



NEW CHALLENGES TO MEDIA FREEDOM AND PLURALISM:  
THE CASE-STUDY OF HUNGARY

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# I. Introduction

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This thesis is a comparative analysis of different approaches of addressing the new challenges of media freedom and pluralism. The subject of the analysis is the European Union, Council of Europe and a member state of both organizations, Hungary. The reason for choosing Hungary is the concerns around its media landscape. Recently the media ownership concentration in Hungary became extremely disproportionate and defines a phenomena which has been called “soft-censorship”<sup>1</sup>. The paper unfold the meaning of this relatively new term and explain the characteristics of the threat. As the name indicates this phenomena is a type of restriction on freedom of expression. It is “soft” because in contrast to the traditional censorship the soft-censorship occurs indirectly. Soft-censorship is a censorship without actual censors. Since it is a hidden threat it is difficult to prove its existence. In order the describe soft-censorship one must be aware of all the factors which contribute to the unfavorable environment. By analyzing the Hungarian media’s history, political implications, authorities and media legal framework the reader will be able to understand whether the circumstances of the media impose and actual threat on the right to freedom of expression and the right to information. Chilling effect is a type of threat on freedom of expression which has similar features as soft-censorship. The adjective “chilling” implies as hidden, indirect nature of the effect. Because of the assumed similarities the paper will assess the differences and similarities of the two type of threat.

Hungary is a member state of the Council of Europe and the European Union as well. The thesis will discover how these two regional organizations approach the issue of media pluralism; what the similar and different elements of the approach are. By comparing the two jurisdictions along

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<sup>1</sup> Lasner, Thomas R., ed. “Capturing Them Softly Soft Censorship and State Capture in Hungarian Media.” WAN-IFRA and CIMA. Accessed March 28, 2014. [http://mediaobservatory.net/sites/default/files/Soft%20Censorship\\_Hungary\\_English.pdf](http://mediaobservatory.net/sites/default/files/Soft%20Censorship_Hungary_English.pdf). p. 32

the same aspects the paper will evaluate the actual effect of the institutions on media pluralism in case of Hungary. By the end of the paper the reader will have an idea of the answers of the following questions: *should we consider the latest changes in Hungary's media as a new type of chilling effect on freedom of expression? If there is a threat on Hungary's media freedom and pluralism are external actors (EU and CoE) able to address the problem? What is the root of the concerns around the Hungarian media environment?*

The thesis starts with explaining the theoretical framework of freedom of expression and media pluralism. The importance on freedom of expression will be stressed out through presenting the role of free media in democratic society. It will be demonstrated through the leading scholars of free speech theories why is this fundamental right so important. The chapter will show the link between free speech and media pluralism as well. To understand the watchdog<sup>2</sup> role of media justifications in favor of media freedom will be listed. The first time when media was called *as fourth estate* by Edmund Burke was in 1787 during a parliamentary debate.<sup>3</sup> The phrase perfectly express the significance of the media in a democratic society. The chapter answers the question what is the function of media i.e. why media pluralism matters; what do we mean by media pluralism and freedom of the media; what are the possible challenges to the media freedom; is it possible to measure media pluralism, if yes, what are the possible indicators for it. The theoretical framework supposed to provide a clear explanation for the need of protection of media pluralism and independence.

The next chapter of the international legal framework will briefly demonstrate how freedom of expression is protected by international law instruments (e.g.: ICCPR, UDHR). Since the primary subject of the analysis is media pluralism the legal framework of freedom of the media will be examined in more details. For this reason the thesis looks at the EU and Council of

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<sup>2</sup> Goodwin v. UK [1996] application no. 17488/90 paragraph 39. (ECtHR)

<sup>3</sup> Schultz, Julianne (1998). Reviving the fourth estate. Cambridge, England: Cambridge University Press. p. 49

Europe's media pluralism policy. The chapter will define the key feature of the two forums. The reader will be able to understand to what extent and in what terms do the European Court of Human Rights cases differ from the European Court of Justice cases. By analyzing the media freedom and pluralism competences of these bodies the paper aims to highlight their potential role in case of Hungary. The section will highlight the actions already taken by the EU and CoE to foster media pluralism among member states. The chapter will show how media pluralism is being protected by policy and legal instruments.

The following chapter gives a deeper insight to the Hungarian media scene. The aim of the analysis is to find out the possible reasons of the concerns around the Hungarian media. The paper uses as a source three interviews conducted by the author. Before discussing the shortcomings of the media authority's institutional feature a few paragraphs describe the historical and political context of the media. The events highlighted by the section have detrimental role on the present situation of the media. Under the section of the institutional guarantees, mainly the critique expressed by the EU and the results of it will be discussed. The paper will analyze the authorities based on their competences, level of independence, willingness to cooperate and comply with the recommendations of the European Commission. The section tries to find out whether the national media watchdogs are strong and independent enough to "bark".<sup>4</sup>

The next subsection captures the Hungarian media market. The functioning characteristics and the historical background of the market will be described in more details. By this the reader will be able to understand the soft-censorship phenomena and decide whether there is a real threat on media freedom and pluralism. The chapter will lead to the explanation of the soft-censorship

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<sup>4</sup> Dean Starkman, *The Watchdog That Didn't Bark: The Financial Crisis and the Disappearance of Investigative Journalism* (Columbia University Press 2014).

or party colonization<sup>5</sup> of the media, as Péter Bajom Lázár calls it. After unfolding the potential risks of the phenomena concrete case studies will illustrate the problem. As a final part of the chapter the Freiberga report's most relevant suggestions will be highlighted which should be implemented in Hungary as well.

In the last chapter of the thesis the author will summarize the key findings of the paper and answer the questions of the introduction. The chapter will also include the personal reflections of the author regarding to the Hungarian media environment.

Since the topic has been constantly developing during the last few months the paper will not be able to cover all relevant events and changes. The paper does not look at the public sector media and does not go into details of the Hungarian media law, only looks at the most relevant elements of it. In order to get a full picture of the media environment the paper relies on three interviews conducted by the author of the thesis. The interviewees: Krisztina Rozgonyi, former board member, vice-president and then president of the National Telecommunications Authority (2004- 2010); Péter Bajomi-Lázár media researcher at the Department of Politics and International Relations, University of Oxford, editor of the *Médiakutató* (a Hungarian media journal), professor at the Media and Communication Department of the Budapest Business School; Attila Bátorfy journalist at *Kreatív* (Hungarian media and marketing focused journal) specialized in media pluralism.

The methodology applied in the thesis is comparative legal and policy analysis. The thesis looks at the general approach of the CoE and EU towards media pluralism and shows the differences and similarities of them. After discovering the institutional approach the paper will introduce a country example and examine the situation of the media within Hungary. The paper uses policy

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<sup>5</sup> Bajomi Lázár P, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014)

papers, court decisions, NGO and IGO reports, EU and CoE legal instruments, international human rights treaties, interviews with stakeholders and academic sources.

## II. Theoretical framework of freedom of expression and media freedom

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### A. The importance of freedom of expression in a democratic society

To understand the importance of freedom of expression and the protection of media in the following paragraphs the paper will introduce the principal justifications of free speech. Most of the time under the aegis of human rights treaties there is no explicit reference to media freedom. However many claim that media freedom and structural media pluralism are preconditions of free speech.<sup>6</sup> The paper will discuss the relationship between freedom of expression and free press in another section, for now it will be explained why freedom of expression should be protected. Eric Barendt<sup>7</sup>, prominent freedom of expression expert, listed several arguments in his book, *Freedom of speech*.<sup>8</sup> Four of those arguments to justify freedom of expression will be introduced in the following paragraphs.

John Stuart Mill was among the proponents of the *discovery of truth argument*.<sup>9</sup> According to him and many other supporters of the argument truth should be always revealed in order to achieve public good. This approach puts the truth above everything and because of it many has criticized the idea of Mill's truth. An issue which easily challenges his claim is hate speech and incitement. In case of racists expressions the safety and dignity of minority groups should be taken into account. Therefore if one would agree with Mill it would mean that all views, no matter how racist and harmful those are, should be spoken out. Justice Holmes from the US

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<sup>6</sup> Ewa Komorek, *'Is Media Pluralism a Human Right? The European Court of Human Rights, the Council of Europe and the Issue of Media Pluralism'* 395.

<sup>7</sup> 'Eric Barendt - UCL Faculty of Laws' <<http://www.laws.ucl.ac.uk/people/eric-barendt/>> accessed 14 November 2014

<sup>8</sup> Eric Barendt, *Freedom of Speech* (second, Oxford University Press 2005).

<sup>9</sup> John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press 1991). p7-13

Supreme Court was also referring to truth in his *Abrams v. US* statement.<sup>10</sup> Holmes was looking at the expressions by examining whether those are powerful or true enough to enter the market place of ideas. The market place of idea was seen as the market place of goods and as liberal economist reject the need of market manipulation so did the proponents of the discovery of truth argument. In other words, according to them there was no need to regulate freedom of expression by the government. By now it has become obvious that Mill's idea does not necessarily result in a free speech friendly environment due to additional political and economic elements on the market. The market place of ideas plays a crucial role in media pluralism, still the discovery of truth cannot be seen as the one and only justification of freedom of expression, at least not at any cost.

Others argue that restrictions called for regulating what people say, write or read are limiting their ability of *self-fulfillment and personal growth*.<sup>11</sup> The self-fulfillment argument can be criticized for the same reasons as the discovery of truth. Saying anything without consequences can be dangerous for certain elements of the society. Thomas Scanlon<sup>12</sup> is among the leading supporters of this argument. He claims that freedom of expression should not be suppressed regardless if it is harmful to others. Scanlon was promoting J.S. Mill's theory and called it Millian Pinciple.<sup>13</sup> Although in contrast to Mill, Scanlon does not assume that the open discussion is the precondition of the emergence of truth.

Brison, one of the opponents of the self-fulfillment argument, raised the issue of personal autonomy.<sup>14</sup> His concern was that not everyone is able to exercise autonomy when it comes to personal decisions which affect the society, like voting on elections. What he meant can be

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<sup>10</sup> *Jacob Abrams, et al v United States* [1919] Supreme Court of the United States 250 U.S. 616.

<sup>11</sup> Eric Barendt, *Freedom of Speech* (second, Oxford University Press 2005),p13-18

<sup>12</sup> Scanlon T, *A Theory of Freedom of Expression* (Philosophy & Public Affairs 1972) p160-162

<sup>13</sup> *ibid.* p163

<sup>14</sup> J. Brison S, *The Autonomy Defense of Free Speech* (Ethics 1998)p323-36

considered as a risk and might result in unfavorable decisions. This is particularly important when it comes to media freedom. Media is a channel through which people get informed and based on the information those people make their decisions. If freedom of expression is uncontrolled, extremist voices will have space and be able to gain easily supporters. At the end Scanlon accepted that limitation on free speech might be justified to promote environment for rational ideas. By this he recognized the legitimacy of restriction on free speech on paternalistic grounds.<sup>15</sup> So far both arguments have been criticized on the basis of being unrestricted and free from governmental interference. The critique suggests that in relation to freedom of expression there are other involved values like minority rights or media freedom and pluralism. Consequently the unrestricted freedom of expression is not in the interest of the whole society. In order to resolve this tension the argument of democratic self-governance offers a solution. This argument makes difference between different types of speeches and by this pays attention to the other values. Alexander Meiklejohn<sup>16</sup>- who was often associated with this idea- considered the First Amendment of the US Constitution as a tool which enables the effective participation in democracy through the protection of all citizen's rights to understand political questions. This approach was present in the German Constitutional Court as well where they found that the free speech enables the citizens to form public opinion about political issues.<sup>17</sup> Although political speech is protected by this argument but artistic speech, obscene material or commercial advertising are excluded from the circle of protected speeches. More importantly the argument does not cover voices which address criticism of the government. A possible answer to this challenge is a key principle of democracy, namely equal access to rights of the citizens. Ronald Dworkin<sup>18</sup> argues by using constitutional theory of democracy for equal

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<sup>15</sup> Scanlon T, 'Freedom of Expression and Categories of Expression' (1979) 40 5p19

<sup>16</sup> Meiklejohn A, *Political Freedom: The Constitutional Powers of the People* (HarperCollins 1960)p19-28.

<sup>17</sup> *61 BVerfGE 1* (German Constitutional Court)

<sup>18</sup> Dworkin R, *Freedom's Law* (Oxford University Press 1996)p15-26

treatment when it comes to respect the rights of citizens by the political institutions. He claims that the minority just as the majority has the right to participate and contribute to the public debate. The majority cannot suppress the minority to hold back their points of view, especially their criticism. Following Dworkin's findings defamation, hate speech or extremist speech must be accepted because it is not the state who should decide about the scope of the public debate. The argument from citizen participation in democracy can be easily connected with the previously mentioned free speech arguments. For instance the right to equal accession to the political debate is linked to the self-determination principle. Despite the several objections the argument from democracy is the pre-eminent and most frequently applied argument.

All the principles discussed before highlighted some special features or consequences of free expression. According to Mill free speech facilitated the discovery of truth, Meiklejohn argued that free speech is essential for the effective functioning of democracy and Scanlon emphasized the importance of self-fulfillment through the exercise of freedom of expression. All of them presented a positive theory, they pointed out why freedom of expression should be protected. Whereas Frederik Schauer<sup>19</sup> introduced a negative theory in relation to free speech. The last theory's basic assumption is that there are several grounds to be suspicious of the government and its activities. The theory focuses on the possible negative aspects of governmental regulation but does not give explanation on why speech is special and therefore why should be protected. For this reason Schauer failed to provide a strong argument in favor of freedom of expression. In relation to Schauer's theory Barendt raised the issue of governmental regulation of freedom of expression and the scope of it.<sup>20</sup> Historically constitutional rights intended to limit the power of the state and were not guarantees against private authorities like media corporations. The regulation of the media market might seem to be beyond the scope of

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<sup>19</sup> Schauer F, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982)p80-86

<sup>20</sup> Barendt E, *Freedom of Speech* (second, Oxford University Press 2005)p22

governmental interference. Albeit one could argue leaving the free speech to the players of an unregulated market imposes serious danger on it. Schauer's suspiciousness is not unfounded however an unregulated media market is rather a threat to freedom of expression. As it was mentioned before other values are affected by freedom of expression. Those values also need to be protected and the governments have to take them into account in the media law drafting process.

The relationship of democracy and freedom of expression cannot be ignored. The European Court of Human Rights in the decision of *Lingens* said that free speech is "one of the essential foundations of a democratic society"<sup>21</sup>. Steyn called the freedom of expression "the lifeblood of democracy"<sup>22</sup> and Brandeis defines it as the "cornerstone of democracy"<sup>23</sup> in the case of *Whitney v California*. These arguments show how much emphasis is on free speech when it comes to democracy. The last principle has particular importance in case of Hungary. Thereby in the further parts of the thesis the argument from democratic self-governance will be the dominant principle.

