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Erstveröffentlichung / Primary Publication

Konferenzbeitrag / conference paper

Empfohlene Zitierung / Suggested Citation:

Mutu, A. (2023). The allocation of state advertising to private media corporations in Europe: legal and regulatory frameworks. In F. Haumer, C. Kolo, & J. Mütterlein (Eds.), *Reorganization of Media Industries: Digital Transformation, Entrepreneurship and Regulation* (pp. 1-10). München: Deutsche Gesellschaft für Publizistik- und Kommunikationswissenschaft e.V. <https://doi.org/10.21241/ssoar.90871>

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The allocation of state advertising to private media corporations in Europe: legal and regulatory frameworks

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Zusammenfassung

The allocation of state advertising to private media corporations in Europe: legal and regulatory frameworks

This study introduces a cross-country comparative analysis of the institutional mechanisms, legislative and regulatory procedures for allocating and distributing state institutional advertising to private news media organisations across nine European countries. I provide an assessment of the extant frameworks in Austria, Denmark, Germany, Finland, France, Norway, Spain, Sweden and Switzerland, based on an extensive review of the academic literature. This cluster of countries represents the two models for media systems conceptualised by Hallin and Mancini (2004): the Polarised Pluralist and the Democratic Corporatist media systems. Various research questions are raised in relation to the main variables identified for the comparative analysis: legal and regulatory frameworks; the competent authorities; tender preparation and awarding; monitoring and enforcement; and transparency. Data was collected from multiple publicly national and international sources. Results show significant variations between countries in the level of institutional transparency regarding the allocation and distribution of state institutional advertising.

Keywords: Europe, media regulation, state advertising, comparative study, transparency

Summary

The allocation of state advertising to private media corporations in Europe: legal and regulatory frameworks

This study introduces a cross-country comparative analysis of the institutional mechanisms, legislative and regulatory procedures for allocating and distributing state institutional advertising to private news media organisations across nine European countries. I provide an assessment of the extant frameworks in Austria, Denmark, Germany, Finland, France, Norway, Spain, Sweden and Switzerland, based on an extensive review of the academic literature. This cluster of countries represents the two models for media systems conceptualised by Hallin and Mancini (2004): the Polarised Pluralist and the Democratic Corporatist media systems. Various research questions are raised in relation to the main variables identified for the comparative analysis: legal and regulatory frameworks; the competent authorities; tender preparation and awarding; monitoring and enforcement; and transparency. Data was collected from multiple publicly national and international sources. Results show significant variations between countries in the level of institutional transparency regarding the allocation and distribution of state institutional advertising.

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INTRODUCTION

State aid schemes for media corporations in the form of state advertising and subsidies have been seen both as instruments to support media pluralism and as potential forms of government control over the media. This duality could be influenced by factors such as country-specific administrative characteristics or the configuration of the national media systems (Mutu, 2018). American scholars consider that state support to private media organisations can be understood as regulatory tools that may correct market failures (Pickard, 2013), jeopardising the sector's independence, while in some European countries the support schemes are beneficial for the media sector. The Council of Europe Report (2021, p. 11) analyses the European print media funding models, distinguishing between four main forms of financial support, such as:

direct subsidies (support awarded to media outlets upon approval by the government); tax advantages (reductions to taxes or full tax exemptions for the print media sector, usually following a change in legislation); state advertising (awarding of funding by government bodies in the form of advertising contracts with media outlets for purchase of specific services, i.e. advertisements for state-owned media companies or payments for social campaigns); [and] project-based support schemes (funding that covers specific needs of print media outlets, i.e. training and skills development, upgrade of technology or facilities, or restructuring processes).

The regulation of state advertising as a form of indirect state sponsorship was scarcely studied in prior research (Fernandez Alonso & Masoni, 2021). Attention was paid to the transparency mechanisms in the bidding process, criteria to award contracts, checks and balances mechanisms and reporting procedures. Depending on the national legal systems, a variety of concepts are used to refer to this type of state aid (Mutu & Martori, 2022): institutional advertising, institutional communication, marketing communications, public government advertising, state assistance for the media, government-sponsored advertising and government communications.

