significantly increased. The report further cites concerns about new proposed tax legislation concerning media groups and highlights the increasingly unwelcome environment for foreign-owned media.<sup>41</sup>

## Slovenia

Many observers also see the media freedom situation in Slovenia as increasingly problematic. Slovenia currently holds place 36 on the World Press Freedom Index (falling four places from #32 in 2020). The Rule of Law Report 2021 identifies several concerns concerning the media landscape in Slovenia. These include issues such as the independence of the media regulator, revision of the media and audiovisual services law, regulation and transparency of state advertising regulation, access to public information for journalists, and the growing online harassment and threats towards journalists.<sup>42</sup> These problems are not recent as media concentration in the hands of informal, non-transparent networks and cross-sectorial ownership of media outlets by economic and political elites have been hampering media plurality and freedom of media since the (post-)communist time in Slovenia. The biggest public media outlet in Slovenia is RTV Slovenia, which has often been accused of being an extension of the post-communist elites, therefore lacking political balance and pluralistic views. A high concentration of media defines the public media landscape, and the Slovenian Media Act has proven to be toothless in preventing media concentrations that endanger a pluralistic media market.<sup>43</sup>

Slovenia’s prime minister, Janez Janša, has repeatedly and openly attacked Slovenia’s main public media outlets, calling the Slovenian Press Agency STA, for example, “a national disgrace, unworthy of the name it bears”.<sup>44</sup> Janša’s campaign against media outlets is not just rhetoric: in 2020, the Slovenian government increased its influence over STA (Slovenian Press Agency) and reduced funding for media outlet RTV. Previously, the Government Office of Communications (UKOM) has already halted financing for STA (STA is a limited liability company, with the Republic of Slovenia as its only shareholder) after STA refused to hand over documentation related to its market activity as it threatened STA’s editorial autonomy.

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<sup>38</sup> European Center for Press and Media Freedom, 24 Feb. 2021, ‘Strategic lawsuits against public participation threaten human rights and democracy. The EU must Act.’

<sup>39</sup> <https://rsf.org/en/poland>.

<sup>40</sup> *EUObserver* 10 March 2021, ‘Poland on brink of having no independent media.’

<sup>41</sup> European Commission, SWD(2021) 722 final, 2021 Rule of Law Report – Country Chapter Poland.

<sup>42</sup> European Commission, SWD(2021) 722 final, 2021 Rule of Law Report – Country Chapter Slovenia.

<sup>43</sup> Freedom of Press under Stress in Slovenia,

<sup>44</sup> [Tweet](#) of Janez Janša of 14 Oct. 2020.



This has influenced the situation for free and independent media in Slovenia, and journalists say the government's pressure and aggressive rhetoric have led to self-censorship and increased threats against journalists.<sup>45</sup> During the COVID-19 pandemic, the political pressure on the media and journalists has further increased. UKOM (the Government Office of Communication) has denied public health officials and ministers to give interviews to control the news coverage concerning the coronavirus. The Slovenia Press Agency and other media outlets critical of the government have been systematically overlooked in press conferences by the government about the coronavirus.<sup>46</sup>

Slovenia traditionally had a small media market with little foreign investments. In recent years, foreign investors, politicians, and oligarchs have taken over Slovenian media ownership.<sup>47</sup> In 2017, Slovenian media company Nova24TV.si received funding from three Hungarian media companies that all have ties to Orbán and which now collectively own 45% of the company. Janša's allies also currently own several pro-government news outlets, partially with the support of investors linked to Orbán and Fidesz.

## Bulgaria

Of all EU member states, Bulgaria scores the lowest in the World Press Freedom Index (currently it holds #112; in 2006 it ranked at place 35).<sup>48</sup> Independent monitors characterise the situation in Bulgaria as involving smear campaigns, harassment by the state, and intimidation and attack – verbal and physical – against journalists. In general, the quality of the media landscape in Bulgaria is criticised by many. Most media can be seen as pro-government tabloids, often owned by oligarchs, characterised by low quality and ethical standards. Defamation and privacy violations are common in the Bulgarian press.<sup>49</sup> Such tabloids often are used as a weapon against the opposition and people critical of the government while glorifying former Bulgarian Prime Minister Boyko Borissov's corrupt network – which finances many of these tabloids. Some of the money originates from EU funds, as indicated in the 2020 Commission Rule of Law Report on Bulgaria.<sup>50</sup>

The environment in which Bulgarian journalists operate is very hostile, reaching from cases of (online) harassment of journalists to physical attacks, often very brutal. Journalist Ognyan Stefanov (owner of Frognews, a media outlet writing about corruption and the declining rule of law in Bulgaria) is facing several criminal investigations against his person, among them treason allegations raised by the Prosecutor's Office.<sup>51</sup> In 2008, Stefanov was brutally attacked with hammers; the attackers were never found.<sup>52</sup> Many believe that certain (unsolved) murder cases of journalists are linked to and have been covered up by authorities, such as the case of investigative journalist Viktoria Marinova.<sup>53</sup>

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<sup>45</sup> *Politico.eu* 16 Feb. 2021, 'Inside Slovenia's War on the Media.'

