

## External Pluralism Protection in Five EU Countries and the U.S.: The Regulatory Authorities' Views <sup>(\*)</sup>

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### Abstract

The protection of pluralism in a cross-media scenario is a major concern for regulatory authorities in all democratic countries. This paper presents the outcome of in-depth interviews with members of six independent audiovisual regulatory authorities. They were questioned about the assessment of measures being taken to protect external pluralism in their respective countries, and about the problems and shortcomings they encounter during their implementation. In spite of the difficulties that arise when trying to compare different national realities and to gather qualitative data from legal bodies, this paper draws several conclusions on current policy trends for the protection of pluralism.

**Keywords:** pluralism, regulatory authorities, European Union, United States

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

This paper presents the results of in-depth interviews with officials of independent audiovisual regulatory authorities – board members with an expertise in the area of pluralism – in five EU countries and the U.S.: Conseil Supérieur de l'Audiovisuel (CSA) (France), Kommission zur Ermittlung der Konzentration im Medienbereich (KEK) (Germany), Autorità per le Garanzie nelle Comunicazioni (AGCOM) (Italy), Commissariaat voor de Media (CvdM) (Netherlands), Office of Communications (Ofcom) (United Kingdom) and the Federal Communications Commission (FCC) (U.S.).

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<sup>1</sup> This paper is part of the research project "Pluralism and communication groups in Spain: audience concentration", funded by the Spanish Ministry of Science and Innovation (National RD&I Plan 2009-2011). The first part of the study analyses to what extent and in which way several European countries and the U.S. have set limits on audience reach/concentration as a communication policy instrument aimed at protecting pluralism in a cross-media scenario. The ultimate objective of the project is to develop a proposal for the Spanish market.

These countries were chosen because they were considered to be a good representation of Western democracies with the most advanced media policies. Spain, the country where the authors of the paper reside, was not included because there was no national independent regulatory authority at the time the research was undertaken.

The first main objective of the interviews, conducted between September 2009 and April 2010, was to gather information about measures being taken to protect external pluralism in broadcasting. In this respect, the interviewees were asked about policies dealing with corporate, ownership, market and economic-political concentration in the mass media sector. In addition, special attention was paid to the use of audience reach or share as a concentration/pluralism indicator. The second main objective of the interviews was to focus on how the above-mentioned regulatory authorities assess pluralism policies and what problems they encounter during their implementation. To that end, the following sets of questions were posed:

1. *Context:* How is media pluralism measured/evaluated? What kind of relationships between the protection of pluralism and the existence of a regulatory authority (considering its organisation and powers) can be established?
2. *Assessment of legislation on pluralism:* Have any shortcomings in the regulation of pluralism been detected? What problems cannot be solved by regulation? What are the main conflicts in this field? Is there any debate about the need for or the effectiveness of legislation on the protection of pluralism? To what extent has media pluralism improved with current legislation?
3. *Audience concentration as a mechanism for regulating pluralism:* Has audience concentration been considered a potential threat to pluralism? Is an audience indicator used as a criterion to assess and protect pluralism? How is it measured?
4. *Assessment of regulatory authority powers:* What specific problems do regulatory authorities encounter when setting limits or restrictions to protect pluralism? Have any changes in procedure been proposed or are any expected?

As a result of the qualitative analysis carried out on the interview results, this paper provides answers to those questions.

## **2. Theoretical Framework**

The relationship between media concentration and pluralism is a classic topic in media policy studies, particularly those focusing on media ownership as a key concept in the protection of pluralism. However, the configuration of a multichannel, multiplatform and multimedia environment has changed the structure

and the operational logic of the media sector. This fact has a direct impact on the concerns of media policy-makers involved in the protection of pluralism.

The growth of media offerings – free newspapers, Internet, digital radio and television channels – has been a constant feature of the structure of the sector in the last decade. At one and the same time, the bigger the groups are, the more they have to offer. Given this new scenario, it would seem logical that the now classic study of the relationship between media concentration and pluralism should find new points of focus and concepts in order to identify and evaluate the impact of large communication groups – through their various media – on public opinion, and therefore be able to propose alternatives to the current policies for the protection of pluralism, which in many cases are almost exclusively based on the limitation of ownership to a single media. For this reason, the evaluation of audience concentration has been one of the most common mechanisms applied in recent years to regulation in various countries. This is the initial framework for the research encompassed by this study.

Numerous studies have been carried out previously on the connection between the protection of pluralism and concentration. Among others, the most noteworthy are reports by the Council of Europe – which has a long tradition of studies on pluralism (Bruck et al., 2004, or Ward, 2006) – or those of the European Commission (report on the European regulatory situation published in 2007 or the proposal for key indicators for evaluation of the risks to pluralism published in 2009: European Commission, 2007 and 2009). Pluralism has also been a topic of concern for the European Parliament, which has set out its views on this aspect in numerous resolutions and studies (one of the most interesting ones was produced by the European Institute for the Media: EIM, 2004). In the book *Television and Media Concentration. Regulatory models on the national and the European level* (Nikoltchev (ed.), 2001), the European Audiovisual Observatory assembled a compilation of regulation on media concentration in various European countries. Further compilations worthy of note are the studies carried out by the independent regulatory authorities of the United Kingdom (*Review of Media Ownership Rules*, Ofcom, 2006) and of the Netherlands (*A mapping study of media concentration and ownership in ten European countries*, Commissariaat voor de Media – Ward, 2004). The academic contributions on the study of concentration and pluralism are numerous as well. The most noteworthy are contributions by Noam, 2009; Harcourt & Picard, 2009; Sánchez-Tabernero & Carvajal, 2002; Doyle, 2002 and 2006; Llorens, 2003; Ariño, 2004; Napoli, 2005 and 2007; Becerra & Mastrini, 2006; Dwyer et al., 2006; Gusse, 2006; and Baker, 2006, among others.

