Measuring media concentration and diversity: new approaches and instruments in Europe and the US

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Working-class writing, alternative publishing and audience participation

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Since the 1970s, working-class writers' workshops and community publishers have provided an important example of creative expression in social movements and alternative media. Groups fostered direct relations with their audiences and nurtured new reading publics in working-class areas. A broader radical network also proved to be an important source of book buyers and offered external validation. As the wider context changed in the 1980s, some groups moved to more professional forms of marketing, in part to appeal to mainstream audiences as well as 'new' constituencies, for example, black or gay and lesbian writers and readers. These shifts led to a partial divergence from the original vision, although not all groups developed in this way and some workshops chose a path which veered across both of these dimensions. Clear-cut distinctions between alternative/oppositional and mainstream tendencies often broke down as groups utilized all available means to stay afloat.

Keywords: alternative media, audiences, culture, publishing, working class, writing

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Debates on media concentration and the appropriate way to handle it are not coming to an end. This article stresses the dual character of media goods, the underlying ideological ideals, and the attendant institutional setting as sources of value conflict in communications policy making. It discusses this value conflict and gives examples of where it surfaces and how it is confronted. It is particularly evident in cases of media concentration. Newly introduced communications laws and policies within Europe and the US aim to reduce (ownership) regulation, promote competition and cope with the challenges posed by convergence. This quest is coupled in part with protections of media pluralism through custom-developed indices for measuring concentration in media markets and tests for assessing media plurality in merger cases. The article describes and discusses these new methods and instruments as novel but imperfect attempts by policy makers to respond to the various challenges in communications such as value conflict, convergence, the need for empirical proof and claims for non-economic ways of assessing media diversity. It concludes by stressing the need to re-emphasize normative claims as essential guiding elements of communications policy making.

Keywords: communications policy, Europe, measurement, media concentration, value conflict, US

Measuring media concentration and diversity: new approaches and instruments in Europe and the US

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Measuring media concentration has always been a difficult task and results were never satisfactory. The convergence of media, telecommunications and information technologies adds a new dimension to this problem as it results in changing market structures, exacerbating among other things the handling of cross-ownership and market definitions, and in claims for a greater emphasis on empirical evidence. Policy makers worldwide responded to this with new laws, and novel approaches for measuring concentration and diversity. This article discusses these approaches in the light of the value conflicts that lastingly shape communications policy. It describes how these value conflicts derive from the dual character of media goods, from ideological ideals and institutional settings. It discusses some manifestations of this conflict, new challenges that add to it, and its management. In consideration of these conflicts the article finally examines the novel instruments and assesses their usefulness for measuring market power, concentration and diversity in communications.

Value conflicts shape communications policy

Communications policy is a value-laden issue. A multiplicity of values surface in debates on media policy, and conflicts over regulatory objectives are manifold. One potential for conflict with regard to this article's focus on media concentration derives from the distinctive feature that the (mass) media serve multiple, at times conflicting public interests (economic and

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non-economic) and thus fulfill a *dual function*. Media products and services are simultaneously economic and cultural goods, that is, commodities and constitutive elements of public-opinion formation. They convey values and ideas and contribute to fulfilling several public functions (e.g. socialization, orientation, recreation, articulation, education, critique and control). This dual character of media goods is widely acknowledged in politics and scholarly work, and has recently for the first time been explicitly expressed in *international law*, namely in the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which entered into force in March 2007. The Convention acts as a complementary cultural counterbalance to World Trade Organization (WTO) agreements such as the GATS (General Agreement on Trade in Services) and affirms that 'cultural activities, goods and services have both an economic and a cultural nature … and must therefore not be treated as solely having commercial value'.

This dual character results in a *value conflict* in media policy, which is particularly evident whenever media concentration issues arise as a result of the need to align two 'competing' interests: safeguarding competition on the one hand, and ensuring media plurality/diversity/pluralism on the other.

Values are – to quote Thacher and Rein (2004: 460) – 'the ultimate ends of public policy – the goals and obligations that policy aims to promote as desirable in their own right, not just as means to some other objective'. They can also play a role, however, as a means to some other – overarching – end. Overarching public policy goals in communications are the safeguarding of communications freedom, the protection of democratic, cultural, social and economic development and the avoidance of and compensation for market failure (Latzer et al., 2002: 105–6). Media plurality is an end in itself with its own normative justification, and it is also a means to achieve communications freedom, which as an essential element of democracy is again not only an end in itself but also a means of guaranteeing the proper functioning of the public sphere. Democratic, social and cultural ends are pursued predominantly by content- and user-specific objectives, economic goals mostly by objectives related to the promotion of competition and market-power control.

Although communications policy is generally committed to all of these objectives simultaneously, policy makers usually make value choices, even when trying to accommodate both economic and cultural values. The prevalence of the respective values in political and public communications policy discourse has varied over time, with a now widely observable accentuation of economic values. While this is also due to recent *technological changes*, such as the convergence of media with telecommunications, and *political decisions*, such as the liberalization of public service markets (telecommunications, broadcasting), the underlying *ideological struggle* behind this value conflict results from what is occasionally described as tensions between competing schools of liberalism, namely market liberalism and social liberalism (Vick, 2006), and/or between two competing models of the public interest, namely the efficiencyoriented model and the 'democracy' model (Shelanski, 2006), and/or between 'market economics' and 'social value' schools of thought (Entman and Wildman, 1992). These various – sometimes roughly drawn – dichotomies conceptually denote divisions in positions regarding the efficiency of the market and the need for government action in achieving communications policy goals. They also accentuate the differing conceptions regarding media companies as public trustees and as economic institutions like any other, and entail a conflict between economic and non-economic values.