In the 21<sup>st</sup> Century the realization of the cornerstone of democracy happens through the media. Hence resulting from the relationship of freedom of expression and media it follows that the arguments listed above can be used to justify the protection of media freedom and pluralism. Yet this is not the case and the relationship is more complicated. The next section is going to unfold the connection of freedom of expression and media.

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<sup>21</sup> *Lingens v Austria* [1986] European Court of Human Rights 9815/82

<sup>22</sup> *R v SSHD* [1987] Court of Appeal of England and Wales [1989] 1 QB 26

<sup>23</sup> *Whitney v California* [1927] United States Supreme Court 274 U.S. 35

## B. Freedom of expression and the media

### 1. The role of media freedom and pluralism in a democratic society

Freedom of expression has different values for an individual and means something else for the public good.<sup>24</sup> The most often raised concerns regarding free speech are related with hate speech, equality and dignity or the importance of media pluralism. Diversity within the society has an important role and makes it possible in a liberal community to equalize the expression opportunities. Pluralism has particular importance in the functioning of the media. Media pluralism is not necessarily easy to achieve without uniform standards and governmental regulation. Media pluralism is an extremely important factor in democracy to facilitate public debate by providing platform for everyone to be heard.

Barendt raised the question whether the government should act in the name of pluralism in order to promote free speech.<sup>25</sup> An answer comes from Raz<sup>26</sup> who suggests that protection for freedom of expression can be provided by the interference of the government to promote pluralism. Also, Lichtenberg<sup>27</sup> claimed that just because there is freedom of expression it does not necessarily mean that there is no censorship, but it means open debate among the members of the public.

Speaking about freedom of expression in relation to individual interests and in relation to public interests in a liberal society is not the same. The presumption that freedom of expression enjoys greater level of protection and should not be restricted by the law seems to be false if someone claims the promotion of pluralism. In agreement with Barendt, at the end of the day freedom of

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<sup>24</sup> Raz J, 'Free Expression and Personal Identification' (1991) 3 p303

<sup>25</sup> Barendt E, *Freedom of Speech* (second, Oxford University Press 2005) p35

<sup>26</sup> Raz J *opcit.*

<sup>27</sup> Lichtenberg J (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) p102-107

expression is not just part of a set of rights but at the same time related with several other values. The involvement of other values might require the states to intervene by legal instruments to promote other related values, like pluralism. Media provides a platform to exercise the right to freedom of expression. At the same time only relatively small part of the society can be heard through media. Hence society needs the help of the government to ensure that everyone has equal opportunities to express themselves. My thesis will demonstrate that being legally free to say what someone thinks does not automatically mean freedom of expression by itself. This claim will be unfolded throughout the paper by demonstrating the current challenges of media pluralism in Hungary.

One of the most inherent values of freedom of expression is the possibility to express different ideas and- at the same time- have access to different existing ideas. Freedom of expression should go hand in hand with pluralism. Unfortunately pluralism of ideas and more importantly media pluralism faces several threats and is often being imposed to political, as well as economic interests. In order to avoid such interferences governments justify their intervention by these threats on the market place of ideas. Eric Barendt<sup>28</sup> refers to the French and Italian examples where constitutional safeguards enable the limitation of freedom of expression in case of those media outlets which are considered as a threat for media pluralism. Inner tensions arise, however, if media is really being considered as the fourth estate. Whereas in that case the intervention of another estate is problematic and against the equality of arms. One could argue that protecting freedom of expression is sufficient and protecting media freedom and pluralism is a different, not directly related issue. The following section provides an explanation of the media and free speech relationship.

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<sup>28</sup> Barendt E, *Freedom of Speech* (second, Oxford University Press 2005)p35

## 2. Relationship of free speech and free press

Before defining media pluralism the relationship of media and freedom of expression needs to be discovered. A report prepared by the Commissioner for Human Rights describes<sup>29</sup> the relationship of freedom of the press and freedom of expression. It suggests that pluralism is usually seen as a result of freedom of expression, nevertheless it should be also seen as an inherent value of it. Furthermore freedom and pluralism of media is considered to be the precondition of freedom of expression. Freedom of media historically has not been incorporated in universal and regional human rights treaties, the provisions usually provide protection for free speech. However free speech and the media has a special relationship and this has been recognized by international bodies as well. As a result media is being more and more mentioned explicitly in freedom of expression related policy and human rights standards papers.

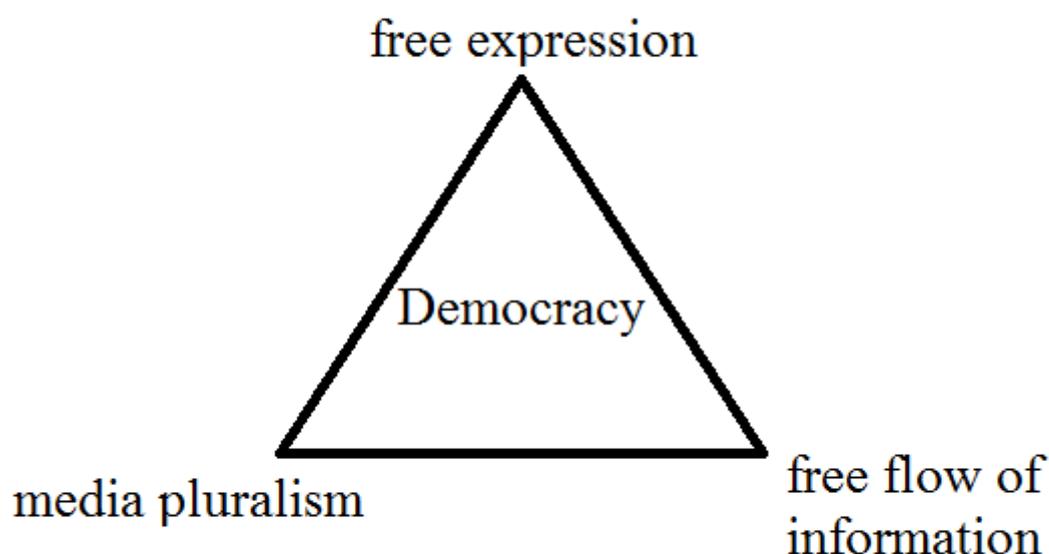
The report<sup>30</sup> suggests that freedom of expression guarantees the right to speak; while the right to know or to receive information is guaranteed by the freedom of information; finally the free and pluralistic media is the safeguard of the right to choose.

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<sup>29</sup> 'Commissioner for Human Rights - Media Pluralism and Human Rights. Issue Discussion Paper Commissioned and Published by the Commissioner for Human Rights'

<<https://wcd.coe.int/ViewDoc.jsp?id=1881589>> accessed 25 September 2014

<sup>30</sup> *ibid.*



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The report<sup>32</sup> notes another crucial difference. Namely that freedom of expression and the right to information usually concern individuals, those are individual rights. Whereas media freedom and pluralism is used in several cases as a factor for measuring democracy and also seen as a human right.

Another relevant fact is that media pluralism has no universally accepted definition. Many argue that the ambiguities of media pluralism make it impossible to create a uniform definition for the term. Media pluralism is a multi-faced term. Ewa Komorek wrote<sup>33</sup> that there are two faces of pluralism. There is internal pluralism which is responsible for the content diversity and there is external pluralism which guarantees structural pluralism. In case of internal pluralism the

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<sup>31</sup> *picture by the author*

<sup>32</sup> 'Commissioner for Human Rights - Media Pluralism and Human Rights. Issue Discussion Paper Commissioned and Published by the Commissioner for Human Rights'

<sup>33</sup> Komorek E, 'Is Media Pluralism a Human Right? The European Court of Human Rights, the Council of Europe and the Issue of Media Pluralism' p396

focus is on the diversity of voices in the media while external pluralism is responsible for the variety of the actors on the media market (pluralism of media ownership). These two types of pluralism which is usually being mentioned by the literature. However in the era of the internet the external pluralism is less relevant since the number of the sources has significantly increased.

In the contemporary media environment the potential risk is not anymore the homogenization of media content, since the number of choices the audience has is infinite. Scholars like, Keane called the current media environment “communicative abundance”<sup>34</sup>, McNair names it “cultural chaos”<sup>35</sup> and Gitlin defines it as “supersaturation”<sup>36</sup>. All these definitions indicate that in the present age of media the discussion around pluralism and media freedom reached another level and the concerns are not the same any more. One could raise the question, if we have infinite number of sources why should anyone be worried about media pluralism? Kari Karpinnen<sup>37</sup> suggests that by providing a media environment with plenty of choices the audience will be able to filter the source and by this the information they receive is shaped for their personal interests. This is one of the aspects which needs to be taken into account when media pluralism is being analyzed. Those who believe in the magic power of the internet predict that the “single axis system”<sup>38</sup> of political powers will be replaced by the “multiacity” of media players. If their assumption can be taken granted that would enable all the less powerful, non-mainstream political players to shape public opinion on the same level with the mainstream parties. Carpini and Williams wrote about multiacity ten years ago, today their argument faces several

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<sup>34</sup> Keane J, ‘Public Life in the Era of Communicative Abundance’ (1999) 24 165

<sup>35</sup> McNair B, *Cultural Chaos: Journalism and Power in a Globalised World* (Routledge 2006)

<sup>36</sup> Gitlin T, *Media Unlimited: How the Torrent of Images and Sounds Overwhelms Our Lives* (Henry Holt 2002)

<sup>37</sup> Karpinen K, ‘Rethinking Media Pluralism and Communicative Abundance’ (2010) 3 Observatorio (OBS\*) <<http://obs.obercom.pt/index.php/obs/article/viewArticle/314>> accessed 24 September 2014

<sup>38</sup> Carpini D and Williams BA, ‘Monica and Bill All the Time and Everywhere: The Collapse of Gatekeeping and Agenda Setting in the New Media Environment’ (2004) 47 1208

challenges and has been refuted many times. Hindman<sup>39</sup>, who is among the skeptical media scholars on the field, claims that Internet did not bring positive changes to media freedom and pluralism. He emphasized how new ways of exclusion from the media market appeared and old media powers became even more powerful by the growing number of information sources. Thus it can be concluded that there is an inherent tension between the quantitative changes brought by the new technologies and the lack of the positive qualitative changes on the media landscape.

In the era of the new kind of pluralism there should be another feature mentioned in relation to media. Media is always being referred to together with freedom and pluralism, however the quality of the freedom and pluralism should be taken into account as well. In a media environment where the number of sources is endless and the media ownership in non-transparent the audience has a bigger responsibility than before. In today's media world the market place of ideas is not the most appropriate expression anymore; there should be more and more emphasis on the market place of attention. To understand the importance of this market place the following sub-chapter will discuss how media is playing an essential role in the society and why is it important but also hard to protect media pluralism.

### 3. Why should media freedom and pluralism be protected?

The media has gone through several changes in the past centuries due to the technological developments. Many theories about media freedom and pluralism became outdated because of the technological transition and new theories needed to be introduced. Historically media has been seen as a gatekeeper and intermediary of information in the society.<sup>40</sup> Therefore the responsibility of the media is huge and the way it functions can have serious impacts on

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<sup>39</sup> Hindman M, *The Myth of Digital Democracy* (Princeton University Press 2008)

<sup>40</sup> Karppinen K, 'Rethinking Media Pluralism and Communicative Abundance' (2010) 3 Observatorio (OBS\*) <<http://obs.obercom.pt/index.php/obs/article/viewArticle/314>> accessed 24 September 2014 p151

democracies. The impact might be that media fosters public discourse and as a result different voices- not just governmental friendly ones- are able to express their views on different issues.

The study prepared by the Center for Media Pluralism and Media Freedom<sup>41</sup> listed three inherent functions of the media which basically justify the need for protection. First the already mentioned self-expression and the need of plurality among voices and values is being mentioned.<sup>42</sup> In case of media however the self-fulfillment is not the strongest argument to be brought up. Media is a platform for self-expression but it not accessible for everyone, or at least not to the same degree. The level of freedom of expression within a state can be easily assessed by examining the level of difficultness in accessing media platforms.

The study mentions the right to information as a second major function of media. O'Neil claims that access to information should be seen as a tool in the hand of the citizens for political choices.<sup>43</sup> This function presupposes that media has strong influence on political decisions and supports the view that free and pluralistic media is the bastion of well-functioning democracies. However one could question the actual impact of media in today's over-saturated media environment. Furthermore the role of the media is essential not just in providing access to information but providing platform for expressing views and enabling public debate. Because of the multiple faced role of the media ideally all the involved actors- such as political parties, general public, media outlets etc.- have strong interest in transparent and fair power distribution. Practically pluralism is the most important feature which strengthens the role of the media as a platform for expression and source of information. Ofcom<sup>44</sup> wrote in its 2012 report that

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<sup>41</sup> Center for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (European Commission 2013) policy report <<http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>> accessed 24 September 2014 p16-19

<sup>42</sup> Andrea Czepek, Melanie Hellwig and Nowak Eva (eds), *Press Freedom and Pluralism in Europe: Concepts and Conditions* (Intellect Books 2009).

<sup>43</sup> O'Neil P, *Communicating Democracy: The Media and Political Transitions* (Lynne Rienner Publishers 1998)

<sup>44</sup> 'Ofcom' S Report on Measuring Media Plurlaity' (Ofcom 2012).

pluralism is something which facilitates the proper functioning of democracies by preventing disproportionate political and economic influence on the media.

Although in case of the arguments being used in favor of freedom of expression the discovery of truth is among the most powerful ones but in case of media information this is not necessarily the best argument to justify media freedom. The reason is very simple, media provides space for true and false information as well. Not all media sources are able to guarantee that the audience will be able to discover the truth.<sup>45</sup> This means that the audience has to be active and conscious as well in order to have a well-functioning democracy.

The last function being mentioned by the CMPF report<sup>46</sup> is debate and consideration before the decisions of the members of the society. Media helps the society to discuss public issues and hear all sides' views. By doing so the result, theoretically, is a final consensus within the society. Curran<sup>47</sup> wrote in 1966 that media functions as a mediator of the competition and negotiation between the competitors (usually political groups). Media and democracy go hand in hand; democratic values support media freedom and pluralism and media pluralism supports democracy. In new democracies media plays an extremely important role exactly because of its relationship with the democracy itself. At the time of the regime changes in Central and Eastern Europe media was a tool in the hand of the new political powers to achieve a smooth transition. Altogether the legitimacy of media freedom and pluralism can be found in its goals; namely it aims to provide access to information from diverse source; protects freedom of expression; contributes to the protection of democratic values; enables public discourse and ideally results in well-informed citizenship and well-founded political decisions.

