

Media Ownership Regulation:
Legal Framework of Media Plurality Measurement*
การกำกับความเป็นเจ้าของสื่อ:
กรอบทางกฎหมายในการกำหนดความหลากหลายของสื่อ

Warut Songsujaritkul

วรุตม์ ทรงสุจาริตกุล

อาจารย์ประจำ
คณะนิติศาสตร์ มหาวิทยาลัยเชียงใหม่
239 ถนนห้วยแก้ว ตำบลสุเทพ อำเภอเมือง จังหวัดเชียงใหม่ 50200
Full-time Lecturer
Faculty of Law, Chiang Mai University
239 Huay Kaew Road, Muang District, Chiang Mai, Thailand, 50200
Corresponding author E-mail: songsujaritkul.w@gmail.com

(Received: March 3, 2023; Revised: September 4, 2023; Accepted: October 19, 2023)

Abstract

Concerns about media plurality are at the heart of media law and policy. The concept of media plurality is based on the fact that, unlike other sectors, media are powerful gatekeepers of public communication; hence competition law is not sufficient to prevent media ownership concentration. Thus, a specific regulation is essential to safeguard the public interest by avoiding excessive power and concentration of media ownership. To control undue power and concentration of media, a specific regulation which enhances media plurality is necessary. This article studies various complicated factors concerning media plurality in the regulation of media

* This research project is supported by Faculty of Law, Chiang Mai University.

ownership. It analyzes the UK framework as an example model in comparison with other jurisdictions such as the US, Canada, and the Netherlands to recognize media plurality concerns. The article found that there is no single masterpiece for an accurate evaluation of market power. Policy concerns for achieving pluralism are distinctly complex from country to country depending on their history and context. It, therefore, provides guidelines on various factors that should be taken into consideration in media ownership regulation.

Keywords : Media Law, Media Ownership Regulation, Media Plurality

บทคัดย่อ

ความหลากหลายของสื่อจึงเป็นหัวใจสำคัญของกฎหมายกำกับดูแลสื่อ หลักว่าด้วยความหลากหลายของสื่อมีพื้นฐานจากข้อเท็จจริงที่ว่า สื่อเป็นผู้ทรงอิทธิพล ด้วยสื่อเป็นผู้คุมช่องทางในการสื่อสารของสาธารณะ กฎหมายว่าด้วยการแข่งขันทางการค้าจึงไม่เพียงพอต่อการป้องกันการกระจุกตัวของสื่อ ดังนั้น การวางแผนในการกำกับดูแลสื่อจึงมีความสำคัญในการพิทักษ์ประโยชน์สาธารณะด้วยการหลีกเลี่ยงไม่ให้สื่อบางรายมีอิทธิพลมากเกินไปและป้องกันไม่ให้เกิดการกระจุกตัวของความเป็นเจ้าของสื่อ บทความนี้ศึกษาปัจจัยที่หลากหลายในการวัดความหลากหลายของสื่อ โดยวิเคราะห์มาตระการทางกฎหมายในสหราชอาณาจักรเปรียบเทียบกับประเทศอื่น เช่น ประเทศสหรัฐอเมริกา แคนาดา และเนเธอร์แลนด์ ในประเด็นที่เกี่ยวข้องกับความหลากหลายของสื่อ บทความนี้นั้นสรุปว่าไม่มีเครื่องมือใดที่จะเป็นเพียงมาตรการเดียวในการใช้วัดอิทธิพลของสื่อได้อย่างแม่นยำ มาตรการในการทำให้เกิดความหลากหลายของสื่อนั้นขับข้อนและแตกต่างกันออกไปในแต่ละประเทศโดยขึ้นอยู่กับบริบทและเรื่องราวเบื้องหลังของสื่อในประเทศนั้น บทความนี้จึงเสนอปัจจัยในการวัดความหลากหลายของสื่อเพื่อเป็นแนวทางในการควบคุมความเป็นเจ้าของสื่อ

คำสำคัญ : กฎหมายสื่อ, การกำกับความเป็นเจ้าของสื่อ, ความหลากหลายของสื่อ

1. Introduction

1.1 Background and Problems

In the complex modern economic and democratic societies, the majority of available information which has influenced the decision-making of citizens is provided by the media. Although people can sometimes have direct access to information sources, they may not do so due to the lack of time and expertise.¹ Instead, they rely on the media as the window onto politics and public affairs. The effects of media are not only determining ‘what’ people perceive but also the way they perceive the world which have an impact on both personal and political activities.² With these positions, the media holds a considerable power and has been regarded as ‘the fourth estate’. As a result, the concentration of media can lead to a concentration of power. Authoritarian and totalitarian can stay in power by censorship, reducing political engagement and distorted propaganda. Although most media companies merely concentrate on maximizing profits, without guarantee, they may exploit their power to further other interests.³ Thus enhancing media plurality is necessary to control undue powerful media entities.

Therefore, the communication sector has been recognized as a distinguished sector with a great social impact.⁴ The capacity to speak effectively to a large number of people and influence public opinion was controlled by a few media owners. The concentration of power and control over the channels of communication lead to concentrated control over the content. As a consequence, the content made available was concentrated around mainstream preferences and marginal viewpoints

¹ Rachael Craufurd Smith and Damian Tambini, “Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges,” in **Journal of Media Law** 4, no.1 (2012), p.35.

² Dan Bernhardt et al., “Political Polarization and the Electoral Effects of Media Bias,” in **Journal of Public Economics** 92, (2008), p.1092.

³ Rachael Craufurd Smith, “Rethinking European Union Competence in the Field of Media Ownership,” in **European Law Review** 29, no.5 (2004), p. 652.

⁴ Teresa La Porte et al., “Globalization and Pluralism,” in **The International Communication Gazette** 69, no.4 (2007), p. 377.

were ignored. Thus, a specific regulation is essential to safeguard the public interest by avoiding excessive power and concentration of media.⁵

However, competition law is not purposely created to protect media plurality, so it is neither efficient nor always protects every dimension of media plurality. The goals of competition law and media plurality are different. Competition law aims to ensure efficient competitive markets and (which leads to) consumer welfare. Consumer welfare relates to price, service, quality, and choice which can be determined by the efficiency of resources being allocated to satisfy consumers' desires and the efficiency of resources being used by particular companies. On the other hand, media plurality focuses on the diversity of viewpoints people choose and the influence of media entities and media owners. Competition law is concerned about the market power of the companies; whilst media plurality is concerned about the media power of media entities on the distortion of people's perception of the world. These two powers are not the same thing. Therefore, the achievement of media plurality requires other different approaches. To control the concentration of media ownership and undue power, media plurality regulation is at the heart of media law.

This article examines the principle of media plurality and media ownership rules in the UK. Part 2 provides the concept of media plurality as a foundation for media regulatory policy. In Part 3, the development of the existing UK regulation framework in promoting media plurality will be examined. Part 4 then analyzes the metrics of the UK Public Interest Test and other possible frameworks in regulating media ownership and influence. The article proposes guidelines on media ownership regulation and various complex factors concerning media plurality.

⁵ Gillian Doyle, "From 'Pluralism' to 'Ownership': Europe's Emergent Policy on Media Concentration Navigates the Doldrums," in **The Journal of Information, Law and Technology** 3, (1997).

1.2 Methodology, Objectives, and Scope of Research

This research has three major objectives as follows:

- (1) To study the principle of media plurality as a fundamental concept for regulating media ownership;
- (2) To analyze the legal framework of media ownership regulation in the UK in comparison to other frameworks in other jurisdictions; and
- (3) To propose a guideline on various complicated factors concerning media plurality in the regulation of media ownership.

This research adopts a doctrinal methodology based on studies and analyses of legislations, legal literature, research papers, policy documents, the resolutions of international and regional organizations and in the UK which is a country that has Office of Communications (Ofcom) who actively concerns and studies about media plurality, and documents from official websites pertinent to this issue of the study.

