8

Lost in Capture

How and Why the European Union Lost the Battle for Media Freedom in Europe

Marius Dragomir and Zsuzsa Detrekői

8.1 INTRODUCTION

The blueprint for capturing the media is from Hungary. After Fidesz, the political party led by Viktor Orbán, won two-thirds of the seats in the Hungarian parliament back in 2010, his most pressing priority was to address what he criticised as left-wing bias in the media.[1] Within a decade, the Fidesz government had cemented its control over media regulation, public media outlets, and a raft of the country's privately owned media. Orbán's mission was accomplished: not only was the left-wing bias wrung out from the Hungarian media, but independent, critical journalism was also hampered and pushed to the fringes.

Media capture has undermined free media and editorial independence in several European countries during the past decade. European media have been facing a series of threats for a longer time, including concentration of ownership, politicisation of public service media, controlled media regulation, and collusion between political power and businesses. Media capture, however, poses a much larger threat as it involves the systematic takeover of a significant portion of a country's media system by a coalition of interests that includes the ruling political party and affiliated businesses. As such, media capture significantly reduces the space for independent journalism, hurting the financial viability of independent media outlets.

Building on the results of empirical research carried out over the past twenty years, Marius Dragomir's media capture matrix identifies four key elements of media capture: 1) control of national media regulators; 2) government control and political influence in public service media; 3) channelling of public funds to government-friendly, privately owned media (i.e., through state advertising); and 4) control of

[1] Marius Dragomir, 'The state of Hungarian media: Endgame', LSE Media Policy Project, 29 August 2017, available at: https://blogs.lse.ac.uk/medialse/2017/08/29/the-state-of-hungarian-media-endgame/.

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ownership of private media by state-owned companies or businesses directly or indirectly associated with the government or the political party holding power.[2]

Several countries across Europe have faced growing levels of media capture, especially in Central and Eastern Europe. Among them, Hungary is a textbook case of media capture, as the government of the Fidesz party has since 2020 managed to achieve control in all four areas described here. Poland, under the PiS government, followed in Hungary's steps, rolling out a strategy aimed at the 'repolonization'[3] of the media by pushing out foreign owners of media assets and taking them over through businesses connected with the state. Only the 2023 change of government put a halt to these efforts. Tendencies of media capture have been documented in several other countries, including Czechia, Slovakia, and Bulgaria.[4]

Yet the media capture phenomenon is not confined to Central and Eastern European countries. At times, public service media in various EU Member States in Western Europe have come under attack by governments.[5] Although the media systems in these nations are more resilient to capture than their Central and East European counterparts, mostly due to stronger journalistic communities or a longer tradition of independent journalism, the threat of capture looms large.

The literature on media capture has grown in recent years. Most of the work on this topic has thus far focused on defining the phenomenon[6] and studying its manifestation in various countries.[7] In contrast, the assessment of the impact of capture

[2] Marius Dragomir, 'Media capture in Europe', Media Development Investment Fund, 2019, available at: www.mdif.org/wp-content/uploads/2019/07/MDIF-Report-Media-Capture-in-Europe.pdf.

[3] Annabelle Chapman, '"Repolonization": Poland again hints at limiting foreign media ownership', IPI, 5 October 2020, available at: https://ipi.media/repolonization-poland-again-hints-at-limiting-foreign-media-ownership/.

[4] Boryana Dzhambazova, 'Media capture in Bulgaria: Hidden alliances and vested interests', IPI, 2022, available at: https://ipi.media/wp-content/uploads/2022/03/IPI-Bulgaria-Media-Capture-Report-24-03-2022.pdf; Michal Klíma, 'Media capture in the Czech Republic: Lessons learned from the Babiš era and how to rebuild defences against media capture', IPI, 2022, available at: https://ipi.media/wp-content/uploads/2022/03/Media-Capture-in-the-czech-Republic.pdf; Peter Hanák, 'Media capture in Slovakia: A story of fragile pluralism, media resilience and the struggle against corruption', IPI, 2023, available at: https://ipi.media/wp-content/uploads/2023/05/media-capture-in-slovakia-final.pdf.

[5] Helmut Spudich, 'Austria: Serious challenges mounting for public broadcaster ORF", IPI, 29 March 2023, available at: https://ipi.media/austria-serious-challenges-mounting-for-public-broadcaster-orf/; Laura Dubois, 'Brussels warns Giorgia Meloni over press freedom in Italy', *Financial Times*, 24 July 2024, available at: www.ft.com/content/b29fcd19-669f-485e-be81-666273e88ae9.

[6] Andrea Prat, 'Media capture and media power', in Simon P. Anderson, Joel Waldfogel and David Stromberg, *Handbook of Media Economics*, vol. 1 (Amsterdam: Elsevier, 2015), pp. 669–686; Giacomo Corneo, 'Media capture in a democracy: The role of wealth concentration' (2006) 90(1–2) *Journal of Public Economics* 37–58; Marius Dragomir, 'Media capture in Europe'; Alina Mungiu-Pippidi, 'Freedom without impartiality: The vicious circle of media capture', in Peter Gross and Karol Jakubowicz (eds.), *Media Transformations in the Post-Communist World: Eastern Europe's Tortured Path to Change* (Lanham, MD: Lexington, 2012), pp. 33–47; Anya Schiffrin, 'Introduction' (2018) 19(8) *Journalism* 1033–1042; Adam Szeidl and Ferenc Szucs, 'Media capture through favor exchange' (2021) 89 *Econometrica* 281–310.