Some manifestations of value conflict

The value conflict is observable in communications policy discourses and in various processes of communications regulation reform, where institutions and the institutional framework within which they operate play an important part in shaping, defining, reinforcing or modifying values and value conflict. Accordingly, it is evident at all levels of communications governance: between and within nation states, within Europe between nation states and the European Community (EC) level, or between various institutions (e.g. between the European Commission and the European Parliament, or between communications regulators and competition authorities).

Media ownership regulation in Europe

In Europe, value conflicts are particularly visible with regard to media policy. This concerns questions of authority between member states and the Community, and tensions between the European Commission and the European Parliament with regard to media ownership regulation. While there is no debate regarding the Community's legitimate responsibility for telecommunications matters, the extent to which it is responsible for media matters is still being debated. The debate centers to a lesser extent on the view that broadcasting is considered a service and is thus subject to the European internal-market doctrine and to competition rules. But it develops mainly in the context of the Community's responsibility for cultural issues and media plurality, and concurrently for a supranational sector-specific concentration control applied to media – a control that also serves non-economic goals. According to the treaties the Community has no legal competence in this area. The cultural competencies as per Article 151 of the EC Treaty are limited, with paragraph 5 explicitly excluding any harmonization of the law and regulations of the member states. Competencies that may influence the media sector are connected to internal-market rules, competition law and the fundamental rights of the EC Treaty (free movement of goods, free movement of persons, services and capital, rights of establishment). They are thus targeted at safeguarding competition and 'economic plurality' (Bär, 2005; Dörr, 2003). Similarly, media plurality is not a Community matter in the context of its merger control. The main objective of the EC Merger Control Regulation (Council Regulation (EC) 139/2004) is the effective control of all mergers with regard to their effects on *the structure of competition* within the European Union. It is concerned with the need to *maintain and develop effective competition* in the common market. The regulation does not cover goals other than effective competition, which is why media mergers subject to it are assessed solely on economic criteria like any other merger, and why media plurality is identified as a national task. The Commission has repeatedly argued that the protection of media pluralism is primarily a task for member states (e.g. European Commission, 2004: 374). Accordingly, the new European electronic communications framework in the Access Directive (2002/19/EC) and the Framework Directive (2002/21/EC) states that competition rules may not be sufficient to ensure cultural diversity and media pluralism (in digital television) and that the framework is without prejudice to measures taken at the national level to promote these goals. Nonetheless, the European Parliament has frequently put media concentration issues on the agenda of the European Commission since the mid 1980s (e.g. Harcourt, 1998), most recently in 2002 with a resolution on media concentration and in 2004 with a resolution on freedom of expression and information (European Parliament, 2002, 2004). The European Commission has repeatedly taken up the issue and framed it from the outset as an *internal-market matter*, criticizing the fact that the varying national legislations on media ownership undermine the development of the internal market and striving for harmonization of national rules. The European Parliament, in contrast, has politicized and stressed plurality issues, the importance of the media in shaping public opinion, and the possibility of violations of freedom of expression and information due to concentration. In early 2007 the European Commission (2007) again raised the issue with a working document on ‘Media Pluralism in the Member States of the European Union’. In this, just as on earlier occasions (e.g. European Commission, 2005), the Commission asserts its commitment to the protection of media pluralism with reference to Article 11 of the Charter of Fundamental Rights – a codification of fundamental rights and freedoms that is not yet legally binding. Originally, its binding status was dependent on the ratification of the European Constitution, which failed, among other things, because of rejection in referendums in France and the Netherlands (Bär, 2005; Feise, 2006; Schwarze, 2003). The project of a European Constitution was eventually halted, and the Charter included in the Treaty of Lisbon, which amends the current European treaties. This was signed in mid December 2007 and is expected to enter into force on 1 January 2009, if ratified by all member states. The repeated reference to this Charter and the fact that the Commission frames the issue in broader terms than ownership inevitably raises the question of whether the Commission is trying to establish grounds for extended competencies. However, Article 51(2) of the Charter seems to curb this as it explicitly excludes the establishment or modification of any powers or tasks as defined by the treaties for the Community or the Union.