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<sup>45</sup> O'Neill O, *The Foundation for Law, Justice and Society* (University of Oxford 2012)

<sup>46</sup> Center for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (European Commission 2013) policy report <<http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>> accessed 24 September 2014

<sup>47</sup> Curran J, 'Media and Democracy: The Third Route.' in MB Andersen and M Bruun (eds), *Media and democracy* (Department of Media and Communication, University of Oslo 1996)

In order to be able to assess the level of freedom and pluralism of certain state's media other aspects need to be taken into account as well. It has been discussed above what are the leading arguments in favor of media pluralism. These arguments, however, presuppose the existence of those factors which are the structural pieces of the media empires. The CMPF<sup>48</sup> paper lists as structural element the sustainable media market; quality media coverage; existence of investigative journalism; diversity of information sources; developed media distribution and consumption; fair market competition and political representation. These factors undoubtedly play a major role in the proper functioning of the media but it does not cover all the relevant stakeholders and factors.

According to Gibbons the issue of media pluralism is a question of political decisions and cannot be calculated by using economic formulas.<sup>49</sup> However there has been several initiatives to develop the methodology of measuring media pluralism. The next section will introduce the seven conditions of media pluralism listed in Péter Bajomi-Lázár's<sup>50</sup> book. In a latter chapter about the European Union's approach towards media pluralism there will also a section dedicated to the EU's method of media pluralism measuring.

#### 4. Indicators of media pluralism; conditions which determine the level of media pluralism

Péter Bajom Lázár's<sup>51</sup> book, *Party Colonization of the Media* is a comparative analysis of five Central and Eastern European countries' media landscape. Bajomi raised the question why do

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<sup>48</sup> Center for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (European Commission 2013) policy report <<http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>> accessed 24 September 2014 p19

<sup>49</sup> Gibbons T, 'Kontrolle Über Technische Engpässe: Ein Fall Für Das Medienkonzentrationsrecht?', *Die Regulierung des Zugangs zum digitalen Fernsehen* (IRIS Spezial 2004) p74

<sup>50</sup> Bajomi Lázár P, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014)

<sup>51</sup> Bajomi ,*opcit.* p10-15

these analyzed states have different level of media freedom; Bajomi gathered together in his book seven conditions which play a crucial role in the level of media pluralism. Since the key country of this thesis is Hungary, which is a Central European county, Bajomi's conditions are particularly relevant.

Bajomi refers to transitologists who argue that there are three conditions<sup>52</sup> which are inevitable for young democracies. These are the proper media institutional framework; the behavioral culture of political players, whether they agree on the legitimacy of democratic institutions and values; attitude of the citizens, whether they are committed to democratic values.<sup>53</sup> Above the three already mentioned conditions there are four more, which enable not just the emergence of strong democracies but the establishment of media freedom.

The *institutional framework* plays an important role as it function as a gatekeeper against the political and economic pressures. Milton<sup>54</sup> claims that the reason for the media freedom deficit in the post-communist countries can be explained by their poorly designed media institutional framework.

Hall<sup>55</sup> justifies the low level of media freedom in post-communist countries by the *behavior* of the previous political actors. The intolerance of the previous regimes towards the critical voices in the media have a strong impact on the present media freedom level in the post-communist countries. His argument is supported by Jakubowicz's<sup>56</sup> argument according to which media freedom cannot be guaranteed solely by law. It is important to note that during the democratic transition many countries interpreted the role of the media wrongly and have seen it as safeguard

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<sup>52</sup> Bajomi, *opcit*, p11

<sup>53</sup> Linz J. J and Stepan A, *Problems of Democratic Transitions and Consolidation* (John Hopkins University Press)

<sup>54</sup> Milton A, 'News Media Reform in Eastern Europe: A Cross National Comparison' in Patrick O'Neil (ed), *Post-Communism and the media in Eastern Europe* (Frank Cass 1997)p7-23

<sup>55</sup> Hall R. A., 'Institutions, Transitions, and the Media: Comparison of Hungary and Romania' in Patrick O'Neil (ed), *Communicating democracy: the media and political transitions* (Lynne Rienner Publishers 1998)p125-145

<sup>56</sup> Jakubowicz K, 'Change in Polish Media: How Far to Go Yet?' in David Paletz (ed), *Business as usual. Continuity and change in Central and Eastern Europe* (Hampton Press)p205-242

of the ruling party's interests instead of an independent, fourth estate.<sup>57</sup> Bajomi brings up the example of Hungary and Poland where the lack of willingness of the politicians to improve the situation of media freedom resulted in Freedom House's downgrading of the level of press freedom.<sup>58</sup>

However the right *attitude* is needed from the citizens' side as well. It is essential to have a society committed to media freedom and pluralism.<sup>59</sup> One could argue that states which have undergone or are undergoing democratic transition failed to or did not think of fostering societies to be committed towards democratic values.

*Professionalism* could be named as a condition as well since the third actors in the media scene, the media workers have responsibilities too. Vajda argues that during the time of the communist regimes journalism meant something completely else; journalists were rather soldiers of political parties then watchdogs of democracy.<sup>60</sup> There will be always political and commercial pressure, professional and ethical journalism is a tool of the society which is able to resist those pressures and foster media freedom and pluralism.

The *entrepreneurial* factor is among the conditions too. This factor is particularly important regarding to Hungary. Bajomi<sup>61</sup> highlights that the conditions are uneven, therefore the importance of them (beside the first three) vary from country to country. In case of Hungary the attitude of the media outlet owners is crucial. It makes a huge difference whether owners see their business as a political investment or do they consider it simply as a source of money. Arguably the most influential attitude is the combination of the previous two. Therefore the

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<sup>57</sup> Bajomi, p12

<sup>58</sup> *ibid.*

<sup>59</sup> Dowling J, *Internationalizing Media Theory: Transition, Power, Culture. Reflections on the Media in Russia, Poland and Hungary, 1980-95.* (Sage 1996)

<sup>60</sup> Vajda É, 'Közeg És Szakma [The Context of Journalism]' in Ákos Csermely and Miklós Sükösd (eds), *A hír értékei. Etika és professzionalizmus a mai magyar médiában* (Média Hungária)p155-161

<sup>61</sup> Bajomi, p13

media owners' respect of journalistic autonomy should be a condition of free and pluralistic media.

In relation to the attitude of the owners the *economic aspect* is being mentioned as a conditions as well. Media is not just the market place of ideas but it functions as a market in the traditional economic meaning too. Because of the presence of political and commercial interests on the media market both can put pressure on it. If the political and commercial actors become closer to each other it can pose serious threat on media freedom and pluralism. Sparks<sup>62</sup> concludes that in case of poor economies less money goes to advertising. Therefore countries with strong economy are more likely to support independent and pluralistic media. It suggests that this condition should always be examined in context with the political condition.

The last condition mentioned by Bajomi is the so called *external condition*<sup>63</sup>. This factor contains all the external political powers which are not part of the central political power. For instance the European Union can be considered as an actor which-in theory- is able to act in the name of media freedom and pluralism. The shortcomings of the EU as an external actor are the jurisdictional limits of it and the lack of competence on certain fields. Under the section where the role of the EU and Council of Europe is discussed it will be analyzed in more details how and to what extend can media rely on external factors.

The examination of all these factors regarding to Hungary would go beyond the scope of this paper. For this reason the paper will concentrate on the *attitude of the politicians towards the media; the institutional framework; the external factors (namely European Union and Council of Europe) and the economic condition*

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<sup>62</sup> Sparks C, 'The Interplay of Politics and Economics in Transitional Societies' in John Downey and Sabina Mihelj (eds), *Central and Eastern European Media in Comparative Perspective* (Ashgate)p41-61

<sup>63</sup> Bajomi, p14

Since the paper mentions the economic aspects of media pluralism the next section address the competition law challenges of the media market.

## 5. The challenges of media pluralism from competition law perspectives

Gábor Polyák<sup>64</sup> unfolds in one of his writings the difficulties and challenges of media pluralism when it comes to competition law sanctions. Polyák explains how anti-concentration law is able to foster media pluralism but also emphasizes that competition law is not the one and only tool of protecting media pluralism. To understand the relationship of media law and competition law one must see the target divergence of the two law types. In case of media law public interest is in focus to affiliate public debate and free market place of ideas. This is not the same in case of competition law where public interest traditionally means something else. Public interest must be protected by competition law in order to establish consumer welfare and diversity of the supply. Still competition law has an important role on the media market.<sup>65</sup> According to Feintuck and Varney<sup>66</sup> beside the already existing competition regulations sectorial regulations should be also enacted when media pluralism is in danger. Their idea is that market interests and regulations can be easily overruled if public interests are at stake. Although they also highlight that competition law only occasionally contribute to the quality of media pluralism but generally speaking it has never been its major goal.

The competition on the market place of ideas depends on different factors, like quality of the media content; diversity of ideas and opinions; balance of information; actuality and impartiality of information.<sup>67</sup> These factors are not directly related with the media content's

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<sup>64</sup> Polyák G, 'Versenyjogi És Médiajogi Eszközök a Média koncentráció Korlátozásában'

<sup>65</sup> Polyák, *opcit.* p9-11

<sup>66</sup> Feintuck M and Varney M, *Media Regulation, Public Interest and the Law* (Edinburgh University Press 2006)p94

<sup>67</sup> Beck H, *Medienökonomie. Print, Fernsehen Und Multimedia* (Springer-Verlag 2005)p72

successfulness in terms of financial aspects. Since quality media content does not automatically result in bigger audience and more income for the media outlet. In conclusion the competition law looks at media outlets alongside economic aspects; while the media law looks at the outlets from democratic and public interest angle. However Arino<sup>68</sup> claims that these aspects are not necessarily against each other. She suggest that the existence of a lot media outlets does not automatically result in media pluralism or the presences of all the political, cultural, minority views. Arino names the phenomena “multichannel paradox”<sup>69</sup> when there are more and more TV channels but the content is not more diverse.

Consequently competition laws are not the guarantees of media freedom and pluralism although the absence of the media ownership laws can impose threat on media pluralism. For instance effective market competition is a possible guarantee against the political pressure. According to Beck<sup>70</sup> the effective competition can be considered as a guarantee for the presence of a wide range of ideas. He argues that by competition the number of services and service providers is bigger and by this the different/controversial voices and ideas have the possibility to be heard.

The lack of agreement among the scholars on the field show how uncertain is the role of competition law in media pluralism. Yet all of them seem to agree on that the power dominance from media law point of view and power dominance from competition law perspectives means something different.

Generally the problem is that competition law sanctions focus solely on economic dominance and those are controlling fusion in order to avoid disproportionate market dominance. If media law aspects are taken into account as well, sectorial competition law provisions are needed. The main disadvantage of the competition law focused fusion control is that it does not always

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<sup>68</sup> Arino M, ‘Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps’p103

<sup>69</sup> *ibid.*

<sup>70</sup> Beck H, *opcit.*

regulate the media related fusions. It is not able to control or limit the growing ownership concentration. Company fusions are monitored by the competition authorities usually only when their business reach a legally determined threshold. Many argue that sectorial fusion control should be part of the competition law provisions since it is capable for controlling the position of a company even if it is a result of internal growing.<sup>71</sup> This point of view was objected by Knothe and Lebens <sup>72</sup>who have a completely different approach. They said that there is no reason to enact legislation which would punish content providers for their success. They claimed that competition law sanctions which are based on the internal growth of a media outlet goes against the media's requirement to be independent from the state. Knothe and Lebens might be right about this. However the examination of the source of successfulness can easily challenge their theory. In case the content provider managed to achieve internal growth due to the high quality of media products Kothe and Lebens are right. Although if the growth occurred as a result of external or state funding then their argument is wrong.

Competition law's role remains unclear in case of media pluralism mostly because it is very hard to demonstrate its direct role in every case. However there are other factors and legal instruments in support of media pluralism. The following chapter is going to introduce the international and European human rights instruments which are called to protect freedom of expression and freedom of the media. The next chapter will cover and compare the role of the Council of Europe and the European Union in the area of media pluralism and freedom.

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<sup>71</sup> Hain K-E, 'Regulierung in Den Zeiten Der Konvergenz, Wirtschaftrechtliche Und/oder Medienrechtliche Steuerung?'p332

<sup>72</sup> Knothe M and Lebens J, 'Rundfunkspezifische Konzentrationskontrolle Des Bundeskartellamts' p125-131

## II. The idea of media pluralism under the scope of the Council of Europe and the European Union

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### A. Media freedom and pluralism protected by universal and regional human rights treaties

Freedom of expression is a right which is part of the most important human rights treaties such as the Universal Declaration of Human Rights, Article 19<sup>73</sup> or the International Covenant on Civil and Political Rights, Article 19<sup>74</sup>. The European Convention on Human Rights, Article 10<sup>75</sup> and the Charter of Fundamental Rights, Article 11 also provides protection for freedom of expression. All the articles mentioned refer to media in different ways. It must be emphasized however that only according to Article 11 of the Charter of Fundamental Rights of the European Union should “freedom and pluralism of the media”<sup>76</sup> be explicitly respected. The other three articles refer to the media or certain channels of the media but do not mention any concrete obligation regarding to media freedom and pluralism. One could argue that just because there is no explicit reference to it in the articles those can still imply the need of the protection.

Moreover the ICCPR’s implementation monitoring body, the Committee on Human Rights significantly contributed to the presence of media pluralism and ownership concentration related matters on the international level. In 2011 the Committee issued the General Comment number 34 on Article 19, ICCPR.<sup>77</sup> The GC n.34 is very significant since it refers to media

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<sup>73</sup> Universal Declaration of Human Rights 1948

<sup>74</sup> International Covenant on Civil and Political Rights 1966

<sup>75</sup> European Convention on Human Rights 1952

<sup>76</sup> Charter of Fundamental Rights of the European Union 2009

<sup>77</sup> UN Human Rights Committee, ‘General Comment No. 34: Article 19: Freedoms of Opinion and Expression’ (2011) CCPR/C/GC/34

pluralism and ownership concentration. The Comment emphasized the state's role in taking actions against "undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views".<sup>78</sup> The case study of this paper will be Hungary and its changing media landscape. The General Comment n.34 reference is especially important in Hungary's case and could provide guidelines for the state to improve the state's media environment.

In the following sections the reader will learn more about the practices of the Council of Europe and the European Union and see how these two regional organizations handle the challenges of media freedom and pluralism. It is essential to understand the role of the CoE and EU on this field since Bajomi<sup>79</sup> claims that the external conditions also play a crucial role in Europe's media pluralism.

