



## European Citizens' Initiative proposed by the coalition

### European Initiative for Media Pluralism

#### Our Common Action

The following text represents a proposal for a European Citizens' Initiative on the Protection of Pluralism within the Media through the partial harmonisation of national rules on media ownership and transparency, and by setting standards at EU level for the sufficient independence of media supervisory bodies in the Member States.

#### Endorsement of a European Directive on Media Pluralism

- **Object of the Proposition**

We demand amendments to the Audiovisual Media Services Directive (or the adoption of new Directive for Media Pluralism) aiming at a partial harmonisation of national rules on media ownership and transparency, and setting EU standards for the sufficient independence of the media supervisory bodies, also as necessary steps towards the correct functioning of the internal market. Such legislation, in accordance with **Article 11, par. 2, of the Charter of Fundamental Rights of the European Union**, will also promote a more intense protection of fundamental rights and the public interest objectives of maintaining the pluralism and the independence of the media, a democratic, open public discourse, and the free exchange of ideas and information in the European Union.

- **Description of the Objectives of the Proposal**

This proposal aims at introducing harmonised rules in national legislations with regard to the protection of pluralism in the media. Famous recent cases have demonstrated how urgent is the adoption of common standards in this field, since, as made clear by EU Commissioner Neelie Kroes in her speech delivered on 17<sup>th</sup> January 2011 regarding the EU Commission's examination of Hungarian media laws, the legal enforcement powers of the Commission regarding fundamental rights are limited to cases where the Member States act in the sphere of European Law. This new legislation will definitively fill the gap reported

by the Commission, which had already suggested in its draft proposal to the Audiovisual Media Services Directive that Member States should guarantee the independence of the media supervisory bodies. Had this proposal of the Commission become part of the AVMS Directive some years ago, it would have been a clear and enforceable rule that members of the Media Council in Hungary could not have been selected exclusively by the governing super-majority in the national Parliament.

Undoubtedly, the increase in number and capacity of information providers, including new media, cannot be underestimated. Nevertheless, as made clear in various Resolutions of the European Parliament (as well as, in another legal context, Resolutions and Declarations of the Council of Europe), even an increasing number of information outlets can be controlled, either directly or indirectly, by few actors. In several Member States there have been and there still are situations in which an excessive media power has brought/brings about real dominant positions in mass media markets as well as undue interference by political power in the ownership and control of communication operators. Moreover, the pressure that some governments put on the media, especially those of the public TV and radio broadcasting service, as well as on the administrative authorities implementing – and enforcing – the rules on information pluralism, is alarming.

Every citizens' initiative proposal for the adoption of a new legislation shall fall within the sphere of legislative competence of the European Union. The European Union can exercise its competences whenever the proper functioning of the internal market is negatively influenced by the existence and application of different national provisions in any sector which is not expressly excluded from the founding Treaties. Notably, European legislation on media already deals with cultural diversity, as in the case of the AVMSD (Audiovisual Media Services Directive) rules on quotas of European production, so there is no reason to deny competence on media ownership, whose ultimate goal is to guarantee political and cultural diversity. In particular, the sufficient independence of the media supervisory bodies is a precondition not only for freedom of the press and more broadly for freedom of speech as well, but also for the proper functioning of the internal market as arbitrary political interventions cannot be reconciled with reliable market conditions.

In practice, an analysis of national provisions on mass media ownership brings out the fact that there are different parameters to define positions prejudicial to pluralism (number of channels controlled, resources, audience share). Moreover, the various national legislations in Europe adopt very different solutions to tackle positions prejudicial to pluralism, and contain diverging rules concerning incompatibility between political (*lato sensu*) activities and ownership or control of mass media / media controller ("disqualified persons"). Finally, whereas some countries impose obligations to ensure transparency of media ownership as well as financial transparency, other countries still do not have adopted such rules. These differences endanger the functioning of the internal market by hindering the right of establishment (art. 49 TFEU) and the free movement of services (art. 56 TFEU) and at the same time put at risk the freedom of expression and information, as protected by Article 10 of the European Convention on Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union.

If it is common knowledge that, on the basis of the principle of supremacy of EU law, national rules which restrict or hinder the functioning of the internal market should be set aside, it is also true their very existence may be detrimental to the free movement of services or the right of establishment, since operators may find it difficult to establish or to provide services in another Member State where dominant positions are in place. Moreover, according to the case law of the Court of Justice of the European Union, a

Member State may invoke the protection of media pluralism as an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services.