2. Media Plurality Principle

Media plurality is a concept which presents different voices of political opinions and cultures. This notion not only refers to a diversity of media made available to the public but also what the audience consumed.⁶ It is about encouraging people to access a variety of information in order to avoid any excessive influence dominating their opinions. Media plurality ensures that the public can access and consume a wide range of viewpoints and prevents too much influence over the political process being exercised by any media owner.⁷ Preventing this can

⁶ Peggy Valcke, “Looking for the User in Media Pluralism Regulation,” in **Journal of Information Policy** 1, (2011), p.287.

⁷ Ofcom, “Measurement Framework for Media Plurality: Ofcom’s Advice to the Secretary of State for Culture, Media and Sport,” November 2015, p.1, [online] Available from : https://www.ofcom.org.uk/_data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_statement.pdf [27 February 2023]

be achieved by ensuring no one organization has a share of news consumption which is so high that it risks exposing people to a narrow set of viewpoints. The notion of media plurality is recognized to be a prerequisite for contribution to freedom of expression.⁸ According to Article 10(1) of the European Convention on Human Rights (ECHR), true freedom of expression is not only about the right to express an opinion but also includes the freedom to receive information that contributes to ideas and refers to the discovery of truth. To achieve this notion, it is essential to establish the marketplace of ideas where arguments between different points of view interact. This can also be seen in Article 11 of the Charter of Fundamental Rights of the European Union which respects media plurality as well as the right to receive information.⁹ Thus, without media plurality, freedom of expression would not be existent.

The UK Parliament attaches particular significance of media plurality for the functioning of a healthy and informed democracy. In particular, Lord McIntosh of Haringey stated in the parliamentary debate around the Communications Act 2003 that “plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda”¹⁰. Democracy cannot exist without the environment of contrasted facts being presented to and tested by citizens. To enable participation in political decision making e.g. through free election, people must have free access to information concerning sufficient facts for making political choices and enlightened

⁸ European Commission, Media pluralism in the Member States of the European Union, Commission Staff Working Document, SEC(2007) 32, 2007, p.4.

⁹ Article 11 of the Charter of Fundamental Rights of the European Union provides that: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.”

¹⁰ Lord McIntosh of Haringey (Parliamentary Under Secretary, DCMS) 2 July 2003, Hansard. [online] Available from : <http://hansard.millbanksystems.com/lords/2003/jul/02/communications-bill> [27 February 2023]

judgments.¹¹ Witnessing the impact of media on democracy during the Second World War, European states and organizations have guarded media against government influence and excessive concentration by private entities.¹²

Media plurality has two perspectives: external plurality and internal plurality. While internal plurality refers to ranges of contents, external plurality is about the diversity of suppliers, i.e., media ownership.¹³ External plurality relates to the structure of media ownership system as a whole through a range of media outlets and various services reflecting different points of view of culture and society. This framing not only applies to media owning by various entities but also includes different types of media ownership; state, private, minority, and non-profit organizations. It also embraces a range of aspects such as merger control rules applied to media entities, a proper relationship between media owners and politics, editorial freedom, and the independence of public service broadcasting.¹⁴

Furthermore, media plurality is not merely about expanding the opportunity to access various voices. It is also concerning being objective, truthful, unbiased, and high quality.¹⁵ Recommendation No. R (99) 1 on Measures to Promote Media Plurality emphasizes that both quantity and quality of voices are the center of the media plurality concept¹⁶, especially, news genres whose quality will affect the public sphere of the received citizen¹⁷. To safeguard media plurality, especially

¹¹ Vaira Vīķe-Freiberga et al., “A Free and Pluralistic Media to Sustain European Democracy,” in **Report of the High Level Group on Media Freedom and Pluralism**, 2013, p.10.

¹² Rachael Craufurd Smith et.al., “Regulating Media Plurality and Media Power in the 21st Century,” in **LSE Media Policy Project: Media Policy Brief 7**, (2012), p.6.

¹³ Thomas Gibbons, **Regulating the Media** (Sweet & Maxwell, 1998), p. 29-31.

¹⁴ EU Media Futures Forum, “Fast-forward Europe: 8 Solutions to Thrive in the Digital World,” September 2012, p.11-14, [online] Available from : http://ec.europa.eu/information_society/media_task-force/doc/pluralism/forum/report.pdf [27 February 2023]

¹⁵ Vaira Vīķe-Freiberga et al., “A Free and Pluralistic Media to Sustain European Democracy,” p. 11.

¹⁶ Council of Europe, “Explanatory Memorandum to Recommendation No. R (99) 1 on Measures to Promote Media Pluralism,” adopted by the Committee of Ministers on 19 January 1999, [online] Available from : <https://wcd.coe.int/wcd/ViewDoc.jsp?id=399303&Site=CM> [27 February 2023]

¹⁷ Council of Europe, “Recommendation CM/Rec(2011)7 of the Committee of Ministers to

a range of providers, sometimes states are required to restrict the free speech of private entities, such as by licensing systems. Due to Article 10(2) of the ECHR, European nations can restrict freedom of speech; regulation on media concentration is allowed to restrict free speech of private entities on the basis of media plurality.¹⁸ Conversely, in the US, the First Amendment seems to guarantee the competition of media corporations rather than the intervention by media ownership restriction.¹⁹

There are also risks to media plurality in an online world. The growth in online news and the consequent increase in the range of providers have the potential to strengthen plurality and reduce the influence of any one media owner. However, the rise of news online has not yet materially reduced the influence of traditional news providers and also presents new challenges to media plurality. Notably, news providers are also seeking to make money from their editorial content online, for example through the adoption of paywalls, which can constrain people's access to a range of opinions. The growth in online news has been particularly disruptive for the business model of newspapers, leading to closures and continuing to challenge the viability of some local and national titles.²⁰ Other risks include online intermediaries such as social media and search engines and their insufficiently transparent algorithms influencing public opinion by controlling what new stories people see through algorithms.²¹

Member States on a New Notion of Media," 2011, [online] Available from : <https://wcd.coe.int/ViewDoc.jsp?id=1835645&Site=CM> [27 February 2023]

¹⁸ Tele 1 Privatfernsehgesellschaft MBH v. Austria (2002) 34 E.H.R.R. 181.

¹⁹ Sinclair Broadcasting Group challenged the local ownership rule that its restrictions violate the First Amendment. The Court determined that the Commission had not provided a rational basis for local ownership rule. It remanded the rule for the Commission's further justification. (Sinclair Broadcasting Group Inc v FCC, 284 F 3d 148 (DC Cir 2002)).

²⁰ Ofcom, "The Operation of the Media Ownership Rules Listed under Section 391 of the Communications Act 2003," Ofcom's Report to the Secretary of State, November 2018, p.2, [online] Available from : https://www.ofcom.org.uk/_data/assets/pdf_file/0030/127929/Media-ownership-rules-report-2018.pdf [27 February 2023]

²¹ Ofcom, "Media Plurality and Online News," Discussion Document, November 2022, p.2, [online]

This phenomenon alerts the European Commission to recently propose the European Media Freedom Act (EMFA) in 2022 which would require Member States to establish substantive and procedural rules for assessing the impact of media market concentrations on media plurality and editorial independence.²² This proposed EMFA complements the EU competition rules which do not directly address the market concentration impacts on media plurality. Also, EMFA contains the right of recipients of media services to receive a plurality of news and current affairs content, produced with respect to editorial freedom of media service providers, to the benefit of the public discourse.²³

3. The Development of the UK Media Ownership Regulation

Involving the public interest, economy and technology, the regulation of media ownership is distinctly complicated and varied from country to country. Whereas these viewpoints are different, they share many overlapping objectives. Regarding media plurality, EU member states have adopted various criteria for media ownership rules. For example, some limit the number of licenses held by the same entity, others impose ceilings on audience shares. Besides the prevention of quantitative threshold concentration, most nations impose qualitative ownership rules by disqualifying categories of entities from controlling media. In some countries, public service broadcasters or some types of private broadcasters are obliged to represent various ideological groups within the management composition, e.g. staff and boards.²⁴

Available from : https://www.ofcom.org.uk/__data/assets/pdf_file/0030/247548/discussion-media-plurality.pdf [27 February 2023]

²² Proposal for a Regulation of The European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, Article 21.