Sanders et. al (2011) study the professionalisation of central government communication in Germany, Spain and the United Kingdom, applying a framework developed using indicators derived from the sociology

of work and from the strategic planning and quality literature. Kantchev and Ognyanova (2013) define institutional advertising as government-mandated advertising commissioned for institutions such as ministries and government agencies and aimed at facilitating campaigns that public authorities carry out to provide citizens with information about their rights and obligations, the functioning of public institutions and the services they provide. Howlett (2009, p. 25) defines government communication policy tools as “policy techniques or mechanisms which rely on the use of information to directly and indirectly affect the behaviour of those involved in the production, consumption and distribution of different kinds of goods and services in society”. The author discusses the role of governmental mass media and targeted information campaigns conducted to raise awareness on social issues such as public safety.

The Media Pluralism Monitor (MPM) Reports published by the Center for Media Pluralism and Media Freedom at the European University Institute offers insights on the topic, measuring the indicator “state regulation of resources and support to the media sector”, which includes the various direct and indirect aids to media organisations. In addition, the yearly European Commission's Rule of Law Reports offer information on the national media regulatory authorities, transparency of media ownership and state advertising.

Based on this background, this article examines the legislative and regulatory procedures for allocating and distributing state advertising to private news media organisations in nine European countries as of 2022. The variables selected for analysis are extracted from prior interdisciplinary research published on the topic and focus on the relevant laws and regulations, authorities involved in the process of tender preparation and awarding of advertising contracts, monitoring and transparency mechanisms. It raises several research questions: What are the fundamental rules and regulations for awarding state institutional advertising contracts to news media companies? How is competition ensured in the award process? Are there specific rules for awarding contracts regarding institutional advertising? Is there any approval, control or scrutiny by the competent authority needed before awarding the state institutional advertising contracts? Is there any obligation regarding the disclosure of government spending carried out in institutional advertising campaigns?

The contribution of this article is threefold. First, an extensive literature review is conducted to assess the current methodologies and theoretical frameworks. Second, the exploratory qualitative cross-country comparative analysis provides an in-depth look at the institutional arrangements across nine countries, including Spain, Austria, Germany, Denmark, Finland, France, Norway, Sweden and Switzerland. Third, the study contributes to the scholarship on media governance at an international level.

LITERATURE REVIEW

Theoretical accounts of state aid for media organisations have been discussed in academic research. Murschetz (2013, p. 23) reviews the various types of state instruments to help the media, classifying them as general or specific, indirect or direct. State control on advertising volume in media is categorised as a type of indirect subsidy. An interesting view on theories of regulation is offered to justify the rationale of government intervention in the press. These are the public interest theory of regulation, assuming “that the ‘free play of market forces’ of supply and demand would be the most efficient organising principle of exchange and lead to a welfare-optimising allocation of resources without government intervention”; the paradigm of market failure, “a doctrine within economics which explains the notion that self-regulated markets reveal structural and behavioural instances that lead to their failure in working efficiently as a result of which corrective government action seems warranted”; and the “traditions in the political economy of the media which look into the issue of government control over the media whereby government may seize the media and induce bias such that media misreport the news in favour of government interests. Subsidies to these favourable media may be the price to pay for such covert government control” (Murschetz, 2013, p. 28). Neoclassical economic theories suggest that state aid can be seen as the antidote to market failure. As Murschetz (2013, p. 37) puts it, “government intervention in private markets is justified to enforce property rights, correct market failures, reign in the market power of monopolies, or address inequity by redistributing resources”. Accordingly, subsidies “are possible regulatory tools that may correct market failure and work as one-way financial transfer payments that are payments of income which are not redeemed by any current factor services from the beneficiary” (Murschetz, 2013, p. 38).

State aid to the media in the form of institutional

advertising has been defined as “any advertising that is paid for by governments and state-owned institutions and companies, to the media” (Media Pluralism Monitor, 2020) and can be understood as a form of incentive-based regulation (Puppis, 2013, p. 101). Scholars have analysed the support measures targeted at the media sector in the European Union (Ehlermann, 1994), studying the interaction of Member States’ support policies in relation to the role of the press in the diffusion of information relevant to the public interest. Psychogiopoulou (2013) examines the compliance of national support measures with EU law, while other studies address the cross-country differences in media regulatory regimes that affect the performance of media (Murschetz, 2014). The Country Chapters of the yearly Rule of Law Reports published by the European Commission provide updates on the current legal and regulatory frameworks of the allocation of state advertisement in various countries.