<sup>46</sup> IPI 8 Feb. 2021, 'Slovenia: Government Communication Office must stop controlling COVID-19 news coverage'.

<sup>47</sup> RSF 13 Feb. 2018, 'Slovene media owned by oligarchs, corrupt politicians'.

<sup>48</sup> <https://rsf.org/en/bulgaria>.

<sup>49</sup> A good example is the case of a mayoral candidate in Sofia in whose case a sextape of his girlfriend were published and widely spread in Bulgarian media, more about this case here: <https://balkaneu.com/bulgarian-presidents-office-speaks-on-explicit-photos-of-girlfriend-of-sofia-mayoral-candidate/>.

<sup>50</sup> Rule of Law Report 2020, Country Chapter on Bulgaria, p. 16.

<sup>51</sup> <https://verfassungsblog.de/framing-and-raiding/>

<sup>52</sup> <https://www.nytimes.com/2008/11/14/world/europe/14bulgaria.html>

<sup>53</sup> <https://www.bbc.com/news/world-europe-45777948>

The problem lies not just in the structure of funding and ownership of media. As many claim, the roots of the problem are more profound because the media landscape mirrors the status quo of Bulgarian democracy and society.<sup>54</sup> Corruption is widespread in Bulgarian media, as well as collusion between media, politicians and oligarchs. The Bulgarian Council of Electronic Media (the institution issuing media licenses) is said to be politically influenced due to the way its members are elected. Recently, one of its members resigned to protest the Council's politically motivated decisions. The Prosecutor's Office – controlled by former Prime Minister Boyko Borissov and his allies – blatantly uses its unrestrained authority as a weapon against opponents.<sup>55</sup> Journalists often face pressure and threats from the Prosecutor's Office, which regularly interrogates journalists to intimidate them. The Prosecutor's Office can start investigations without any proof and quickly resorts to freezing financial accounts or other properties, complicating the work of independent media critical of the government.

## 6. Potential for further legal action

Increased state interference in the media landscape by governments of some Member States strikes at the heart of what Art. 11 of the EU Charter guarantees: the freedom to “receive and impart information and ideas without interference by public authority”. The legal ability of the EU to do something about this trend is sometimes contested, including by the European Commission. One obstacle for legal action is that the Charter only applies to the Member States “when they are implementing Union law” (Art. 51(1) Charter).

Apart from the so-called Rule of Law toolbox, which includes the procedure laid down in Art. 7 TEU, the Commission and Member States are competent to bring infringement proceedings against individual Member States for failure to respect EU law (Arts. 258 and 259 TFEU). Although media pluralism has no stand-alone basis in the Treaties, the Commission's competence (as well as that of the Member States) to bring infringement proceedings in media-related cases can be grounded in multiple areas of EU law. Without aiming to be exhaustive, we identify three distinct sets of EU rules that may be the subject of media-related infringement cases.

These are, respectively, the obligation to hold free and fair elections, rules on state aid (in respect of both public broadcasting and state advertising), and secondary legislation on the audiovisual media and electronic communications markets. Basically, EU law requires media pluralism as a condition for free municipal elections and elections for European parliament; and media pluralism as part of a free and competitive market that fosters choice and variety.

It is explained below how Member State practices aimed at or having the effect of dismantling media pluralism are susceptible to legal challenge based on these rules.

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<sup>54</sup> Read more about the state of the rule of law and democracy mirrors the situation of media freedom in Bulgaria in this article by Radosveta Vassileva on New Eastern Europe, <https://neweasterneurope.eu/2021/09/21/bulgarias-media-jungle-the-good-the-bad-and-the-ugly/>

<sup>55</sup> <https://verfassungsblog.de/framing-and-raiding/>

## i. Free and fair elections are conditional on media pluralism

The EU treaties guarantee the right of all EU citizens to vote and stand as a candidate at municipal elections and elections to the European Parliament.<sup>56</sup> Art. 39(2) of the Charter specifies that elections to the European Parliament must be “free”.