²³ Ibid, Article 3.

²⁴ Peggy Valcke and Eva Lievens, **International Encyclopaedia for Media Law**, Part III, ch 1, (Kluwer Law International, 2011).

In the UK, before the 1990s, the broadcaster was the regulator (Independent Television Authority (ITA) and its successor, Independent Broadcasting Authority (IBA)) by arranging contracts or franchises to transmit programs produced by companies. There were no specific ownership restrictions; however, the control of media ownership relied on discretion in the authority's hands.²⁵

The Broadcasting Act of 1990 was based on the government policy of reducing regulatory discretion.²⁶ The changes included the separation of regulator from broadcaster, replacing contract with license, disqualified persons to own media, and quantitative ownership restriction. The legislation prohibited the holding of licenses beyond certain limits; for instance, prohibiting the holding of more than two regional Channel Three licenses, and prohibiting newspapers from having more than 20 percent interest in Channel Five.²⁷

The 1996 reform proposal of media ownership measurement replaced the traditional division media market with the total media market and provided market measurement with audience or revenue share and weighting influence system.²⁸ The 1996 ownership rules were complex due to the overlap of the 1990 elements and the 1996 ownership regime.²⁹ For example, it combined accumulation limits and market share measured by total audience time for broadcasting and newspaper sale for press. For cross-media ownership, there were two types of rules: market share and the Public Interest Test. Public Interest Test did not specify the baseline or the level of holding interest to trigger intervention but leaving it to the regulator's

²⁵ Lesley Hitchen, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Hart Publishing, 2006), p.88.

²⁶ Home Office, *Broadcasting in the '90s: Competition, Choice and Quality: The Government's Plans for Broadcasting Legislation* (Cm 517, 1988) paras 2.5-2.6.

²⁷ Broadcasting Act 1990 (UK), sch 2, Pt IV.

²⁸ Petros Iosifidis, "Pluralism and Concentration of Media Ownership: Measurement Issues," *Javnost* 17, no.3 (2010), p. 15.

²⁹ Lesley Hitchen, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation*, p.91-99.

determination.³⁰ Paradoxically, the 1996 reform reverses the 1990 attempt and moves back to regulatory discretion.³¹

The Communication Act 2003 has further relaxed media ownership restrictions. While the importance of media plurality is continually emphasized, the reason to compete in the international market supports the consolidation for encouraging the efficiency of economies of scale and scope.³² Moreover, the development of technology lowers the barrier and allows new and broader players to enter the media market. With the increase in the variety of services and consumer power, many existing ownership restrictions are no longer justifiable and are diminished.³³ Communication Act 2003 freed up media restrictions far more than expected. Unsurprisingly, after it came into force, it can be seen as the higher-up of considerable media consolidation.³⁴

Apart from the restriction on market shares, the UK media ownership rules do not restrict the number of outlets; for example, a certain market should have at least four voices in order to provide adverse sides and alternative perspectives. In comparison, in the US, for example, more than six independent voices are required in a certain context and the revision in 2007 specifies at least eight independent providers to be retained for permitting merger in the large market or dual ownership of local television.³⁵

During the consideration of Communication Bill 2012, competition law was proposed to be the measure of preventing undesirable media consolidation.

³⁰ Broadcasting Act 1996 (UK), sch 2, Pt IV.

³¹ Lesley Hitchen, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation*, p.92.

³² Petros Iosifidis, "Pluralism and Concentration of Media Ownership: Measurement Issues," in *Javnost* 17, no.3 (2010), p. 11.

³³ Antonio Ciaglia, "Pluralism of the System, Pluralism in the System," in *International Communication Gazette* 75, no.4 (2013), p.410.

³⁴ Petros Iosifidis, "Pluralism and Concentration of Media Ownership: Measurement Issues," p.8.

³⁵ Adam D Rennhoff and Kenneth C Wilbur, "Local Media Ownership and Viewpoint Diversity in Local Television News," (2011) FCC Study on Media Ownership, Federal Communications Commission, p.2.

However, Lord Puttnam, chair of the Joint Scrutiny Committee, issued that Competition Commission should not consider only competition but also the potential of media plurality.³⁶ The compromise led to the amendment of the Enterprise Act 2002 containing the ‘Public Interest Test’ based on media plurality ground.

Therefore, according to the Communication Act 2003 and the Enterprise Act 2002, most of the fixed limits ownership rules have been abolished. The current remained restriction subjects to three mechanisms. Taken together, the rules are intended to protect the public interest by promoting plurality and preventing undue influence by any certain media owner. First, the National Cross-media Ownership Rule, or the 20/20 principle, prohibits a newspaper operator with 20 percent interest or more of the newspapers market share from holding a Channel 3 license or a stake in a Channel 3 licensee that is greater than 20 percent interest.³⁷ The holder of a Channel 3 license is also prohibited from holding an interest of 20 percent interest or more in a large national newspaper operator.³⁸

Second, the Disqualified Persons Restrictions prevent certain bodies or persons from holding broadcast licenses to prevent undue influence over broadcasting services. For example, advertising agencies and political parties are prohibited from holding any broadcast licenses. Local authorities are disqualified from holding broadcast licenses except to operate a broadcast service solely to provide information on their functions and services within their area. Religious bodies are prohibited outright from holding licenses for Channel 3, Channel 5, sound broadcasting and multiplexes.³⁹

Lastly, the Public Interest Test authorizes the government to intervene in a media merger involving broadcasters or a newspaper enterprise when a plurality

³⁶ Joint Committee (House of Lords and Commons), Draft Communications Bill, Vol 1 (Report, HL 169-1/HC 876-1, 2002).

³⁷ Communication Act 2003 (UK), sch 14, Pt I.

³⁸ Ibid.

³⁹ Broadcasting Act 1990 (UK), sch 2, Pt II.

concern is raised. Thus, now, the key mechanism to control media ownership concentration in the UK is the Public Interest Test.

4. The UK Public Interest Test and Factors Concerning Media Plurality

Section 58(2A) to (2C) of the Enterprise Act sets out the Public Interest Test. The tests will be triggered when the proposed merger meets certain conditions which are distinct depending on different mediums involved in the merger.⁴⁰ When the Secretary of State (SOS) suspects that media plurality concern would be raised by any media merger, it can issue an intervention notice for initial investigation by The Office of Fair Trading (OFT) for competition aspect, and for initial investigation by The Office of Communications (Ofcom) for media plurality aspect.

The Enterprise Act 2002 and Communication Act 2003 provide no guidelines on how to interpret and assess the Public Interest Test. Consequently, it falls under the considerable discretion of relevant authority which undermines public confidence.⁴¹ Whereas the Public Interest Test fulfills narrow competition law aspects

⁴⁰ Sections 58(2A) - (2C) of Enterprise Act 2002, The existing media public interest grounds for referral under section 58 of the Enterprise Act 2002 include:

- a) sub-section (2A)(a) & (b): The need for accurate presentation of news and free expression of opinion in newspapers.
- b) sub-section (2B): The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK (or a part of the UK).
- c) sub-section (2C) (a): The need, in relation to every different audience in the UK (or in a particular area or locality), for there to be a sufficient plurality of persons with control of the media enterprises serving that audience.
- d) sub-section (2C) (b): The need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests.
- e) sub-section (2C) (c): The need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

⁴¹ Rachael Craufurd Smith, “Is the UK ‘Media Plurality Test’ Fit For Purpose,” July 2011, [online] Available from : <https://cfom.org.uk/2011/07/15/is-the-uk-media-plurality-test-fit-for-purpose/> [27 February 2023]

with democratic and cultural considerations, the Department for Trade and Industry (DTI) guidance proposed that intervention should be in exceptional circumstances.⁴² In the merger case of News Corporation/BskyB in 2009 which relates to a convergent context that merged different media segments into one market, Ofcom for the first time set out a measurement framework for plurality and developed new metrics from a new perspective: in particular, the definition of relevant market and the method of assessment.⁴³ However, in July 2011, News Corporation withdrew its proposed undertakings, before withdrawing its bid altogether.