From sector-specific regulation to general competition law

The value conflict is also a constituent theme of a striking and fiercely contested policy change: the relaxation or abolition of sector-specific competition regulation in communications in favor of the sole application of general competition law (e.g. Braun and Capito, 2002: 64ff.; Geradin and Kerf, 2003; Prosser, 2005; Shelanski, 2002, 2006, 2007). The justifications for such reform include the new abundance of channels of information due to convergence and digitalization, the need to sustain international competitiveness, the cost of multiple reviews by competition and communications regulators, and the arbitrariness of rules that were designed for a non-converged communications environment. There is evidence of this trend at the institutional and the substantive level, and examples are manifold – although as yet it appears to be a gradual and uneven process. In the US, for example, the 1996 Telecommunications Act brought about an institutional shift for the FCC (Federal Communications Commission) – from having complete control over telecommunications mergers to a position where the presumption prevails that sector-specific expertise is not necessary, being regarded as something that duplicates regulatory efforts or gives rise to inconsistencies (Shelanski, 2002). At the substantive level, changes are observable mostly in the area of market structure regulation, that is, the abolition/relaxation of ownership rules in the media sector. While some states have already implemented such ownership reforms, in others recent changes have been stalled. Changes have taken place most prominently in the UK with the Communications Act 2003 – which among other things eased cross-ownership rules and removed foreign ownership restrictions – and in Italy, where the new Communications Law ('Legge Gasparri' 2004, amended 2005), abolishes cross-ownership restrictions between broadcasting and newspapers from the end of 2010. In Austria, the Private Radio Law of 2001 eliminated the cross-ownership rules in favor of an approach that limits the ownership with regard to the service area and the coverage. Further, the amendment of the Austrian Cartel Act 2005 abolished a sector-specific prohibition regarding the abuse of market power, which was introduced in 1993 and tightened in 2002. This prohibition would theoretically have allowed the divestiture of media companies, a remedy that is not provided for other industries in Austria. In the US, the 1996 Telecommunications Act eliminated, among other things, the numerical station limit (up to then 12), raised the national television audience cap to 35 percent, and eased radio limitations. Efforts to institute further reform have failed in the US and also in Germany, for example. In the US, in *Prometheus Radio Project* v. *FCC* the Third Circuit Court of Appeals remanded the FFC's contentious, far-reaching 2003 deregulatory package on media ownership rules. Pursuant to Section 202(h) of the 1996 Telecommunications Act, in mid 2006 the FCC opened a new review of the media ownership rules, which it concluded in December 2007. It lifted the absolute ban on newspaper/broadcast cross-ownership and now allows a newspaper to own one television or radio station in the 20 largest markets. All other broadcast ownership rules remain in place. In Germany, in the context of the amendment of the Restraints of Competition Act, there has been discussion on lowering the turnover multiplication factor from 20 to 10 and concurrently allowing mergers between publishing companies in the case of market dominance, as long as editorial independence is guaranteed. Decisions on this have thus far been postponed and were not introduced in the 7th amendment to the Restraints of Competition Act 2005. The value issues are at the forefront of discussions surrounding these changes, and a central question is whether 'competition law [can] internalize public service values?' (Prosser, 2005: 24). In the media sector, the particular concern is directly connected to the question of who controls the media and whether competition law will be sufficient to secure a diverse media landscape and a plurality of voices.

From vertical to horizontal communications regulation

The value conflict was further evident in discussions of the shift from vertical to horizontal/integrated regulation in communication within Europe. The debates centered mainly on the question of whether such an institutional integration is indeed necessary and whether it would only be pursued at the expense of non-economic interests and in favor of a market approach. While many favor an integrated regulation, because it removes regulatory inconsistencies and reduces transaction costs (e.g. Frieden, 2003; Latzer, 1997), others warn of the incompatibility of the regulatory traditions in media and telecommunications, and hint at the possibility that public interest objectives such as cultural and societal issues could eventually be neglected, resulting in overall reduced media plurality (e.g. Vick and Doyle, 2004).

Convergence exacerbates this value conflict in communications because it unites sectors with historically diverse regulatory models (print vs. broadcasting vs. telecommunications), in which cultural and economic values prevail to different extents and which are, in part, also treated differently under constitutional law (Krattenmaker and Powe, 1995). In many Western democracies the media is constitutionally protected due to its special role in public opinion formation and in fulfilling democratic functions. This protection is judicially and normatively interpreted as being both a *constitutional constraint* on government regulation of speech (censorship) and a *constitutional obligation* to regulate in the name of guaranteeing media plurality (media concentration control). This corresponds to the negative and positive views of freedom of expression as sustained by market liberals and social liberals (Vick, 2006). The former conceive communications freedom as a liberty that restricts the state from infringing or promoting this right, while the latter associate it with a positive obligation on the state to promote and protect this right in order to limit the power of private media owners. Current policy changes and debates show a shift in emphasis from a positive understanding of communications freedom towards its negative connotation. In cases of media mergers, for example, media owners often claim that their communications rights are being violated by the various ownership restrictions, and refer to communications rights as *individual rights*. Early and reiterated constitutional jurisdiction within Europe and the US, however, has interpreted broadcasting freedom in a positive tradition as a *functional right* ('Funktionsgrundrecht', Stock, 1985), which is granted to corporations as part of their public functions, that is, to serve individuals' and society's opinion formation. Accordingly, the German Constitutional Court coined the term 'serving freedom' in its 3rd Broadcasting Decision (BVerfGE 57, 295), in which it claims that the task and meaning of *broadcasting freedom* is to guarantee free and comprehensive formation of opinion through broadcasting. Similarly, in 1969 the US Supreme Court decided in *Red Lion Broadcasting Co.* v. *FCC* that the First Amendment is relevant to public broadcasting, but that 'It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.' Germany and France put a special positive emphasis on this distinction (Bullinger, 2002; Mailänder, 2000) inasmuch as from this freedom they infer a constitutional obligation to guarantee media pluralism. As such, a media-specific concentration control is no longer a restraint but a constitutive element of freedom of communication (Kübler, 2002: 113).