Prior research has shown that in many Member States there is no specific legislation on the distribution of state advertising to media outlets (Mutu & Martori, 2022). In Denmark, for instance, there are no specific laws pertaining to the allocation of state advertising, except for the obligation to comply with the general rules in the Radio and Television Broadcasting Act and the secondary legislation in connection with the Act. In Ireland and Luxembourg there are no specific rules on state advertising in media. In Croatia, the allocation of state advertising is regulated for state administration and entities predominantly owned by the state. The 2020 Rule of Law Report (p. 13) mentions that “the Electronic Media Act stipulates that the state administration is required to use 15% of their annual funds, earmarked for the promotion of their services or activities, for advertising in the audio-visual and radio programmes of regional or local television or radio broadcasters. The state bodies need to report to the AEM annually about the advertising activities”. In Italy, rules on state advertising exist and:

public authorities that purchase advertising space in the mass media must inform the AGCOM about the advertising expenditures of the previous financial year via an electronic tool adopted by AGCOM, and spending criteria are set, while hefty fines are provided for in case of breach. In addition, all relevant data relating to the expenses for institutional communication are published in the section of the Government’s website dedicated to transparency (2020 Rule of Law Report, p. 13).

Kantchev and Ognyanova (2013) discuss the case of Bulgaria, where the absence of an official state subsidy scheme has fostered the malpractice of institutional advertising as a main source of revenue for major media. In Greece, “the state acts as a hidden agent in advertising and may place respectable quantities of advertising from various ministries, state bureaucracies and state-owned enterprises in the print media” (Papathanassopoulos, 2013, p. 247). Citing an MPM Report, the Greek Rule of Law Report 2020 (p. 9) states that “stakeholders have reported concerns about the lack of financial support from the government for journalists and the non-transparency of allocation of pandemic-related state advertising. The Greek authorities indicate that the Secretariat-General for Communication and Media supervises the implementation of the communication programs and actions of public services and organisations. Each service or organisation that runs a communication program with a budget exceeding 30,000 EUR is obliged to submit an application to be approved by the Secretariat-General”.

Country-specific administrative characteristics are relevant to the discussion, as the regulation of government advertising depends on the configuration of the media and political systems. Legal obligations exist in Germany requiring the disclosure of media ownership and any type of involvement in media entities by political parties in accordance with the Political Parties Act of 1967, while in France, the allocation of state advertising is regulated by the Public Procurement Law and the Law on the Government Information Service.

To sum up, this article aims to close the gaps in prior research and provides an assessment of the institutional advertising regulatory frameworks in nine European countries, including Spain, Austria, Germany, Denmark, Finland, France, Norway, Sweden and Switzerland. This cluster of countries represents the two models for media systems conceptualised by Hallin and Mancini (2004), the Polarised Pluralist – active in Spain and France – and the Democratic Corporative media systems – used in Austria, Germany, Denmark, Finland, Norway, Sweden and Switzerland. The research questions are raised in relation to the main variables identified for the comparative analysis: legal and regulatory frameworks; the competent authorities; tender preparation and awarding; monitoring and enforcement; and transparency.

METHODOLOGY

This study introduces a qualitative cross-country case study analysis on the regulatory frameworks for allocating and distributing state advertising across nine European countries. The analysis variables were extracted from the extensive review of academic literature and legal texts, including the European Commission’s Annual Rule of Law Reports, Public Procurement Laws, national laws on the Government Information Service and industry reports. Data were collected between 2019 and 2022 from multiple publicly available sources. The analysis covered the extant legal and regulatory frameworks, competent authorities involved in the process, the tender preparation and awarding process, the checks and balances, and transparency mechanisms. Methodological limitations are related to access and availability of public data.