The following describes factors of the ‘Public Interest Test’ regulatory framework in controlling media ownership mergers. Since policy concerns for achieving pluralism are distinctly complex from country to country depending on their history and context, instead of comparing specific jurisdiction regime, the following considerations will be taken into account in comparison with the UK framework.

4.1 The Scope of Regulatory Framework

4.1.1 Content Genre

The primary consideration in forming a condition that triggered a media ownership intervention is the area that should be concerned, especially the genre of programs. Two controversial regimes are whether the consideration should cover merely news and current affairs, or expand to all types of content. For the UK, Ofcom narrows its focus merely on the domestic providers of news and current affairs and excludes international news services such as CNN.⁴⁴ From Ofcom’s

⁴² Department for Trade and Industry, “Enterprise Act 2002: Public Interest Intervention in Media Mergers,” Guidance Document, May 2004, p.5, [online] Available from : <https://www.gov.uk/government/publications/enterprise-act-2002-public-interest-intervention-in-media-mergers> [27 February 2023]

⁴³ Davide Morisi, “Measuring Media Pluralism in the Convergence Era: The Case of News Corp’s Proposed Acquisition of BSkyB,” Media@LSE, 2012, pp.23-30, [online] Available from : <https://www.lse.ac.uk/media-and-communications/assets/documents/research/msc-dissertations/2011/74.pdf> [27 February 2023]

⁴⁴ Ofcom, “Measuring Media Plurality: Ofcom’s Advice to the Secretary of State for Culture, Olympics, Media and Sport,” June 2012, p.12, [online] Available from : https://www.ofcom.org.uk/__data/

perspective, news causes the greatest ‘personal and social importance’ and forms public opinion which importantly affects the democratic process.⁴⁵ The Netherlands, like the UK, also applied media ownership regulation only to news and current affairs as the Dutch Media Authority emphasized that news has the ability directly to form an opinion and transfer its own agenda to the public which shapes its power and raises the essential concern of assessment.⁴⁶

In contrast, some European countries assess media concentration by looking to content as a whole; Germany, for instance, considers the general audience share of broadcasting outlets and does not divide data into content genres.⁴⁷ It should be noted that only success in possessing a large share of the entertainment market means having the ability via economic power to form the cultural agenda of the nation. This leads to another concern that excessive focus on news and current affairs can decrease the incentive for media entities to provide news and turn to spin-off this service to strategically avoid extended power control.⁴⁸

4.1.2 Relevant Market

Not only the scope of content, but the covered market is also under consideration on whether the regulator should focus solely on the entire combined market or should concern media concentration in each separate sector, and if so, which one.

The UK Public Interest Test covers all medium platforms into account: broadcasting, radio, newspapers, and online news media; since individuals

assets/pdf_file/0031/57694/measuring-media-plurality.pdf [27 February 2023]

⁴⁵ Ofcom, “Report on Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation,” November 2010, p.6, [online] Available from : <https://www.ofcom.org.uk/consultations-and-statements/category-3/public-interest-test-nov2010> [27 February 2023]

⁴⁶ Commissariaat Voor De Media, “Mediamonitor: The Dutch Media in 2010,” February 2011, p.86 [online] Available from : <https://www.mediamonitor.nl/wp-content/uploads/2013/08/Mediamonitor-The-Dutch-media-in-2010.pdf> [27 February 2023]

⁴⁷ Andrea Czepek and Ulrike Klinger, “Media Pluralism between Market Mechanisms and Control: The German Divide,” in **International Journal of Communication** 4, (2010), p.841.

⁴⁸ Ibid.

increasingly avail themselves of news from a wide range of media.⁴⁹ However, the scope of these newspaper and broadcast sectors is inconsistent. For broadcasting, the conditions are: ‘the need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience’ and ‘the need for the availability of a wide range of broadcasting which is both of high quality and calculated to appeal to a wide variety of tastes and interests’.⁵⁰ The criteria include structural plurality, content diversity, quality of content, and commitment to meet content standards set out in the Communications Act. Meanwhile, the conditions for newspaper are: ‘accurate presentation of news’, ‘free expression of opinion’, and ‘a sufficient plurality of views in newspapers in each market’.⁵¹ This regards the quality of content, freedom of expression, and content diversity. While the concern of ownership is identified in broadcasting, it is not clearly specified in regard to the press but leaving to further explanation in Explanatory Note Communication Act 2003.⁵² It is not apparent why they are different, but this causes an unsuitable and insufficient basis for considering newspapers and broadcasting as media markets and services convergence.

With the convergence of media platforms, the platform neutrality notion persuades us to not differentiate services due to the mode of transmission. While the Netherlands has no media restriction on specific sectors, many other countries have ownership rules imposing on sub-markets. This is because of the recognition that each type of platform (audio, text, and sounds) has its own presentational style and serves a different set of information.⁵³ Therefore, the scene in which one sector

⁴⁹ Ofcom, “Report on Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation,” November 2010, p.25, [online] Available from : <https://www.ofcom.org.uk/consultations-and-statements/category-3/public-interest-test-nov2010> [27 February 2023]

⁵⁰ Section 58 (2C) of Enterprise Act 2002

⁵¹ Section 58 (2A) - (2B) of Enterprise Act 2002

⁵² “New subsection (2B) specifies...and for there to be a variety of outlets and publications in which they can be expressed.” (Communication Act 2003, Explanatory Note (The Stationery Office 2003) para 800).

⁵³ Co-ordinating Committee for Media Reform, “The Media and the Public Interest,” Preliminary

is exclusively dominated by a few players is still a crucial concern since it cannot be balanced or replaced by plurality in other outlets.

The current Public Interest Test is restrictedly able to regulate services with licenses (not fully reach to online providers) and online intermediaries are failed to recognize. With the increasing significance of the Internet as an influencing media platform, solely focusing on traditional media is inadequate. Online outlet should be counted in plurality regulation. Online media platform does not comprise of only content aggregators, but also search engines and social networks. Though these services do not play editorial role, it has power to form opinion through the distribution of content to audience.⁵⁴

Noteworthy, the Ofcom's report 2021 recommended that the existing Media Public Interest Test framework should broaden its scope to 'news creators' which replace newspapers and broadcasters.⁵⁵ The purpose is to reflect how audience access and consume news at the present and to address the range of media plurality concerns that might have from mergers or acquisitions involving media enterprises other than broadcasters and print newspapers. The term should be broad enough to encompass all entities, irrespective of platform, who have editorial control over the creation and publishing of news materials by journalists, i.e., online news providers.⁵⁶

Briefing Paper, November 2011, p.5, [online] Available from : https://www.mediareform.org.uk/wp-content/uploads/2015/11/The_Media_and_The_Public_Interest-Plurality_Briefing_Paper.pdf [27 February 2023]

⁵⁴ Lord Justice Leveson, "An Inquiry into the Culture, Practices and Ethics of the Press: Report Volume III," The Stationery Office, November 2012, p.1464, [online] Available from : https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270942/0780_iii.pdf [27 February 2023]