Managing value conflict

Thacher and Rein (2004) describe three alternative strategies to traditional instrumentalist trade-off approaches based on cost–benefit analysis through which policy makers manage value conflict in public policy. These strategies repudiate the idea that values must be commensurable for a rational policy response to value conflict. They identify the following strategies used in case of value conflict: cycling (temporary segregation), casuistry (casuistic, analogical reasoning) and firewalls (institutional segregation). They exemplify these strategies by examining crime policy, retirement and refugee policy, but there is also a wide range of examples of these strategies in communications policy. Cycling is a temporary segregation strategy where policy makers focus sequentially on values, sometimes subordinating one value and then the other. Vick (2006), for example, traces the origin of divergences in regulatory approaches in broadcasting and the press in the UK to shifts within 20th-century liberal thought and the respective emphasis on cultural or economic values. Similarly, Shelanski (2006) claims that the FCC has pursued the democracy and efficiency models to varying degrees, with an emphasis on the public interest model from the mid 1940s to the 1970s, and a shift in emphasis to the efficiency model in the early 1980s. In cases of casuistry, communications policy makers resort to case law such as merger cases, or reiterate jurisdiction such as that on communications freedom mentioned above. In merger cases concerning pay-TV markets, for example, the European Commission reverted to earlier decision making on market definitions, and repeatedly held that pay-TV and free-TV are two separate relevant markets (e.g. M.468; M993; JV.37). Firewalls, which are ways of institutionally segregating the responsibility for values, are also common in communications policy: various nation states give different institutions responsibility for assessing media mergers, for instance, and divide the task between competition authorities and communications regulators. The former are responsible for economic issues, the latter for public interest other than economic concerns, thus mostly for media plurality and diversity issues (e.g. in Germany, the Federal Cartel Office and the KEK – Commission on the Concentration in the Media). Similarly, the EC Merger Control Regulation contains a provision (Art. 21 (4)) that identifies media plurality as a national task. According to this, a member state may demand that a notified transaction is also referred to the responsible national authorities instead of only to the European authorities, and it may prohibit the merger, but only on media plurality grounds.

Whereas institutional segregation was also common with regard to telecommunications and broadcasting regulations, within Europe this has increasingly withered with the establishment of horizontal regulators such as Ofcom or the institutional integration of media and telecommunications policy within the Information Society and Media Directorate General of the European Commission in 2004.

The justifications for sector-specific concentration control in communications are very much based on normative reasoning theoretically derived from normative assumptions of (Western) democracy that emphasize the importance of diverse ownership to guarantee an equal distribution of communicative power, provide safeguards against the abuse of media power, assure the availability of diverse content, and consequently enable the development of public discourse and a proper functioning of the public sphere (Baker, 2007). This, however, increasingly seems to be failing in communications policy discourse, where there are growing calls for empirical proof to sustain sector-specific ownership regulation. Formulaic measures of media diversity are seen as important steps in the broader review of the need for governmental regulation of media markets (Hill, 2006: 171) and policy makers have called for the identification of specific indicators (beyond ownership) to measure and assess pluralism, which is – technocratically – to be placed in risk-based analytical frameworks (European Commission, 2007).

Newly introduced laws and policies are intended to reduce (ownership) regulation, promote competition and cope with the challenges posed by convergence. This quest is coupled in part with protections of media pluralism through custom-developed indices to measure concentration in media markets and tests to assess media plurality in mergers. The next section identifies and discusses such new methods and instruments with which policy makers in Europe and the US are trying to respond to the various challenges in communications such as convergence, the need for empirical proof, and claims for non-economic ways of assessing media diversity.

In search of new methods and instruments for assessing market power, concentration and diversity

Concurrently with the phasing out of sector-specific rules, new instruments and methods of assessing and judging market power and media diversity in communications, especially in the media sector, are being introduced. These are vested in and fueled by the above-described value conflicts in communications and modeled as an answer to technological change and the perceived limitations of a solely economic approach to media. The most recent are: the Diversity Index in the US (2003), the public interest or plurality test in the UK (2003), the integrated communications market (SIC) in Italy (2004), and a new approach to weighting the influence of various media by the German KEK in the context of its merger decision on ProSiebenSAT.1 Media AG and Axel Springer Media AG (2006). These four approaches are new attempts to tackle some of the most contentious and still unresolved issues regarding the appropriate treatment of media in cases of concentration processes, and with regard to new challenges posed by convergence. The question of how the 'competing' goals of safeguarding competition and securing media plurality can be reconciled, and the generally shared assumption that diversity is a major communications policy goal, underlie all these issues. Among the points of contention are the questions of (1) whether traditional indices for measuring economic concentration can be adequately applied in the communication sector, (2) what actually constitutes the relevant market in an increasingly convergent communication environment, (3) what media diversity is and how it can be quantified, (4) what kind of market structure triggers what kind of output (content) and with what effect on opinion formation, and/or (5) how to weight the combined market power of integrated companies (cross-media ownership) and its effect on the diversity of opinion.