It is well-established in case law of the European Court of Human Rights and in the regulatory work of the Council of Europe that in times of elections, media coverage should be fair, balanced and impartial. This means inter alia that advertising space should be accessible in a non-discriminatory manner and that public broadcasters may not discriminate against or support a specific political party or candidate.<sup>57</sup>

These principles are jeopardised in some Member States. For example, the OSCE has established in its reports on elections in Hungary since 2014 that there is “a pervasive overlap between state and ruling party resources, undermining contestants’ ability to compete on an equal basis”.<sup>58</sup> This was also the case in the 2019 Hungarian election for European Parliament. According to one report, the independent weekly newspaper HVG was banned from using public advertising space in the midst of the election.<sup>59</sup> At the same time, streets across the country were full of posters by the governing parties calling on voters to support Orbán’s programme and stop immigration. Opposition parties were offered advertising space at exorbitant prices, meaning they were hampered in bringing across their message.<sup>60</sup> These matters were not addressed in the Commission’s Report on the 2019 elections to European Parliament.<sup>61</sup>

Such reports constitute evidence that the governing parties manipulated Hungary’s elections and therefore that elections were only partly free. This is justiciable before the CJEU in an infringement action on the basis of Arts. 258 and 259 TFEU that invokes a failure to guarantee free elections for the European Parliament as required under Art. 14 TEU, 20(2)(b) and 223(1), second sentence TFEU and Article 11, 39 and 40 of the EU Charter.

Although part of the EU’s foreign policy is sending EU Election observation missions to promote free and fair elections in third countries, the EU has no robust framework in place for systematically monitoring the fairness of elections to European Parliament in its own Member States. The OSCE’s Office for Democratic Institutions and Human Rights did in the past deploy observatory monitoring missions for European elections, but these did not cover all Member States and such missions were apparently discontinued after the 2009 elections for the European Parliament.<sup>62</sup> The Commission published its own reports on the 2014 and 2019 elections to European Parliament, but these reports were merely based on

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<sup>56</sup> Art. 14 TEU, Arts. 20, 22, 223 TFEU, Art. 39 EU Charter, Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 Sep. 1976, Directive 93/109/EC, Council Decision 2018/994.

<sup>57</sup> ECtHR 19 June 2012, *Communist Party of Russia v Russia*, no. 29400/05; ECtHR 30 Jan. 1998, *United Communist Party of Turkey a.o. v Turkey*, no. 19392/92; ECtHR 8 July 2008, *Yumak and Sadak v Turkey*, no. 10226/03; [Recommendation CM/Rec\(2007\)15](#) of the Committee of Ministers to member states on measures concerning media coverage of election campaigns.

<sup>58</sup> The OSCE’s reports on Hungarian elections are accessible [here](#).

<sup>59</sup> Rosa Luxemburg Stiftung 27 April 2019, ‘The 2019 European Parliament Elections in Hungary’, available [here](#).

<sup>60</sup> *Ibid.*

<sup>61</sup> COM(2020) 252 final.

<sup>62</sup> See the OSCE’s [website](#).

Eurobarometer and other surveys as well as interviews with stakeholders and only contained conclusions applicable to the EU as a whole.<sup>63</sup>

The Meijers Committee calls upon the Commission, or, if the Commission remain inactive, Member States, to start infringement procedures against Member States which actively undermine media pluralism on the argument that this endangers free and fair elections for the European Parliament elections in 2024, and any upcoming municipal elections.

In addition, the Meijers Committee calls upon EU institutions to establish capacity to be able to conduct monitoring of European Parliament elections in 2024, and any upcoming municipal elections, in at least those Member States that are reported to manipulate elections and to promptly launch infringement proceedings if serious irregularities are found by EU election monitoring capabilities.

## ii. State aid and public broadcasting

Public broadcasters once enjoyed a monopoly. Since the 1970s, the broadcasting market in Member States gradually opened to private parties, leading to wider choices for consumers and a larger degree of pluralism. The Member States considered however that public broadcasting ought to be protected to satisfy public policy interests that would otherwise not be fulfilled.<sup>64</sup>

As a matter of EU law, the functioning of the broadcasting market is fully governed by the Treaty provisions on public undertakings and state aid (Arts. 106 and 107 TFEU). However, an interpretative protocol (no. 29) on the system of public broadcasting in the Member States is added to the treaties. This protocol considers that “the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”. It holds that the treaty provisions “shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest.”