⁵⁵ Ofcom, "The Future of Media Plurality in the UK: Ofcom's Report to the Secretary of State on the Media Ownership Rules and Our Next Steps on Media Plurality," November 2021, p.2, [online] Available from : https://www.ofcom.org.uk/_data/assets/pdf_file/0019/228124/statement-future-of-media-plurality.pdf [27 February 2023]

⁵⁶ Ibid. p.26-27

Regarding online news providers, Ofcom indicated that this would include online-only news providers, online versions of existing print sources, and wholesale news providers and magazines with a focus on news or current affairs. However, online intermediaries (such as Facebook or Twitter) are not certain to fall within the scope of this new term since a transaction of an online intermediary to acquire a large newspaper or significant broadcaster would probably be a current ‘relevant merger’ for the Secretary of State to intervene on public interest grounds.⁵⁷ Ofcom noted that any further changes to the Media Public Interest Test to bring online intermediaries within the scope are now under study and consideration in media ownership rules reviews.⁵⁸

4.1.3 The Condition to Trigger Media Ownership Intervention

The Public Interest Test covers only mergers and excludes other forms of expanding market power. In other words, the test can only be triggered when a merger or acquisition occurs but it does not include other types of market development such as organic growth.⁵⁹ Historically, plurality concerns take place when a merger occurs or a license changes hands, and it is appropriate to regulate at that point. The concern is that ‘organic growth’ control can cause a reduction of competitive incentives which is undesired in a competitive marketplace. Besides, the issue of remedy when company growth exceeds specified lines is problematic. In some situations, market share does not increase because of gaining company growth but due to other players losing and being out of the market. In a merger or acquisition case, a remedy can be applied by ceasing the transaction but this cannot be used in a normal organic growth case. However, Ofcom regards this inadequacy and

⁵⁷ Ibid.

⁵⁸ Ofcom, “Media Plurality and Online News,” Discussion Document, November 2022, p.56-57 [online] Available from : https://www.ofcom.org.uk/__data/assets/pdf_file/0030/247548/discussion-media-plurality.pdf [27 February 2023]

⁵⁹ Ofcom, “Measuring Media Plurality: Ofcom’s Advice to the Secretary of State for Culture, Olympics, Media and Sport,” June 2012, p.2, [online] Available from : https://www.ofcom.org.uk/__data/assets/pdf_file/0031/57694/measuring-media-plurality.pdf [27 February 2023]

recommends that ‘organic growth’ should be included when monitoring the threat of media plurality.⁶⁰

Canada, in contrast, adopted organic growth cap limit on 45 percent national audience share for television in 2008.⁶¹ However, Canadian Radio-television and Telecommunications Commission (CRTC), Canada’s regulator, states that the rule will be restrictively applied when acquisition may establish a dominant position in the market, not when share rises due to normal competition or providing new service.⁶² This illustrates the difficulty to set a limit to normal growth. Though only imposing ownership restrictions on mergers is not sufficient and the regulatory framework should cover organic growth, the above concerns should be taken into account.

4.2 Methodology of Measurement

The key question is how to evaluate media plurality in the market. It is complicated to assess influence; simply counting the number of media providers is not sufficient to illustrate power concentration. The main problem is that there is no single standard for monitoring plurality across media platforms. Each sector has its own specific metric and the online news sector has no own measuring standard. This can be seen from an attempt by the European Commission to develop the ‘Media Pluralism Monitor’ containing more than 160 indicators; however, no member states are likely to adopt it.⁶³

⁶⁰ Ofcom, “Report on Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation,” November 2010, p.15, [online] Available from : <https://www.ofcom.org.uk/consultations-and-statements/category-3/public-interest-test-nov2010> [27 February 2023]

⁶¹ Media Reform Coalition, “The Elephant Next Door: A Survey of International Media Ownership Regulations,” 2013, p.5, [online] Available from : <http://www.mediareform.org.uk/wp-content/uploads/2013/02/The-Elephant-Next-Door.pdf> [27 February 2023]

⁶² Canadian Radio-television and Telecommunications Commission, Regulatory Policy: Diversity of Voices, Broadcasting Public Notice CRTC 2008, para 84.

⁶³ K.U.Leuven Et al., “Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach,” April 2009, Prepared for the European Commission Directorate-General Information Society and Media SMART 007A 2007-0002; Centre for Media Pluralism and Media Freedom,

4.2.1 Common Indicators

Measurement can be considered on both sides: the supply side from providers and the demand side from consumers. The most common form of supply-side indicator is ‘revenue’. While measurement from the supply side benefits in being straightforward to the weight of each company’s power and size in a market, its flaw is the lack of pictures of its real influence reaching the audience. Conversely, the consumer side approach can represent media impact over public opinion, but it requires a metrical summary of many aspects such as usage, trust, engagement, and influence. The demand side indicators are such as audience share, share of reference, audience reach, and time-exposure share.⁶⁴

Table 1: the advantages and disadvantages of some of the various metrics of measurement that have been used, or proposed, in various European countries.⁶⁵

Indicator	Pros	Cons
1. Revenue shares: Indicates what proportion of revenues a media company holds within a specific media market E.g. Italy	- Revenue data easy to gather and compare - Focus on owners at the ‘whole level’	- Poor indicator of influence: media companies can have high revenues due to particular income sources (such as subscription) but reach only a small percentage of the audience

“Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the Year 2021,” 2022, [online] Available from : <https://cadmus.eui.eu/bitstream/handle/1814/74712/MPM2022-EN-N.pdf?sequence=1&isAllowed=y&fbclid=IwAR3hwSiTdvkNsXepWDbDR-O0pH05VNkOm1fOyMD2VhGqkmSd-dlv3q-AMcPk> [27 February 2023]

⁶⁴ Ofcom, “Measuring Media Plurality: Ofcom’s Advice to the Secretary of State for Culture, Olympics, Media and Sport,” June 2012, p.21, [online] Available from : https://www.ofcom.org.uk/__data/assets/pdf_file/0031/57694/measuring-media-plurality.pdf [27 February 2023]

⁶⁵ Rachael Craufurd Smith et.al., “Regulating Media Plurality and Media Power in the 21st Century,” p.11.

Indicator	Pros	Cons
<p>2. Standard industry indicators for ‘audience’ shares in each media sector (i.e. shares of TV views/ newspapers readers/ radio listeners/ Internet users):</p> <p>Indicate what proportion of the total of the users select a particular media item E.g. German, France, Belgium</p>	<ul style="list-style-type: none"> - Long-standing and increasingly reliable metric for television, radio and newspapers - Can be easily used for particular media content (e.g. for television news program only) - Focus on the consumer side 	<ul style="list-style-type: none"> - Poor indicators of influence: do not take into account the time spent accessing a particular media item, thus providing eventually misleading results - Difficult to combine different indicators developed for each media sector in one cross-media indicator - No standard industry measures for share of Internet users
<p>3. Audience reach:</p> <p>Indicate how widespread exposure to a particular source is across users e.g. France</p>	<ul style="list-style-type: none"> - Show how many consumers a media outlet is able to reach, thus providing the ‘penetration rate’ of a media outlet with in the entire audience - Focus on the consumer’s side 	<ul style="list-style-type: none"> - Reaching many people means having potential influence, but not necessarily real influence (e.g. a TV program can be watched by many people, but only for a short time) - Must be combined with multi-sourcing: the more sources are used by a consumer, the less is the influence if a single source.