While some of the general problems (e.g. applicability of concentration indices, definition of relevant market) pose difficulties in other sectors as well, the preoccupation with all of these issues reveals a certain analytical helplessness on the part both of policy makers and scholars concerned with media concentration issues.

The various concentration measures usually employed to measure concentration are in general appraised cautiously regarding their actual effectiveness and employability. For the HHI (Herfindahl-Hirschman Index), a concentration measure commonly employed, for instance, by the US Department of Justice since the 1980s, it is argued, that 'the index is a pure number with virtually no real-world content', 'difficult to interpret', and thus 'an empty index' (Shepherd, 1997: 74f.). Regarding concentration ratios that only measure the market share of a certain number of companies (e.g. the top four or top eight), Heinrich (1999: 230) claims: 'of the rest one learns nothing', and bearing in mind the increase in conglomerate mergers, Dugger (1985: 345) argues: 'Concentration ratios miss … conglomerate concentration.' Against this background it is then often held that these traditional indices for measuring concentration also do not adequately account for the peculiarities of the media sector – especially because of the need to also secure media plurality. To quote Noam (2004b): 'The issue is partly … whether the HHI methodology itself accounts sufficiently for media pluralism.' This contention results in claims for *alternative approaches* (e.g. by measuring audience share, or by comparatively assessing differences in media content), and/or for a *stricter handling of media concentration* altogether through a *sector-specific concentration control* (e.g. cross-ownership restrictions, or multiplication factors for turnover to cover mergers that would otherwise not fall under the merger control).

Similarly, the definition of relevant markets – which is the key to any competitive assessment – is a very controversial subject with no conclusive definition. It is argued, for example, that: 'There is no subject in antitrust law more confusing than market definition' (*US Healthcare* v. *Healthsource*, 1993). At least two problems – one well known and the other more recent – add to this challenge. The well-known one is that prices of media products are usually not set at a competitive level, which makes it difficult to apply the standard tests usually employed for market definition. The more recent one is the question of what actually constitutes the relevant market in an increasingly convergent communication environment.

The Diversity Index (US) and the integrated communications market (Italy)

A new approach to assessing viewpoint concentration in local media markets was adopted by the FCC during its third biennial ownership review. This Diversity Index (DI) was introduced to provide 'its media ownership framework with an empirical footing' (FCC, 2003: 46316). The Commission was responding to claims increasingly voiced both by the courts (e.g. *Fox* v. *FCC*, 2002: 1048) and scholars (e.g. Napoli, 1999) that media ownership regulations targeted at non-economic goals such as media diversity need to be justified by empirical proof, and that traditional justifications no longer suffice. Media plurality is a political goal and there is a far-reaching consensus in democracies that it should be maintained so as to guarantee a free and diverse communications landscape. There is, however, neither a consensus on what constitutes plurality (e.g.is it a plurality of owners, a plurality of channels and titles and variations within them, or a diversity in content/ideas), nor on how this goal can adequately be achieved, let alone empirically measured. Heinrich (1994: 93f.) thus even questions the extent to which plurality can be an appropriate goal of media policy. In Austria, the term 'media plurality' was clarified in the amendment to the 2001 Cartel Act, and is defined as a plurality of independent media through which coverage that considers different views is guaranteed. A major problem in measuring media concentration is the lack of measurable knowledge regarding the influence of the economic structure on supply and demand of programs, on output and opinion formation (Kiefer, 1995: 58f.). This lack of appropriate means to capture this relationship adequately led to the widely followed approach of securing media plurality through structural ownership regulation with an emphasis on a plurality of independent media companies. This position has also been held in the USA since the mid 1940s, when the Supreme Court declared in the newspaper case *Associated Press* v. *US* that 'the widest possible dissemination of information from *diverse and antagonistic sources* is essential to the welfare of the public' (emphasis added). This approach was also later and repeatedly upheld in broadcasting cases (e.g. Baker and Kübler, 2004; Cooper, 2004).

The highly controversial DI, which was among the reasons why the US appeals court eventually remanded the new cross-media rules in 2004, is modeled along the lines of the HHI. It is intended as an indicator of viewpoint concentration in local markets and to inform the FCC where it should retain cross-media limits. The procedure to determine the DI is as follows: the FCC determines the weight (market share) of various media within the market and weights the various outlets within the same medium. Then it calculates the DI by first multiplying each owner's share of the total availability of one class of media by its share of the total media market. Then it adds the shares of properties that are commonly owned (e.g. a television station and a newspaper) and squares them. The sum of all the squared weighted ownership shares finally constitutes the DI. Contending that the analysis of media diversity requires a cross-media analysis, the FCC departs from traditional competition analysis of defining relevant markets. For its analysis, it regards various media as viable substitutes for one another for the dissemination of news and viewpoint expression, and consequently groups them into *one media market*. The FCC rests its argument upon the question of what happens when one or more media outlets refuse to transmit a particular viewpoint. Presuming that consumers access various media, it concludes that they would most likely be exposed to this viewpoint by other (independently owned) media, thus warranting the definition of a total media market.