[7] See Dzhambazova, 'Media capture in Bulgaria'; Klíma, 'Media capture in the Czech Republic'; Hanák, 'Media capture in Slovakia'; Gülçin Balamir Coşkun, 'Media capture strategies in new authoritarian states: The case of Turkey' (2020) 65 *Publizistik* 637–654.

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has received less attention.[8] Similarly, the role of the EU in preventing or combating media capture has been less analysed. This chapter aims to fill the gap in the literature by examining the role and impact of EU legal provisions in fighting capture, namely the EU-level interventions that have addressed the four elements of media capture described here.

The chapter aims to shed light on what the EU could have done differently to more effectively prevent media capture from taking root across various countries in Europe. Media regulation is the responsibility of national governments, with the EU having little room to intervene in national media-related affairs. Yet the EU should have recognised the indispensability of independent media for the functioning of democracy in Europe, especially after the two waves of EU enlargement that allowed several Eastern European nations with poor track records in media freedom to join the Union. The EU acted more forcefully to protect media freedom, using existing tools or designing new ones. Some countries lacking a healthy and independent media sector have experienced significant democratic backsliding in the past decade, which endangers European unity and also harms public accountability, especially around the spending of EU funds. Hence, the analysis in this chapter can also serve as a resource for identifying regulatory measures that could be more effective in staving off media capture in the future.

8.2 THE UNBEARABLE LIGHTNESS OF CRITICISING THE EU

Traditionally, the European Union has only limited power to regulate media. Article 6(1) of the Treaty on European Union (TEU)[9] incorporates the Charter of Fundamental Rights of the European Union (CFREU),[10] which requires that the freedom and pluralism of the media be respected, along with the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority, regardless of frontiers.[11] According to the European Commission, media pluralism covers not only the variety of sources of information and the range of content available, but also the diversity of ownership.[12]

However, the CFREU applies to EU institutions and Member States only if they implement EU law. Article 6(1) of the TEU determines that the endorsement of the

[8] Marius Dragomir, 'The capture effect: How media capture affects journalists, markets and audiences' (2024) 17(36) *Central European Journal of Communication* 162–184.

[9] Consolidated version of the Treaty on European Union, Official Journal of the European Union, OJ 2012 No. C326/15 (hereafter Treaty on European Union).

[10] Charter of Fundamental Rights of the European Union, OJ 2012 No. C326.

[11] Treaty on European Union.

[12] European Commission, 'Commission staff working document: Media pluralism in the Member States of the European Union', SEC(2007) 32, 16 January 2007, available at: https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf.

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Charter shall not extend, in any way, the competences of the Union as enshrined in its treaties. Moreover, a significant part of the media ecology is not covered at all by EU legislation. The detailed regulations accepted by the EU to cover specific areas of the internal market cover only audiovisual media services, but not online and print media, which are essential players in the overall media system.[13] Therefore, the EU does not have sufficient competence to regulate media pluralism and freedom in EU Member States.[14] The onus is on the authorities and courts in each EU country to protect these rights.

Because of the EU's limited competences in relation to media, the European Commission can only criticise legal developments in Member States that are found to be in contradiction with EU law. Therefore, when the Hungarian government adopted a rather controversial new media law and media constitution in 2010,[15] even though the two acts empowered the government to greatly distort the Hungarian media system and the European Parliament had voted for a stricter resolution on the Hungarian case,[16] all that the European Commission could do was to criticise four provisions put forward by those acts that affected the internal market of audiovisual media services. Those issues included the disproportionate application of rules on balanced information, the application of fines to broadcasters legally established and authorised in other Member States, rules on the registration and authorisation of media service providers, and rules against offending individuals, minorities, or majorities.[17]

The limited power of the EU in media-related matters has been exploited by various European governments in their meddling with the media. In 2011, despite requirement from the EU to adopt a series of amendments to the Hungarian Media Law and Media Constitution, the government in Budapest ignored the requests and adopted those two controversial Hungarian laws. But this was not the first time an

[13] Kristina Irion and Peggy Valcke, 'Cultural diversity in the digital age: EU competences, policies and regulations for diverse audiovisual and online content', in Evangelia Psychogiopoulou (ed.), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe* (London: Palgrave Macmillan, 2015), pp 75–90.

[14] Economic and Social Committee, 'Opinion of the Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament follow-up to the consultation process relating to the Green Paper on Pluralism and Media Concentration in the Internal Market – an assessment of the need for Community action', OJ 1995 No. C110.

[15] The legislation we refer to consists of two laws: the 2010 Act 104 on the Freedom of the Press and the Fundamental Rules on Media Content, adopted on 2 November 2010 ('Media Constitution'), which regulates media content and the rights and obligations of the media; and the 2010 Act 185 on Media Services and Mass Media, adopted on 21 December 2010 ('the Media Law), which covers media services and products and sets up a media regulatory institution, the Media Council, as well as administrative procedures for media law enforcement.

[16] European Parliament, 'Joint motion for a resolution on media law in Hungary', 14 February 2011, available at: www.europarl.europa.eu/doceo/document/RC-7-2011-0103_EN.html.

[17] European Commission, 'Media: Commission Vice-President Kroes welcomes amendments to Hungarian media law', 16 February 2011, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_89.

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attempt by the EU to intervene in media-related issues had not generated results.[18] Two years earlier, the European Parliament had aimed to take action against the media empire controlled by the then prime minister of Italy, Silvio Berlusconi. However, the proposals put forth in the European Parliament by various groups of MEPs did not receive enough votes to pass.[19]

Notwithstanding its limited power to regulate media-related matters within EU Member States, the EU does possess the authority to enforce compliance with specific standards and regulations in countries that aspire to accede to the EU. According to the Copenhagen Criteria, the EU can require stability of institutions that ensure democracy, the rule of law, and human rights from countries seeking to join the EU.[20] This is a major opportunity for the EU to push EU aspirants to comply with a set of rules that can positively influence their long-term track record in protecting media freedom.