In essence, public broadcasting must be seen as an accepted derogation to the rules on competition and state aid, in line with the exceptions provided under Art. 106(2) and Art. 107(3)(d) TFEU, referring to inter alia culture and heritage conservation and the general economic interest. It is for the Commission to consider, in accordance with its powers under Art. 108 TFEU and Reg. 2015/1589, whether or not any distortion of competition caused by public broadcasting meets these exceptions, taking account of the interpretative protocol. The key is that the Member State can demonstrate that public broadcasting brings “added value in terms of serving the social, democratic and cultural needs of society”.<sup>65</sup>

As observed above, evidence is mounting that public broadcasting in some Member States serves no general societal interests but narrow political purposes. Questions are being asked, for example, about the significant increase of funding of Hungarian public media with 50% from 2011–2021, as well as the loss of its editorial independence. Such developments raise legal issues in view of the interpretative protocol’s aim to promote media pluralism. Any political favouritism by public broadcasting is justiciable before the CJEU on the basis of

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<sup>63</sup> COM (2015) 206 final and COM(2020) 252 final.

<sup>64</sup> Commission Communication 2009/C 257/01, esp. recitals 1–3.

<sup>65</sup> *Ibid.*, point 48.

Arts. 106 or 107 TFEU as it does not serve a purpose recognised by EU law and therefore amounts to interference by public companies in free markets for which the treaties provide no exception.

Remarkably, none of the 40 decisions issued since 1999 by the European Commission on state aid to public service broadcasting was directed at Member States which score comparatively poor in the World Press Freedom Index, including those discussed above. Without exception, decisions have been issued in respect of Member States where media landscapes are regarded as generally free and plural. As these decisions include cases in which no failures to comply with EU law were found, it appears that public broadcasting policies of states which joined the Union in 2004 or 2007 have never been seriously tested against the EU’s rules on state aid.

*Table* Commission decisions on state aid to public service broadcasting, 1999–2019, per Member State<sup>66</sup>

France	10
Denmark	6
Spain	4
Germany	3
Portugal	3
United Kingdom	3
Belgium	2
Italy	2
The Netherlands	2
Austria	1
<i>Total</i>	<i>40</i>

The Meijers Committee calls on the European Commission to more systematically review allegations that public broadcasting serves purposes beyond those recognised in the treaties, especially in those Member States that are flagged as raising concerns in the Commission’s Rule of Law Report, and, where appropriate, to launch state aid investigations as part of the enforcement of the findings in said Rule of Law Report. The Meijers Committee calls on the European Parliament to ask the European Commission for a periodic progress report in this regard.

### iii. State advertising as state aid

Attempts at distorting the media landscape through state advertising are justiciable under EU state aid rules too. Hungary’s policy since 2010 of subsidising pro-government media outlets in the newspaper, online and television markets is particularly well-documented.<sup>67</sup> Such practices may violate Art. 107(1) TFEU, which sets forth that aid granted through state resources which distort competition by favouring certain undertakings is incompatible with the internal market in so far as it affects trade between Member States. The provision of affecting trade between Member State is to be interpreted widely<sup>68</sup> and encompasses situations in which national undertakings – such as pro-government media outlets – are favourably treated as it reduces opportunities for undertakings in other Member States to

<sup>66</sup> These decisions are compiled by the European Commission on its [website](#) (accessed 20 July 2021).

<sup>67</sup> A. Bátorfy and A. Urbán (2020), ‘State advertising as an instrument of transformation of the media market in Hungary’, *East European Politics* 36:1.

<sup>68</sup> Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.04.2004, p. 81.

enter the market. Moreover, examples are known of foreignly-owned media outlets being pushed out of some Member States' markets by excluding them from state advertising benefits.

The Meijers Committee calls on the European Commission to more systematically review instances of state advertising in the media sector with a view to ascertaining their compatibility with the EU's rules on state aid. The Meijers Committee calls on the European Parliament to ask the European Commission for a periodic progress report in this regard.

#### iv. Directives regulating specific services sectors

There are several sector-based legal instruments that regulate parts of the media market.

The *European Electronic Communications Code*<sup>69</sup>, which replaces and updates a series of existing EU directives and entered into force in December 2020, guarantees inter alia free access of companies and consumers to electronic communications networks as well as to the radio spectrum (Art. 12-13), political independence and accountability of national regulatory authorities (Art. 8) and lays down special obligations for undertakings with significant market power as to their transparency and providing access to services without discrimination (Arts. 69-70). The recent infringement case against Hungary for allegedly withdrawing Klubradio's license on arbitrary, i.e. discriminatory grounds, is based on this directive.