For its analysis, the FCC decides that broadcast television, daily and weekly newspapers, radio and the internet are part of the total relevant media market, while it excludes cable/satellite television and magazines, because it considers their contribution to local viewpoint diversity to be of lesser importance. The need for the definition of a 'total media market' has been expressed frequently lately, especially in view of increasing technological convergence and diversification of media companies. Although the FCC contends that the various media outlets are substitutes for the purpose of usage, it also states that not all media are of equal importance and therefore need to be assigned different weights. It bases the weights (market shares) of the various outlets within the total media market on consumer usage patterns, using data derived from a survey conducted by Nielsen Media Research (2002), namely from responses to the question of what media sources people had used for local news and current affairs in the past seven days. From these results the FCC concludes that people use multiple media sources and hence that different media outlets can be regarded as substitutes in providing viewpoint diversity. The survey yields the following weights: broadcast television 33.8 percent, daily newspapers 20.2 percent, weekly newspapers 8.6 percent, radio 24.9 percent and internet 12.5 percent.

On the issue of how to weight different media outlets within each category, the FCC adopts an 'equal share' approach, that is, all independent outlets for a particular media source are considered equal in size regardless of their actual market share or the audience they reach. The FCC departs from this approach only in the case of the internet, where it uses subscriber shares based on cable or telephone/DSL access to assign the weight, resulting in internet market shares of 2.4 percent (cable) and 10.1 percent (telephone/DSL) respectively. This equal-share approach has been widely criticized (e.g. Baker, 2007; Baker and Kübler, 2004; Cooper, 2003, 2004; Hill, 2006), and seems inconsistent with the FCC's choice of the HHI, which is a concentration measure that particularly emphasizes differences in size by squaring market shares, and with FCC statements regarding the differing importance of media and the need for weighting. The FCC's approach, however, also has supporters. Owen (2003: 692), for example, considers each source of available ideas to be equally important and therefore requiring equal weight, and argues: 'The FCC would commit a serious error if it attributed shares in the marketplace of ideas according to the current revenue or audience shares of individual outlets.' The difficulties and inconsistencies of following such an approach, however, reveal themselves when looking at the various findings that resulted from a ten-city study and DI test cases conducted by the FCC. The results indicate, for example, that a community college TV (Dutchess) in the New York City area has the same weight as *The New York Times*. Besides the problem of equally weighting competitors that often vary considerably in size and have very different market shares, it also considers all media in a local market as competitors and substitutes, when in reality they may not be, because they might be competing in distinct submarkets. Altogether, the FCC case studies indicate that most local media markets in the US are well functioning, healthy and diverse. This assessment appears to be contradicted by a study by Noam (2004a). Among other things, he provides an HHI analysis of eight local media markets (e.g. radio, TV, newspapers, internet, mobile networks) in the US over a 20-year period. This analysis indicates that all local media markets together are still highly concentrated, although they exhibit a decline in concentration, mostly due to the decline in concentration of distribution media such as wire line and cellular telephony.

By providing data for this combined convergent media sector, he hints at an important issue – the question of what actually constitutes the relevant market in an increasingly convergent media environment. Compaine (2000: 213) identifies the media as *a single industry*, and argues: 'With the continued blurring of the boundaries of the old media as all become essentially digital in nature, the product market distinctions have become all but meaningless.'

In fact, as indicated above, there is a general discussion as to whether the convergence of media and telecommunications, together with the concomitant blurring of boundaries, requires a broadened product market definition, even whether all media (be they mass media or point-to-point communications, content or delivery) should be grouped in one product market. The idea of such a total media market comprising press, radio and television has, for example, been advanced in the UK in the 1995 Government's Media Ownership Proposal (Department of National Heritage, 1995) as a future proposal for ownership control, but has not been realized so far. It was introduced in Italy in 2004 with the new communications law 'Legge Gasparri'. The Italian SIC – *sistema integrato delle comunicazioni* (integrated system of communications) – is such an attempt to define the total media market. It includes radio, television, cinema, the press, advertising and the internet, but – contrary to earlier proposals – does not include telecommunications. With this, Italy also departs from commonly pursued market definitions in communications and considers the media market as a whole as one economic sector. The 'Legge Gasparri' was hotly disputed, among other things because of this SIC, which forms the basis for defining market power in media markets. President Ciampi even sent the law back to Parliament for reassessment (Mastroianni, 2007; Spalletta, 2005). According to Article 43 (9, 10), no company is allowed to hold more than 20 percent of the total media market, with a restriction of 10 percent for telecommunications companies with more than 40 percent market share. One main criticism concerns the very broad market definition (e.g. Camilli et al., 2005; Cassese, 2003), which encompasses very heterogeneous products with varying characteristics and economic importance, different degrees of diffusion among the public and influence on opinion formation. Especially for Italy, it is also claimed that in 1994 the Constitutional Court held that there should be pluralism within each individual media sector, thus making it not sufficient for pluralism to exist within the SIC alone (Camilli et al., 2005). Another point of contention is that the introduction of the SIC and new rules resulted in a widening of the market definition to include areas not previously covered by media ownership rules, and a concurrent lowering of the permissible market share from 30 percent to 20 percent (e.g. Camilli et al., 2005; Cassese, 2003; Hibbert, 2004). The estimated market volume is still being debated (Mazzoleni, 2003), but it is argued that companies would be allowed to expand considerably, favoring in particular the Italian duopoly, and specifically Berlusconi's media empire. Cassese (2003) estimates that the widening of the market could entail a possible expansion for Mediaset, Mondadori and Medusa from about 4 billion euro to a sum of 5 billion to 6.4 billion euro.