The limitations faced by the EU in regulating the media have been criticised by media freedom NGOs across Europe. This is especially true in the context of the expansion of the media capture phenomenon, which leads to serious power imbalances in the communications and media ecosystem, ultimately harming the quality and diversity of content and media pluralism.

With media capture spreading across Europe, calls for the recalibration of the EU regulatory framework have intensified in recent years. The crises unleashed by the COVID-19 pandemic and the Russian invasion of Ukraine have deepened the vulnerabilities and structural challenges faced by the media, adding to the pressures that prompted the EU to put forward the European Media Freedom Act (EMFA), a law that was supposed to address threats to media freedom in Europe.[21] The preparation of the EMFA was part of a more extensive lawmaking process that comprises several major regulations that the EU has put in motion in recent years, including the revision of the Audiovisual Media Services Directive (AVMSD),[22] the

[18] Wendy Zeldin, 'Hungary: Controversial new media law defended by government', Library of Congress, 2011, available at: www.loc.gov/item/global-legal-monitor/2011-01-07/hungary-controversial-new-media-law-defended-by-government/.

[19] European Parliament, 'Joint motion for a resolution on freedom of information in Italy and in the European Union', 19 October 2009, available at: www.europarl.europa.eu/doceo/document/RC-7-2009-0090_EN.html; European Parliament, 'Motion for a resolution on freedom of information and media pluralism in Italy and in the European Union', 14 October 2009, available at: www.europarl.europa.eu/doceo/document/B-7-2009-0093_EN.html.

[20] Accession criteria (Copenhagen criteria), available at: https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html; see further Chapter 9 by Krisztina Rozgonyi in this handbook.

[21] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ 2024 No. L1083; see also Francisco Javier Cabrera Blázquez, 'The proposal for a European Media Freedom Act', European Audiovisual Observatory, 2022, available at: https://rm.coe.int/note-emfa/1680a9af14.

[22] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation

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renewal of the copyright directive,[23] and more recently the Digital Services Act[24] and the Digital Markets Act.[25] Of those, the AVMSD (Article 30) is relevant to media capture.

Yet the effectiveness of these new regulations in combating media capture is questionable. Ensuring that national governments will comply with the EMFA's provisions will depend on the mechanisms that are introduced to achieve that.

8.3 EU MEDIA POLICY: THE WEAKEST LINK

This section presents an analysis of what the European institutions have done, are doing, and plan to do in each of the four areas of media capture and assesses the EU's effectiveness in combating media capture.

8.3.1 *Conformity of Independent Media Regulatory Authorities with EU Law*

In many European countries, media regulatory authorities are supposed to act independently, as mandated by national legislation. However, in some European countries that can hardly be the case considering that the process of appointment and dismissal of the decision-making members of the media regulatory authorities in those countries.[26] The exact appointment formulas differ among European countries, but it is often the parliament that appoints the members of the board. This is how political parties can have 'a degree of political influence' to leverage 'their' candidates to the boards of media regulatory authorities.[27] Appointed members are then in a position to decide about licensing media outlets, fine them for breach of local laws, and revoke their licences when they violate legal provisions.

or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ 2018 No. L303/69 (Hereafter AVMSD 2018).

[23] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 No. L130.

[24] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 No. L277.

[25] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ 2022 No. L265.

[26] Kristina Irion and Gijs van Til, 'Introduction' in Maja Cappello (ed.), *The Independence of Media Regulatory Authorities in Europe* (Strasbourg: European Audiovisual Observatory, 2019); Kristina Irion, 'The independence of media regulatory authorities "on the books" and "on the ground"', in Manuel Puppis, Robin Mansell and Hilde van den Bulck, *Handbook of Media and Communication Governance* (Cheltenham: Edward Elgar Publishing, 2024), p. 126.

[27] Maja Cappello (ed.), *The Independence of Media Regulatory Authorities in Europe*, p. 120.

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Based on its competence to harmonise legislation for the internal market, the EU governs the provision of audiovisual media services in the Union with the AVMSD.[28] Before 2018, Article 30 of the Directive only emphasised the importance of competent independent regulatory bodies in the media sphere. Since its revision in 2018, the AVMSD has reinforced the EU's legal requirements for the independence and functioning of national regulatory authorities, which Member States have designated for implementing the AVMSD.

This was achieved through the modification of Article 30, which outlined a series of more tangible requirements than previously. They include the requirement that media regulators are legally distinct from, and functionally independent of, the government or other public and private bodies, and that they do not take instructions from any institution when carrying out their tasks. Article 30 AVMSD also calls on Member States to ensure that regulators have 'adequate financial and human resources', as well as sufficient enforcement powers, to effectively carry out their functions.

Additionally, the Directive addresses the sensitive issue of appointing and dismissing members of the regulators' boards. It does not prescribe who should nominate and appoint the members of the decision-making body, as this is the prerogative of the Member States. Article 30(5) AVMSD provides that

> Member States shall lay down in their national law the conditions and the procedures for the appointment and dismissal of the heads of national regulatory authorities and bodies or the members of the collegiate body fulfilling that function, including the duration of the mandate. The procedures shall be transparent, non-discriminatory and guarantee the requisite degree of independence. The head of a national regulatory authority or body or the members of the collegiate body fulfilling that function within a national regulatory authority or body may be dismissed if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance at national level. A dismissal decision shall be duly justified, subject to prior notification and made available to the public.[29]

When it comes to key aspects of media regulators' work, such as their competences, powers, and mechanisms for accountability, the Directive does not put explicit obligations on Member States to provide guarantees of the independence of the regulators. Article 30(2) AVMSD states that 'Member States shall ensure that national regulatory authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.'[30]

[28] AVMSD 2018.
[29] AVMSD, Art. 30(5).
[30] AVMSD, Art. 30(2).