## B. The human rights concept of media pluralism under the scope of Council of Europe

### 1. External vs. internal pluralism in the case law of the European Court of Human Rights

The European Court of Human Rights is a key organization in the history of freedom of expression in Europe. The ECtHR played an essential role in the widening of Article 10's interpretation. Due to the relevant court decisions the need to protect media pluralism and freedom has been recognized within the by Court.<sup>80</sup>

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<sup>78</sup> *ibid.*

<sup>79</sup> Bajomi Lázár P, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014)

<sup>80</sup> Komorek E, 'Is Media Pluralism a Human Right? The European Court of Human Rights, the Council of Europe and the Issue of Media Pluralism' p396

Media pluralism has more than once faces. Under the jurisdiction of the European Court of Human Rights the decisions usually refer to internal media pluralism. Komorek<sup>81</sup> says that ECHR provides protection for clear cut freedom of expression cases where individuals were about to express themselves in the media and there was an interference by the state. Therefore their right to freedom of expression have or have not been violated. This is the simplest description of the CoE's approach towards pluralism. Certainly there are cases before the European Court of Human Rights which concern external pluralism. The relationship of the Council of Europe and structural (external) pluralism is not the same, though. In case of external pluralism ECHR cases there are no pure answers and the decisions are generally paradoxical. The explanation of the ambiguous decision is the double role of pluralism. On one hand pluralism serves as a safeguard of freedom of expression since it enables public debate with a variety of participants. However, on the other hand in order to have a pluralistic media certain restrictions need to be applied by the states.

In the case-law of ECtHR *Handyside v United Kingdom*<sup>82</sup> is the first Article 10 case with explicit reference to media pluralism. Paragraph 49 of *Handyside* lists pluralism alongside with tolerance and broadmindedness as essential elements of democratic society. Since then *Handyside* is undoubtedly among the most cited cases before the ECtHR. In this particular decision the Court recognized pluralism as an important but not a supreme value in a democratic society.

The aforementioned principles of *Handyside* have been cited by the Court in *Lingens v Austria*<sup>83</sup> too. More importantly the Court defined the role of the media and said that media can be held responsible for political pluralism. According to the *Lingens* decision media is a crucial

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<sup>81</sup> *ibid.*

<sup>82</sup> *Handyside v United Kingdom* [1976] European Court of Human Rights 5493/72

<sup>83</sup> *Lingens V Austria* [1986] European Court of Human Rights 8 EHRR 407

tool in the hand of the public. This tool is especially useful when political decisions are being made. For this reason the previously mentioned legal or any kind of restrictions on the media are hard to be justified in front of the ECtHR under Article 10.

Another relevant case was the *Jersild*<sup>84</sup> judgment where the Court reemphasized the role of the media. The decision added to the previous rulings by saying that pluralism is important not just for politicians but for the whole society too. The finding of *Jersild* is similar to the “pluralism, tolerance and broadmindedness” triangle cases since it is about internal pluralism. However *Jersild* can be considered as a cornerstone decision as the expression “press” taken from the *Observer and Guardian*<sup>85</sup> was replaced in *Jersild* by “audiovisual media”. By doing so the Court acknowledged the growing power of the audiovisual media. It should be also noted that neither *Jersild* nor any of the Article 10 ECHR cases recognized a right to access the media.<sup>86</sup> Therefore Article 10 provides protection for internal pluralism but only within the media.

Just because the protection of Article 10 (ECHR) does not cover completely structural or external pluralism is does not mean that the Council of Europe does not find it necessary to protect both internal and external pluralism. The Council of Europe generally does not support restriction on freedom of expression, if does there always has to be a legitimate aim. In the decision of *Groppera*<sup>87</sup> the finding recognized licensing system for broadcasting as a justifiable limitation on freedom of expression. In this particular case the right of the other broadcasters constituted the “rights of others” which is why the interference did not constitute a violation of Article 10. The licensing system was applied by the state in order to guarantee external pluralism and protect the right to freedom of expression and right to information of the public

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<sup>84</sup> *Jersild v Denmark* [1994] European Court of Human Rights 15890/89

<sup>85</sup> *The Observer and Guardian v the United Kingdom* [1991] European Court of Human Rights 13585/88

<sup>86</sup> Miller G, Nicol A and Sharland A, *Media Law and Human Rights* (OUP Oxford 2001)p155

<sup>87</sup> *Groppera Radio AG and Others v Switzerland* [1990] European Court of Human Rights 10890/84

and the rest of the media. Although this decision is a unique one because normally the Court is against this type of limitation and does not accept it as a legitimate aim.

In contrast to *Groppera* in the case of *Lentia* <sup>88</sup>the ECtHR ruled against the Austrian broadcasting monopoly and did not accept the state's argument as a legitimate aim. Austria claimed that Article 10 lets the state to establish a broadcasting system in a way which is most suitable for the protection of freedom of expression. The Court stated that media pluralism is a value which can be considered as a legitimate aim of an interference with free speech. Although in case of *Lentia* the Court ruled that in order to prevent public opinion manipulation a broadcasting monopoly is not an appropriate measure to address the issue of media pluralism. A particularly important part of the decision rejected the state's argument regarding to the economic aspects of such a monopoly. The government referred to the size of Austria and said that more than one private monopoly would be unnecessary in such a small market. The Court recalled all the countries in its decisions where both public and private broadcasting outlets can be found and by this rejected Austria's market size claim. In conclusion the Court recognized the state as the ultimate guarantor of media pluralism for the very first time. The judgment also indicated that monopoly is a serious threat on media pluralism and only in exceptional cases can be seen as legitimate aim. The Court also implied in the finding of *Lentia* that anti-concentration laws are suitable for safeguarding structural pluralism on the media market in their view.

Unfortunately nowadays not just public broadcasting monopolies impose a threat on media pluralism and freedom of expression. This new kind of threat has been recognized by the Council of Europe as well.<sup>89</sup> However the European Court of Human Rights has not issued any judgments which call the states to introduce anti-concentration laws. Interestingly only the

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<sup>88</sup> *Informationsverein Lentia v Austria* [1993] European Court of Human Rights 17 E. H. R. R. 93

<sup>89</sup> 'Political Declaration and Resolutions', (Council of Europe 2013)p5

European Commission for Human Rights, which operated until 1999, issued two preliminary decisions<sup>90, 91</sup> on media ownership concentration. These decisions have never been recalled by the European Court of Human Rights.

One could argue that because of the lack of concrete ideas and views on the issue of media concentration and pluralism the Council of Europe is unable to enforce the right to media pluralism. It has been never stated by the Court that there is a right to media pluralism under the ECHR in any of its decisions. Although the *Tierfabriken*<sup>92</sup> decision of the Court could be interpreted as a judgment which imposes a positive obligation on the ultimate guarantors of media pluralism, namely the states. According to the judgment national governments have the duty to take steps against media concentration in the name of media pluralism.

In conclusion the European Court of Human Rights primarily deals with internal pluralism cases and external pluralism is not very often subject of the judgments. This does not mean that the Court is not a promoter of structural pluralism. However the ECtHR might not be the right or only platform for the protection of media pluralism in Europe. The reasons are simply rooted in the institutional and procedural structure of the Court.

## 2. The challenging role of the European Court of Human Rights on the field of media pluralism

The Court is clearly a promoter of media pluralism and is aware of the growing threat caused by the latest media concentration phenomena. Still it does not have the right tools to step up against the threat. Ewa Komorek summarize the main reasons in her writing about media pluralism under the aegis of the Council of Europe.<sup>93</sup>

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<sup>90</sup> *De Geillustreerde Pers NV v Netherland* [1977] European Commission for Human Rights no.5178/71

<sup>91</sup> *Verein Alternatives Lokalradio Bern v Switzerland* [1986] European Commission for Human Rights no. 10746/84

<sup>92</sup> *VgT Verein gegen Tierfabriken v Switzerland* [2001] European Court of Human Rights 24699/94

<sup>93</sup> Komorek, p402

Firstly, it is not clear how the Court sees media pluralism, it is hard to decide whether they see it a restriction on or a corresponding value of freedom of expression. Secondly, the Court's decisions are binding only on the respective governments which are subjects of the judgments. Thirdly, all the cases are filed by individuals before the Court. The already existing case-law regarding to media pluralism can be categorized into three groups. There are cases about pure freedom of expression issues related with internal pluralism question, such as the already mentioned Handyside, Lingens and Jersild. There are very few cases which concern external media pluralism and the need of it in order to protect freedom of expression (Lentia). The last type of cases are those which deal with governmental measure to protect structural pluralism, like Groppera where such measures were justified according to the ruling.

Moreover even if the Court is aware of a problem it has to wait until someone files a complaint. While the European Union is able to express its views and call the states for action when the EU finds it necessary. But probably the biggest weakness of the ECtHR on media pluralism issues is the nature of the problem. While in instances which concern internal pluralism the Court is able to deliver decisions because individuals able to file complaints. This is not the case with external pluralism.

In order to have a case admissible in front of the ECtHR the applicant should to have victim status. Among several requirements of the victim status the applicant has to be able to prove the directly affected status.<sup>94</sup> Taken this criteria it becomes extremely hard to bring external pluralism cases in front of the Court since it is hard to prove that and individual is directly affected by media ownership concentration. The only possible scenarios of admissible cases in this topic are those when the broadcasters which are affected by the media concentration file complaints to the ECtHR.

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<sup>94</sup> Cojocariu C, 'Handicapping Rules: The Overly Restrictive Application of Admissibility Criteria by the European Court of Human Rights to Complaints Concerning Disabled People' [2011] Sweet & Maxwell p688

Furthermore the paper will discuss in the upcoming chapters that the real threat is imposed by commercial actors which makes it even more difficult for the ECtHR to decide about structural pluralism cases. The Court is only able to deal with media pluralism cases when the lack of pluralism is caused by the state. Commercial actors are unlikely to be subject to the ECtHR judgments even if those are undoubtedly undermining freedom of expression.

As it can be seen the Court's protection in case of media pluralism is 'incidental and individual'<sup>95</sup>. Although the Court's power is not sufficient to step up effectively against this threat the Council of Europe has expressed its concerns several times regarding to the issue.<sup>96</sup>

Hence it can be concluded that the European Court of Human Rights has been a promoter of freedom of expression and recognized the importance of media pluralism in a democratic society. It is also true that the ECtHR and the CoE are strong advocates of internal and external pluralism in Europe. However given the structure and the rules of procedure of the ECtHR it is difficult to have a standing in front of the Court about structural pluralism. The CoE raised its voice in several policy papers but sadly those are not as powerful as a Court decision could be. The Council of Europe and its judiciary body might not be the perfect platform for external pluralism issues but could significantly contribute to the work of the European Union by providing expertise and support. Because of the potential role of the EU in the following chapter the paper will discuss the competences of the EU on the field of media pluralism on both national and community level.

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<sup>95</sup> Komorek, p408

<sup>96</sup> Komorek E, 'European Attempts to Control Media Concentrations. Persisting Conflict of Interests' (2004) 5 p53

## C. Economic aspects of media pluralism in the European Union

### 1. General approach of the European Union towards freedom of expression and human rights

Neelie Kroes, the previous Vice-President of the European Commission said in 2012 at the Pan-European Forum on Media and Pluralism and New Media that the European Union “does not have the legal competence to act in this area as part of its normal business.”<sup>97</sup> She also said that the Commission originally has the task of naming and shaming and by this she excluded the possibility of any actions taken by the Commission in the name of media pluralism. However another major institution of the EU, the Parliament has been always a promoter of media pluralism.<sup>98</sup> There have been several steps taken by different EU institutions on the field of media and freedom of expression already. The paper will not be able to examine all the actions and tools of the EU but will look at the most recent ones.

The field of media pluralism is a rapidly changing area which demands changing policy and legal instruments as well. Due to the changing nature of the field, documents which have been created short after the founding treaties became obsolete. The EU directives in the 1990s looked at the broadcasting part of the media and developed policy and legal instruments regarding to the common market in broadcasting.<sup>99</sup> These instruments more or less did not manage remain usable in the fast paced digital evolution. There was a debate in the 1990s on media pluralism but it did not result in any concrete legal instrument. Therefore the EU had no other choice than the application of EU competition law instruments on the field of media pluralism as well. The

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<sup>97</sup> Kroes N, ‘Safeguarding Media Pluralism in the EU’ (European Commission 2012)

<sup>98</sup> Center for Media Pluralism and Media Freedom, ‘European Union Competencies in Respect of Media Pluralism and Media Freedom’ (European Commission 2013) p67

<sup>99</sup> European Commission, ‘Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable’ (1984) <<https://ec.europa.eu/digital-agenda/en/news/1984-%E2%80%93-green-paper-establishment-common-market-broadcasting-especially-satellite-and-cable>> accessed 2 November 2014

previous chapter provides an explanation why competition law might not be the right and only legal tool for the regulation and protection of media pluralism.

According to Anna Herold the Commission has “practical omnipotence”<sup>100</sup> regarding to media freedom and pluralism. The explanation differs a bit from the Council of Europe’s omnipotence’s explanation. The EU looks at the media market and applies competition law safeguards as soon as there is a conflict with the Single Market of the EU.<sup>101</sup>

The challenge with the EU’s approach towards media freedom and pluralism that it looks most of the time solely at the economic and competition law aspects. The problem with this is that media pluralism affects other areas as well. Media pluralism is a multifaceted term and involves both economic and human rights elements. While the Council of Europe primary looks at the human rights elements the EU emphasize the importance of the well-functioning internal market. By this the EU fails to recognize that media pluralism is just as important for the market players like for the society. This is not to say that there are only cases within the EU where arguments in relation to media pluralism are solely based upon economic evaluations.<sup>102</sup> Arino claims that competition law can be seen as a potential tool in the hand of Commission to fill the competence gap and address not just the economic aspects of media pluralism but the democratic ones as well. Since the Lisbon Treaty has been signed there is prospect for a stronger human rights engagement from the European Union’s side.

Before 2009 all the EU member states were part of the European Convention on Human Rights and the International Covenant on Civil and Political Rights.<sup>103</sup> One could argue that there is no need for an additional document if all the necessary rights are already listed in the mentioned ones and shall be respected in accordance with the treaty obligations. Even more, all these

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<sup>100</sup> Herold A, *European Film Policies in EU and International Law* (European Law Publisher 2009)

<sup>101</sup> Competition Rules Applying to Undertakings-Treaty on the Functioning of the European Union, Article 101-109

<sup>102</sup> Arino M, ‘Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps’ p287-300

<sup>103</sup> International Covenant on Civil and Political Rights 1966

documents include the protection of free speech. In 2009 the Treaty of Lisbon came into force and by this the European Union's Charter of Fundamental Rights became a new part of the list of legally binding treaties. One should not forget that the Charter is applicable just in case the member states are acting under the scope of European law.<sup>104</sup> The Charter includes the protection of free speech under article 11.<sup>105</sup> The EU usually tends to move forward common standards and create a minimum level. This is the case with human rights as well. However in terms of freedom of expression the EU will definitely face several difficulties. The member states show a very colourful picture regarding to media landscape and scope of free speech protection. On one hand there are states like Sweden or Netherlands which belong to the free state category according to the Economist's democracy index.<sup>106</sup> On the other hand the EU includes states like Hungary or Italy which face several shortcomings in terms of free and pluralistic media.<sup>107</sup> Because of such differences the protection of freedom of expression may be challenging on the EU level.