ANALYSIS OF THE MAIN FINDINGS

France

Research shows that the state plays a hyperactive and interventionist role in the media sector and that both direct and indirect state support schemes for media companies are in place. Mutu and Martori (2022) analysed the French government spendings on advertising over the past decades, showing that various government campaigns were promoted across different mediums and the themes were related, among others, to the national public health initiatives, the social cause of violence against women, sexual education, sustainability, raising awareness on breast cancer, road safety and active solidarity income campaigns.

The allocation and distribution of state support to French media companies is done in a fair and transparent manner, given that “the transparency of the policy is based on the budget information annexed to the Finance Bill, which clarifies the calculation method” (Media Pluralism Monitor, 2020, p. 14). Regarding the investments in advertising spaces by the state, the MPM Country Report for France (2020, p. 14) states that these “are regulated and spread over all media (...). The Internet has become the first media in which the state invests. The Direction of Purchases of the state keeps watch over the performance of the public contracts that it has concluded on its behalf”. The allocation of state advertising is regulated by the Public Procurement Law and the Law on the Government Information Service (Ordinance 2018-1074 of 26 November 2018 and Decree 2000-1027 of 18 October 2000). Measures and

provisions related to public project contracting, subcontracting and terms of payment included in the Public Procurement Law are related to the equal treatment for all bidders, open access to public procurement, transparency during the bidding process and full disclosure of rules applicable to the tendering process, streamlining of public procurement and a proper use of public funds. Oversight institutions are involved in the public procurement procedures, including the Ministry of Economy and Finance and the Department of Legal Affairs, the Union for Grouping Procurements and the State Purchasing Body. The National Court of Audits acts as the main oversight body.

The French anti-corruption Sapin Law of 29 January 1993 introduced more transparency requirements for both the Government and media organisations. The Sapin Law enforces “billing practices that correspond to services actually rendered and objectivity in the choice among competing media”, requiring that “all companies or persons who act as media planners must inform clients (...) of the financial ties that they or their group have to media-brokers (...) or to owners of media” (Mesnooh, 1994, p. 228). Direct payments or benefits from the media owners to the media agencies are prohibited, while “media agencies must disclose in their general terms of sale any financial ties with media owners. Media agencies must provide the advertisers (i) with reports on the media diffusion, within one month following such diffusion, and (ii) with detailed invoices relating to the purchase of advertising space, specifying every advantage granted by the media owners” (Kadar et al., 2017).

The scope of the Sapin Law was extended to digital media as abusive practices in the digital advertising sector were identified. On 1 January 2018, the Sapin Decree on digital advertising services came into force, adapting the rules of the Sapin Law of 29 January 1993 to digital media.

Spain

Press subsidies were introduced in the 1980s and the first regulations for state aid were implemented in 1984. Aguado-Guadalupe and Blasco-Gil (2020) analysed the distribution of media subsidies in the Spanish Autonomous Communities, showing that subsidies granted by the autonomous communities since the 1980s have been marked by language criteria, aiming to strength the media sector, fostering media consumption and increasing specialised journalism.

State institutional advertising is regulated by Law 29/2005 and various autonomous communities have created their own laws, such as Law 4/2009, dated 28 May 2009 in Castilla y León, Law 6/2010, dated 23 December 2010 in Euskadi, Law 13/2010, dated 9 December 2010, in the Balearic Islands, among others. Institutional advertising is a source of controversy, which has “led the Spanish Association of Periodical Editorial Publishers (AEEPP) to ask political parties to include institutional advertising among the activities contained in the Transparency, Access to Public Information and Good Governance Law” (Aguado-Guadalupe and Blasco-Gil, 2020, p. 155). Annually, the Institutional Advertising and Communication Report is published by the Government and includes information on how grants have been awarded by ministerial departments, objectives, target audience, campaigns carried out, territorial dissemination, type of medium used for such dissemination, as well as the amount allocated to each type of medium.

The provisions regulating the contracting of state advertising and institutional campaigns are stipulated in Spanish Law 29/2005 of 29 December 2005, on Institutional Advertising and Communication, and Royal Decree 947/2006. The process is presented in the 2020 Rule of Law Report (p. 10):

The Secretary of State for Communication verifies that media plans follow objective criteria in the distribution and weight of the different media. The Directorate General for Rationalisation and Centralisation of Procurement of the Ministry of Finance centralises the contracts of media plans and campaigns proposed by the different administrative bodies and agencies of the Spanish central administration. Occasionally, according to specificities related to the target public or aims of the campaign, different criteria may be established as long as these do not generate inequalities, in line with the doctrine established by Constitutional Court rulings 104 and 130/2014.