The KEK's weighting approach (Germany) and the public interest test (UK)

The German Commission on Concentration in the Media (KEK), the regulatory body responsible for ensuring a diversity of opinion in national broadcasting, entered new ground in the course of its review of the proposed merger between ProSiebenSAT.1 Media AG and Axel Springer Media AG by developing a new weighting approach that takes account of possible influences of various media on the diversity of opinion (KEK, 2006). This new attempt, which tries to convert the various market shares of the daily press, radio, online activities, etc. into the equivalent of the audience share in television, was widely disputed and discussed. Besides a general criticism of the manageability and validity of this weighting approach, much of the debate has centered on the interpretation of §26 of the German Broadcasting Treaty (9th amendment, in force since 1 March 2007), on the question of whether the KEK is entitled to depart from the quantitative thresholds contained in it, and further on the premises and limits on the examination and inclusion of related, media-relevant markets in the control of national broadcasting (e.g. Bornemann, 2006a, 2006b; Dörr, 2006; Gounalakis and Zagouras, 2006; Hain, 2006; Holznagel and Krone, 2005; Monopolkommission, 2006; Pfeifer, 2005; Säcker, 2006; TNS infratest, 2006)

Germany has used an audience-share model to determine concentration in national television since 1997. At present, a broadcaster may operate an unlimited number of television programs unless it obtains a dominant opinion-forming power. It is assumed to have reached this if it achieves a 30 percent audience share, or an audience share of 25 percent if it concurrently holds a dominant position in a related, media-relevant market or if an overall assessment of its activities in television and in related media-relevant markets suggests that the influence of such activities is equivalent to that of a company with a 30 percent audience share.

The KEK developed the weighting criteria for assessing the equivalent of television audience share in compliance with the jurisdiction of the German Federal Constitutional Court. The criteria were: (1) the suggestive powers of the media in question (*Suggestivkraft*), (2) the broad effect (*Breitenwirkung*) and (3) the topicality of news (*Aktualität*). The suggestive powers of media are the result of a combination of various communications forms such as text, images (moving/still), and sound. Television combines text, moving images and sound, and thus exhibits greater suggestive powers than newspapers or radio, for instance. The broad effect refers to the range of national coverage and the spatial and temporal availability. Here again, broadcasting has a wider coverage than the internet, magazines or newspapers, however its spatial and temporal availability is limited. As regards the coverage, the internet, newspapers and magazines are weighted to a lesser degree, while they have some advantages over television with regard to their spatial and temporal availability. Finally, the topicality of news refers to daily relevance (*Tagesaktualität*). According to the

KEK's analysis, only television satisfies all three criteria, while the other media lag behind. This lag is measured by an analysis of the media based on the three criteria. Altogether, the KEK equated the proportional influence of the various media as, for example, two-thirds for daily newspapers, one-seventh for TV program guides and a half for online activities, a half for radio as compared to the influence of television. The KEK estimated that after the merger, Axel Springer would have a market share equivalent to a broadcaster's 42 percent audience share (22% of which audience share by the ProSiebenSAT.1 group, 25% related media markets, less a bonus of 5% granted for securing diversity through regional and third-party programs).

As a new approach to the assessment of media diversity, the 2003 UK Communications Act introduces a 'public interest, or plurality test' into section 58 of the 2002 Enterprise Act. According to sections 375ff. of the Communications Act, the regulator, Ofcom, is required to give advice and recommendations on media public interest issues arising from mergers of newspaper, broadcast media companies, or a combination of the two. It can only do so, however, if the Secretary of State for Business, Enterprise and Regulatory Reform issues an investigation notice. Public considerations may include the need for a sufficient plurality of persons controlling the media in the case of broadcasting or cross-media mergers, and the need for accurate presentation of news, free expression of opinion and a sufficient plurality of views expressed in the case of newspaper mergers (DTI, 2004; Ofcom, 2004). Media mergers that may raise concerns can also be scrutinized solely on public interest grounds, if the standard thresholds for competition assessment (turnover and share of supply) are not met (DTI, 2004).

Some critics have anticipated there will be no intervention (Vick and Doyle, 2004), claiming that it is 'unlikely the plurality test will play an important role in media ownership policy' (Doyle and Vick, 2005: 85). This is because the plurality test was established as a compromise with the opponents of the media ownership proposals, and accepted only to secure the Act's passage through the House of Lords. The discretion to invoke it is left to the government rather than the regulator, and from the outset it was stated that it would only consider this test in cases where ownership restrictions had been removed by the Communications Act (Doyle and Vick, 2005; DTI, 2004). The OECD (2005) considers this lack of intervention – albeit with the existence of several high-profile newspaper and media mergers since 2003 – as a sign of ministers' willingness to adopt a deregulatory approach.