It is crucial to understand how the EU approaches human rights and in what terms is it different from the Council of Europe. While the ECtHR starts its reasoning always from a human rights based point of view, the EU looks at different aspects in the beginning.<sup>108</sup> When the European Court of Justice forms its final judgement it always begins with the economic perspectives. Their approach in relation to freedom of expression is well exemplified in the case of *Sky Österreich*<sup>109</sup>. In this case the ECJ was deciding about whether freedom of conduct business<sup>110</sup>

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<sup>104</sup> Harris M, 'Time to Step up: The EU and Freedom of Expression' p4

<sup>105</sup> Article 11, Charter of Fundamental Rights of the European Union 2009

<sup>106</sup> The Economist, Intelligence Unit, 'Democracy Index 2012 Democracy at a Standstill, A Report from The Economist Intelligence Unit' (2012) p3-8.

<sup>107</sup> Reporters without borders, '2013 World Press Freedom Index: Dashed Hopes after Spring' (2013)

<sup>108</sup> EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights' 2006, p116

<sup>109</sup> *Sky Österreich GmbH v Österreichischer Rundfunk*, European Court of Justice Case C-283/11

<sup>110</sup> 'Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media services (Audiovisual Media Services Directive)' Article 15 (6). (2010) 15/04/2010 P. 0001 – 0024,

is in conformity with the right to property.<sup>111</sup> The judgement is framed from an economic angle for the first sight but at the end they applied a fair balance test. The balancing granted the priority to freedom to receive information, because eventually the case was about media freedom even though the Court did not look at this aspect primarily.

## 2. The triangle of European Union, human rights and media pluralism

As it was discussed before the European Union has a primary focus on market aspects which is because of the founding principal aim, namely the creation of the common single market.<sup>112</sup> Fortunately beside the founding principles there are other core values to be respected within the EU such as fundamental rights. Three human rights documents<sup>113</sup> can be considered as the most essential human rights themed sources of the EU: the European Convention for the Protection of Human Rights and Fundamental Freedoms; member states' constitutional traditions; Charter of Fundamental Rights of the European Union. Not just the pure existence of these documents but the legal framework of the Community (*acquis communautaire*) created by the European Court of Justice in the *Internationale Handelsgesellschaft*<sup>114</sup> case and Article F.2 of the Treaty of Maastricht claim that the EU shall respect fundamental rights and consider those as general principles of the Community law.<sup>115</sup> Furthermore Article 2, TEU names the most fundamental values of the EU where the respect for human rights is being explicitly mentioned.<sup>116</sup> In relation to Article 2, TEU there is a mechanism under Article 7, TEU which

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<sup>111</sup> "EU Network of Independent Experts on Fundamental Rights ." op.cit.,:136.

<sup>112</sup> Articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union(TFEU)

<sup>113</sup> Center for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (European Commission 2013) policy report p80

<sup>114</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel - Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany* [1970] European Court of Justice C-11/70

<sup>115</sup> Article F.2 of the Treaty on the European Union of February 1992

is aimed to protect the fundamental values of the EU. This is to say that in case a member state is in breach with any of the Article 2 values the Council has the right to suspend certain rights of the respective member state.<sup>117</sup> One could argue that this instrument has been created just to deter member states from not respecting the core values and the mechanism is considered as an *ultima ratio* step.

Presumably from media pluralism and freedom's perspective the most essential instrument is Article 11 of the Charter.<sup>118</sup> This article refers to the protection of freedom of expression as well as to the need of media pluralism and freedom. It must be noted however that the EU has limited competences within this field mainly because of the subsidiarity principle. Moreover the Court of Justice of the European Union is not able to cite Article 11 as a legal basis for its judgments.<sup>119</sup> Although it can be still considered as a progressive approach in Europe since by this media pluralism and freedom are being mentioned in a source of primary EU law as fundamental principles. Even if there is no legal basis for EU competences in this field the fact that media freedom and pluralism is considered as a fundamental principle is a progressive step.

It is also important to mention the Commentary of the Charter by the EU Network of Independent Experts of Fundamental Rights.<sup>120</sup> According to the Commentary there is a very strong cooperation among the Council of Europe and the European Union's institutions, especially among the ECJ and ECtHR. Keller<sup>121</sup> says that the EU is practically expanding the interpretation of human rights standards in Europe hand in hand with the Council of Europe. If this is really the case then the protection of media freedom and pluralism on European level

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<sup>117</sup> Article 7 of the Treaty on the European Union of February 1992

<sup>118</sup> Charter of Fundamental Rights of the European Union 2009

<sup>119</sup> Center for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (European Commission 2013) policy report p82-83

<sup>120</sup> EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights'

<sup>121</sup> Keller P, *European and International Media Law Liberal Democracy, Trade, and the New Media* (Oxford University Press 2011)p131

might be addressed properly. Taken the fact that the European Court of Human Rights looks at the internal pluralism (pure freedom of expression cases with human rights arguments) in media pluralism related cases, while the European Court of Justice address the same issue through the lens of external pluralism (more focus on competition law underpinned with economic and common single market arguments) the cooperation of these two institutions can lead to the effective protection of media freedom and pluralism.

Regarding to ECJ's approach towards media pluralism generally the rulings use a rather vague language like in case of TV10<sup>122</sup>. Although in the same decision under paragraph 25 the Court acknowledged the role played by media pluralism. Briefly in TV10 the Netherlands introduced a broadcasting authority in order to preserve media pluralism. The court found the measure necessary and concluded that the broadcasting policy seeks to guarantee not just diversity of opinions but the protection of freedom of expression. In case of Vereingte Familiapress<sup>123</sup> ECJ stressed out that domestic laws limiting the functioning of the common single market with the aim of protecting diversity of ideas can be permissible in certain circumstances. In Vereingte Familiapress Court defined in what cases is it possible to limit the free movement of goods within the EU. According to the ruling's proportionality test the limitation has to be proportionate to the aim, namely the maintenance of media pluralism; moreover the prohibition has to be an ultima ratio. The fact that there is a chance to put media pluralism and freedom of expression before the common single market principles shows that the EU is aware of how important media pluralism is. Although the strict proportionality test mentioned above makes it harder to recognize the ECJ as a strong promoter of media freedom and pluralism.

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<sup>122</sup> *TV10 SA v Commissariaat voor de Media* [1994] European Court of Justice Case C-23/93

<sup>123</sup> *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] European Court of Justice Case C-368/9

The EU has been active not just in terms of legal aspects but also expressed its views in policy documents. The Committee of Ministers prepared a policy instrument on the issue.<sup>124</sup>The recommendation urge the member states to limit the power of media monopolies directed by one single company or person. The paper stresses the importance of media outlet diversity and mentions the possibility of introducing threshold rules determined by reasonable criteria in order to protect diversity in the media. The recommendation refers to other measures which could contribute to an ideal media market such as specific anti-concentration media authorities. The paper highlights the importance of the media authorities' institutional independence from both political and economic interests.

Generally speaking international instruments serving media freedom and pluralism are more or less not legally binding. There are several recommendations, uncountable number of reports and case-studies and numerous declarations. It must be emphasized however that the mere existence of these documents is already helpful not just for the states when shaping their media policies but also for courts like ECtHR and ECJ when those decide about cases on media pluralism.

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<sup>124</sup> Committee of Ministers, 'Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on Media Pluralism and Diversity of Media Content' (2007)

### 3. Latest steps taken by EU in relation to media freedom and pluralism

Lately the European Parliament has been discussing the issue of common media pluralism and freedom policy in the EU. The latest development they managed to achieve was a respond by the European Commission to their requests on the matter. There has been several previous steps but the most recent and still ongoing measure is the Commission's "three step approach"<sup>125</sup> to address media pluralism in the EU. The project was launched in 2007 and the last step still has not finished.

The first step was a document published by the Commission. The Staff Working Document<sup>126</sup> aims to define the meaning of media pluralism among the EU member states. Although after consultations with member states and experts the Staff Working Document is against any unformed EU legislations on the field of media pluralism. The paper cited the 2005 Liverpool Conference<sup>127</sup> and emphasized the importance of monitoring media pluralism not just on a European level but on the domestic level too.

The second step is a study<sup>128</sup> also with the same aim as the Staff Working Document. The study was prepared to clarify and further develop the debate on media pluralism. The study was prepared by the local stakeholders of the member states in cooperation with Central European University, Ernst and Young Consultancy Belgium, University of Leuven and Jönköping

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<sup>125</sup> Center for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (European Commission 2013)p95-96

<sup>126</sup> European Commission, 'Commission Staff Working Document- Media Pluralism in the Member States of the European Union'

[http://ec.europa.eu/information\\_society/media\\_taskforce/doc/pluralism/media\\_pluralism\\_swp\\_en.pdf](http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf)

<sup>127</sup> Reding V, 'Better Regulation for Europe's Media Industry: The Commission's Approach' (2005)

[http://europa.eu/rapid/press-release\\_SPEECH-05-532\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-05-532_en.htm)

<sup>128</sup> K.U.Leuven – ICRI (lead contractor), Jönköping International Business School - MMTC , Central European University - CMCS, and Ernst & Young Consultancy Belgium, 'Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach' (European Commission Directorate-General Information Society and Media 2009) SMART 007A 2007-0002

International Business School. The paper tried to define all the potential indicators of media pluralism. The goal was to be able to set media pluralism standards on the EU level by defining the indicators of it. Difficulties arose because of the diversity of media landscape of the EU member states. In some cases there are indicators which are completely irrelevant for other countries and it is true vice versa. In case the EU decides to use standardized indicators to measure media pluralism there is potential risk that the survey outcome will be misleading and distorted. The survey would serve as the basis of the EU media pluralism standard setting. Therefore it is crucial to have as accurate results as possible.

The third step is supposed to be a Communication of the Commission<sup>129</sup> based on the results of the above mentioned report. The Communication was never finalized and in the meantime a new Commissioner and Vice-President was appointed. Neelie Kroes started her presidency in 2011 and set up a high-level expert group with the aim to properly examine and provide recommendations about media freedom and pluralism. The Expert Group of Media Pluralism and Freedom issued a report<sup>130</sup> on the topic. The report is often being referred to as Freiberga report after the president of the expert group and has significant relevance for Hungary's media landscape. Kroes set up two more groups to address media pluralism on an advanced level. As a result of Kroes's agenda the Center for Media Pluralism and Media Freedom was established to develop further the EU's media policy instruments.

The latest outcome of the process is the User Guide for the Media Pluralism Monitor 2014.<sup>131</sup> Recently there was a focus group discussion at the Central European University with several Hungarian media workers about the user guide. During the debate several questions were raised

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<sup>129</sup> Center for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (European Commission 2013) p95

<sup>130</sup> Viķe-Freiberga, V, 'A Free and Pluralistic Media to Sustain European Democracy' (High Level Group on Media Freedom and Pluralism 2013) <<http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>>

<sup>131</sup> Center for Media Pluralism and Media Freedom, 'Media Pluralism Monitor 2014' (European University Institute 2014)

around the indicators. One of the members of the focus group, Attila Bátorfy<sup>132</sup>, raised a few questions which are particularly relevant in case of Hungary. The guide lists as an indicator the level of media ownership concentration and introduce the ownership share as a risk coefficient. Bátorfy argued that in case of small member states like Hungary it is very likely to have a certain level of ownership concentration on the media market. He did not say that there is no point in examining media ownership concentration but because of the media market size differences among member states he suggested an additional indicator. His idea was to examine not just the ownership share but also the network of relationship of the owners in order to get a full picture. Furthermore the user guide fails to recognize the relevance of the specific legal provisions concerning media matters, such as the state advertising subsidies' distribution mechanisms. Bátorfy argues that his critique concern local, country specific issues. Problems arise when those are disregarded and the results of the surveys will not depict the actual danger zones of the media environment. He brings up the example of Transparency's Global Corruption Barometer<sup>133</sup> where the final outcome is usually better than it is expected. One could argue that this is because of the forced global objectivity.

In conclusion the question 'How to measure media pluralism?' remains unanswered. It is certain though that the one-dimensioned, media-market position approach is not appropriate either. According to Rott and Kohlschein<sup>134</sup> there is no proper theoretical framework which focuses on how the ownership structure of the media companies could strengthen external media pluralism.

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<sup>132</sup> Interview with Attila Bátorfy, 'Comments on the Center for Media Pluralism and Media Freedom's Media Pluralism Indicator Study' (September 2014)

<sup>133</sup> Transparency International, 'Global Corruption Barometer 2013 - Results' (2013)  
<<http://www.transparency.org/gcb2013/results>> accessed 5 November 2014

<sup>134</sup> Rott A and Kohlschein I, 'A Médiakoncentráció Ellenőrzése Európában: Elvek, Vitakérdések És Kitalások' in Mihály Gálik (ed), *Tanulmányok a médiakoncentráció szabályozás tárgyköréből* (Budapesti Közgazdaságtudományi Egyetem Alapítvány 2007)p137

#### 4. Do external conditions, like the Council of Europe and the European Union, have an actual effect on media pluralism?

The issue of media freedom and pluralism have been addressed several times on both domestic and EU level. However there has not been developed any clear answers or solutions to address the matter of media pluralism effectively by European Union or Council of Europe institutions. Since media is considered as a fourth estate not only freedom of expression and human rights interests are present in the media pluralism arguments but also political and economic interests influence the level of media pluralism in the member states.

Media scholars like Armstrong<sup>135</sup> or Rysman<sup>136</sup> recently have started to refer to media market as a two-sided market paradigm. The paradigm can be applied to all the advertising-funded media channels. In case of online platforms advertising is becoming more and more important and in many cases it is the only financial source. The idea of this paradigm is that the media market is double profit oriented. On one hand there is the market place of ideas where media sells the information to the audience. On the other hand media has to sell the attention to the advertisers. In order to stay on the market media outlets need to be profitable on both markets. Caillaud and Jullien<sup>137</sup> call this the chicken-and-egg dynamic. They claim that it is necessary to be able to attract audience in order to attract advertisers but at the same time if there are enough advertisers outlets are more likely to invest in quality content. They explain this by the fact that the expediency of the advertisers is increasing simultaneously with the size of the audience.

In the rapidly growing internet world it is impossible to keep track with all the sources. Thus there should be more and more focus on the way attention is divided and on the quality of the

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<sup>135</sup> Armstrong CL, 'Revisiting Structural Pluralism: A Two-Dimensional Conception of Community Power' (2006) 9 p287-300

<sup>136</sup> Rysman MS., 'The Economics of Two-Sided Markets' (2009) 3 p125-143

<sup>137</sup> Jullien B and Caillaud B, 'Chicken & Egg: Competing Matchmakers' (2001)

available materials. Unfortunately the press freedom indexes still fail to recognize the strong influence of the changing media market phenomena and keep issuing the annual reports based on the same aspects. This is not to say that the already existing indexes are giving a false picture but in many cases there are additional factors playing an essential role on the media market but not being examined by the global press freedom report makers.