Galletero-Campos and Álvarez-Peralta (2021) make an extensive assessment of institutional advertising in Spain, looking at the extent of its legal framework and mechanisms for accountability. The authors show that in all autonomous communities where legislative frameworks exist, the use of state advertising to serve political purposes or political ideologies is prohibited. The awarding criteria established by law are: efficiency, diffusion and audience, territorial reach, social implantation, profitability, and sustainability. The awarding of contracts is done through public

bidding processes.

Austria

Government subsidies and rules on state advertising in Austria were extensively studied in prior research. The allocation of state advertising is regulated by the Federal Constitutional Act on Media Cooperation and Media Funding, and by the Transparency in Media Cooperation and Funding Act. The 2012 Media Transparency Act aims to create transparency in public-sector advertising and media cooperations and “ensures that the Government, public bodies and state-owned corporations disclose their relations with the media (such as advertising and other kinds of support); however, there are no rules ensuring a fair distribution of state advertising among media outlets. While in 2018, state subsidies for the media amounted to 40 million EUR, nearly 170 million EUR were spent on state advertising” (2020 Rule of Law Report published by the European Commission, p. 11). The Report emphasised that “Austria allocates relatively high levels of state advertising to media companies, and concerns were raised over potential political influence over such allocation, in the absence of rules on its fair distribution” (2020, p. 1).

The Media Pluralism Monitor (2020, p. 14) reveals that the “rules for the distribution of direct and indirect subsidies can be considered to be transparent, but not entirely fair. For example, high circulation tabloid newspapers benefit disproportionately from the funding, and the Private Broadcasting Fund is about seven times higher than the Non-Commercial Broadcasting Fund. Experts have long criticised the effectiveness of the rules in terms of ensuring media plurality”. Data shows that the distribution of state advertising spending disproportionately favours the most popular tabloid media, given that two-thirds of the ministerial advertising spending in 2018 and 2019 was swallowed by the three largest tabloids (Vogt, 2020).

Media organisations have disclosure and reporting duties towards the national media regulatory authority, KommAustria, and the Austrian Court of Audit. Since 2012, recipients of the subsidies and the total amount received must be disclosed, and the Austrian Court of Audit keeps records of this information. The 2017 Austrian Court of Audit (ACA) Report (p. 39) describes the checks and balances, and cooperation mechanisms aimed at ensuring institutional transparency in allocating public funding:

Every six months, the Austrian Court of Audit must submit to the media authority KommAustria a list of all legal entities it is aware of and which are subject to its audits, stating their name and executive bodies. ... In addition to updating master data, which is carried out by the ACA at six-monthly intervals, KommAustria must also survey media corporations, advertising contracts and grants on a quarterly basis, which leads to temporal overlaps in the surveys conducted by the ACA and KommAustria twice a year.

The issue of transparency in the allocation of state advertising is analysed in the 2020 Report titled European Rule of Law Mechanism – Austrian Input, published by the Austrian Federal Chancellery: “all legal entities subject to supervision by the Austrian Court of Audit are obliged to publicly disclose the name of the periodical medium and the amount of the fee. In the case of subsidies to media owners of a periodical medium, the name of the recipient of the subsidies and the amount of the subsidies must be disclosed” (2020, p. 45). Non-compliance with the legal requirements is considered an administrative offence. As of 2020, as the Report discloses, about 99% of all legal entities were duly fulfilling the required reporting. The Report also shows that “the KommAustria fines, on average, four legal entities for non-compliance per quarter. The KommAustria publishes lists of the disclosed information quarterly, to provide full transparency” (2017, p. 46).