Indicator	Pros	Cons
<p>4. Share of reference:</p> <p>Indicate how many times a news provider is cited by consumers as a regular source of news or current affairs. The share is obtained by calculating the proportion of references a news provider receives within the total number of references provided by consumers e.g. UK</p>	<ul style="list-style-type: none"> - Considers the loyalty factor, focusing on the regularity of exposure - Overcomes all the methodological problems related to the different nature of each media platform - Focuses on the consumers' side 	<ul style="list-style-type: none"> - No simple correlation between regular accessed influence: a source accessed infrequently but for extended periods could be more influence than sources accessed regularly but for short durations - Does not sufficiently take into account the relative importance attached to different media outlets Suitable for news content, but more difficult to apply to media content in general
<p>5. Share of time exposure:</p> <p>Indicates the proportion of time spent by consumers on each media content provider e.g. Netherlands, UK</p>	<ul style="list-style-type: none"> - Best proxy for media influence, assuming that time spent on a media outlet correlates with influence - New tech may offer more detailed time-based metrics - Focuses on the consumer side 	<ul style="list-style-type: none"> - Relies on an equal impact assumption, implying that one minute of news consumption has the same impact across all media - Not easy to calculate the time spent reading newspapers or listening to radio

As described in the Table above, there is no perfect indicator; therefore, more than one metric should be used. To complete the picture of media plurality, two outcomes are sought: diversity of views and control of excessive power.⁶⁶ To measure the diversity of views, not only the proliferation of voices but also the variety of voices consumed should be concerned. To assess excessive power, revenue share is appropriate to measure the financial capacity of entities and share of time exposure should adopt for measurement of the consumer side. Other assessments such as audience reach and audience share should also be contributed to a better understanding of media influence figures.

For the UK Public Interest Test, Ofcom, in the merger case of News Corporation/BskyB, refers to ‘cross-media audience research’ (CMAR) and constructs four main indicators: audience reach, time-based consumption, specified main source, and share of references.

(1) Audience Reach

Audience reach can be defined as ‘the percentage of the total audience which is exposed to a specific news provider’. In other words, it shows the amount of audience that each provider reaches to. Ofcom develops the measure of cross-media reach metric based on the ‘regular use’ of specific sources from CMAR survey data.⁶⁷ However, this metric is unreliable since the thresholds for ‘regular use’ included in the reach data have a too low link to media influence such as seven-day-a-week viewer of television and once-a-week daily newspaper reader being counted as a ‘regular use’ and have no distinction.⁶⁸ Behavior of consumers using multi-sourcing media providers also makes this metric not precise.

⁶⁶ Lord Justice Leveson, “An Inquiry into the Culture, Practices and Ethics of the Press: Report Volume III,” The Stationery Office, November 2012, p.1461.

⁶⁷ Ofcom, “Report on Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation,” November 2010, pp.27-28, [online] Available from : <https://www.ofcom.org.uk/consultations-and-statements/category-3/public-interest-test-nov2010> [27 February 2023]

⁶⁸ Communications Management Inc, “Measuring Across Media: Key Issue in the United Kingdom”, Research Note, November 2011, p.6-7, [online] Available from : http://media-cmi.com/downloads/CMI_Research_Note_UK_Media_100411_111711.pdf [27 February 2023]

(2) Time-based Consumption

Time-based consumption directly analyzes individual audience spending time-consuming content across different providers. It shows the overview of each provider's influent weight in the average individual's public sphere.⁶⁹ This indicator has two flaws. First, different medium uses different measurements which cannot be compared to each other. Second, each medium has a different impact, one-minute consumption from watching television and from reading a newspaper does not cause an equal effect. However, this metric relies on the assumption of the same impact across all media.

(3) Specified Main Source

Main source specifies the media provider that audience considers to be their main source. Instead of referring to regular use of media, obtained data is based on consumers quoting their main source. This approach assesses influence from a subjective aspect. Whereas 'main source' can be interpreted divergently, only one source is allowed to be specified and the relative importance of other various used sources is ignored.⁷⁰ The relationship between media and audience is not simply to be embodied by indicating merely a single source. Thus, the diversity importance of each source should be differentiated. All sources which individuals consider to be important should be identified and should be classified due to a scale of influence such as ranging from less influential to very influential.⁷¹

(4) Share of Reference

Ofcom creates a share of reference approach calculated by consumer survey which involved respondents who were asked to list which sources they used.⁷²

⁶⁹ Davide Morisi, "Measuring Media Pluralism in the Convergence Era: The Case of News Corp's Proposed Acquisition of BSkyB," *Media@LSE*, 2012, pp.26-27.

⁷⁰ Rachael Craufurd Smith and Damian Tambini, "Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges," p. 35.

⁷¹ Davine Morisi, "Response to Ofcom Consultation on Measuring Media Plurality," 2012, [online] Available from : <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/responses/davide-morisi.pdf> [27 February 2023]

⁷² Ofcom, "News Consumption in the UK," June 2012, p.14, [online] Available from : <https://>

The survey includes both regular uses and which of these uses are regarded as their 'main source'. The data, is then, weighted and summed to constitute the total number of overall references to be the basis for market proportion attributed to each provider across all platforms. The advantage of this indicator is that it emphasizes influence rather than market power. It also does not have problems with different indicators from different sectors and equal influence assumptions.⁷³

However, the relationship between regular access and influence is problematic. A source that has a long period of consumption though not regularly may have more influence than a source which frequently accessed but for a short time.⁷⁴ With the very particular method of analysis, it may not be an appropriate framework since the measure should be clear for all parties to see the line. By using the main source, it cannot simply overcome the problem of weighting different media impacts on public opinion, in particular, no distinction is made between those who read and watch seven days a week as audience reach.⁷⁵

In 2015, by consulting with the industry on the plurality measurement framework, Ofcom established a new framework for assessing media plurality. The measurement framework consists of three categories of quantitative metrics as well as qualitative or more contextual factors. The quantitative measures illustrate the availability of news sources, the consumption of these sources and provide proxies to help assess the impact, or influence, that these sources may have. Quantitative metrics are organized into three areas⁷⁶:

www.ofcom.org.uk/__data/assets/pdf_file/0018/55602/annex4.pdf [27 February 2023]

⁷³ Davide Morisi, "Measuring Media Pluralism in the Convergence Era: The Case of News Corp's Proposed Acquisition of BSkyB," *Media@LSE*, 2012, p.28.

⁷⁴ Rachael Craufurd Smith and Damian Tambini, "Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges," p.35.

⁷⁵ Media Reform Coalition, "The Elephant in the Room: A Survey of Media Ownership and Plurality in the United Kingdom," April 2014, pp.19-20, [online] Available from : <https://www.mediareform.org.uk/wp-content/uploads/2014/04/ElephantintheroomFinalfinal.pdf> [27 February 2023]

⁷⁶ Ofcom, "Measurement Framework for Media Plurality: Ofcom's Advice to the Secretary of State for Culture, Media and Sport," November 2015, p.2-3.

(1) Availability: The number of different news sources available on each media platform and across all media is a relevant aspect of media plurality. Understanding the number of media providers gives a picture of the number of news sources that people can exploit. However, this metric does not measure how widely those sources are used. As such, availability metrics offer limited insight in isolation.

(2) Consumption: Ofcom measures consumption on television, radio, printed newspapers and online media using industry data for each platform. In particular, Ofcom examines cross-platform audience reach (the number of people using different news sources), and cross-platform share of consumption (how many people use different news sources) by using their invented ‘share of reference’ metric.

(3) Impact: Availability and Consumption metrics indicate what news sources are available and how much they are being used, but not how much impact these sources are having on audiences. While measuring the impact and influence of news sources on people’s attitudes is inherently complex, the proxy measurement for impact plays an important part in any plurality assessment. To assess media impact, Ofcom uses an individual’s assessment of the importance of a particular item of news, its impartiality, reliability, trustworthiness, and the extent to which a news source helps a particular individual to make up their mind about issues in the news.