However, the relationship between pluralism and audience concentration has not been so widely studied and analysed until recently. First, the French and U.S. governments have addressed this question with actions seeking to update their anti-concentration legislation. In 2005, France published the Lancelot report, which includes numerous references to audience concentration as a system for protecting local and regional

pluralism (Ministère de la Culture et de la Communication, 2005; Llorens, 2006). The Federal Communications Commission of the U.S. has also produced various empirical reports about concentration. In both cases, audience concentration is used as the indicator of reach, a far more restrictive concept than the more common concept of share used in Germany and Spain. Second, a group of academics have recently developed this subject as a part of an analysis of instruments to measure media concentration: Valcke, 2009; Just, 2009; and Iosifidis, 2010, among others.

However, as far as we know, there has been no previous research on the study of pluralism by means of the assessment of independent audiovisual regulatory bodies. Of course, there is extensive academic literature on audiovisual regulatory bodies; on their aims, history, comparative tasks and independence (e.g., Barendt, 1995; Holoubek, 1998; Levy, 1998; Robillard, 1996; Tornos, 1999; Salvador, 2002; CoE, 2003; Arenas, 2004; EPRA, 2007), as well as research on regulatory bodies and media convergence (e.g., Trayter, 2007 and Carniel, 2009). However, no previous qualitative research using in-depth interviews to gather answers from these legal bodies has been identified.

### **3. Regulatory Authorities' Boards**

As already stated, the main sources for this research were in-depth interviews conducted with members of the boards of the independent audiovisual regulatory authorities of the six countries studied. For this reason, an overview of these authorities and their boards is provided below: Autorità per le Garanzie nelle Comunicazioni (AGCOM) (Italy), Conseil Supérieur de l'Audiovisuel (CSA) (France), Commissariaat voor de Media (CvdM) (Netherlands), the Federal Communications Commission (FCC) (U.S.), Kommission zur Ermittlung der Konzentration im Medienbereich (KEK) (Germany) and Office of Communications (Ofcom) (United Kingdom).<sup>2</sup>

As shown in Table 1, the longest established authority is the U.S. FCC, while the most recent is the British Ofcom, though the latter actually inherited the duties that had previously been the responsibility of five former British regulatory bodies. As far as the main decision-making bodies are concerned, the German KEK has the largest board, with 12 members, while the Dutch CvdM has the smallest, with only three members including the Chair. The term of office for board members is generally between five and seven years, which is renewable in two thirds of the authorities studied.

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<sup>2</sup> The sources for this section were the authorities' websites or legal documents (as indicated in the Tables).

<b>Table 1. General Data</b>			
	<b>Board (members)</b>	<b>Term of office</b>	<b>Establishment date</b>
<b>AGCOM</b> (Italy)	9	Non-renewable 7-year term.	1997
<b>CSA</b> (France)	9	Non-renewable 6-year term.	1986 & 1989
<b>CvdM</b> (Netherlands)	3	Renewable 5-year term.	1988
<b>FCC</b> (U.S.)	5	Renewable 5-year term.	1934
<b>KEK</b> (Germany)	12	Renewable 5-year term.	1997
<b>Ofcom</b> (UK)	9	Renewable undetermined term.	2002

In all cases (Table 2), board appointments are made directly by governments and/or by parliaments. In only two cases are some board members appointed by other actors: executive Ofcom board members are appointed by non-executive members (the latter designated by government), and half of the German KEK board is appointed by the Media Authorities of each Land or state.

<b>Table 2. Board Appointments</b>	
<b>AGCOM</b> (Italy)	<ul style="list-style-type: none"> <li>• Parliament: 4 members by the Senate and 4 by the Chamber of Deputies.</li> <li>• President of the Italian Republic (under proposal by the Prime Minister and the Minister for Communications): Chair.</li> </ul>
<b>CSA</b> (France)	<ul style="list-style-type: none"> <li>• President of the French Republic: 3 members, including the Chair.</li> <li>• Speaker (president) of the Senate: 3 members.</li> <li>• Speaker (president) of the National Assembly: 3 members.</li> </ul>
<b>CvdM</b> (Netherlands)	<ul style="list-style-type: none"> <li>• Minister of Education: All 3 members.</li> </ul>
<b>FCC</b> (U.S.)	<ul style="list-style-type: none"> <li>• President of the U.S. (confirmed by the Senate): All 5 members.</li> </ul>
<b>KEK</b> (Germany)	<ul style="list-style-type: none"> <li>• Minister Presidents of the German States (unanimously): 6 experts (plus 2 substitute members).</li> <li>• State Media Authorities: 6 representatives (plus 2 substitute members).</li> </ul>
<b>Ofcom</b> (UK)	<ul style="list-style-type: none"> <li>• Secretary of State for Business, Innovation and Skills and Secretary of State for Culture, Media and Sports: Chair and non-executive members.</li> <li>• Chair and non-executive members: Executive members.</li> </ul>

The law provides for compulsory board profiles in all but two cases: the French CSA and the Dutch CvdM. In the British Ofcom case, we could not identify any legal profile provision for non-executive officers. In the remaining cases, as shown in Table 3, board members must conform to different criteria: professional criteria in the case of AGCOM, political criteria in the case of FCC, and both professional and political criteria in the case of KEK.

<b>Table 3. Board Member Profiles according to the Law</b>	
<b>AGCOM</b> (Italy)	High professional reputation and competence.
<b>CSA</b> (France)	Could not be identified.
<b>CvdM</b> (Netherlands)	Could not be identified.
<b>FCC</b> (U.S.)	U.S. citizenship, and the maximum number of commissioners who may be members of the same political party shall be a number equal to the lowest number of commissioners that constitutes a majority of the full membership of the Commission.
<b>KEK</b> (Germany)	Experts in broadcasting and commercial law (three of whom must have the qualification for judgeship) and legal representatives of Germany's State Media Authorities.
<b>Ofcom</b> (UK)	Executive members must belong to Ofcom staff. No profile provision for non-executive members could be identified.

Finally, all board members' eligibility is subject to the absence of a variety of incompatibilities, prior and during their terms. These incompatibilities are mainly related to officers being involved, directly or indirectly, with business or occupations that bring about conflicts of interest of any kind, as shown in Table 4.

