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on EU Charter: standard settings for media freedom across the EU

Committee on Civil Liberties, Justice and Home Affairs

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United in diversity

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1. Introduction: media in democracies

Media are often referred to as “public watchdog” or “fourth power” in democracies: “**public watchdog**” as they help citizens in scrutinizing the actions of those holding power – be it the State, the government, the parliament, parties, but also economic and social actors – by providing citizens with information which is fundamental to them to judge and take informed decisions on the occasion of electoral consultations. Media are also described as “**fourth power**” as they play an important public opinion-forming role, which can be misused and abused for the interests of a certain group, normally those holding power. This dichotomy illustrates, in substance, the positive and negative roles that media can exert in a democracy.

Totalitarian and dictatorial regimes routinely put their grips on media to gag critical voices, suspend freedom of expression, of information and freedom of the media, that are transformed into the “megaphones” of the regime. The **temptation of controlling the media** to advertise the action of those in power and weaken the space for critical voices is well known **also in democracies**.

NGOs, associations monitoring media freedom, the Council of Europe and OSCE, as well as EP studies and resolutions, have extensively reported about the **threats posed to media by States’ governments** including in the European Union: among others, direct or indirect political control and influence through the appointment by the government or of the parliamentary majority of media heads or control bodies; barring or limiting the access of some media outlets to the market through licensing and authorizing of broadcasting; misuse and abuse of the rules on State, national or military security and public order or morality to impose censorship and impede access to documents and information¹; violation of the principle of the confidentiality of sources; absence of laws on media concentration and conflict of interests; use of advertisement to influence the editorial line.

These violations of media freedom take place also in EU Member States, as reflected in NGOs reports published in 2012: according to **Reporters Without Borders** Press Freedom Index², Bulgaria ranks 80th, Greece 70th, Italy 61st, Hungary 40th, France is 38th, UK is 28th, Lithuania and Latvia fell to 30th and 50th respectively. The **Freedom House** Freedom of the Press report³ classifies as “partly free” the media situation in Italy (70th), Bulgaria and Hungary (78th), Romania (86th). The **OSCE** Media Freedom representative reports yearly about her activities to defend media freedom: the 2012 report shows that action is still needed in relation to quite a number of EU MSs⁴.

This picture demonstrates that freedom of the media is **still at stake in Europe** and that common standards and actions should be developed to guarantee media freedom.

2. From freedom of expression and information to media freedom

¹ This process is even more relevant today, as media provide information that governments try to hide away from public scrutiny (Wikileaks information reported by public media, journalistic inquiries revealing CIA extraordinary renditions and secret prisons on the EU soil, etc)

² See <http://en.rsf.org/press-freedom-index-2011-2012,1043.html>

³ See <http://www.freedomhouse.org/sites/default/files/Booklet%20for%20Website.pdf>

⁴ See <http://www.osce.org/fom>

International and European human rights law protects the **freedom of opinion, expression and information**. Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights are the main references in the field. The **EU Charter of Fundamental Rights** makes a step further by stating in its Article 11(2) that “**the freedom and pluralism of the media shall be respected**”, which is a novelty in comparison to previous human rights treaties. With the entry into force of the Lisbon Treaty, the Charter has become binding and the obligation in the EU of respecting media freedom and pluralism shall be looked at in a new perspective, notably in connection to Articles 2 (EU values and principles), Article 7 and Articles 9-12 TEU on democracy and citizenship.

It is first and foremost a duty of Member States to protect freedom of opinion, expression, information and media freedom, as these are principles also guaranteed in their Constitutions and laws. Having said this, shall a serious risk or violation of media freedom and pluralism take place in a Member State, the European Union should take initiative on the basis of the Treaties and of the Charter and **intervene to protect the European democratic and pluralistic order and citizens’ rights**. The **EP** has constantly supported this interpretation of the Treaties and of the Charter, while the **doctrine** described this approach as “reversed Solange” aiming at protecting the essence of fundamental rights - and of European citizenship - enshrined in Art. 2 TEU throughout the EU legal space against those EU Member States violating them at European and internal level¹.

Media freedom has been one of the areas where these different interpretations by the Commission, the EP and Member States have clashed. The boundaries of European intervention in relation to media freedom, the existence of a legal basis for the EU to regulate media freedom and pluralism with legislative initiatives, as well as the political opportunity of such intervention, have been under discussion for more than a decade now.

3. The EU and media freedom

The **European Parliament** has repeatedly expressed concern on media freedom and pluralism and called the Commission to act, including by proposing a **legislative initiative** on media freedom and pluralism, as the EP constantly supported the necessity and appropriateness of an EU legal and political intervention for media freedom and pluralism, as well as the existence of a legal basis in the Treaties to do it². The Boogerd Quaak report³ is fundamental in this remit. The EP reiterated most recently its constant call in its resolution of 10 March 2011 on media law in Hungary (par. 6).