In Court of Justice case law regarding television “**Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariaat voor de Media**”, of July 25, 1991 (Case C-288/89), the Court stated that “A cultural policy understood in that sense may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that Dutch policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order”.

In the Judgment of the Court of Justice “**Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias**”, of December 16, 2008 (Case C-213/07), the Court accepted the argument put forward by the Greek Government, according to which “national measures establishing an incompatibility between the public works sector and that of the media are compatible with EU rules on freedom of establishment since they intend to pursue a legitimate aim which permits restriction to the fundamental economic freedoms guaranteed by the Treaties”. The Court ruled that “a Member State’s desire to prevent the risks of interference of the power of the media in procedures for the award of public contracts is consistent with the public interest objective of maintaining the pluralism and the independence of the media (see, in this respect, Case C-368/95 **Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag** [1997] ECR I-3689, paragraph 18, and Case C-250/06 **United Pan-Europe Communications Belgium and Others** [2007] ECR I-11135, paragraphs 41 and 42)”.

In brief, the complexity created by a patchwork of different national rules and the fact that in each country the media market and/or the public service media are coming under increasing political pressure discourages companies from entering new markets, in particular where subjects holding shares in a media undertaking also play a significant role in the political arena. This justifies the full competence of the Union to take action through an approximation of national laws (arts. 26, 50 and 114 of the Treaty on the Functioning of the European Union). As a general rule, in shaping these new provisions, the Union is required to uphold the highest protection to fundamental rights as guaranteed by the EU legal order, in particular the freedom of information as enshrined in Article 11 of the Charter.

For the above-mentioned reasons, the signatories of this initiative believe that the harmonisation of rules on protection of information pluralism is necessary. These rules could be tailored in a way that takes into account the specific features of mass media compared to information disseminated through the new individual media, on the pattern of the differentiated legislation which has already been adopted in the Audiovisual Media Services Directive (2010/13/EU).

With full respect of the principle of subsidiarity, the proposed amendment of the AVMS Directive (or the new Directive) should adopt an approach of minimal, but sufficient harmonisation of rules and procedures. Following the model of the AVMS Directive, it should include only the common rules necessary to reach the above mentioned goals, without impeding the adoption of more severe rules by national legislators. Thus, the basic principle should be the following: “The Member States shall adopt the measures needed to ensure pluralism and independence of the audiovisual media sector. The Member States shall ban the creation and retention of dominant position on the media market and related markets”. A clear rule shall establish an incompatibility between media sector and political activities (“conflicts of interest” of members of the national and European Parliaments as well as members of the national Governments and of the Commission). Also, clear rules shall require Member States to invest independent authorities with

the necessary powers to apply the rules, and therefore guarantee their independence *vis-à-vis* economic and political influence.

Moreover, as an additional legal basis, it should be stressed that an informed exercise of European Citizenship Rights, especially of the right to participate in the European elections under art. 22 of the Treaty on the Functioning of the European Union, implies and requires the absence of dominant positions in mass media markets, especially if those holding these dominant positions are politically active.

We therefore ask the European Commission, in line with the request put forward by the European Parliament in several occasions (lastly in its Resolution of March 2011 on the Hungarian Media Law) to present a formal proposal of directive with a view to harmonising national legislation on media pluralism and on national regulatory authorities, whose independence from economic as well as political influence should be strongly guaranteed following the model of the Electronic Communications Directives.

- **Legal Basis**

The Treaty regulations considered relevant to the proposed initiative are the following:

**General Framework**

- Article 2 TEU states that the EU “is founded on the values of respect for human dignity... the rule of law and respect for human rights”. It adds that “these values are common to the Member States in a society in which “pluralism prevail[s]”.
- Article 3, n. 3, TEU, provides that “The Union shall establish an internal market”.
- Article 26, n. 1, TFEU, provides that “The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties”.
- Article 167, n. 4, provides that “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures”.
- The Preamble of the Charter of Fundamental Rights of the European Union provides that “The Union (...) recognizes the rights, freedoms and principles set out hereafter”.
- Article 11 of the Charter is dedicated to the Freedom of Expression and Information. It states that “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected”. If it is true that the Charter in itself does not provide for new competencies of the Union, this proposal does not go beyond the limits of the founding Treaties, since it is based on the provisions which confer to the Union the power to ensure the proper functioning and establishment of the internal market.
- Article 51, n. 1, of the Charter states that “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of

subsidiarity (...). They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”.

The legal basis specifically refers to:

- Article 50, n. 1, TFEU states that “In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives”.
- Article 114, par. 1, states that “The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

For further information please visit the website: <http://www.mediainitiative.eu/>