<b>Table 4. Board Incompatibilities</b>	
<p><b>AGCOM</b> (Italy)</p>	<p>Board members may not exercise, directly or indirectly, any professional or consultancy activity, may not be directors or employees of public or private companies, or hold public office of any kind, including representation in elective office or political parties, or have direct or indirect interests in companies operating in the sector covered by the authority. Civil servants are relieved of their public duties for the entire term of office.</p> <p>Board members may not be involved, directly or indirectly, in any collaboration or consultancy activity, or be employed by businesses operating in the field for a period of four years following the end of their terms in office.</p> <ul style="list-style-type: none"> <li>• Source: Legge 14 novembre 1995, n. 481 Art. 2.8 and 2.9 (as indicated in Legge 249 del 31 luglio 1997, art. 5).</li> </ul>
<p><b>CSA</b> (France)</p>	<p>Board members must be under 65 years of age at the time of their appointment and may not hold any elective office, be employed or carry on any other professional activity.</p> <p>Board members may not, either directly or indirectly, exercise any function, receive any fees (with the exception of services rendered prior to the effective start of their terms in office) or hold any interest in any audiovisual, film, publishing, press media, advertising or telecommunications company (and this restriction continues to apply for one year after the end of their terms in office).</p> <p>Board members may not be employed by any audiovisual communications company that is subject to an authorisation granted by, or to a legal agreement (<i>conventionnement</i>) entered with, or which may be penalised by, the CSA, for a period of three years following the end of their terms in office.</p> <ul style="list-style-type: none"> <li>• Source: Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication modifiée et complétée, art. 4 and 5.</li> </ul>
<p><b>CvdM</b> (Netherlands)</p>	<p>Independent administrative bodies are incompatible with membership of the Commission. Thus, board members may not hold:</p> <p>(i) Membership of the House of Parliament, a provincial administration or a municipality.</p> <p>(ii) A job with a ministry, a department, institution or company falling under the responsibility of a minister.</p> <p>(iii) Membership of a body of or a job with the public broadcaster, a public media institution, a commercial institution or a media publisher of a newspaper.</p> <ul style="list-style-type: none"> <li>• Source: Mediawet 2008, 29 December, art. 7.</li> </ul>



<p><b>FCC</b> (U.S.)</p>	<p>No member of the Commission or person employed by the Commission shall:</p> <p>(i) Be financially interested in any company or other entity engaged in the manufacture or sale of telecommunications equipment which is subject to regulation by the Commission.</p> <p>(ii) Be financially interested in any company or other entity engaged in the business of communication by wire or radio or in the use of the electromagnetic spectrum.</p> <p>(iii) Be financially interested in any company or other entity which controls any company or other entity specified in clause (i) or clause (ii), or which derives a significant portion of its total income from ownership of stocks, bonds or other securities of any such company or other entity.</p> <p>(iv) Be employed by, hold any official relation to, or own any stocks, bonds, or other securities of, any person significantly regulated by the Commission under this chapter; except that the prohibitions established in this subparagraph shall apply only to financial interests in any company or other entity that has a significant interest in communications, manufacturing or sales activities that are subject to regulation by the Commission.</p> <p>Members of the Commission shall not engage in any other business, vocation, profession or employment while serving as such members.</p> <ul style="list-style-type: none"> <li>• Source: Code of Federal Regulations, Title 47.</li> </ul>
<p><b>KEK</b> (Germany)</p>	<p>Board members may not be members or employees of institutions of the European Union or the Federal and State constitutional bodies, or members of the governing bodies or employees of the State Broadcasting Corporations of ARD, ZDF, "Deutschlandradio", the European cultural television channel ARTE, the State Media Authorities or commercial broadcasters, or employees of companies having a direct or indirect interest in them.</p> <ul style="list-style-type: none"> <li>• Source: Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag), August 31, 1991, amended by Neunter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge – Neunter Rundfunkänderungsstaatsvertrag, October 10, 2006, art. 35.</li> </ul>
<p><b>Ofcom</b> (UK)</p>	<p>Non-executive officers must comply with a policy on conflicts of interest (<a href="http://www.ofcom.org.uk/about/policies-and-guidelines/policy-on-conflicts-of-interest/">http://www.ofcom.org.uk/about/policies-and-guidelines/policy-on-conflicts-of-interest/</a>).</p> <p>Mainly:</p> <p>(i) They should have no interests in companies a significant part of whose activities are</p>

	<p>those of an Ofcom-regulated company (excluding companies who require solely a Wireless Telegraphy Act Licence). Where the Ofcom-regulated activity forms only a small part of the overall group's activity, an interest may be held, provided the non-executive member gains approval and the interest is made transparent to external stakeholders.</p> <p>(ii) They may have significant interests in other non-regulated companies in the communications sector provided they gain approval and there is full transparency about any such interests.</p> <p>(iii) All employees at Ofcom (including specifically executive board members) and other part-time members of Ofcom (for example members of the Content Board) are also subject to policies on conflicts of interest.</p> <ul style="list-style-type: none"> <li>• Source: Policy on Conflicts of Interest (<a href="http://www.ofcom.org.uk/about/policies-and-guidelines/policy-on-conflicts-of-interest/">http://www.ofcom.org.uk/about/policies-and-guidelines/policy-on-conflicts-of-interest/</a>)</li> </ul>
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However, the above rules do not prevent the board members of some of these authorities from holding positions on external private boards – as was the case of some Ofcom and CvdM officers, for instance, at the time the research was undertaken. Similarly, not all boards prohibit members from working for industry-related bodies or companies, or from acquiring interests in them immediately after ending their terms in office<sup>3</sup>.

In all cases, boards operate on the principle of collective responsibility. Thus, their members are under the obligation to refrain from making any public comments on minority views held within the boards. It is for this reason that we have not provided the names of our interviewees in the authorities, since the majority of them, five out of six, stated that they were answering by giving the respective authority's general view and/or on the behalf of the authority. The exception to this was the interviewee who pointed out that his/her answers had to be considered mainly as personal opinions. However, besides this latter case, personal opinions were recurrently provided alongside the authority's general view. Sometimes these opinions were clearly identified as such, but not always. In at least one case, an officer gave us answers that were in open opposition to the statements that we were subsequently able to gather from other officers of the same authority.

<sup>3</sup> In fact, one of the main problems that appears when studying the efficacy of the FCC, for example, is the "revolving doors" phenomenon (Napoli, 2001; Segovia, 2009).