¹ The doctrine has supported this view in substance, see Carlino Antpöhler, Armin Von Bogdandy, Johanna Dickschen, Simon Hentrei, Matthias Kottmann, Maja Smrkolj, 'Reverse Solange—Protecting the essence of fundamental rights against EU Member States' (2012) 49 *Common Market Law Review*, Issue 2, pp. 489–519.

² Resolutions of 20 November 2002 on media concentration, OJ C 25 E, 29.1.2004, p. 205, of 4 September 2003 on the situation of fundamental rights in the EU, OJ C 76 E, 25.3.2004, p.412, of 4 September 2003 on Television without frontiers, OJ C 76 E, 25.3.2004, p.453; of 6 September 2005 on the application of Articles 4 and 5 of Directive 89/552/EEC (“Television without Frontiers”), as amended by Directive 97/36/EC, for the period 2001-2002, OJ C 193 E, 17.8.2006, p. 117; 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 (Boogerd Quaak report), OJ 104 E , 30.4.2004, p. 1026; of 25 September 2008 on the concentration and pluralism in the media in the EU, OJ C 8 E, 14.1.2010, p.75; of 10 March 2011 on media in Hungary, P7_TA(2011)0094.

³ OJ 104 E , 30.4.2004, p. 1026.

Once the EU has intervened in the field of media freedom and pluralism through the adoption of a legal act, the Commission would have undisputable competence, as "guardian of the Treaties", to check the implementation of EU law in Member States: this would enlarge the possibilities for the EU to intervene to address threats in this field and ensure that the Charter obligations of respecting media freedom and pluralism are applied all over the EU.

The **European Commission** had always taken a more "moderate" approach to the issue and did not follow up EP requests. The Commission services had prepared a draft directive on the protection of pluralism (Monti-Bangemann initiative of 1996/7), but then decided in 1997 to suspend the proposal as it met political internal and external resistance and later declared that it doubts on whether a sufficient legal basis existed¹.

After repeated calls of the EP, the Commission launched on 16 January 2007 the so-called "**3 steps approach**" that included: 1) the issuing of a Commission Staff Working Paper on Media Pluralism, published in 2007, which stated that "*it would not be appropriate to submit a Community initiative on pluralism*"; 2) the launching of an independent study on media pluralism in EU Member States to define indicators for assessing media pluralism in the EU Member States: the study was issued in 2009; 3) a Commission Communication on the indicators for media pluralism in the EU Member States - never issued - followed by a public consultation – which did not take place². The "Media Pluralism Monitor", a risk-based monitoring tool developed by the independent study, was also never applied in practice. In substance, the Commission discontinued the "3 steps approach" that was announced by Commissioners Reding and Wallström by dropping the 3rd step and the whole initiative.

The **current Commission has made a step forward** in order to face the threat of government control of public and private media, starting from the crisis in **Hungary**: it called the Hungarian authorities to review their law on media to bring it in line with EU law, the Audiovisual Media Services Directive (AVMSD) and with the Council of Europe standards, notably the Commissioner for Human Rights and Venice Commission recommendations.

At the same time and in order to address these concerns, Commissioner Kroes created a **High Level Group on Media Freedom and Pluralism** whose objective is to "*analyse media and press freedom, including the current legal framework and... assess the need for action, proposing concrete ways to address the risks to pluralism and freedom of the media*"³. The HLG will make recommendations to ensure press and media freedom in an Internet world and set out how risks should be addressed, including through legislation, better enforcement and other measures, and at which level. The results of the HLG work are expected before the end of the year.

The HLG will cooperate with the **EU Media Futures Forum** – charged with reflecting on the impact of the digital revolution on European media industries, resulting risks and opportunities and emerging new business models⁴ - as well as with the European University

¹ See Explanatory Statement of the Boogerd Quaak report. Up to now the Commission has not requested any legal service opinion to check the existence of a legal basis or not in EU law for a legislative initiative and is still reflecting on the issue.

² <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/52>

³ See terms of reference of the HLGMPF

http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_tor.pdf

⁴ See press release

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1506&format=HTML&aged=0&language=EN&guiLanguage=en>

Institute in Florence **Center for Media Pluralism and Media Freedom**, that will publish working papers including on the issue of the EU competences in respect of media freedom and pluralism expected for end of July.

In parallel, NGOs have continued calling for EU initiative for media freedom and pluralism. A **European Citizens' Initiative for Media Pluralism** is being discussed in the view of its launch, calling the Commission to issue a legislative initiative to harmonize national rules on media ownership to protect pluralism and the appropriate functioning of the internal market, either through a new directive or an amendment to the AVMSD. In substance, the discussions on the issue of media freedom and pluralism, and how to protect and promote them in Member States and in the EU, are gaining a new momentum, to which the present report on the "EU Charter: standard settings for media freedom across the EU" wants to contribute.