Furthermore, there are also aspects of the market that cannot be measured quantitatively at all. Thus, Ofcom considers relevant qualitative factors as an integral part of measuring plurality. These factors will vary depending on the transaction which is different between news sources and the organizations that produce them. The examples of relevant factors include, but are not limited to internal plurality, funding models, editorial policy, impartiality requirements, market trends, and future market developments.⁷⁷ For example, in the proposed acquisition of Sky plc by 21st

⁷⁷ Ibid.

Century Fox case in 2017, Ofcom considered that there is a risk that the acquisition could weaken the editorial independence of Sky News and so the Murdoch Family Trust would have a greater effect on the influence over public opinion. Also, the transaction may increase the influence of the Murdoch Family Trust over the political process. Therefore, Ofcom considers that the acquisition raises public interest concerns arising from the risk that the Murdoch Family Trust will exert greater influence over the news agenda and the political process.⁷⁸

4.2.2 Multi-sourcing and Weighting System

Multi-sourcing is the average number of sources regularly used by an individual. The greater number of sources the audience consumes, the less influence a single outlet has on individuals. In an abundance of information environment, the impact of multi-sourcing consumption on the public sphere and media plurality should be analyzed for a better understanding of media influence.

The assessment of media plurality within a cross-media environment is not straightforward as in a submarket but is much more complex. Even if the indicator can be set and the measurement of multi-sourcing media can be found, another problem is how to weigh the influence of each media. This is because there are concerns that different media has a different degree of influence attached to an individual's public sphere.⁷⁹ In particular, certain time spent on television may not have the same impact as equivalent exposure spending on newspapers. Though the information presented in both images and sound is widely considered to be more influential than data presented by letter, there is no standard measurement of comparison.

⁷⁸ Ofcom, "Public Interest Test for the Proposed Acquisition of Sky plc by 21st Century Fox: Ofcom's Report to the Secretary of State," June 2017, p.3, [online] Available from : https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf [27 February 2023]

⁷⁹ Media Reform Coalition, "The Elephant in the Room: A Survey of Media Ownership and Plurality in the United Kingdom," April 2014, p.23.

Ofcom's indicators for UK Public Interest Test have no weighting system. The approach is based on the assumption that public opinion is influenced equally by every media platform.⁸⁰ Consequently, the metric does not consider each medium having a different weight of impact. The attempt to achieve this sophisticated approach in weighting influence of each outlet can be seen in the US and Germany.

In the US, the Hirschmann-Herfindahl Index (HHI) as part of the 'Diversity Index' has been generated by the Federal Communications Commission (FCC). It is derived from concentration measurement in competition regime calculated in terms of share of revenue and was developed to be the metric for media merger considering different terms such as share of time exposure.⁸¹ It expresses the sum of the squares of the percentage market shares of all participants. Its range is between 10,000 points substituted monopoly scenes and 0 referred to many players with small market share. The market will be considered as less concentration when the HHI point is below 1000 and will be determined as high concentration if the HHI is over 1800 points. Weighting various media outlets have been used in the index based on the importance of each medium on audience consumption. This indicator is distinct from the share of reference of the UK in two points: it uses regular sources instead of a single main source in calculating the weight; and it considers the effect of different media platforms on both the audience side and among inter-media.⁸² The HHI can be criticized that its key problem in achieving plurality is the disregard for the number of voices in a market.⁸³

⁸⁰ Davide Morisi, "Measuring Media Pluralism in the Convergence Era: The Case of News Corp's Proposed Acquisition of BSkyB," *Media@LSE*, 2012, p.29.

⁸¹ Department of Justice of the United States, 'Horizontal Merger Guidelines (08/19/2010),' [online] Available from : <https://www.justice.gov/atr/herfindahl-hirschman-index> [27 February 2023]

⁸² Philip M Napoli and Nancy Gillis, "Media Ownership and Diversity Assessment," in **Media Ownership: Research and Regulation**, ed. Ronald E Rice, (Hampton Press, 2008), p.309.

⁸³ Eli M Noam, 'Are the American Media Becoming More Concentrated?' in **Media Ownership: Research and Regulation**, ed. Ronald E Rice, (Hampton Press, 2008), p.149.

In Germany, the German Communication Authority, KEK, generated a new weighting system to assess media influence in 2006.⁸⁴ The system considered the influence of each media and attempted to determine the equivalent share of different media platforms by converting press, radio, and online outlets into TV audience share. Unfortunately, the approach is too complicated to explore here in depth. This system was devised from the KEK review of the endeavor to take over Pro7/Sat1 Media AG, Germany's biggest private television company, by the Axel Springer publishing group. KEK exercised 2/3 weighting to change 26 percent of Springer's daily print market share to 17 percent of television market share and combined with Pro7/Sat1's market share to assess media concentration.⁸⁵ Besides, other Springer's interests such as holding in program guides, magazines, radio, and the Internet were considered by different conversion ratios.⁸⁶ However, the validity and manageability of the approach are under criticized.⁸⁷

4.3 Form and Intervention Process

4.3.1 Fixed Lines or Discretion Thresholds

Not only means of media plurality measurement that is various, but the form of intervention process after reaching the triggered line is also controversial, in particular, the degree of discretion power of the decision maker. Whereas discretion leads to wide consideration, it causes uncertainty for participants.⁸⁸ In forming an ownership regulatory framework, the balance between citizen and industry

⁸⁴ Petros Iosifidis, "Pluralism and Concentration of Media Ownership: Measurement Issues," in *Javnost* 17, no.3 (2010) p. 15.

⁸⁵ Andrea Czepek and Ulrike Klinger, "Media Pluralism between Market Mechanisms and Control: The German Divide," p.820.

⁸⁶ Rachael Craufurd Smith and Damian Tambini, "Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges," p.35.

⁸⁷ Natascha Just, "Measuring Media Concentration and Diversity: New Approaches in Europe and the USA," in *Media, Culture & Society* 31, No. 1 (2009), p.97.

⁸⁸ Rachael Craufurd Smith and Damian Tambini, "Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges," p.35.

interests and regulatory sophistication to examine all aspects have to be concerned. Therefore, the rules have to be clear and predictable as well as sufficiently practical.

(1) Fixed Lines

Fixed lines set specific limits or ceilings that ownership concentration can reach. It can be divided into two layers; the clear lines itself and fixed prohibition. Unlike the UK Public Interest Test which provides a wide range of assessments, the clear lines precisely specify the indicators by, for example, referring to various metrics mentioned. For instance, Italy's media ownership restriction and the 'clear bright lines' which has been used in the US until recently provides obvious limit in the legislation.⁸⁹ This does not mean that contextual factors cannot be taken into account. For example, the US clear bright lines have the flexibility to suitably respond to a particular circumstance. On the other hand, fixed prohibition places a strict ceiling such as prohibiting holding more than 20 percent of the SIC's total income in Italy.⁹⁰ The advantage of fixed lines is the certainty from limiting discretion: on the citizen and industry side, it is understandable and predictable; on the regulator side, it reduces political influence.⁹¹ However, it disregards other qualitative and quantitative factors affecting media plurality.⁹²

(2) Discretion Thresholds

Another approach is to set triggered thresholds for allowing the regulator to in-depth consider whether the proposed situation threatens diversity or address alternative safeguards before intervention.⁹³ These thresholds offer a chance for media entities to convince regulators that media plurality does not really be

⁸⁹ Ibid, p.56.

⁹⁰ Ibid.

⁹¹ Ibid, p.35.

⁹² Philip M Napoli and Nancy Gillis, "Media Ownership and the Diversity Index: Outlining a Social Science Research Agenda," McGannon Center Working Paper Series, Paper 5, (2008), p.8.

⁹³ Lesley Hitchens, "Media Regulatory Frameworks in the Age of Broadband: Securing Diversity," in **Journal of Information Policy** 1, (2011), p.217.

threatened or the proposed action actually benefits the media market. Though the activities triggered intervention cause a negative impact on media plurality, media companies can propose counterbalanced remedies such as independent directors and increasing additional nonmainstream content.⁹⁴ The thresholds can be exceeded if only the advantages to the public interest can be presented.