## 4. Results

This section sets out a comparative analysis of the responses to the questions posed.

### 4.1. Context

A set of introductory questions was put to the interviewees in order to contextualise external pluralism protection policies in each country and to assess the relevance of these policies within each national legal framework. Given the generic nature of the responses, it should be noted that reference is also made to internal pluralism.

#### ***Question: How is media pluralism measured/evaluated?***

When assessing the protection of pluralism, both internal and external pluralism are taken into account in all studied countries. Therefore media pluralism is assessed in terms of both political pluralism (internal pluralism) and market concentration (external pluralism). However, the authorities' competences and focus differ in terms of internal and external pluralism. This has a direct impact on which mechanisms of evaluation are considered as the most relevant. Despite that fact, it can be stated that, with the exception of France and Italy, market concentration is the prevailing issue concerning the assessment of media pluralism.

In Germany, public service broadcasters are in charge of internal pluralism, which should be guaranteed in their broadcasts. The assessment of this duty is not controlled by the KEK but by a social council integrated within the structure of each public broadcaster. Thus, the KEK only evaluates external pluralism. In order to do that, ownership and number of licences are no longer considered significant criteria in Germany. According to the German Federal Constitution and the Interstate Broadcasting Agreement, media influence on the creation of public opinion is seen as the main issue to be taken into account when assessing market concentration and pluralism. In this respect, audience share is the main criterion used by the KEK to measure that influence and, hence, to evaluate market concentration.

In the United Kingdom, the Netherlands and the U.S., authorities are in charge of internal pluralism monitoring by law, but the interviewees did not point it out as a major issue. In all three cases, the interviewees showed much more concern for external pluralism measures. In the U.S., although an equal time provision is in force to ensure equal access opportunities to political candidates during election time (*Equal Time Provision*), the interviewee stressed that the FCC is very careful not to violate the First Amendment. In the United Kingdom, cross and mono-media restrictions are covered by legislation, with limits on ownership, licences, market share and audience reach, although many are subject to review. In the Netherlands, audience share is the main criterion used for assessing concentration in the television and radio markets. On the press sector, press circulation is used to determine audience share. Since 2007, it

has also been used when evaluating media merging processes, albeit on an experimental basis, and is subject to review in near future. The FCC interviewee did not use the term *pluralism* but *diversity*. Diversity relates to the number of existing voices and the rationale would be that more owners guarantee greater diversity of voices (taking into account the particularities of the U.S. media system and its fragmentation and competition in local markets or Designated Market Area-DMA). However, once again, these cross-ownership restrictions on how many outlets the same company can own in the same geographical market are subject to review<sup>4</sup>.

The French CSA and the Italian AGCOM do have important regulation and monitoring functions in both internal and external pluralism, with major duties and responsibilities in political pluralism protection. Accordingly, French and Italian interviewees showed much more concern about internal pluralism than the interviewees from the other four countries under scrutiny. Internal pluralism is extensively regulated by the CSA by means of the Political Pluralism Principle,<sup>5</sup> while external pluralism is measured according to the provisions set out by law: restrictions on ownership, number of licences, potential population reach and audience concentration. Likewise, internal pluralism is extensively regulated by law in Italy (to guarantee *par condicio* or equal air time to political actors in programmes encompassing political opinions, news programmes are excluded) while external pluralism is mainly evaluated in terms of market share<sup>6</sup> and frequencies share.

***Question: What kind of relationships between the protection of pluralism and the existence of a regulatory authority (considering its organisation and powers) can be established?***

All interviewees consistently agreed that there is a strong relationship between the protection of pluralism and the existence of their regulatory authority.

In Germany, the KEK, as its name implies (Commission on Concentration in the Media), was specifically created to control media pluralism, mainly regarding media concentration and its impact on public opinion. Likewise, the French interviewee emphasised that the CSA's *raison d'être* is to protect and ensure pluralism. Internal pluralism is not only monitored but also regulated by the CSA. External pluralism is protected by the CSA through licensing; in this respect, the interviewee stressed that only broadcasters complying with what is set out by law can obtain and keep a licence.

Similarly, monitoring internal and external pluralism figures are amongst the main duties of AGCOM. Although the Italian authority holds fewer competencies than other authorities, the officials interviewed

<sup>4</sup> The Federal Communications Commission (FCC) released the 25th May 2010 a Notice of Inquiry (NOI) as part of the 2010 quadrennial review of its media ownership rules.

<sup>5</sup> The Political Pluralism Principle is a mechanism to distribute media coverage time between political actors.

<sup>6</sup> However, the calculation of market share in Italy is based on the controversial SIC (Integrated Communication System). Current legislation (Law No 112/2004 or Legge Gasparri) defined the SIC to include written press, online newspapers and magazines, radio, television, film, advertising and sponsorships. The definition of the SIC was meant to relax the concentration rules that placed limits on advertising revenues.

stressed the relevance of the authority's roles (AGCOM can fine broadcasters that do not comply with legal provisions for pluralism and the authority sets criteria for licensing, among other tasks).

In the Netherlands, the interviewee pointed out the key responsibility held by the CvdM in media merging processes. Since 2007, the CvdM is in charge of gathering data, checking it and empirically validating the output audience ratio produced by merging processes. The Dutch Competition Authority is the body in charge of approving or rejecting corporate mergers, but the CvdM has a key consultancy role in these processes, according to the interviewee.

In the United Kingdom, the review of media ownership and public service broadcasting rules is at the core of the Ofcom mission as stated in the Communications Act of 2003. In the U.S., the FCC member stated that the authority "is the main guarantee of pluralism protection in the United States".

#### ***4.2. Assessment of legislation on pluralism***

The aim of the next set of questions was to gather information about the main problems that the authorities – as the principal organisations concerned with pluralism – had identified regarding the regulation of pluralism in their respective countries. Again, pluralism in general was considered in order to contextualise external pluralism in their concerns and debate. However, with very few exceptions, the interviewees referred almost exclusively to external pluralism when answering, in spite of the general focus of the questions posed.