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It is thus not clear whether this article imposes an obligation on Member States to provide further guarantees in addition to the legislative obligations stipulated in the article.[31] That can create room for governments to be weak in enforcing EU legislation. The EU could play a more proactive role by more strictly monitoring compliance with the AVMSD articles addressing regulators' independence (Article 30 and Article 30a).

In conclusion, the AVMSD has not much changed the way media regulatory authorities are created at national level. In countries with a tradition of independent regulation, mostly in the West, the EU's legal provisions were in many respects redundant. By contrast, in countries with a tradition of politicised institutions and a lack of respect or, worse, a contempt for independent regulation, they were poorly implemented.

That points to the crux of the problem related to Member States' compliance with EU law, especially in countries with a poor track record in media freedom: the tension between formal and substantive guarantees. The 2011 INDIREG report distinguished between formal and *de facto* (often also referred to as 'operational', 'informal', or 'real') independence of media regulators. It defined independence as the situation in which a regulator's 'governance structure ensures that its decision-making processes meet the normative requirements for which the independence of the regulator is necessary'.[32]

Polyák distinguishes between formal and substantive guarantees of independence.[33] He explains that formal guarantees are reflected in the rules governing the organisation and financing of the regulatory body, including the nomination, election, status, and financial situation of the regulator's members. Substantive guarantees, by contrast, are directly reflected in the regulator's decision-making body. In countries experiencing media capture, formal guarantees alone are not sufficient to ensure the independence of media regulators. For example, the formal provisions of Article 30 of the AVMSD directive were integrated into Hungarian law before the directive's amendment in 2018. However, the independence of the Hungarian Media Council, Hungary's media regulator, has remained questionable as council members are appointed by the parliament with a two-thirds majority, and the ruling party, Fidesz, refused to consider any member of the opposition.[34] That happened because Hungarian law lacked substantive guarantees for the regulator's independence, containing only vague provisions without explanation or legally binding interpretation.

[31] Gábor Polyák, 'Monitoring the independence of the media regulatory body as an effective enforcement mechanism for the implementation of the AVMSD' (2022) 15(1) *Journal of Digital Media and Policy* 81–99.

[32] INDIREG, 'Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive', February 2011, 6, available at: https://ec.europa.eu/newsroom/document.cfm?action=display&doc_id=4703.

[33] Polyák, 'Monitoring the independence of the media regulatory body'.

[34] Ibid.

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The European Commission can monitor the activities of the regulatory authority and intervene in cases where it finds that the independence of the regulators is compromised. In fact, the European Commission has the duty to investigate breaches of EU law by Member States. The so-called infringement procedure enables the European Commission to assess and take legal action when a Member State fails to implement EU law correctly.[35] The European Commission can require the Member State to remedy the situation; if those negotiations fail it can refer the matter to the Court of Justice of the European Union (CJEU), which can fine Member States found to have breached EU law after a procedure that includes a ruling by the CJEU and a request for national authorities to remedy the situation to comply with the court judgement.

If the European Commission does nothing in relation to a Member State's competent national authority tasked with the implementation of the AVMSD, then the concerned Member State can assume that its regulatory body is considered 'independent' pursuant to Article 30 of the AVMSD. According to Polyák, by letting a Member State 'get away' with a violation of EU law regarding the independence of its national regulatory authority, the European Commission tacitly 'legitimises the operation of the regulatory body'.[36]

So far, the European Commission has not launched any infringement procedures relating to the independence of national media regulators of EU Member States.[37] In its 2023 Rule of Law Report, the European Commission explicitly expressed again its concern about the independence of the Hungarian Media Council. It emphasised that there has been no progress in strengthening the functional independence of the Hungarian media regulator, as the rules regarding the nomination of members to serve on the Council's decision-making body have resulted in the governing party nominating all the members.[38] In the 2021 Rule of Law Report, the Commission stated that certain decisions made by the Hungarian Media Council raised concerns regarding its effective independence. The European Commission also expressed concerns in the 2021 Rule of Law Report about the functional independence of regulators in countries including Romania, Spain, and Slovenia and the lack of safeguards against political interference in Croatia, Malta, Slovakia, and Hungary.[39]

[35] Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 No. C326/49 (hereafter Treaty on the Functioning of the European Union), Art. 258.

[36] Polyák, 'Monitoring the independence of the media regulatory body'.

[37] The European Commission only launched procedures against members states for late implementation of the latest AVMSD: European Commission, 'Stepping up legal action: Commission urges 19 Member States to implement EU digital and media laws', 23 September 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4612.

[38] European Commission, '2023 Rule of Law Report. The rule of law situation in the European Union', 5 July 2023, available at: https://commission.europa.eu/document/download/d69f242b-bd69-4e15-976f-870470b72b55_en?filename=40_1_52623_coun_chap_hungary_en.pdf.

[39] European Commission, '2021 Rule of Law Report. The rule of law situation in the European Union', 20 July 2021, available at: https://commission.europa.eu/publications/2021-rule-law-report-communication-and-country-chapters_en.

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In summary, despite the incorporation of EU legal provisions designed to safeguard the autonomy of national media regulators into the legal frameworks of various European nations, media regulation remains a contentious and politically charged process in many countries, enabling governments to bolster their influence over the media landscape. While the EU's influence in this area is constrained, increased interventions such as infringement procedures and stricter monitoring could potentially enhance compliance with regulatory standards.