The *Audiovisual Media Services Directive*<sup>70</sup> provides a regulatory framework for the audiovisual media services industry, with a view to promoting cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection. It applies to all media involving moving images – with or without sound – thus encompassing both televised and online content. The directive guarantees the principles of free provision and receipt of audiovisual services and protects the editorial independence of providers of audiovisual content.

The 2018 recast pays specific attention to safeguarding editorial decisions from state interference or influence by national regulatory authorities and ensures the provision of information to individuals and society “with the highest level of variety”.<sup>71</sup> Member States may oblige media providers to be transparent about ownership structure (Art. 5) and are obliged to establish national regulatory authorities which function legally distinct and independent from their governments (Art. 30). The work of these regulatory bodies should pursue the aims of media pluralism, cultural diversity and the promotion of fair competition (Art. 30(2)).

The Meijers Committee calls on the Commission to make full use of specific sector-based legal instruments, including the recently adopted and revised European Electronic Communications Code and Audiovisual Media Services Directive, and on the European Parliament to include this aspect in its political control of rule of law work carried out by the Commission.

The revised Audiovisual Media Services Directive should be regarded as a powerful tool for the European Commission to safeguard against political ownership of media providers, political influence over regulatory bodies and policies that are aimed at eroding media pluralism. Although the directive suffers from a number of gaps, it contains several provisions

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<sup>69</sup> Directive 2018/1972.

<sup>70</sup> Directive 2010/13/EU as amended by Directive 2018/1808.

<sup>71</sup> *Ibid.*, recital 54.



that may be invoked to challenge what was branded by the OSCE as a “pervasive overlap” between the state, the governing party and private media.

## 7. Recommendations

As guardian of the Treaties, the European Commission holds primary responsibility to act upon Member State failures to comply with Union law. This responsibility is more apparent when it comes to transgressions of the rule of law. The Union itself is a rule-based organisation. It is also a political project that aims, by treaty, to protect and promote democracy and the enjoyment of fundamental freedoms.

The Meijers Committee welcomes that the European Commission takes its responsibilities in respect of the rule of law increasingly serious. We share its assessment that not all rule of law-related concerns fall within its competences. Moreover, Treaty-based action to address failures of the rule of law such as Art. 7 TEU or the power to bring infringement cases are no panacea for political, societal or cultural animosity towards the rule of law that is sometimes deeply rooted.

However, the Meijers Committee also observes that the Commission has remained questionably passive in the last decade in safeguarding the rule of law in general and media pluralism in particular. As no lines were drawn in the sand, the government-driven dismantling of media pluralism in at least one Member State could continue unabated, which may have incited similar practices by governments and ruling parties in other Member States.

**We therefore call on the European Commission**

- to more systematically follow up on media pluralism monitoring, including in its own Rule of Law Reports in which media pluralism is one of four pillars, the Media Pluralism Monitor and information provided by experts, NGOs, media companies and individuals such as journalists
- to start infringement procedures against Member States which actively undermine media pluralism on the argument that this endangers free and fair elections for the European Parliament elections in 2024, and any upcoming municipal elections.
- develop capacity to closely monitor future elections to the European Parliament and municipal elections in at least those Member States that are reported to manipulate elections and to promptly launch infringement proceedings if serious irregularities are found.
- to more systematically review instances of state advertising in the media sector to ascertain their compatibility with the EU’s rules on state aid.
- to prioritise state aid and other infringement cases that involve media pluralism in those Member States that are flagged as raising concerns in the Commission’s Rule of Law Report

## Annex: Sources on media pluralism in the European legal order

### European Commission

European Commission [Guidelines for EU support to media freedom and media integrity in enlargement countries](#), 2014–2020, including the [Action Plan](#) to support recovery and transformation of the media and audiovisual sectors (December 2020).

Shaping Europe’s digital future – [Media Freedom Projects](#) (2020).

The EC also published a [report](#) based on 2 public consultations on the independence of the audiovisual regulatory bodies and an independent report from the [High Level Group on Media Freedom and Pluralism \(report\)](#) was conducted in 2013.

Media freedom is one of the four topics addressed by the yearly [Rule of Law Reports](#) by the European Commission.