##### ***Question: Have any shortcomings in the regulation of pluralism been detected?***

A large majority of the interviewees considered that the current legislation in their own country was good enough and provided the necessary means to guarantee a satisfactory level of pluralism. However, those statements contrasted with their later opinions, which clearly show that there are, of course, issues concerning the content of regulation that could be improved. Therefore, it can be asserted that there is a certain level of self-satisfaction among the authorities. Moreover, most of the people interviewed shared the following opinion: the political relevance of an issue like pluralism, together with the impact of the measures applied to the market in order to protect it, make it very difficult to reach political agreements. For that reason, in general, according to the officials of the regulatory authorities analysed, significant changes to the current regulatory framework are not expected in the near future.<sup>7</sup>

##### ***Questions: What problems cannot be solved by regulation? What are the main conflicts in this field?***

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<sup>7</sup> However, in the United Kingdom, some changes took place in summer 2010 after the interviews had been held. Under the Digital Economy Act (passed on 8 April 2010 and effective from June 2010), Ofcom is able to modify (and relax) limitations on concentration in the local commercial radio market. As a result of pressures from market players and the new conservative-liberal government, new concentration rules are expected to be approved. In the case of the U.S., a regulation review process is under way as well. However, whether it will result in any changes remains to be seen. FCC officials did not give any indication in this regard.

It was also detected that most of the regulatory authorities were more concerned about their competences and procedural issues than about the quality of the legislation that they were supposed to apply or control. Evidence supporting this idea is the fact that, despite recognising the need for improvements in the quality and the detail of legislation, most of the interviewees tended to focus their answers to this question on problems regarding their daily performance and their possible solutions.

In some cases (Germany and France), the interviewees recognised (not openly), that legislation could be improved in certain aspects connected with the regulatory authority's capacity to intervene. However, since changes are not likely to happen, they try to make the best of their resources and competences. The attitude is more positive in Germany, where the interviewees saw themselves as a part of the solution to the existing problems by carrying out their duties properly. In France, excessively complex regulation was seen as the main obstacle for the CSA to ensure a high degree of effectiveness in its interventions. In other cases (Italy and France), the officials of the regulatory authorities suggested that there was room for significant improvement in regulation addressing pluralism. However, as in the previous cases, real changes are not expected and the interviewees complained about procedural obstacles. In that regard, while in the U.S., the FCC sees its intervention externally conditioned by judgements made by courts, in Italy, AGCOM's board seems to face internal coordination problems that hinder its effectiveness.

Concerning conflicts, in France it is perceived that the Internet is a source of new situations that are not covered by legislation. This development leads to new problems that cannot be tackled by the CSA. In this regard, more regulation is demanded. However, that request clashes with a previously mentioned problem: the excessive complexity of legislation. The Internet is currently being studied by the AGCOM officials, especially in the fields of Internet neutrality, copyright and protection of minors. In the case of the United Kingdom, similar to the German approach, the Ofcom official interviewed pointed out that the implementation of regulation should consider the particularities of each case. Otherwise, the measures aiming to protect pluralism can threaten public interest. This was the case in the application of certain disinvestment obligations (Emap/SHR, 2005), which resulted in the disuse of several radio frequencies. In the U.S., the FCC points out decency as a main issue that is not effectively addressed by regulation. As a result, it has become a major problem and source of legal conflict. On many occasions, complaints by individuals or lobbies are brought to the FCC and result in significant fines for the broadcasters, which are now being challenged in court. Besides that, similarly to AGCOM, the FCC has identified net neutrality as a new source of conflict.

***Question: Is there any debate about the need for or the effectiveness of legislation on the protection of pluralism?***

The general perception in all of the cases is that the effectiveness of regulation aiming to protect pluralism is not a current topic of debate, unlike in the past, when the regulatory framework was designed and passed. Nowadays, the complexity of that process has reinforced the assumption that it is not worth investing huge amounts of effort in constantly questioning the current system, or trying to achieve a perfect protection system, which may not exist or may be subject to changes in the near future. Therefore, most of the interviewees declared that there is not a high level political debate. However, from time to time, certain cases are discussed in public due to their social or economic relevance. The debate normally remains highly technical and professional, and therefore has a limited impact in the public arena and only makes news for a limited period of time. This was the case recently in France, for instance, where internal pluralism regulation was a hot topic until June 2009, when the CSA modified the rules to ensure political pluralism.

When a debate arises, the level of conflict depends on the political system of each country. In Germany and the United Kingdom, the debate tends to be highly administrative. In Italy, there seems not to be a real debate and modifications in legislation are a result of changes in the political system, especially if the elections result in a change of government. Moreover, strong connections between the government and the media groups due to political parallelism are a source of conflict as well as a driver for changes. In the U.S., the contrary positions of Republicans and Democrats tend to be reflected in the FCC with every change of government, so any possible debate would seem to be unproductive. However, the FCC Commissioners appointed by the Democrat Party and some media reform movements have denounced that the concentration of the media system has increased due to the low level of strictness of current regulation.

***Question: To what extent has media pluralism improved with current legislation?***

Despite recognising the need for certain changes and the lack of an effective debate about it, most of the interviewees held the opinion that pluralism had improved as a result of the implementation of the current regulatory framework and the intervention of the institution they work for. In addition to this general assumption, it is interesting to note the perspectives of different countries on this issue. In Germany, the official interviewed at the KEK pointed out that the results of audience surveys showed a strong diversity of television audience shares. According to them, this should be understood as a proper situation of pluralism, since the impact of the media groups on public opinion is effectively distributed. In the case of the United Kingdom, the Ofcom official recognised that pluralism had been reduced at local level, where ownership concentration has increased as a result of evolution of the market. In this respect, the interviewee pointed out that, in the United Kingdom, the objective of legislation was to protect pluralism "rather than to positively ensure it". For that reason, since technology provided a wider range of opportunities to access diverse sources of information, the tendency towards concentration in certain markets, as mentioned above,

is not seen as a potential threat to pluralism. In the Netherlands, despite declaring that the current regulatory framework is satisfactory, there seems to be pluralist stagnation and no improvements have been detected in the last five years. According to the interviewee, this is due to the fact that levels of pluralism have always been very high in that country, so further developments are not expected. In Italy, the AGCOM officials stressed their belief in the fact that pluralism was not a result of the implementation of the current legislation but a consequence of the evolution of the market. In this respect, the digitalisation process, together with the reassignment of the resulting digital dividend, are identified as the most significant contributing factors to the improvement of pluralism and diversity in Italy. Their effects can be observed not only on audience shares, but also on the distribution of advertising investment. The interviewees also stressed the continuing significant imbalance between local and national media.