Compared to the UK Public Interest Test, the FCC rule has three prominent points.⁹⁵ First, it places positive and negative presumptions on the impact of a merger on public interest, for example, the merger of non-top four television companies and at least eight players remaining in the market are presumed that do not threaten media plurality.⁹⁶ The negative presumption puts the burden on the media company to show clear and convincing evidence that the merger will have positive outcomes such as increasing diversity or competition in the market.⁹⁷ Second, there are automatic reverses of negative presumption, with limited circumstances, such as the taken over firm economically failed.⁹⁸ Third, there are specified factors that will be considered to rebut those presumptions such as editorial independence, the financial state of the firms, and the level of concentration in the market.⁹⁹

The discretion thresholds, as with fixed lines, have two sides of a coin: advantages and drawbacks. While the approach is flexible to deal with the change of new technology and dynamic situation, it causes unpredictability and concerns about political influence in both the process of considering the threat to media plurality and negotiation of remedy.¹⁰⁰ Besides, in practice, discretion opens to

⁹⁴ Ibid.

⁹⁵ Rachael Craufurd Smith and Damian Tambini, "Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges," p.35.

⁹⁶ FCC, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCCR 5922, 2008 WL 612180, 18 December 2007.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Council of Europe, "Media Diversity in Europe," Media Division, Directorate General of Human Rights, December 2002, p.15-16 [Online] Available from : <https://rm.coe.int/1680483b2c> [27 February 2023]

greater scope for other benefits, especially economic interest. Thus, large media entities take advantage of their resource to propose convincing evidence supporting this interest which is less difficult compared to societal organizations to show information about the negative impact on media plurality.¹⁰¹ Whereas multifaceted consideration may lead to more targeted and better decisions, it depends on the accurate form of measurement and it is complex, time-consuming, and pricey. The effectiveness of the proposed remedy can also be criticized.

The Media plurality measurement system has to compromise between certainty and responsiveness. Thus, the Co-ordinating Committee for Media Reform (CCMR) proposes to set two lines: the lower lines use discretion thresholds triggered when reaching specified indicators referred to metrics such as share of time exposure; and the upper lines use fixed lines that cannot be superseded.¹⁰² The periodical assessment can also be combined to strengthen discretion thresholds.

4.3.2 Periodical Assessment

Apart from fixed lines and discretion thresholds, Ofcom proposed a periodical assessment that automatically reviews the level of media concentration in a certain market at a certain specified time.¹⁰³ The Dutch Media Authority, for example, also recommended conducting a survey about media influence on an annual basis.¹⁰⁴ However, Ofcom suggested the gap of review at every four or five years to avoid incessant cycle problem.¹⁰⁵ Time-based trigger is better than discretion thresholds

¹⁰¹ Rachael Craufurd Smith and Damian Tambini, “Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges,” p.35.

¹⁰² Co-ordinating Committee for Media Reform, “The Media and the Public Interest,” Preliminary Briefing Paper, November 2011, p.11 [online] Available from : https://www.mediareform.org.uk/wp-content/uploads/2015/11/The_Media_and_The_Public_Interest-Plurality_Briefing_Paper.pdf [27 February 2023]

¹⁰³ Ofcom, “Measuring Media Plurality: Ofcom’s Advice to the Secretary of State for Culture, Olympics, Media and Sport,” June 2012, p.2 [online] Available from : https://www.ofcom.org.uk/_data/assets/pdf_file/0031/57694/measuring-media-plurality.pdf [27 February 2023]

¹⁰⁴ Commissariaat Voor De Media, “Mediamonitor: The Dutch Media in 2010,” February 2011 [online] Available from : <https://www.mediamonitor.nl/wp-content/uploads/2013/08/Mediamonitor-The-Dutch-media-in-20101.pdf> [27 February 2023]

¹⁰⁵ Ofcom, “Measuring Media Plurality: Ofcom’s Advice to the Secretary of State for Culture,

in terms of simplicity, transparency and certainty. Besides, this regular monitoring is useful to ameliorate the problem of discretion thresholds mentioned above. This approach is endorsed by the Lords Select Committee on Communications to be the additional assessment of the existing Public Interest Test.¹⁰⁶

5. Conclusion and Recommendations

The research found that media plurality is a fundamental concern in regulating media ownership. The media sector is a distinguished sector in which competition law is not sufficient to prevent media ownership concentration. Competition law is concerned about the market power of the companies; whilst media plurality is concerned about the media power of media entities on the distortion of people's perception of the world. These two powers are not the same thing. The concentration of media can lead to a concentration of power which has a great negative social impact. To control the concentration of media ownership and undue power, specific regulation is essential to enhance media plurality.

Media plurality is a concept which ensures that the public can access and consume a wide range of viewpoints and prevents too much influence over the political process by any media owner. One aspect of media plurality is external plurality which relates to the diversity of media ownership and media outlets. Even in the digital age, the importance of media plurality has been recognized in the UK, the EU, and other countries. Although each jurisdiction adopts different criteria of media ownership rules, they share many overlapping objectives. Media ownership regulation can be in various forms such as limiting the number of licenses held by the same entity, imposing ceilings of audience shares, preventing quantitative thresholds concentration, and disqualifying categories of entities from controlling media. To restrict media concentration, there is no single measurement or factor

Olympics, Media and Sport," June 2012, p.2 [online] Available from : https://www.ofcom.org.uk/__data/assets/pdf_file/0031/57694/measuring-media-plurality.pdf [27 February 2023]

¹⁰⁶ Media Reform Coalition, "The Elephant in the Room: A Survey of Media Ownership and Plurality in the United Kingdom," p.3.

for an accurate evaluation of media market power. In contrast, there are many complicated factors concerning media plurality and media power concentration which are distinct from country to country depending on contexts such as public interest, economy, market size, technology, history and policy.

The proposed guideline of the media ownership regulatory framework is recommended as a general guideline for any jurisdiction to take into consideration. They are as follows:

1. The scope of an assessment of media concentration should concern only news and current affairs. Although the entertainment market has the ability via economic power to form cultural agenda, the measurement of the whole market may be complicated and may not reflect media power in political issues.
2. The measurement of media ownership power should include all medium platforms via cross-media regime and both separate markets should divide the measurement into specific sub-sectors, i.e., television, radio, newspaper, and online platform. Moreover, the influence of online intermediaries such as search engines should be concerned with ownership restriction.
3. More than one metric should be used to assess media influence. Although the number of different news sources available on each media platform and across all media gives a picture of the number of news sources that people can exploit, other quantitative metrics should be combined. For example, revenue share is appropriate to assess excessive influence from the supply side. Share of time exposure should be applied to measure diversity of voices consumed and to measure excessive influence from the consumer side. Other assessments such as audience reach and audience share should also be contributed to a better understanding of media influence figures. The qualitative metrics such as funding models, editorial policy, impartiality requirements, political influence, and political divide should be counted to represent the impact of media sources.

4. The indicators can be strengthened by implementing a more sophisticated method to explore the impact of multi-sourcing consumption on the public sphere. Moreover, different levels of the effect on individuals' public sphere and among inter-media of each different media should be weighed and taken into account. It should be noted that more research on the relation between audience and multi-media should be provided before adopting a weighting system.

5. Media ownership restriction should set two triggered thresholds. The lower lines provide discretion thresholds with guidelines for the conditions and levels of concentration which are regarded problematic: for example, a presumption of a positive or negative impact of a merger on the public interest, or factors used in consideration to rebut those presumptions. The upper ceiling uses fixed lines that cannot be superseded. The periodical assessment can also be an additional assessment to strengthen discretion thresholds. Also, media ownership regulation should restrictively cover only merger and acquisition transactions, but not include organic growth in the regulatory framework.