Germany

As opposed to France or Spain, Germany is considered a non-interventionist state with no tradition of direct intervention in the commercial media sector (Foster & Bunting, 2019). Scholars observe that “the reluctance towards any kind of state interference is strongly rooted in Germany’s political tradition, and is attributable to the problematic role the press played in the years before and during the Nazi regime. Germany is not at all a best practice example for financial press subsidies” (Kolo & Weichert, 2013). Cross-country comparative research (Mutu & Martori, 2022) shows that data is not available for the distribution of state subsidies and state advertising to media outlets given that German public authorities have no reporting obligations on advertising expenditure by the public sector. Direct grants or public subsidies to media organisations have no support among the key players in the German media sector. Indirect support for traditional media outlets exists in the form of sales tax or value-added-tax relief, postal subsidies for

newspapers delivered to the door, postal, telecoms and transport subsidies.

Germany is considered to have “a well-functioning regulatory framework on media freedom and pluralism”, while the “degree of independence of the media and the relevant regulatory authorities remains high. German law guarantees a good level of transparency of media ownership” (European Commission Rule of Law Report, 2021, p. 1). The Media Pluralism Monitor 2021 (p. 14) reveals that the indicator on state regulation of resources and support to the media sector shows a medium risk (17%), which is due to the fact that “the Federal Government and the states are cautious with providing media subsidies, since any financing of media by public authorities could bear risks for the diversity of opinions. (...) For private broadcasters, there are regulations regarding the financing of production and distribution technology infrastructure” (MPM, 2017, p. 10). In 2021, a support package for press publishers of around 200 million EUR was approved to counter the effects of the Covid pandemic, being considered a “remarkable” initiative given that, for the first time in history, the German state would have directly supported commercial media (MPM Country Report Germany, 2021, p. 14).

Finland, Denmark, Sweden, Norway and Switzerland

The Council of Europe Report (2021, p. 13) reviews the state subsidy systems for media outlets in Finland and argues that, traditionally, state funding was used as a tool to promote political pluralism by supporting the financially weak party press. Currently, subsidies distributed by the Ministry of Transport and Communications to fund newspapers published in national minority languages are in place. No specific regulation or systematic data available on allocating state advertising. This constitutes a major shortcoming, along with the lack of clarity regarding the criteria to distribute direct media subsidies. In addition, no media-specific rules governing transparency of media ownership or media concentration exists for the moment. However, as the 2020 Rule of Law Report discloses, it appears that most companies voluntarily disclose their ownership on their website.

Similarly, in Denmark there are no specific laws regulating transparency of media ownership or allocation of state advertising:

State advertising must comply with the general rules in

the Radio and Television Broadcasting Act and the secondary legislation in connection with the Act, based on the AVMSD. ... Danish media stakeholders have indicated that despite the lack of specific rules, they anyway consider the level of the national transparency of media ownership to be rather satisfactory in practice, notably through the Central Business Register and when it comes to the owners of the main media outlets (2020 Rule of Law Report, p. 11).

In Sweden, Switzerland and Norway, there are no available data on the distribution of state advertising. The Swedish legal system does not provide for any media-specific legislation, as reported by the 2020 Rule of Law Report and the MPM 2020. Companies are required to comply with the Swedish Law on Financial Relations (Transparency Act) and with the Competition Act, which implies that Swedish companies are required to inform about their ownership structure and provide annual reports. In Switzerland, basic principles of advertising regulation can be found in the Federal Law against Unfair Competition, which prohibits unfair business practices and protects good faith in business. The Federal Television and Radio Ordinance includes several restrictions on television advertising.

CONCLUSION

This study presents an analysis of state advertising as a form of government support for private media organisations in nine Western European countries, representing different media systems, as follows: the Polarised-Pluralist media system is represented by France and Spain, while the Democratic-Corporatist media system is represented by Austria, Denmark, Germany, Finland, Norway, Sweden and Switzerland. Results show that a variety of mechanisms are in place, depending on the national jurisdictions. State aid has no support among the key players in the German media market, while in Austria, France and Spain there are various direct and indirect support schemes for the media. On the other hand, in Finland, Denmark, Sweden, Norway and Switzerland there are no specific laws regulating the allocation of state advertising.

To sum up, this article contributes to current research as it provides an in-depth analysis of the frameworks for regulating state advertising in nine European countries. Further research avenues could address the provision of the European Media Freedom Act to support an independent media sector.

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