#### ***4.3. Audience concentration as a mechanism for regulating pluralism***

The following set of questions focused on the audience criterion in order to establish whether or not it is used in the countries studied. In recent years, audience concentration has been one of the most commonly applied regulatory mechanisms in a variety of countries. We wanted to know whether it had been applied as an added criterion or as the main or sole criterion, and to what extent. Our main aim here was to gather enough comparative data to be able to build a reliable general audience index to help decision makers apply and use this criterion.

Prior to the interviews, we identified the main audience criterion measures applied up to now, and then we checked them with the interviewees. These main measures are: audience share (percentage of audience watching a particular programme at a given time); audience reach (percentage of population watching a particular programme at a given time); potential audience (percentage of population able to watch a particular programme at a given time). When measured over a period of time, audience reach is called cumulative audience, and potential audience is called cumulative potential audience.

#### ***Questions: Has audience concentration been considered a potential threat to pluralism? Is an audience indicator used as a criterion to assess and protect pluralism? How is it measured?***

In general, all the interviewees agreed that audience concentration was considered a potential threat to pluralism. However, in spite of those statements, audience is not used as a criterion to assess and protect pluralism in the same way everywhere. There are some significant differences between countries and, in one case at least (Italy), the audience criterion is not used in any of its forms.

Audience share is clearly considered as the main variable to measure a possible threat to pluralism only in Germany. In this case, if the television audience share of a broadcaster (reached by one channel or by a



group of channels under its editorial responsibility<sup>8</sup>) is higher than 30% on an annual basis, then that broadcaster (or the media company owning several broadcasters whose channels' combined share exceeds that percentage<sup>9</sup>), is considered to have an excessive influence on public opinion. In that case, the KEK will urge the operator to apply measures in order to counteract its dominant position: selling/disinvesting in of some of its channels, disinvesting in other relevant media markets<sup>10</sup> or creating programming windows for third parties. Similarly, if a company, by means of all its television assets, exceeds an annual audience share of 25%, then the KEK analyses the position of that company in other media relevant markets. It assesses whether participation in those markets is equivalent to or higher than 30% of the annual television audience share, which would result in the need to implement some of the aforementioned measures. At this point, it is important to mention that, according to the KEK officials, a mathematical formula is not used for converting the presence in other markets into television audience share. Rather, the evaluation is qualitative. Moreover, it is important to note that broadcasters have the opportunity to obtain audience share reductions if they apply initiatives such as having regional (-2%) or third party (-3%) programming windows. Besides the 30%/25% limits, the KEK also intervenes when a news focused broadcaster exceeds a 10% annual share or when a non-news oriented broadcaster exceeds an annual share of 20%. In those cases, the KEK would generally request that third party programming windows be implemented.

The Netherlands has traditionally considered the audience criterion as the main way to measure pluralism in the press market (based on circulation). Since 2007, the Dutch authorities apply an audience share criterion in the whole media sector too, albeit in a restrictive manner. In cross-media markets there is restriction on overall audience shares (press, radio and television). Radio and television markets alone have no restrictions. According to the interviewee, this is due to the fact that the Dutch public broadcaster is very strong and counteracts the commercial share in terms of internal pluralism. In all cases, the restrictions are only applied when a corporate merger is undertaken. Independent audience increases are not punished.

In France, audience criterion is used to assess pluralism but, according to the CSA interviewee, it is only applied in combination with other criteria (restrictions on ownership and on licences, and population reach). In fact, the interviewee stated that restrictions on ownership and licences are the two most important mechanisms to protect pluralism within the French regulatory framework, while restrictions on population and audience criteria are considered only as complementary instruments (to help overcome the limits and problems of the former criteria). Here, both potential audience and audience share are considered.

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<sup>8</sup> Only channels in German.

<sup>9</sup> The KEK considers that a company owns / controls a broadcaster when it has a 25% shareholding or vote.

<sup>10</sup> The relevant media markets considered by the KEK in this case are: television advertising, audiovisual rights (sport and fiction), radio, news production, online media, television magazines, magazines, press, technical and administrative service for digital television and telemedia.

The remaining three countries (Italy, the United Kingdom and the U.S.) apply audience criteria in their assessment of pluralism restrictively and, in the case of Italy, not at all.

In Italy, a restriction on newspaper circulation is applied when reader concentration is considered to be a potential threat. Nevertheless, market concentration in the remaining media sectors is not measured in terms of audience at all. The reason for this, according to the interviewee, is the lack of confidence in audience measurement techniques, which are actually conducted by the measured actor itself: the media and communications industry.

In the United Kingdom, audience is applied as a criterion to protect pluralism only in local radio and local cross-media ownership. By law, the audience criterion refers to potential audience. It is also described as the population coverage of a local licence based upon geographical coverage. However, even in those cases, it is only applied indirectly and in the event of overlapping radio licences. Furthermore, Ofcom recently proposed a relaxation of provisions on a local level and these changes are currently under way.

In the U.S., competition in local markets (DMA) and, therefore, cross-ownership restrictions are the main concerns of the FCC. In fact, the FCC interviewee was very reluctant to use the term *audiences* as something linked to any kind of restriction. Establishing audience thresholds would go against market rules and would mean "punishing success", according to the interviewee. Nevertheless, the audience criterion is used in the U.S. in order to restrict market concentration in some specific cases. When confronted with this fact, the interviewee mentioned that the audience criterion is measured on the basis of potential audience (in 2004, Congress set the national television ownership cap at 39% and excluded the national cap from the quadrennial review requirement), and insisted on the rationale of the "number of voices".

#### ***4.4. Assessment of regulatory authority powers***

Finally, interviewees were asked about the problems the authorities encounter in the context of pluralism protection.