8.3.2 *Control of Public Service Media*

Regulations aiming to ensure the independence of public service media from the government encompass both institutional and financial aspects. In terms of institutional independence, the EU has not introduced any specific, legally binding requests to ensure the institutional independence of public service media, one reason being that, according to the Amsterdam Protocol, the EU has no competence in the organisation of public service media.[40] In 2018, the European Parliament criticised, among other things, practices that amount to 'hijacking the public service media to serve partisan interests',[41] urging EU Member States to adhere to the recommendations regarding public service media issued by the Council of Europe.[42] The 2024 EMFA is the first attempt in EU law to safeguard the independence of public service media providers. In Article 5, the EMFA introduced a series of provisions related to the appointment and dismissal of public service media board members and the funding procedures at these organisations, which aim to protect their independence.[43]

When it comes to financial aspects, the EU acknowledged within the Amsterdam Protocol the importance of public service broadcasting in meeting the democratic, social, and cultural requirements of European societies, as well as protecting media pluralism. The EU recognised the authority of Member States to allocate funds to their public service media, on the condition that such financing does not distort trading conditions or competition within the Union.[44] The EU regulates the financial aspects of public service media through its state aid rules adopted in 2001 and

[40] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States, OJ 1997 No. C340; and also Irion and Valcke, 'Cultural diversity in the digital age'.

[41] European Parliament, 'Report on media pluralism and media freedom in the European Union', 2017/2209(INI), 12 April 2018, available at: www.europarl.europa.eu/doceo/document/A-8-2018-0144_EN.html.

[42] Council of Europe, Directorate General of Human Rights and the Rule of Law, 'Recommendations and resolutions adopted by the Parliamentary Assembly of the Council of Europe in the field of media and information society', 2015, available at: https://rm.coe.int/16806461f9.

[43] EMFA, Art. 5.

[44] Treaty of Amsterdam – Protocol on the system of public broadcasting in the Member States.

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revised in 2009,[45] which are anchored in the TEU and the Treaty on the Functioning of the European Union (TFEU).[46] The main act regulating media in the EU, the AVMSD, refers only vaguely to public service media, stating that benefiting from 'technological progress' is necessary for the fulfilment of the mission of public service broadcasting.[47]

During the period 2012–2022, the latest for which data are publicly available, the Commission made only four decisions in cases of state aid[48] for public service media.[49] In three of them, the Commission decided not to raise objections, concluding that the aid is compatible with the common market. In one case, the Commission proposed appropriate measures to clarify the definition and scope of public service media.[50] Civil society advocates and academics criticised the European Commission for not being more vigilant about public funding to public service media organisations that in some European countries are government mouthpieces.[51]

When the Commission has been called upon to intervene, often at the request of local NGOs and activists, the investigations have not led to findings of an infringement.[52] In September 2020, a spate of media freedom NGOs called on the Comission's Vice President Margrethe Vestager to handle a complaint that

[45] European Commission, 'Communication from the Commission on the application of State aid rules to public service broadcasting', 27 October 2009, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC1027(01)#ntr1-C_2009257EN.01000101-E0001.

[46] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2016 C202/1, Art. 107–109.

[47] AVMSD, recital 13.

[48] Defined as funding allocated by the state from state resources that can affect trade between EU member states, 'confer an advantage to the beneficiary', and distort or threaten competition, according to Article 87 of the Communication from the Commission on the application of State aid rules to public service broadcasting.

[49] European Commission, 'Legal framework conditions applicable to state aid to public service broadcasting', 31 March 2022, available at: https://competition-policy.ec.europa.eu/system/files/2022-06/stateaid_decisions_public_service_broadcasting.pdf.

[50] European Commission, 'State aid: Commission approves amended financing regime of Belgian broadcaster RTBF', 7 May 2014, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_523.

[51] Carles Llorens, 'The European Union and PSM in troubled democracies: A bridge too far?', in Eva Połońska and Charlie Beckett (eds.), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (London: Springer, 2019), pp. 41–65; Astrid Henningsen and Adam Krčál, 'Public financing of news media in the EU', Henningsen Consulting and Technopolis Group, October 2023, available at: www.technopolis-group.com/wp-content/uploads/2024/02/public-financing-of-news-media-in-the-eu-KK0523383ENN.pdf.

[52] E.g. in 2016, Mérték Média Monitor, a Hungarian media NGO, along with Hungary's Klubrádió, an independent radio station, and Jávor Benedek, a Hungarian Member of the European Parliament, lodged a joint complaint with the European Commission detailing how state aid is unlawfully used in funding the Hungarian public media: see Mérték Médiaelemző Műhely, 'Funding for public service media in Hungary – A form of unlawful state aid?', 9 January 2019, available at: https://mertek.eu/en/2019/01/09/funding-for-public-service-media-in-hungary-a-form-of-unlawful-state-aid/. For more, see State aid complaint No. 45463.

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the Hungarian government had violated EU state aid rules.[53] After six years of proceedings, the European Commission's inquiry remained unresolved. This comes after the Commission, in its initial assessment letter, accepted a dubious argument made by the Hungarian government regarding the historical roots of the system of financing the country's public service media. Specifically, the Hungarian government argued that the current system is a direct successor to an earlier model that dates back to 1957 and is tied to ownership of television sets. By endorsing this argument, the European Commission dismissed the NGOs' complaints.[54] According to some proponents,[55] this was a missed opportunity on the part of the European Commission to enforce state aid rules more vigilantly in Hungary, especially considering that since 2012 the Hungarian government has paid its contribution to the public service media directly from the state budget.