As it can be seen media pluralism and freedom is a very fragile field not just under the scope of the Council of Europe but also within the European Union. Since media, especially online media is a very quickly changing part of our lives media regulations, regional or international standards barely manage to keep track with it. This does not mean that international organizations should disregard threats on media simply because they have no clear or direct competence and power on the field.

During the period of developing their competences and policies they should not remain silent and should use one of their strongest tools, the international naming and shaming. As closing remarks of an interview with Dr. Krisztina Rozgonyi<sup>138</sup> she said that nor has the Council of Europe neither the European Union has taken any groundbreaking steps to foster Hungary's media pluralism and freedom. Interestingly Rozgonyi mentions a third organization as a potential savior. She referred to Dunja Mijatovic, OSCE Representative on Freedom of the Media as a strong voice always stepping up against any threat to media pluralism and freedom and expressing OSCE's disagreement. A report<sup>139</sup> prepared by the OSCE after the elections in Hungary raised numerous concerns around the media and the lack of transparency regarding to media ownership. The next chapter will be focusing on Hungary and see how media pluralism is being handled by the state; what are the political and economic implications of the media

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<sup>138</sup> Interview with Dr. Krisztina Rozgonyi, 'Comments on Hungary's media landscape' (September 2014)

<sup>139</sup> 'OSCE/ODIHR Limited Election Observation Mission's Final Report on Hungary's Parliamentary Elections (16. April, 2014.)' (OSCE-Office for Democratic Institutions and Human Rights 2014) p10-18

market. The chapter will summarize the historical background of the Hungarian media scene and highlight the critical elements of it. After the chapter on Hungary the reader will be able to assess whether there is a real threat on the Hungarian media freedom and pluralism.

### III. Analysis of the Hungarian media landscape

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In case of Hungary the situation of media has never been ideal. Not even after the regime change. At least this is what most of the media scholars and media workers argue in Hungary. Few of them claim that the way media was seen after the 1989 regime change was a false interpretation of its actual role. This misinterpretation might be considered as the very first step of today's Hungarian media environment. In the following chapter the paper will look at Hungary and analyze the media landscape.

Hungary recently has been subject to various studies, critics and it has been downgraded by free speech organizations. What global reports usually consider as a critical point of the Hungarian media is the media law itself. The chapter will discover whether the law is the only risk factor of freedom of expression in Hungary or are there any other threats to the cornerstone of democracy. The paper will not be able to look at all the relevant fields and areas. For this reason public media is not going to be the subject of the chapter because the topic itself could construe a separate thesis. The chapter aims to introduce those historical and political stations which can be considered decisive for the media. After reaching today's Hungarian media landscape the chapter gives a brief introduction of the relevant media regulatory framework. This section is crucial in terms of its scope. Studies analyzing Hungary's media law usually focus solely on the clear-cut media laws. On contrary to those studies this section aims to list other inter-regulatory provisions or the lack of them, such as competition law or lobby act. It is also important to understand the institutional background of the Hungarian media and whether it is compliant with the European media authority standards. Through selected case studies it will be explained what media scholars mean by soft-censorship and party colonization of the Hungarian media. After providing a historical, political, regulatory and institutional picture of the Hungarian media environment the reader will have the chance to learn more about which

points of the picture can be considered problematic according to the Freiberga-report<sup>140</sup> recommendations and how can be those effectively addressed.

### A. Historical background and political context explaining the changes of media landscape in Hungary

The history of the Hungarian press will be analyzed after the regime change but the communist censorship must be introduced in a few words before. During the communist regime in Hungary censorship of the press was one of the most important power exercising tools of the authorities and the directly state controlled press was a publicly known phenomena. The regulatory framework of the press during 1945-89 can be described by the following Lenin quote:

“The bourgeoisie (everywhere in the World) is stronger than us, much stronger. If we would let them to access a weapon like freedom of political association (press freedom, since press is the center and basis of political activities) then we would significantly help the work of the enemy, we would support the class enemy. We do not intend to commit suicide therefore we will not do this (...) Press freedom would not serve the Russian communist party in getting rid of its weaknesses, failures and hypocrisy.”<sup>141</sup>

Lenin was not just simply controlling the media of the member states of the Soviet Union but also exercised very strong public education methods in order to have his ideology fully accepted by the proletarian part of the society.<sup>142</sup> He was fully aware of the power and role press has.

After the regime change in 1989 the system went through a huge transition and the aim was to achieve a smooth democratic transition in the post-communist countries. Hungary is usually considered to be a country where the democratic transition was successfully accomplished.

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<sup>140</sup> Vīke-Freiberga, V, ‘A Free and Pluralistic Media to Sustain European Democracy’ (High Level Group on Media Freedom and Pluralism 2013)

<sup>141</sup> *Lenin Ősszes Műve- Levél G. Mjasznyikovhoz(1921)* (Kossuth Kiadó 1975)p74-75

<sup>142</sup> Horváth A, *A Magyar Sajtó Története a Szovjet Típusú Diktatúra Idején* (Médiatudományi Intézet 2013)p7

However many tend to disagree with this. According to Gábor Polyák<sup>143</sup>, Hungarian media law expert, the media policies of the post-communist Hungarian governments differ in several aspects but the final goal of them was always the same. Polyák wrote that political parties always aimed to gain significant political influence through the media. If he is right it would mean that the role of the media was misunderstood and considered as a party soldier instead of fourth estate from the beginning. Hallin and Mancini<sup>144</sup> argued that political powers always politicize media in order to use it in their own political interests. They also wrote that this kind of approach towards the media is not depending on the party's position; it does not matter whether a ruling or opposition party strategy is at stake.

Right after the regime change of Hungary the media war started and all the political powers tried to gain as much influence over media as possible. The final goal was basically to stabilize the position of the right-leaning parties. The method they used was the full control of public sector media and the strengthening of media market positions of certain press organs. As Polyák recalls media policy trends of the governments after 1989 were strongly determined by the inherited position on the media scene of the political left and the frustration because of it of the right-leaning parties.<sup>145</sup>

Polyák wrote that the first media law enacted by the new regime resulted in the rethinking of political influencing methods. The National Radio and Television Commission (NRTC)'s structure was designed to force the political players to compromise and cooperate with each other. The aim of the cooperation was basically to distribute the influence over the media in

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<sup>143</sup> Polyák G and Uszkiewicz E (eds), 'Irányított Nyilvánosság', *Fogylul ejtett média* (Európa Kiadó 2014)7-23

<sup>144</sup> Hallin DC and Mancini P, *Comparing Media systems: Three Models of Media and Politics* (Cambridge University Press 2004)

<sup>145</sup> Polyák G and Uszkiewicz E, *opcit.*

order to avoid disproportionate control centralization. More or less this is what Bajomi<sup>146</sup> argues as well. He defines media as the soldier of the political interests after the regime change.

Dr. Krisztina Rozgonyi<sup>147</sup>, former member, vice-president and president of the National Telecommunications Authority (2004-2010), listed three significant events in the history of the Hungarian media. She refers to the present media regulation as a law which was “conceived in sin”. The first event she mentioned is the Írisz-case, 1997<sup>148</sup>. The history of the case started with the announcement of the NRCT’s call for proposals in January, 1997. The applicants were competing for 10-year-long national television broadcasting rights. NRCT has received four proposals, namely: First Hungarian Commercial Television Inc. (Írisz TV, applied for both TV channels); MTM-SBS Television Inc. (TV2); Hungarian RLT Television Inc. (RTL KLUB). Írisz TV was not awarded with any of the broadcasting rights and claimed that the NRCT’s decision was unjustified. Írisz TV submitted a claim to the Municipal Court against the NRCT’s decision and asked claimed the violation of the Act 1966. LVII. (so called competition law) §7<sup>149</sup>. The Court did not find the decision of the NRCT violating the competition law. Afterwards the Írisz TV lodged an appeal to the Supreme Court. The SC found that NRCT did a mistake since it failed to disqualify RTL Klub because of the formal mistakes of the channel’s proposal. Interestingly the decision was never enforced and RTL Klub never had to stop broadcasting. Rozgonyi<sup>150</sup> also highlights the fact that the decision did not have any consequences although the Supreme Court found a violation.

The next step was the prolongation of the TV2 and RTL Klub’s broadcasting contracts (1997) in 2005. Originally the contracting parties signed the agreement until 2007. NRCT did not

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<sup>146</sup> Bajomi Lázár P, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014)p25

<sup>147</sup> Interview with Krisztina Rozgonyi, ‘Comments on Hungary’s media landscape’ (September 2014)

<sup>148</sup> ‘Magyar Köztársaság Országgyűlése-Az “Írisz”-Per’ <[http://www.parlament.hu/irom37/0694/2354\\_2.htm](http://www.parlament.hu/irom37/0694/2354_2.htm)> accessed 9 November 2014

<sup>149</sup> 1996. LVII. Act of Prohibition of Unfair and Restrictive Market Practices 1996

<sup>150</sup> Interview with Krisztina Rozgonyi, ‘Comments on Hungary’s media landscape’ (September 2014)

impose any conditions for the prolongation. Polyák<sup>151</sup> wrote that it is completely unknown for the public until today on what basis decided the NRCT to prolong the broadcasting rights of the channels. Rozgonyi<sup>152</sup> indicated the fact that one year after the prolongation in 2006 Hungary had parliamentary elections and the period of electoral campaigns followed the prolongation of the broadcasting contracts.

The 2009 national commercial radio station tendering is often referred to as the culmination point of the era. Both Rozgonyi<sup>153</sup> and Polyák<sup>154</sup> consider the 2009 radio market allocation policy of the government driven by strong political interests. The NRCT took the broadcasting rights away from Danubius and Sláger radio and gave it to two other outlets. Danubius and Sláger expressed their disagreement with the decision and appealed to the Supreme Court regarding to the NRCT decision. The Supreme Court<sup>155</sup> found a violation in case of Danubius. The Court declared that the winner applicant's (Advenion Co.) proposal should have been disqualified because of conflict of interest and ownership constraints.

Dr. Krisztina Rozgonyi<sup>156</sup> refers to the transitional period of 2008-2011 as the time during the today's media law was born. She explains that there were three versions of regulatory conception in the process of preparation until 2009. Yet, the final version was a completely new piece of legislation which had basically nothing to do with the three other draft legislations. During this time Hungary had to create a new media law which complied with the EU standards and was able to implement the EU Directives. The result of the EU regulatory compulsion was

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<sup>151</sup> Polyák G, 'Honnan Tovább? Köszöntő a Kereskedelmi Televíziók Szerződésének Lejártá Alkalmából - Mérték Blog' (*hvg.hu- Mérték Média Blog*) <<http://mertek.hvg.hu/2012/07/09/honnan-tovabb-koszonto-a-kereskedelmi-televizio-k-szerzodesenek-lejarta-alkalmabol/>> accessed 10 November 2014

<sup>152</sup> Interview with Krisztina Rozgonyi, 'Comments on Hungary's media landscape' (September 2014)

<sup>153</sup> *ibid.*

<sup>154</sup> Polyák G and Uszkiewicz E (eds), 'Irányított Nyilvánosság', *Foglyul ejtett média* (Európa Kiadó 2014)

<sup>155</sup> 'Tájékoztató a Legfelsőbb Bíróság Kereskedelmi Rádiók (Danubius, Sláger) Ügyében Hozott Döntéséről | K Ü R I A' <<http://www.lb.hu/hu/sajto/tajekoztato-legfelsobb-birosag-kereskedelmi-radiok-danubius-slager-ugyeben-hozott-donteserol>> accessed 11 November 2014

<sup>156</sup> Interview with Krisztina Rozgonyi, 'Comments on Hungary's media landscape' (September 2014)

the 2010 Hungarian Media Law which was subject to not just European Union's but also several international organization's criticism. In the following section the paper is going to analyze the regulatory and institutional framework of the Hungarian media landscape. The section will also incorporate the European Union's steps and reflections on the situation of freedom of expression in Hungary.

## B. Institutional framework of the Hungarian media authorities

As it was indicated in the previous section Hungary has its present media law since 2010. Generally the European Commission stays away from media pluralism on the EU level but lately, especially in case of Hungary it seems to take a more active role.<sup>157</sup> The fact that the European Parliament expressed its strong disagreement with the Hungarian media law was showing that the EU is becoming more active on the field.<sup>158</sup> Many criticized the Hungarian media laws<sup>159</sup>, most of them were concerned about the newly created National Media and Telecommunications Authority (NMTA) and Media Council. The newly established NMTA is an institution with very strong sanctioning powers. NMTA has the right to impose media fines up to 727.000 € on media outlets. Furthermore the new media institutional framework calls into question the independence of the media authorities. The members of the NMTA and Media Council are nominated solely by government representatives. Taken the fact that the current government has two-third majority since 2010 the political independence of the media authority representatives is arguable. Moreover during the period of 2010-2013 the head of both media

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<sup>157</sup> Thompson M, 'Media Pluralism in Europe: Signs of Progress'

<sup>158</sup> European Parliament, 'European Parliament Resolution of 10 March 2011 on Media Law in Hungary, B7-0191/2011' <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN>>

<sup>159</sup> Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content (the 'Press Freedom Act') and Act CLXXXV. of 2010 on Media Services and Mass Media (or the 'Media Act')

supervisory bodies was the same person, appointed by the Hungarian Prime Minister Viktor Orbán.<sup>160</sup>

The European Parliament pointed out the controversial points of the Media Law as well. Hungary refused to adopt the proposed recommendations of the EU parliament. However the Hungarian Constitutional Court itself ruled the new law to be unconstitutional in several aspects. After the disagreement of the EU and the Hungarian Constitutional Court a few changes were adopted in the law. Many argued though that the changes do not modify the over politicized feature of the media supervisory authorities.<sup>161</sup>

As a result of the 2010 new Media Law the European Commission took legal actions and initiated infringement proceeding regarding to more elements of the new law. The proceeding's subject was for instance the structure of the media supervisory authorities or the independence of the data protection authorities.<sup>162</sup> Although the proceedings of European Commission v Hungary<sup>163</sup> are still in the written phase the importance of the action taken by the EU Commission cannot be underestimated.