***Questions: What specific problems do regulatory authorities encounter when setting limits or restrictions to protect pluralism? Have any changes in procedure been proposed or are any expected?***

A common issue mentioned by several regulatory authorities (Germany, United Kingdom and Italy) is the fact that they do not always have competences to establish the limits or restrictions that they are supposed to apply. They are defined by legislation or even in the licences granted to the broadcasters. This implies a certain lack of autonomy for the authority, which cannot modify those limits or restrictions according to its

perception of the evolution of the market.<sup>11</sup> Moreover, the changes tend to need a significant amount of time due to parliamentary processes. As a result, regulation is not proactive but reactive, which tends to be less effective.

In addition, some authorities (in Germany and in the U.S.) also pointed out that their decisions could be rejected, vetoed or annulled by other administrations of higher rank or even by courts. This fact is seen as a major obstacle that does not facilitate the effectiveness of their intervention. In the case of France, the excessive complexity of regulation and the multiplicity of the limitations were stressed again and identified as major problems. According to the CSA officials, as a result of that complexity, the market players tend to avoid offering content to which pluralism protection mechanisms or quotas should be applied. It can be said that the final outcome is that regulation aiming to protect pluralism causes the opposite effect and hinders it. Moreover, similar to the opinion of the German KEK, the CSA requests more intervention powers and the capacity to apply sanctions. The French regulator considers that, otherwise, its authority as a public institution, together with the effectiveness of its performance, diminishes. In the Netherlands, the regulatory authority emphasises the detail and precision of national regulation, which results in the absence of any significant problems. However, the CvdM identified an external but significant problem: many television channels from countries where pluralism protection criteria are less developed, less effective or even nonexistent can be received in the Netherlands. This fact creates a situation of conflict (especially with Luxembourg), since the implementation of national regulation to the television offering is uneven.

With regard to their expectations about changes, most of the interviewees were sceptical. In Germany and the United Kingdom, both the KEK and Ofcom confirmed that they included their complaints and requests in their annual reports. In the Netherlands and the U.S., periodical assessment procedures are carried out. However, improvements are not always expected. In the German case, the balance of power among several authorities and administrations seems to be the main cause of stagnation. In France, the interests of the political parties were identified as an obstacle for improving the performance of the CSA, but no clear examples were given either. In Italy, the AGCOM officials stated that they had enough competences and power and they could do a lot more than was actually done. There was no clarification of the reason why it seemed that AGCOM is not doing enough.

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<sup>11</sup> As previously mentioned (see footnote 7), in the case of the United Kingdom, the recently passed 2010 Digital Economy Act will provide Ofcom with more competences for the definition of limitations.

## 5. Conclusions and Discussion

The main aim of the research presented in this paper was to identify the regulatory bodies' assessment and perception of media policies, particularly those referring to the protection of pluralism and to the audience criterion. Thus, from all the information and data gathered, we are able to conclude the following as far as broadcasting is concerned:

### 5.1. Legal framework: pluralism definition, protection and criteria

For the protection of pluralism, the legal frameworks of the six countries studied take account of both internal and external pluralism. Similarly, the regulatory authorities' competences include both types of pluralism in all but one of the cases. The exception is Germany, where KEK only evaluates external pluralism. In contrast, the focus of the French and Italian authorities is mainly on the control of internal pluralism, although they do have competences for external pluralism as well (See Table 5).

<b>Table 5. Legal Framework: General overview in 2010</b>						
<b>Legal framework for pluralism protection takes account of...</b>	<b>F</b>	<b>G</b>	<b>I</b>	<b>N</b>	<b>UK</b>	<b>U.S.</b>
Internal pluralism	X	X	X	X	X	X
External pluralism	X	X	X	X	X	X
<b>Regulatory authorities' competences include...</b>	<b>F</b>	<b>G</b>	<b>I</b>	<b>N</b>	<b>UK</b>	<b>U.S.</b>
Internal pluralism	X		X	X	X	X
External pluralism	X	X	X	X	X	X

External pluralism in the six countries studied is mainly protected by restrictions on six issues: ownership, number of licences/frequencies, population reach, audience share or reach, market share and cross-media limitations. Germany and France represent opposite poles; while Germany protects pluralism mainly through the application of a single mechanism (limits to audience share), France does it through a complex mix of tools that includes up to five different criteria (restrictions on ownership, licences, population reach, audience share and cross-media operations) (See Table 6).

<b>Table 6. Legal Framework: External pluralism protection in 2010</b>						
<b>External pluralism is protected by law through limits on...</b>	<b>F</b>	<b>G</b>	<b>I</b>	<b>N</b>	<b>UK</b>	<b>U.S.</b>
Ownership	X				X	X
Licences / Frequencies	X		X		X	X
Population reach	X					
Audience share/reach/potential audience	X	X		X	X	X
Market share			X		X	
Cross media	X				X	X

With the exception of Italy, all countries use the audience criterion as an assessment and policy criterion to protect pluralism: it is the main criterion in Germany; it is used alongside other criteria in France; and it is applied in a restrictive or very restrictive manner in the Netherlands, the United Kingdom and the U.S. (See Table 7).

<b>Table 7. Legal Framework: Audience criterion applied to broadcasting in 2010</b>			
<b>Country</b>	<b>Audience share</b>	<b>Audience reach</b>	<b>Potential audience</b>
<b>France</b>	X (only in combination with other criteria)	None	X (only in combination with other criteria)
<b>Germany</b>	X (alone)	None	None
<b>Italy</b>	None	None	None
<b>Netherlands</b>	X (only to corporate mergers in cross-media ownership)	None	None
<b>UK</b>	None	None	X (only to local radio in cross-media ownership)
<b>U.S.</b>	X (only to specific DMA (*) in combination with other criteria)	None	X (only to national TV)
<p><b>Audience share:</b> percentage of audience watching a particular programme at a given time</p> <p><b>Audience reach:</b> percentage of population watching a particular programme at a given time</p> <p><b>Potential Audience:</b> percentage of population able to watch a particular programme at a given time</p> <p><b>(*) DMA:</b> Designated Market Area.</p>			

However, with the exception of Germany and France, account should be taken of the fact that audience criteria were subject to review in the remaining countries (Netherlands, United Kingdom and U.S.) at the time the research was undertaken.