8.3.3 *Use of State Funds as a Media Control Instrument*

Besides state funding for public service media, EU Member States have been supporting private media by awarding them subsidies from state budgets or as payments for public advertising campaigns. Tracking state advertising spending has been especially problematic due to the opacity of funding mechanisms and of the criteria for awarding state advertising contracts. As a result, 'state advertising is arguably the least transparent and most problematic' method that EU Member States have to reward or punish media organisations.[56] Governments often misuse state advertising to support media outlets that are loyal to their authorities and cronies, while sidelining those media outlets that criticise them.[57]

State advertising is regulated by the EU under competition regulations that target state aid, similarly to the financing of public service broadcasting.[58] According to a count made by the authors of this chapter, from 2018 to May 2024 the European Commission handled thirty-three cases of state aid for media in eleven EU Member States, three of which are Eastern European countries. The cases concerned issues such as tax credits for the media, support for media in minority languages, funds for improved distribution of print media, and support for media affected by the economic

[53] IPI, 'European Commission must urgently address media market distortion in Hungary', 26 February 2021, available at: https://ipi.media/european-commission-must-urgently-address-media-market-distortion-in-hungary/.

[54] The source is the letter from the European Commission, which has been consulted by this chapter's authors.

[55] Mérték, 'Funding for public service media in Hungary'.

[56] Martijn de Waal, 'Business and ownership of the media in digital times', in Marius Dragomir and Mark Thompson (eds.), *Digital Journalism: Making News, Breaking News* (New York: Open Society Foundations, 2014), pp. 191–210.

[57] Marius Dragomir, 'Control the money, control the media: How government uses funding to keep media in line' (2018) 19(8) *Journalism* 1131–1148.

[58] See a more detailed description of these rules in Section 3.2 of this chapter, on the control of public service media.

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crisis triggered by the COVID-19 pandemic.[59] The European Commission has not raised objections in any of these investigations, nor has it so far investigated any application concerning the unfair distribution of state advertising.[60]

In 2019, several applicants jointly lodged a complaint with the European Commission describing how Hungarian authorities unlawfully used state resources to support a string of media outlets in the country, all known to be pro-government.[61] The complaint referred to seven advertising campaigns paid for by the Hungarian government, including 'Let's stop Brussels' and 'Stop Soros', which were aimed at bolstering the Hungarian government's political capital by blaming the EU and Hungarian-born businessman George Soros for the ills that Hungary has faced in recent years. Through these campaigns, the Hungarian government funded a range of government-friendly media outlets.

The Commission rejected the complaint, arguing that state advertising spending does not qualify as an 'advantage' under Article 107 TFEU. Furthermore, the Commission accepted the explanation of the Hungarian government that the advertising contracts were awarded to 'sales houses' through public procurement procedures. It is worth noting that public procurement in Hungary has been connected to significant corruption cases.[62] Despite this, the complainants have requested that the Commission keep the procedure open, meaning that the complaint was still awaiting resolution at the time of writing.

While there is no irrefutable legal argument that under the existing regulations the European Commission wrongfully did not enforce state aid rules, there is a compelling case for the Commission to have taken action in instances of egregious misuse of state funds, resulting in significant market distortions and financial

[59] European Commission, 'Commission decisions on state aid to publishing and other media outlets', 29 January 2024, available at: https://competition-policy.ec.europa.eu/system/files/2024-01/stateaid_decisions_to_media.pdf. As this document is regularly updated by the Commission, the link to the cases will change. Hence, data about such cases has to be collected through the European Commission's case search tool available at: https://competition-cases.ec.europa.eu/search?caseInstrument=SA&sortField=caseLastDecisionDate&sortOrder=DESC.

[60] European Commission, 'Commission decisions on state aid to publishing and other media outlets'.

[61] Mérték Médiaelemző Műhely, 'State advertising spending in Hungary – An unlawful form of state aid', 9 January 2019, available at: https://mertek.eu/en/2019/01/29/state-advertising-spending-in-hungary-an-unlawful-form-of-state-aid/.

[62] Corruption in public procurement in Hungary has been documented extensively. Cases of unpublished procurement and single bidders are rife: see European Commission, 'Public procurement – Study on administrative capacity in the EU Hungary country profile', available at: https://ec.europa.eu/regional_policy/sources/policy/how/improving-investment/public-procurement/study/country_profile/hu.pdf; 'Although Hungary has been one of the largest beneficiaries of the EU's budget, the inflow of money has not contributed to increased efficiency or economic activity measured by the number of businesses, inequalities have not decreased either, but corruption has increased', see Transparency International, 'Hungary is the most corrupt Member State of the European Union according to Transparency International's 2022 Corruption Perceptions Index', 31 January 2023, available at: https://transparency.hu/wp-content/uploads/2023/01/TI_Hungary_CPI_2022_press_en_print_final.pdf.

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impropriety that detrimentally impacted the media market, especially as such cases have been brought to its attention by civil society organisations.

8.3.4 *Takeover of Private Media by Businesses Close to the Government*

The fourth element of media capture is the takeover of privately owned media by companies with close ties to the government. In two of the elements of media capture we have described, the government can intervene directly by appointing loyalists to staff the decision-making bodies of media regulatory authorities and the governing structures of public service media. They can also use public funds strategically, as we have explained.

However, without also gaining control over private sector media outlets, the capture would not be complete. The takeover of privately run media companies is typically executed through businesses that are known to be supportive of the government. These businesses are either controlled by cronies who support the authorities or indebted to the government for receiving preferential treatment in obtaining public procurement contracts.[63] In many cases, the companies that buy media outlets are owned by the same people who control industrial holdings that win public tenders.