The situation of fundamental rights in Hungary was a concern of other EU institutions too. The Committee on Civil Liberties, Justice and Home Affairs led by Rui Tavares<sup>164</sup> issued a report on the situation of fundamental rights in Hungary. The report relied on the resolution of the Parliament regarding to the Hungarian media law. However the Hungarian government did not

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<sup>160</sup> Hungarian Civil Liberties Union, Hungarian Helsinki Committee and Mérték Media Monitor, 'Comments of Hungarian NGOs on the Draft Report on the Situation of Fundamental Rights: Standards and Practices in Hungary and on the Position of the Hungarian Government' (2013)

<sup>161</sup> Gill H, 'Hungary and Media Pluralism' <<http://prospectjournal.org/2012/08/26/hungary-and-media-pluralism/>>

<sup>162</sup> European Commission press release, 'European Commission Launches Accelerated Infringement Proceedings against Hungary over the Independence of Its Central Bank and Data Protection Authorities as Well as over Measures Affecting the Judiciary'

<sup>163</sup> Official Journal of the European Union, 'Action Brought on 8 June 2012 — European Commission v Hungary(Case C-288/12);(2012/C 227/22)' (2012) C 227/15

<sup>164</sup> Tavares R, 'Draft Report on the Situation of Fundamental Rights: Standards and Practices in Hungary' (EU Committee on Civil Liberties, Justice and Home Affairs 2012) 2012/2130(INI)

welcome very warmly the critics and responded in a rejecting tone.<sup>165</sup> After the release of the Tavares report not just the government commented on it but also three Hungarian NGOs issued their views on the report<sup>166</sup>. Although the problems raised by the Tavares report have never been reconsidered by the government but it had a strong role in creating a debate on fundamental rights in Hungary among the government and civil society. The EU bodies expressed their concerns and raised their voices. By doing so they managed to create a platform for further discussion and contributed to the Hungarian fundamental rights focused NGOs' work.

In conclusion the most critical point of the 2010 Media Law is probably the way it regulates the structure and role of the media supervisory authorities. As it was mentioned in the history of the Hungarian media the predecessor of the Media Council and National Media and Communication Authority was also not considered to be a politically independent institution. The difference between the old and the new media authorities was highlighted by the Mérték Media Monitor.<sup>167</sup> They call the previous National Radio and Television Council the center of political fights and deals. The new media authorities is defined by them as a politically homogeneous and non-transparent political centrum.

Media law is not the only element of the Hungarian media system which has significant influence on media pluralism and freedom. Bajomi's seven conditions which have big influence on the diversity of the media have a crucial role as well.<sup>168</sup> Beside the institutional guarantees of media pluralism some analysts also suggest to take into account other aspects as well such

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<sup>165</sup> 'Remarks of the Government of Hungary on the Report of the European Parliament on the Situation of Fundamental Rights in Hungary'

<sup>166</sup> Hungarian Civil Liberties Union, Hungarian Helsinki Committee and Mérték Media Monitor, 'Comments of Hungarian NGOs on the Draft Report on the Situation of Fundamental Rights: Standards and Practices in Hungary and on the Position of the Hungarian Government' (2013)

<sup>167</sup> Mérték Media Monitor and Independent Mediacy, 'Újragondolt Nyilvánosság – Médiaszabályozási Koncepció' (2014) [http://mertek.eu/sites/default/files/events/vitaanyag\\_vegleges\\_0.pdf](http://mertek.eu/sites/default/files/events/vitaanyag_vegleges_0.pdf)p32

<sup>168</sup> Bajomi Lázár P, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014)p10.15

as economic, entrepreneurial, behavioral and attitudinal aspects. To understand the influence of these factors the Hungarian media market will be in the focus of the following section and the closing part of the analysis will look at recent media events which can determine the behavioral and attitudinal feature of Hungary's media environment.

### C. Historical background and characteristics of the Hungarian media market

The history of the Hungarian media market dramatically changed after the regime change and the privatization of the market by Western investors, remembers Rozgonyi<sup>169</sup>. The general presumption of the Hungarian media workers was the emergence of a new type of, Western norms and values driven media culture. Everyone thought that the investors will not only provide a financial background for the Hungarian media but also guarantee the Western media attitude and behavior. Unfortunately this was not the case and the foreign investors did not take any responsibility for the quality of the journalism and content produced by their media outlets. The big financial crisis have worsened the situation of the media and quality journalism started to disappear from the Hungarian media. Rozgonyi defines that period as the time when the press started to focus on the survival instead of the content it produces. Bajomi refers to this phenomena among the seven conditions of media pluralism.<sup>170</sup> He claims that if owners consider their media outlets not just a simple money-making but a political investment, they often limit journalistic and editorial freedom in order to follow their political interests. Although Bajomi's argument is slightly different from Rozgonyi's explanation but final claim is the same. Media owners should always consider journalistic and editorial freedom as a fundamental value and respect it. Furthermore the economic condition mentioned by Bajomi also underpins Rozgonyi's claim about the importance of stable financial background. Economic factors can

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<sup>169</sup> Interview with Krisztina Rozgonyi, 'Comments on Hungary's media landscape' (September 2014)

<sup>170</sup> Bajomi Lázár P, *opcit.*

significantly undermine media freedom especially shortage of advertising revenues.<sup>171</sup> Sparks mentions it as a general rule that the poorer the economy the less money is being invested in advertising.<sup>172</sup> Therefore the combination of bad economic and political factors imposes an increased threat on media.

As Dr. Krisztina Rozgonyi<sup>173</sup> explains the Hungarian media market is a small one. Attila Bátorfy<sup>174</sup> claims that because of the media market size media ownership concentration cannot be avoided on the Hungarian media market. However this is not to say that disproportionate concentration cannot be avoided neither because of the market size. Exactly because of the size of the Hungarian media market sectorial competition law can have a visible impact. However the pure existence of such laws cannot guarantee media pluralism. The fair competition on the media market is only one element of a free and pluralistic media environment. The attitude of the political powers is also detrimental.

In Hungary the ruling party with a two third majority is Fidesz since 2010. Polyák<sup>175</sup> wrote that media market has always been distorted by political interests but recently, especially under the Fidesz terms the distortion is unprecedented. Transparency International's Hungarian mission issued a comprehensive report on the situation of lobbying in Hungary.<sup>176</sup> Beside many other aspects the report covers the media's role in monitoring lobbying. The report stresses the negative impact of the market distortion on private media owners' market competition. The TI

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<sup>171</sup> Jakubowicz K and Sükösd M (eds), 'Twelve Concepts Regarding Media System Evolution and Democratization in Post-Communist Countries', *Finding the right place on the map. Central and Eastern European media in a global perspective* (Intellect Books 2008)p9-40

<sup>172</sup> Sparks C, 'The Interplay of Politics and Economics in Transitional Societies' in John Downey and Sabina Mihelj (eds), *Central and Eastern European Media in Comparative Perspective* (Ashgate)p41-61

<sup>173</sup> Interview with Krisztina Rozgonyi, 'Comments on Hungary's media landscape' (September 2014)

<sup>174</sup> Interview with Attila Bátorfy, 'Comments on the Center for Media Pluralism and Media Freedom's Media Pluralism Indicator Study' (September 2014)

<sup>175</sup> Polyák G and Uszkiewicz E (eds), 'Irányított Nyilvánosság', *Foglyul ejtett média* (Európa Kiadó 2014)

<sup>176</sup> Media market scheme in Hungary-Capturing them softly; Bartha A and others, 'Lifting the Lid on Lobbying: Strategic Partnership Agreements in an Uncertain Business Environment- National Report of Hungary' (Transparency International 2014) <[http://www.transparency.hu/uploads/docs/lobbi2014\\_web\\_eng.pdf](http://www.transparency.hu/uploads/docs/lobbi2014_web_eng.pdf)> accessed 12 November 2014 p24-25

report names the Fidesz's own political interest as the core cause of the media landscape's transformation. The public media of Hungary will not be discussed in its details since it goes beyond the scope of the paper. However it should be noted regarding to the public media sector that both the WAN IFRA (World Association of Newspapers and News Publishers) report<sup>177</sup> about Hungary's media and the TI report consider it to be the mouthpiece of the government.

#### D. The phenomenon of soft-censorship in Hungary

Experts find that not just the public funded media is under threat but they are also concerned about the commercial media. The term the TI report and the WAN IFRA reports use is soft censorship.<sup>178</sup>The Open Society Foundation was among the first ones who addressed the issue in 2005<sup>179</sup> for the first time and then in 2008<sup>180</sup>. The terms will be introduced by demonstrating a concrete example from Hungary.

Soft censorship is indirectly affecting the functioning of the market and the fair competition. State funding of the Hungarian government goes not just to the public media but also to advertising. In Hungary as Bajomi also wrote that the allocation of state media funds is based on non-transparent rules and there is no legal specification for the allocation process.<sup>181</sup>Hungary's two leading commercial TV channels is TV2 and RTL Klub. Lately TV2 is being associated with Fidesz, the allegation is based on the change of the TV2's owner. According to the media news the new owner belongs to the close circle of the government.<sup>182</sup>Although there is no clear evidence to prove the relationship between the

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<sup>177</sup> Center for International Media Assistance, 'Capturing Them Softly: Soft Censorship and State Capture in the Hungarian Media' <<http://cima.ned.org/publications/capturing-them-softly-soft-censorship-and-state-capture-hungarian-media>> accessed 25 September 2014 p 32-43

<sup>178</sup> *ibid.*

<sup>179</sup> Open Society Foundations- Justice Initiative, 'The Growing Threat of Soft Censorship' (2005) <[http://www.opensocietyfoundations.org/sites/default/files/threat\\_20051205.pdf](http://www.opensocietyfoundations.org/sites/default/files/threat_20051205.pdf)>

<sup>180</sup> Open Society Foundations- Justice Initiative, 'The Price of Silence: The Growing Threat of Soft Censorship in Latin America' (2008) <[http://www.opensocietyfoundations.org/sites/default/files/silence\\_20080811.pdf](http://www.opensocietyfoundations.org/sites/default/files/silence_20080811.pdf)>

<sup>181</sup> Bajomi Lázár P, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014)p52-62

<sup>182</sup> M. László F, "'Nem Balkán, Ez Már Ukrajna" – Kirobbant a Háború a Tévés Piacon' *HVG* (March 2014) <[http://hvg.hu/itthon/20140310\\_RTL\\_TV2\\_mediapiac\\_harc](http://hvg.hu/itthon/20140310_RTL_TV2_mediapiac_harc)>

businessman and the government; the link has been also denied by the affected parties. It is certain however that the state advertisement is allocated to TV2 rather than RTL Klub. In 2014 during the summer a special tax was introduced on media advertisements. The mostly affected outlets are the market leader channels, in this case it is RTL Klub which is a German owned commercial channel. The channel supposed to pay originally 40% and due to the recently proposed changes 50% of marginal tax rate after the advertisement revenues.<sup>183</sup> The TI report calls the state funding allocation opaque and unfair<sup>184</sup> which significantly distorts the media market.

Not just TV broadcasting is under threat but also the newspaper market landscape has gone under some visible changes. According to the WAN IFRA report's findings<sup>185</sup> Magyar Nemzet which is a historically right-leaning and Fidesz associated newspaper received 13% of state advertisements in 2008 (before Fidesz came into power). The same number in case of the left-leaning Népszabadság was 7% in 2008. According to the report these numbers have significantly changed in 2012 and Magyar Nemzet received 22% while Népszabadság received only 2% of state advertisement. Hence it might be hard to prove the personal connection between certain media businessmen and political powers but it cannot be ignored that the state advertising distribution has become significantly concentrated. This underpins Polyák's<sup>186</sup> claim that the market was always concentrated but recently it is more and more centralized.

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<sup>183</sup> Köves P (MTI), 'Még Nagyobbát Csap Oda a Kormány Az RTL Klubnak' (November 2014) <<http://vs.hu/mind/osszes/a-kormany-40-rol-50-szazalekra-emelne-a-reklamado-legmagasabb-kulcsat-1112>>

<sup>184</sup> Bartha A and others, 'Lifting the Lid on Lobbying: Strategic Partnership Agreements in an Uncertain Business Environment- National Report of Hungary' (Transparency International 2014) <[http://www.transparency.hu/uploads/docs/lobbi2014\\_web\\_eng.pdf](http://www.transparency.hu/uploads/docs/lobbi2014_web_eng.pdf)> accessed 12 November 2014 p24-25

<sup>185</sup> Center for International Media Assistance, 'Capturing Them Softly: Soft Censorship and State Capture in the Hungarian Media' <<http://cima.ned.org/publications/capturing-them-softly-soft-censorship-and-state-capture-hungarian-media>> accessed 25 September 2014

<sup>186</sup> Polyák G and Uszkiewicz E (eds), 'Irányított Nyilvánosság', *Foglyul ejtett média* (Európa Kiadó 2014)

It could be contested that there are other sources of advertising than state funded advertisement. However it is worth considering the possible indirect effects of state advertising concentration tendency on the non-state funded advertising.

Given the background of the Hungarian media market history the government's advertising allocation practice might result in difficult financial situation especially for those media outlets which were already in a vulnerable market position. Presumably these outlets in order to stay on the market rather avoid governmental criticizing just to ensure that advertising revenues. Mérték Media Montitor<sup>187</sup> and Transparency International's Hungarian team<sup>188</sup> both call this phenomena soft censorship. Bajomi Péter<sup>189</sup> defines the current situation of the media not just in Hungary but in the surrounding Central and Eastern European countries as party colonization. The expression chilling effect could be also taken into account for describing the media landscape however in this case the editors and journalists might not be aware of the self-censorship they exercise. Even though the typology is still not finalized but there are more and more think tanks, NGOs and IGOs which refer to this new kind of censorship.

Increasing number of cases tend to prove the existence of a new kind of threat on the media. Rozgonyi<sup>190</sup> explains that the potential risk of the soft-censorship should be recognized by the European Union and the Council of Europe as well. She meant by the risk the impact of Hungary's example on the area's other countries. Dr. Krisztina Rozgonyi recalls one of her advisory meetings in Serbia, which is an EU member state candidate. The country's respond to the critique on the media pluralism's situation was referring to Hungary where the case is almost

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<sup>187</sup> Center for International Media Assistance, 'Capturing Them Softly: Soft Censorship and State Capture in the Hungarian Media'

<sup>188</sup> Bartha A and others, 'Lifting the Lid on Lobbying: Strategic Partnership Agreements in an Uncertain Business Environment- National Report of Hungary' (Transparency International 2014)

<sup>189</sup> Bajomi Lázár P, *Party Colonisation of the Media in Central and Eastern Europe* (CEU Press 2014)

<sup>190</sup> Interview with Krisztina Rozgonyi, 'Comments on Hungary's media landscape' (September 2014)

the same. To counter the criticism Serbia has every right to say that an already EU member state, Hungary has a quite similar media environment. Therefore they could simply claim that there is no need to improve the level of media freedom and pluralism since it is on the same level with an EU member state. To substantiate Rozgonyi's personal experience with the Serbian media, WAN IFRA issued a report about Serbia on the very same topic as in case of Hungary.<sup>191</sup>The report was prepared simultaneously with the Hungarian and both reports are the first one of a global soft-censorship<sup>192</sup> report series.