In fact, only one intervention notice has been issued since these provisions were adopted. This concerned BSkyB's acquisition of 17.9 percent of the ITV shares in November 2006. In early 2007, the Secretary of State asked Ofcom to investigate the media public interest considerations of this merger, in particular regarding the plurality of persons controlling the media. The Ofcom report (2007: 22) concluded that 'there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for national news and the UK TV audience for national news', and recommended that 'a fuller second stage investigation by the Competition Commission is warranted'. The Secretary of State eventually referred the case to the Competition Commission for a detailed investigation of the effects of the transaction both on competition and on the specified public interest consideration relating to the plurality of persons with control of media enterprises. The Competition Commission concluded this inquiry at the end of 2007. The final decision by the Secretary of State of January 2008 is consistent with the recommendations and conclusions of the Competition Commission. It concludes that the acquisition is not expected to operate against the public interest with regard to media public interest consideration, but is expected to be against the public interest with regard to the competitive effects of the acquisition, as it resulted in a substantial lessening of competition arising from the loss of rivalry between ITV and BSkyB in the all-TV market. Accordingly, the decision on remedies only relates to the issue of competition. The Secretary of State imposed a partial divestment of BSkyB's shares in ITV down to a level below 7.5 percent and various behavioral undertakings, for example, not to dispose of shares to an associated person and not to re-acquire shares. BSkyB appealed to the Competition Appeal Tribunal against the decisions both of the Competition Commission and the Secretary of State. Similarly, Virgin Media, which had attempted to acquire ITV before BSkyB, appealed against the decisions. It argued that both failed to offer adequate remedies to address the problem of a substantial lessening of competition. It also appealed the conclusion that there are no adverse effects on plurality and that no remedies have been imposed in relation to media public interest concerns. A main public hearing had been set for June 2008.

Conclusion

Values and value conflicts play a central role in communications policy making, in particular with regard to media concentration issues where regulation needs to cater to economic and non-economic goals simultaneously. The new instruments for assessing market power and diversity in communications analysed in this article are being introduced at the same time as sector-specific ownership regulation is being abolished or relaxed. They are shaped by this value conflict, an answer to challenges posed by technological change (convergence), and spurred by an emphasis on scientific empirical evidence proving the effectiveness of rules in place at the expense of the normative ideals long considered sufficient to guide ownership regulation in communications. Three of the above instruments (the DI, the plurality test and the KEK's weighting approach) underline the tensions between the intent to deregulate the media and apply a pure competition regime to communications, and the acknowledgment that competition law alone might not suffice and an economic approach not account sufficiently for the peculiarities of the communications sector. The SIC is ostensibly about adjusting to technological change (convergence), but in effect is more of a (political) cover to allow already dominant media to expand even further. The instruments are novel but imperfect responses to the issues surrounding today's communications policy making. They have been appraised cautiously due to their methodological shortcomings and have been criticized outright among other things because of the following: the plurality test applies only to mergers that would have been covered by the rules prior to their removal by the 2003 Communications Act, the DI neglects variations in size of media companies, the KEK's weighting approach arbitrarily assigns the equivalence of audience share in television to other media, and the SIC's market definition is too broad, thus rendering it unlikely that a company will have a dominant position under it.

Scholars of public-policy analysis contend that the existence of values makes positive scientific analysis insufficient and acknowledge that policy making is not rational, scientific problem solving (Walters and Sudweeks, 1996). This is particularly true for communications. The analysis of the new approaches and the problems they tackle shows how defining media concentration and its effects – just like earlier attempts – proves to be resistant to scientific empirical evidence and replicable causal generalization. These new attempts at quantification do not live up to the expectations usually associated with the use of quantitative methods (objectivity, reliability). Further, these instruments and attendant policy changes have partly been developed to cater to interests other than empirical clarification or regulatory ease, for example to implement other guiding norms for media policy. Supporting a shift from sector-specific communications regulation to the sole application of general competition law, for instance, is merely a shift to another normative goal (Just, 2007).

Granting the empiricist epistemological a primacy in media concentration control has always been problematic. Media concentration policy is not a mechanistic endeavor and thus cannot be captured by the positivist presuppositions that inform most empirical attempts. The FCC itself has moved away from its DI in its recently concluded 2006 review, admitting that it 'is an inaccurate tool for measuring diversity' (FCC, 2008: 12). In the future it will 'not employ any single metric, such as the Diversity Index, because … there are too many qualitative and quantitative variables in evaluating different markets and combinations to reduce the task at hand to a precise mathematical formula' (FCC, 2008: 43).

Nonetheless, media policies based on normative ideals are increasingly being challenged by policy reforms, not least because of the lack of sound empirical proof of whether they achieve what they are supposed to. It would be wrong to conclude from this, however, that a media concentration control based on normative premises can no longer be followed. Its underlying theoretical rationale is still valid and based on a 'democratic distributive value/principle' (Baker, 2007) that refers to our understanding of how a democratic deliberative process should work and what the distribution of communicative powers should look like. It is thus 'normative appeal, and not empirical evidence' that 'provides its justification' (Baker, 2007: 8). This conclusion is not intended at the expense of further inquiries into the empirical relationship between structure and diversity, but as a return to the normative principle as primary guiding element of communications policy making. The emphasis should be put on a wide dispersal of independent media ownership as a guarantor of the proper functioning of the public sphere as the ultimate end of communications policy.

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