### **5.2. Assessment of legislation on pluralism by the authorities: satisfaction and inconsistencies**

The majority of the regulatory authorities interviewed felt that legislation on pluralism was satisfactory, in spite of their acknowledgment of stagnation and/or increased levels of concentration in the market. The majority of them considered that pluralism had improved as a result of the implementation of the current regulatory framework (and of the respective authority's role in it), but at the same time they recognised

that many issues could be improved. Though the acknowledged need to make improvements varied depending on the interviewee, the findings revealed a degree of contradiction in their answers.

A reason for this inconsistency could simply be pragmatism. As stated by several interviewees, changes to improve shortcomings in legislation need a high degree of political consensus, something that is hard to achieve. At the same time, authorities are independent bodies, which means that commissioners have to be politically neutral – or, in the most politically polarised countries, to appear neutral at least. Although they are considered regulatory bodies, with the exception of the U.S., the authorities' main role is actually not to legislate, but rather to monitor compliance with the law, to organise the communications sector and to allocate frequencies, among others issues related to the sector's control. Therefore, they find themselves in a rather odd position; they must regulate on the basis of politicians' national regulation, and they must do so from an independent stance. In this sense, the authorities' recurrent criticism of their lack of competences and of procedural issues could be interpreted as a politically correct way of criticising national legislations.

Another relevant inconsistency arises in the assessment of controversies potentially existing on pluralism regulation within the authorities. The majority of the interviewees stated that regulation aiming to protect pluralism was not a current topic of debate; in other words, a high level of political debate on this issue did not exist within authorities. However, when asked about the shortcomings of legislation, several officers pointed to the Internet as the main problem for regulation. If the Internet is a big issue for regulation, why, then, is there no debate on this issue with regard to pluralism protection?

### ***5.3. Assessment of audience concentration as a mechanism for regulating pluralism and discussion: general consensus on audience concentration as a threat to pluralism***

Most of the interviewees agreed that audience concentration is a potential threat to pluralism. However, the use of audience as a criterion to assess pluralism varies to the extent that every country is an individual case. Comparisons are hard to make except on one point; most of the interviewees are working within a framework subject to review.

In any case, political and cultural traditions could be at the root of this radically different way of using audience to measure pluralism in each country. At opposite poles we find, on the one hand, the German authority, which completely relies on a system mostly based on audience share to assess pluralism, and, on the other hand, the Italian authority, which provided a technical reason to completely avoid using the audience criterion. While the German legal framework sees audience concentration as the main criterion for assessing the impact of a media conglomerate on public opinion, the AGCOM interviewee stated that in Italy they did not use audience as a pluralism criterion since audience measurements are unreliable. As

market concentration levels in Italian television broadcasting are so glaringly obvious in the Berlusconi era, this technical justification may be considered a sign of a strongly politicised system. Indeed, the Italian interviewees expressed the difficulty of providing a general assessment on pluralism protection due to the "non-written rule" of parliamentary-party divisions being reflected on AGCOM's board: "We have a very strong debate about whether or not we are a country which is really an example of pluralism. The feeling is that there is the need for a kind of monitoring of this kind of legislation. We try with our secondary legislation to really fill in some gaps that may be existing from the primary legislation. The opinion is that we are still in a situation which something more should be done with respect to what we have". Interviewees were unclear, though, as to what exactly should be done.

The U.S. and the French cases can be interpreted from an opposite political tradition perspective as well. Although U.S. legislation clearly states that a potential audience criterion must be applied to national television markets in order to protect pluralism, the FCC interviewee was very reluctant to consider audience concentration as a relevant criterion in the U.S.; otherwise, it would be seen as "punishing success". The strong, liberal, free-market culture in the U.S. appears to be at the root of this interpretation. In contrast, the French regulatory tradition is one of the most prolific in Western democracies, so much so that it has led to a highly intricate yet impracticable legal framework, a feature that the interviewee openly acknowledged. This tradition is nevertheless justified, for the legislator, by the defence of pluralism and citizens' access to information, which was asserted in the Declaration of 1789. This may well explain why audience concentration has been added to the myriad criteria in the country that is, by far, the most complex of all those studied.

Finally, the very restrictive application of audience criteria in the Netherlands and the United Kingdom must be interpreted also from a cultural point of view. Of all the interviewees, the Dutch commissioner was the most satisfied with his/her country's regulation and level of pluralism. That may explain why there is no perceived urgent need to incorporate extra criteria to assess and protect pluralism. The higher level of pluralism in Dutch society has been a traditional trait of the country's media system. That may be the case for the United Kingdom as well, where the interviewee played down the use of an audience criterion within a political tradition that is also characterised by a high degree of pluralism. However, we wonder whether those pluralist traditions really do represent a true protection of pluralism in today's globalised media systems, or whether they are a dangerous excuse for justifying relaxation in a scenario with potentially fatal consequences.



#### **5.4. Assessment of regulatory authority powers and discussion: dissatisfaction and scepticism**

Regarding their actual powers, dissatisfaction and scepticism prevail among the majority of regulatory authorities interviewed.

There was a general consensus among interviewees on: the fact that they do not always have the necessary competences to set the limits or restrictions that they are supposed to apply (or when they do, that such limits or restrictions are contested after being set); the feeling that there is a certain lack of autonomy; and the need to have more power to intervene and capacity to apply sanctions (including more resources to do so). However, in no case was a clear cause of these problems elucidated. The reason for this may be pragmatism again, as explained earlier. But, again, the authorities' perception is in strong contradiction to the satisfaction showed by the interviewees regarding the authorities' impact on pluralism. The inconsistency is reflected in the fact that both things do not appear to be possible at one and the same time; in other words, having had a key impact on pluralism while being short of competences to have an impact. Actually, the Italian interviewee was the only one that did not fall into this inconsistency; the AGCOM official showed great clarity of mind when stressing his/her belief that pluralism was not a consequence of the authority's implementation of current legislation, but a simple outcome of market evolution (paradoxically, this interviewee belonged to the most politically polarised country, at least in theory).

The above dilemma could be taken as a good summary of the general perception of independent regulatory authorities in Western countries. Indeed, our research could conclude with this simple but not so obvious fact: the regulatory authorities' perception of pluralism is as full of contradictions as the scholars', politicians' and citizens' perception of pluralism and regulatory authorities.

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