This type of media capture proceeds as follows: businesses are awarded lucrative public tenders, enabling them to thrive commercially. They then use their corporate structures to acquire media outlets whose editorial orientation is aligned to supporting the ruling political parties, and they thereby secure uninterrupted access to the public resources of the business owners of the media outlet. In certain instances, they may also obtain preferential loans from government-affiliated banks to facilitate the purchase of media outlets.[64]

Devising regulations to prevent or reverse the financial engineering concocted to maintain the flow of funds into a large privately-run media capture market is undeniably a complex task. The EU currently lacks a mechanism capable of effectively regulating these types of indirect control. The main tool that the EU uses for merger and acquisition activities is the EC Merger Regulation.[65] Article 1 of this Regulation establishes the thresholds for combined turnover resulting from a merger that, if exceeded, necessitate the intervention and evaluation of the European Commission. Although the European Commission has the power to control mergers, not many cases have thus far reached the limits imposed by the Merger Regulation. One reason for this is the very high thresholds set by EU law. For instance, the European

[63] Václav Štětka, 'The rise of oligarchs as media owners', in Jan Zielonka (ed.), *Media and Politics in New Democracies: Europe in a Comparative Perspective* (Oxford: Oxford University Press, 2015).

[64] Neil Buckley and Andrew Byrne, 'Viktor Orban's oligarchs: A new elite emerges in Hungary', *Financial Times*, 21 December 2017, available at: www.ft.com/content/ecf6fb4e-d900-11e7-a039-c64b1c09b482.

[65] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 No. L024.

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Commission must intervene only in cases where both of the following situations occur: the combined value of all the corporate undertakings exceeds €5bn and the total turnover of at least two of the undertakings is over €250m.

The available data indicates that the European Commission has tended to be lenient and approve mergers in the media. Between 1990 and 2011, the Commission blocked twenty-one mergers of broadcast operations, which represented only a quarter of all the merger cases in the broadcast market assessed during that period.[66] All the blocked transactions were registered between 1994 and 1998, a period when the European Commission was trying to protect competition between different media platforms at any cost.

Although the debate surrounding the need for the EU to uphold competition regulations while also promoting public interest goals has not led to any palpable results,[67] the significant impact of the European Commission's decisions to permit media consolidation cases that detrimentally affect media diversity cannot be overlooked. Between 1998 and 2013, the Commission gave the green light to all mergers in the broadcast industry that it considered.[68] Many of those mergers were problematic for media pluralism. The concentration of NewsCorp/BSkyB in the UK, for example, was allowed by the Commission in 2011 on the grounds that it would not affect the price of services. Yet the Commission completely ignored the implications for media pluralism, helping to strengthen the Rupert Murdoch media empire in the UK, with negative consequences for independent journalism and media plurality in the country.[69]

In recent years, no cases of takeover of media companies that led to capture in Eastern Europe have been regulated by the Commission, mostly because none of them were anywhere close to the ceilings imposed through the Merger Regulation. But even if they had been, the main problem with the takeover of media companies in captured environments is the corrupt funnelling of state funds to captured media outlets via corporations run by businessmen close to authorities. No EU regulation can get to the bottom of that – which, however, is not an excuse for a lack of action.

8.4 A BETTER FUTURE FOR INDEPENDENT MEDIA IN EUROPE: WHAT THE EU CAN STILL DO

The rise of media capture over the last decade has presented significant obstacles to media freedom and independent journalism in Europe. When the Media Constitution was adopted in Hungary in 2010, experts warned that it could have serious long-term consequences for the country's media and journalism due to the

[66] Konstantina Bania, 'European merger control in the broadcasting sector: Does media pluralism fit?' (2013) 9(1) *The Competition Law Review* 49–80.
[67] EMFA, recitals 62 and 63.
[68] Bania, 'European merger control in the broadcasting sector'.
[69] Ibid.

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threats it posed to the independence of media regulation and media freedom.[70] Their warnings now appear almost prophetic. The legislation adopted at that time was only the first in a series of measures implemented by the Hungarian government that led to growing control over significant portions of the country's media.

More than a decade later, as media capture began to spread across many European countries, the erosion of media freedom started to raise major concerns among EU institutions, prompting them to take action. EMFA,[71] accepted in April 2024, was created to address many of the threats posed by capture. Civil society organisations, experts, and journalists put much hope in this new law, calling on EU institutions to include strong legal provisions that could tackle the most serious threats to media freedom.[72] But how effective will the EMFA be in dismantling existing instances of media capture and preventing new ones?

First, the EMFA addresses the topic of independence of the national regulatory authorities,[73] but it does so by merely reiterating the requirements for 'adequate' financial and human resources and appropriate competence that were already put forward by Article 30 of the AVMSD. In fact, the AVMSD has more provisions aimed at ensuring the independence of national regulatory authorities than the EMFA.

Secondly, as regards public service media, the EMFA introduces institutional guarantees for the independent functioning of public service media providers. These guarantees are focused on the appointment and dismissal of the management and governing boards of these organisations.[74] However, despite the good intentions behind these provisions, there is no mechanism in place to assess whether the already appointed or future heads and boards of public service media organisations in certain countries not only formally meet those requirements but also genuinely act independently.

Thirdly, the EMFA tackles the problem of undue influence on the media by addressing the preferential use of state advertising. It mandates that state advertising budgets should be allocated based on transparent, objective, proportionate, and non-discriminatory criteria, as well as open, proportionate, and non-discriminatory procedures.[75] However, where current state aid rules are not effectively implemented, as has been the case in various instances so far, there are low expectations that the new provisions will be more strictly enforced.