### Projects

- **ECPMF – Addressing violations of media freedom and pluralism (Media Freedom Project):** The European Commission co-funds [projects](#) run by the European Centre for Press and Media Freedom (ECPMF) and its partners to address violations of media freedom and pluralism in the EU Member States and Candidate Countries.
- **CMPF – Independent monitoring of media pluralism:** The European Commission awarded grants to the [Centre for Media Pluralism and Media Freedom \(CMPF\)](#) for the development and implementation of the “Media Pluralism Monitor” (MPM). Details and results are [available on the Media Pluralism Monitor page](#) (for country reports on Hungary and Poland scroll down).

### Council of the European Union

On 14 November 2018, the Council of the European Union adopted [Conclusions on the strengthening of European content in the digital economy](#).

[EU Human Rights Guidelines on Freedom of Expression Online and Offline](#), adopted by the Foreign Affairs Council meeting of 12 May 2014.

Previously, on 26 November 2013, the Council had adopted [Conclusions on media freedom and pluralism](#) in the digital environment.

### European Parliament

European Parliament [resolution](#) of 3 May 2018 on media pluralism and media freedom in the European Union.

[‘A comparative analysis of media freedom and pluralism in the EU Member States’](#) – a study that was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee (September 2016).

## Council of Europe

### Reports

In March 2020, the Council of Europe has released its [annual report about the protection of journalism and safety of journalists](#) (on page 41 the current situation in Hungary and Poland is shortly described).

### Official documents

#### Recommendations by Committee of Ministers:

On [this page](#), all the documents adopted by the Committee of Ministers, Parliamentary Assembly and Ministerial Conferences are accessible. [This document](#) compiles all the recommendations and declarations by the Committee of Ministers in the field of media and information society up until 2016. Selection of relevant documents:

- [Recommendation CM/Rec\(2018\)1\[1\]](#) of the Committee of Ministers to member States on media pluralism and transparency of media ownership
- [Recommendation CM/Rec\(2016\)4](#) of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors ([implementation](#) & guide of CM/Rec(2016)4)
- [Recommendation CM/Rec\(2012\)1](#) of the Committee of Ministers to member States on public service media governance
- [Recommendation CM/Rec\(2008\)6](#) of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters
- [Recommendation CM/Rec\(2007\)15](#) of the Committee of Ministers to member states on measures concerning media coverage of election campaigns
- [Recommendation CM/Rec\(2007\)11](#) of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment
- [Guidelines](#) of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis (2007)

#### Declarations by Committee of Ministers:

- [Declaration](#) of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors (2014)
- [Declaration](#) of the Committee of Ministers on public service media governance (2012)

- [Declaration](#) of the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers (2011)
- Declaration Decl-13.01.2010 of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights (can be found in [this](#) document)

Recommendations by Parliamentary Assembly:

- [Recommendation 2074 \(2015\) and Resolution 2065 \(2015\)](#) Increasing transparency of media ownership
- [Recommendation 2075 \(2015\) and Resolution 2066 \(2015\)](#) Media responsibility and ethics in a changing media environment
- [Recommendation 2062 \(2015\) and Resolution 2035 \(2015\)](#) Protection of the safety of journalists and of media freedom in Europe

For more information about recommendations and declaration of the Ministerial Conferences, please consult [this document](#) that lists all the adopted texts up until 2016.

Venice Commission

Compilation of Venice Commission Opinions and Reports concerning Freedom of Expression And Media (2016), can be found [here](#) (Chapter 2, Regulation of Media Market, and Chapter 7, Professional Journalism) are relevant.

Guidelines on Media Analysis during Election Observation Missions (2009), can be found [here](#).

Projects

The Council of Europe also provides an overview of all threats and attacks against journalists and media freedom in its [platform to promote the protection of journalism and safety of journalists](#) which is updated regularly.

Case law

- [Overview of the case law ECHR](#) in regard to freedom of expression, media and journalists (by the IRIS Themes series from July 2015 though).
- [Overview over the highlights](#) of the ECtHR's case law in regard to freedom of expression and information.
- Another case law overview concerning Article 10 ECHR can be found [here](#) (from 2007).
- A current case law overview concerning Article 10 ECHR from March 2020 is only available in French and can be found [here](#).
- The Council of Europe also publishes several factsheets concerning case law of the ECtHR on media freedom-related topics, an overview of all factsheets can be found [here](#) (unfortunately, they most current ones are from 2018).

Relevant factsheets are for example the factsheet on [media coverage of elections](#), [harassment and intimidation of journalists](#) or [freedom of expression and the broadcasting media](#).

# About

The Meijers Committee is an independent group of experts that researches and advises on European criminal, migration, refugee, privacy, non-discrimination and constitutional law.



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