A distorted media market can significantly undermine freedom of expression. Those who might be the talented investigative journalists will be facing serious financial difficulties and even if they are not afraid of embodying the critical voice they will not have the financial background for it. This type of threat is present in more and more countries as the global review suggests.<sup>193</sup>

A recent case of an investigative journalist seems to serve as a good example of what Transparency International, Open Society Foundations, WAN IFRA, Mérték Media Monitor is worried about. Origo.hu belongs to one of the first online news portals of Hungary and it is owned by Hungarian Telekom. At the end of 2013 the portal planned to publish an article saying that the State Secretary of the Prime Minister's Office spent more than 6000 € to cover three of his foreign visits. The Prime Minister's office has neither confirmed nor rejected the information. For this reason the journalist working on the case submitted a public information request in order to have credible source for the article.<sup>194</sup> The journalist won the case in the first

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<sup>191</sup> 'Soft Censorship: Reports from Serbia and Hungary-CIMA Releases Two Reports in a Series on Censorship with WAN-IFRA' <<http://cima.ned.org/blog/soft-censorship-reports-serbia-hungary/>>

<sup>192</sup> 'Soft Censorship, Hard Impact A Global Review' (WAN-IFRA World Association of Newspapers and News Publishers 2014) <[http://www.wan-ifra.org/system/files/field\\_article\\_file/Soft%20Censorship%20Global%20Review%202014.pdf](http://www.wan-ifra.org/system/files/field_article_file/Soft%20Censorship%20Global%20Review%202014.pdf)>

<sup>193</sup> *ibid.*

<sup>194</sup> Pethő A, 'Fellibben a Fátyol Lázár János Titkos Küldetéseiéről' (May 2014) <<http://www.origo.hu/itthon/20140508-lazar-janos-titkos-kulfoldi-kikuldetesei-es-szallaskoltsege.html>> accessed 27 November 2014

instance with the legal support of Transparency International Hungary.<sup>195</sup> After the release of the fact-finding article the editor-in-chief was dismissed and many journalists followed him voluntarily. Several media workers, the civil society and many other people expressed their disagreement with the dismissal and asked the government to stop punishing independent media. The government rejected all accusation of political pressure on the media.<sup>196</sup>

The results of the reports undoubtedly point out the critical point of the Hungarian media environment which is more complicated than a simply inappropriate legal framework. The European Union recognized this new type of threat and formulated its findings and recommendations in the already mentioned Freiberga report.<sup>197</sup> Although the report is a EU policy instrument the recommendations serve a strong guideline for the member states.

#### E. Recommendations based on the instructive elements of the Freiberga report

The report has a strong focus on the protection and promotion of freedom and pluralism of the media. The High Level Group on Media Pluralism and Freedom consists of prominent media scholars, workers and experts. The report's main aim was provide a list of recommendations for the member states which can be used to improve the situation of the media. This section relies entirely on the recommendations of the Freiberga report.<sup>198</sup>

As a first step the paper suggest a new role for the EU. The paper considers the EU as guarantor of media pluralism and freedom on the member states' level. This would mean that the EU has

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<sup>195</sup> Bartha A and others, 'Lifting the Lid on Lobbying: Strategic Partnership Agreements in an Uncertain Business Environment- National Report of Hungary' (Transparency International 2014) p 25

<sup>196</sup> 'Deutsche Telekom, Hungarian Government Collude to Silence Independent Media' (2014) <<http://444.hu/2014/06/05/deutsche-telekom-hungarian-government-collude-to-silence-independent-media/>>

<sup>197</sup> Vīke-Freiberga, V, 'A Free and Pluralistic Media to Sustain European Democracy' (High Level Group on Media Freedom and Pluralism 2013) <<http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>>

<sup>198</sup> *ibid.*

the competence to foster and take steps on the field of media pluralism, but just under the scope of the EU Treaties.

As it was explained before EU member states show a very colorful picture in terms of media laws and judicial practices. The solution according to the High Level Group is to set minimum standards and adopt harmonization rules to regulate media ownership trends among the member states. The potential risk of adopting minimum standards is that those standards do not inspire member states to enact higher level of rules.

A great value of the paper is the recognition rapid technological transition's impact. The recommendations suggest to both national and EU competition authorities to pay sufficient attention to the latest development on the online market as well. The power of the online media ownership networks cannot be disregarded as it can seriously restrict the access to information of the citizens. The High Level Group introduces the idea of network and net neutrality in order to ensure protection of online access to information.

A particularly important element of the set of recommendations is the one about the media literacy. The thesis mentioned before that the role of the audience is becoming more and more detrimental in the online, supersaturated media environment. The Freiberga report also recognized that the media content consumer's attention distribution is becoming also responsible for media pluralism. The report recommends to the states to teach media literacy and explain the role of the media in democracies. This particular recommendation is especially essential in case of Hungary. It would be especially important for the society to explain the importance of media pluralism and freedom and to make sure that the citizens are self-conscious media content consumers.

Among many other recommendations the experts suggest to create independent media institutional framework. The report recommends the states to have politically culturally neutral

members and nominate the representatives transparently based on fair rules. In case of Hungary a possible way could be the nomination of media experts by both the government and the civil society.

The report proposed the creation of an audiovisual authority network in the European Union. The role of such a network would enable member states to share their both good and bad practices and knowledge among each other.

A particularly important proposal of the High Level Group is the rules of media public ownership. The report recommends to have strict rules in order to guarantee governmental non-interference and internal pluralism in the media. The report also emphasize the importance of the strictly monitored and transparent distribution of state funding for the media.

The Freiberga report suggests the establishment of an independent EU monitoring body which would monitor the changing media landscape and provide expertise for the member states on the media freedom and pluralism. In case of an EU monitoring body it is highly recommended to have country-specific experts exactly because of the country-specific issues. By having local experts the monitoring body would be able to avoid false and deficient monitoring and evaluation results.

Visibly the Freiberga report provides solutions and policies for the critical points of the Hungarian media pluralism. Although as it was told by Rozgonyi<sup>199</sup>, after the report was published no actions followed it. The Freiberga report has no visible result so far and the recommendations have never been implemented.

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<sup>199</sup> Interview with Krisztina Rozgonyi, 'Comments on Hungary's media landscape' (September 2014)

## IV. Conclusions and closing remarks

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In November 2014, four Hungarian NGOs summarized how they think the government is in breach with the European Union's most fundamental values: democracy, pluralism and fundamental rights.<sup>200</sup> The report describe how the past few months' events are questioning Hungary's commitment to those values. Although the paper refers to the lack of pluralism regarding to the whole society and not just the media. However they point out the government's unwillingness to respect and tolerate different ideas and identities.

The Transparency International Hungary<sup>201</sup> report summarize the lobbying culture in Hungary and its implications. The report acknowledges the shortcomings of the global policy and highlights that the paper shaped the recommendations in accordance with the Hungarian country-specific features. It is crucial to understand that Hungary's current lobbying act does not qualify the Transparency International's requirements.

The report explains in more details that the current lobbying framework does not ensure a fair and competitive business environment and creates an opaque lobbying policy framework.<sup>202</sup> To answer one of the major questions of the thesis a root cause of the unfavorable media landscape is the lack of transparent lobbying procedure and proper lobbying act. As it was discussed in more details in previous paragraphs the Hungarian media pluralism and freedom - according to NGO reports- is being undermined through the combination of business and political tools.

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<sup>200</sup> Eötvös Károly Policy Institute and others, 'Disrespect for European Values in Hungary 2010-2014:Rule of Law – Democracy – Pluralism – Fundamental Rights' (2014)

<[http://mertek.eu/sites/default/files/reports/disrespect\\_for\\_values\\_nov2014.pdf](http://mertek.eu/sites/default/files/reports/disrespect_for_values_nov2014.pdf)>

<sup>201</sup> Bartha A and others, 'Lifting the Lid on Lobbying: Strategic Partnership Agreements in an Uncertain Business Environment- National Report of Hungary' (Transparency International 2014)

<[http://www.transparency.hu/uploads/docs/lobbi2014\\_web\\_eng.pdf](http://www.transparency.hu/uploads/docs/lobbi2014_web_eng.pdf)> accessed 12 November 2014

<sup>202</sup> Bartha A and other, *opcit.* p5-6

Since lobbying is about the relationship of the business and politics it is detrimental how it is being regulated and what is the culture of it.

The paper also raised the question whether the phenomena soft-censorship is a new type of chilling effect. In the light of the Hungarian example the ownership concentration and the non-transparent advertising revenue distribution has a negative influence on media pluralism. However the term chilling effect might not be the most suitable. Soft-censorship was used by Mérték Média Monitor, Transparency International and the Open Society Foundations as well. However Péter Bajomi-Lázár suggests another expression instead of it. During the interview with him he expressed his disagreement with the term soft-censorship and suggested the term party colonization. While soft-censorship can be considered a politically neutral term, party colonization implies the direct control of the political powers over the media. That is to say that experts show a certain level of disagreement regarding to the nature of the problem. It must be noted though that the Mérték Média Monitor's experts are mostly media lawyers; while Bajomi and the co-authors of his book are mostly media policy experts with political science background. Furthermore when Bajomi refers to party colonization he mainly covers the public sector media. Whereas Mérték's soft-censorship term covers both public and private sector media.

As to the ability of the Council of Europe and the European Union to address effectively the new challenges of media pluralism in Hungary there is no clear answer. The Council of Europe and the European Court of Human Rights have been dealing with media pluralism cases but the primary focus of those cases was internal pluralism. Furthermore the admissibility criteria of the European Court of Human Rights does not allow the effective protection of external media pluralism. Dr. Rozgonyi adds that the Council of Europe does not have broad enough competences on this field. She recalled Eve Solomon's strong criticism of the Hungarian media landscape and the lack of follow-up measure. There was a conference in Budapest, Hungary on

the new challenges of media regulation in 2013 where the Council of Europe representative, Eve Salomon was present. The conference paper<sup>203</sup> summarizes the outcome of the few days long meeting and comes to the conclusion that the Hungarian media regulation and environment is in conformity with the Council of Europe standards. Rozgonyi does not consider CoE as a strong support and promoter of media pluralism in Hungary. She explains that according to the minimum requirements of the Council of Europe Hungary's level of media pluralism is acceptable. As a result the Council does not take further steps. This was the concern of Attila Bátorfy as well<sup>204</sup> regarding to the global/regional standards and reports. Although he was more concerned about the EU's idea of measuring media pluralism of the member states. Rozgonyi in agreement with Bátorfy does find it necessary to have indicators for the measurement of media pluralism. If the EU was be able to measure properly media pluralism it would have a legitimatizing instrument. Unfortunately the instrument does not seem to be adequately developed and there is no methodology for developing the science of media pluralism measurement.

The Council of Europe and the European Union undoubtedly are key actors and both of them have taken steps in order to address media pluralism challenges. However the changes they have been able to achieve concern the most visible problems and have not resulted in radical changes until now. Nevertheless the EU and the CoE are not the only actors to address country-specific media pluralism challenges. As it was seen in case of the Tavares report, the EU is able to generate debate among the civil sphere and the government by naming and shaming.

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<sup>203</sup> Hungarian Media Law, 'On the International Conference Entitled "The Current Challenges of European Media Regulation" & The 2-Day Round-Table Organized within the Framework of the Cooperation between the National Media and Infocommunications Authority and the European Council' (2013) conference paper

<sup>204</sup> Interview with Attila Bátorfy, 'Comments on the Center for Media Pluralism and Media Freedom's Media Pluralism Indicator Study' (September 2014)

The state has also strong role in addressing the emerging challenges of Hungary's media pluralism. Although Rozgonyi names an event which indicates that the current government (Fidesz 2010-2014) have a different idea of media freedom and pluralism. She and Bátrofy both refer to the 2002 parliamentary elections<sup>205</sup>. Fidesz almost won the elections but at the end the socialist coalition attracted more citizens. Not just the two interviewees but Boris Kálnoky<sup>206</sup> also recall the 2002 elections to explain what Orbán thought of media. The 2002 elections result was a huge disappointment for the relatively young, liberal party. Based on the interviews and Kálnoky's thoughts Orbán blamed the media for the result; i.e. he thought that the media failed to communicate the reality due to the opposition's influence. Boris Kálnoky<sup>207</sup> thinks that the fear of losing another election made the government less committed to the liberal values it was promoting in the very beginning. Presumably as a result of the Fidesz's conclusions the media faces several challenges and the public sector media has become a governmental institution.

Lenin in 1921<sup>208</sup> recognized the significance of the press, so did all the leaders after him. It would be naïve to assume that political powers do not want to influence it. Media serves as a platform to exercise freedom of expression. At the same time it also serves as a platform for political powers to influence the society. However, it does matter to what extent political powers rely on media's power in order to strengthen their voter base.

The term soft-censorship is in its early stage and experts use it carefully. The reason for the prudence is the hidden nature of the term. It covers both public and private sector media. It is

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<sup>205</sup> Nemzeti Választási Iroda, 'Országgyűlési Választások 2002' (2002) <[http://valasztas.hu/hu/ovi/49/49\\_0.html](http://valasztas.hu/hu/ovi/49/49_0.html)> accessed 27 November 2014

<sup>206</sup> Techet P, 'Orbán, a „félreértett Vezető”' (2012) <<http://valasz.hu/vilag/eltulzottnak-iteli-az-orban-ellenes-vadakat-a-vezeto-svajci-hetilap-45484>>

<sup>207</sup> *ibid.*

<sup>208</sup> *Lenin Összes Műve- Levél G. Mjasznyikovhoz(1921)* (Kossuth Kiadó 1975)

hard to prove the existence of it as the censoring occurs indirectly, invisibly. The strongest evidences of its existence are numbers and anecdotes told by those who faced soft censorship.

Due to the difficulties of proving the existence of soft-censorship there is an urgent need to develop a complex media pluralism measuring method which is able to cover country specific features and provide a nuanced picture of the level of media pluralism. This is where the European Union and the Council of Europe should step in and provide expertise for developing the measuring methods. Steps has been taken but it is more likely to have distorted results than a nuanced picture.

All the markets are based on the supply-demand relationship. In case of the market place of ideas this is also a valid claim. If there is a demand for the diversity of ideas there will be a plural media environment. Although this type of demand assumes that the society is democratic and is aware of the importance of media pluralism. When there is no demand it is hard to imagine that supply remains plural and diverse. In the rapidly changing media environment roles and responsibilities are also changing. The attitude of the citizens plays a crucial role in media pluralism. Apathy is not just a strong tool in the hand of weak political powers but an inner-enemy of media pluralism. Today it is not enough anymore to talk about the responsibility of the government, civil sphere or external actors (EU, CoE). The role of the citizens, i.e. media content consumers, has significantly changed. Their media consciousness and high level of media literacy can be considered as a strong protection against the growing threat of soft-censorship.

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