Finally, the EMFA addresses the issue of undue influence in the media through its provisions on market concentration and ownership transparency, specifically

[70] Central European University, 'Experts debate the state of media freedom in Europe', 7 November 2013, available at: www.ceu.edu/article/2013-11-07/experts-debate-state-media-freedom-europe.

[71] EMFA.

[72] European Federation of Journalists, 'Media freedom and journalist groups call on EU to secure effective Media Freedom Act', 7 July 2023, available at: https://europeanjournalists.org/blog/2023/07/07/media-freedom-and-journalist-groups-call-on-eu-to-secure-effective-media-freedom-act/.

[73] EMFA, Art. 7.

[74] EMFA, Art. 5.

[75] EMFA, Art 25.

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their impact on both media pluralism and editorial independence.[76] The assessment of this impact must cover the 'effects on the formation of public opinion and on the diversity of media players in the market, taking into account the online environment and the interests, links, or activities of the parties in other media or non-media businesses'.[77]

The EMFA is undoubtedly the EU's boldest attempt at media regulation to date. While its provisions on the independence of media regulation[78] and public service media[79] are somewhat vague, reflecting provisions in existing EU law, the EMFA goes as far as any EU law can in addressing state funding[80] and market interference,[81] which are two key components of media capture. However, it appears that this will not be sufficient, as strong enforcement mechanisms are still lacking.

As Bayer and Cseres write, 'the proposal for EMFA is currently based on the assumption that each Member State has a fully independent NRA [national regulatory authority] capable of effectively enforcing media law, including the EMFA'.[82] One might expect the new pan-European regulatory body created by the EMFA, the European Board for Media Services,[83] to play that role. However, it does not. The Board is tasked with drawing up opinions that assess the impact of nationally adopted decisions on media pluralism and editorial independence in cases of media market concentration. An opinion of the Board may serve as the basis for another opinion that the Commission 'may issue'.[84] Yet the Board cannot impose any obligations on national regulators or Member States' governments. 'Its function merely involves consultation and cooperation, and its most concrete actions are the issuing of opinions', write Bayer and Cseres.[85]

Moreover, with the role afforded to it by the EMFA, the European Commission is completely toothless: all it can do is issue opinions, organise dialogues, and conduct regular monitoring activities. 'These proposed tools do not have the potential to make the already existing enforcement tools of EU law more effective, credible, or deterrent', conclude Bayer and Cseres. In summary, the main problem at the heart of the EMFA is that it fails to provide 'sufficient guidance on how, or by whom, decisions should be made'.[86]

[76] EMFA, Art. 22.
[77] Ibid.
[78] EMFA, Art. 7.
[79] EMFA, Art. 5.
[80] EMFA, Art. 25.
[81] EMFA, Art. 22.
[82] Judit Bayer and Kati Cseres, 'Without enforcement, the EMFA is dead letter', Verfassungsblog, 13 June 2023, available at: https://verfassungsblog.de/without-enforcement-the-emfa-is-dead-letter/.
[83] EMFA, Art. 13(g).
[84] EMFA, Art. 23.
[85] Bayer and Cseres, 'Without enforcement, the EMFA is dead letter'.
[86] Theresa Seipp, Ronan Ó Fathaigh and Max Z. van Drunen, 'Defining the "media" in Europe: Pitfalls of the proposed European Media Freedom Act' (2023) 15(1) *Journal of Media Law* 39–51. Since the completion of this chapter, EMFA has entered into application. For ongoing analysis and country-level monitoring of its implementation, see the Media Capture Monitoring Report project: https://journalismresearch.org/media-capture-monitoring-report/.

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8.5 CONCLUSIONS

Despite the EU's reputation as a leading authority in shaping policies for the digital age, its regulations have not been effective in fighting or preventing media capture; they have not provided sufficient protection for media freedom and independent journalism. This is partly because the EU was not originally designed to serve as a second line of defence against the erosion of media freedom in Member States, hence its limited ability to compel national governments to uphold these principles. Nevertheless, the European Union possesses the necessary mechanisms, notably the rule of law, and has had the capacity to develop additional measures in order to more efficiently intervene in preventing national governments from seizing control of media outlets and misappropriating EU subsidies. Furthermore, the EU could have assumed a more stringent oversight role in monitoring instances of capture throughout Europe. That the EU has not done this is arguably because of a confluence of factors, including excessive bureaucratic procedures needed to take action against governments and internal political dynamics. That discussion is beyond the scope of this chapter; the reasons why the EU has not intervened when it could do so require further investigation.

The latest legal initiatives at EU level, particularly the EMFA, serve as a clear indication of the mounting concern among EU institutions regarding media freedom in Europe. While the provisions within the EMFA address all problematic areas that contribute to media capture, some of them could benefit from improved precision. Moreover, the responsibility for implementing those provisions is solely entrusted to national regulatory authorities, which, unfortunately, are often subject to political interference themselves and are thus used to promote the government's interests in the media. The establishment of a pan-European body, as envisioned by the EMFA, does not guarantee the effective enforcement of any EU law at the national level.

In conclusion, the argument for implementing regulations that seek to dismantle such forms of capture, in order to foster an environment for independent and diverse media to thrive, is more compelling than ever. The EU has made little progress in addressing this issue, despite clear indications of a severe decline in media freedom within its borders. In spite of the visibly good intentions behind its latest legal initiatives, there are no indications that this situation will improve much in the foreseeable future. The EU should take bolder and more effective action by monitoring, as recommended in this chapter, the activities of the regulatory authorities and intervening in cases where it finds that their independence is compromised.

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