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# **Ofcom response to the European Commission public consultation on the EU Media Freedom Act**

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Safeguarding media plurality is one of the main aims of the Media Freedom Act. Ofcom has an overarching statutory duty to secure and maintain a sufficient plurality of providers of different TV and radio services, and specific responsibilities in relation to media mergers, media ownership rules in the UK, oversight of public service broadcasting, and the enforcement of due impartiality and accuracy standards in broadcasting.

Ofcom has always contributed to European debates on media pluralism, participating in the drafting of relevant Council of Europe standards, convening in-depth discussions within the European Platform of Regulatory Authorities (EPRA) network, responding to and participating in the 2016 European Commission fundamental rights Colloquium on Media Pluralism and Democracy<sup>1</sup>, and acting as co-drafters of ERGA's first report on media plurality. Continuing in this vein, we would like to take this opportunity to share some of our recent work on media plurality which is relevant to the issues under consideration in the Commission's Consultation, and which we hope the Commission will find a helpful contribution to its deliberations. We would also be very happy to share and discuss the outcomes of our further planned work with the Commission and any other interested groups.

## Ofcom's Work on Media Plurality

Ofcom has defined media plurality as:

- Ensuring that there is diversity in the viewpoints that are available and consumed, across and within media enterprises and
- Preventing any one media owner, or voice, having too much influence over public opinion and the political agenda.

Part of our responsibility is to understand how changes in media markets affect media plurality and to recommend or propose governmental and regulatory responses. At the request of the UK government, Ofcom developed a Media Plurality Measurement Framework which uses our research findings to give a picture of media plurality in the UK at any given time, covering availability, consumption and impact of media, including online.

Most recently, we wanted to build on the findings of recent media merger public interest tests and our regular reviews of the UK's media ownership rules to understand how changes in the market might affect media plurality. In November 2021 we published a Statement on the Future of Media Plurality in the UK and our planned next steps.<sup>2</sup>

## Media Ownership & Concentration

### Regulatory oversight of media mergers

Under UK law, when a proposed merger involves a broadcaster and/or a print newspaper enterprise, the Secretary of State for Digital, Culture, Media and Sport can issue an intervention notice, based

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<sup>1</sup>[https://webarchive.nationalarchives.gov.uk/ukgwa/20210810104404mp\\_/https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0018/92007/Ofcoms-response-to-2016-European-Commission-Annual-Colloquium-on-fundamental-rights-public-consultation-on-Media-Pluralism-and-Democracy.pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20210810104404mp_/https://www.ofcom.org.uk/_data/assets/pdf_file/0018/92007/Ofcoms-response-to-2016-European-Commission-Annual-Colloquium-on-fundamental-rights-public-consultation-on-Media-Pluralism-and-Democracy.pdf)

<sup>2</sup>[Future of Media Plurality](#)

on a defined set of public interest grounds. This triggers a review of whether the merger might result in harm to the public interest specified by the Secretary of State. Ofcom has an advisory role in that process.

Ofcom also has a statutory duty to carry out regular reviews of the operation of the UK media ownership rules, of which the Public Interest Test is one.

Relevant to Section 2 of the Commission’s Consultation, in November 2021 we recommended that the scope of the public interest grounds be widened to include all news creators, not just broadcasters and/or print newspapers, to reflect the way in which people access and consume news today. The definition of “news creators” should be broad enough to encompass all entities which have editorial control over the creation and publishing of news material by journalists, irrespective of platform. This includes online news outlets, but not online intermediaries which do not exercise editorial control over content. We will make recommendations on any further changes to specifically bring online intermediaries within the scope of the Media Public Interest Test (for example, mergers between two online intermediaries) when there is more available evidence. We continue to gather evidence on this question as part of our ongoing work on media plurality.

Given the increasingly global reach of media organisations and the common challenges all countries face in response to rapidly changing markets and citizen behaviour, it might be useful to consider harmonised definitions of media which reflect how people consume news content. This could help when assessing the effect of media market transactions on media pluralism or considering EU-level actions on ownership restriction/authorisation (Question 2.2). In this area, the Commission could consider the recommendations made by the Council of Europe (CoE) on a new notion of media. These recommendations call for a new, broad notion of media which encompasses all actors involved in the production and dissemination of content and propose a graduated and differentiated media policy response, depending on the role media services play.<sup>3</sup> The Commission could also consider the more recent CoE draft recommendations on media and communications governance.<sup>4</sup>

## Cross-media ownership

One of the UK’s media ownership rules restricts cross-ownership between large newspaper operators and the holder of a Channel 3 licence.<sup>5</sup> The UK is not alone in applying a cross-media ownership rule of this kind to limit concentration of opinion power and influence. Ofcom considered in our latest review that this rule should be retained for the time being. We identified limitations to the current scope that might be relevant to the Commission’s thinking about this type of intervention. For example, the focus on ownership by print newspaper groups alone does not

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<sup>3</sup> <https://edoc.coe.int/en/media/8019-recommendation-cmrec20117-on-a-new-notion-of-media.html>

<sup>4</sup> Draft version: <https://rm.coe.int/msi-ref-2020-05-draft-rec-media-and-comm-governance-principles-en-7-7-/1680a31dd7>

<sup>5</sup> Channel 3 is the largest commercial public service channel in the UK and is a network of 15 regional licensed services. These regional services share a schedule with ‘opt-outs’ for regional news programming. Over time there has been consolidation and there are now only two licence owners – STV in northern and central Scotland and ITV in the remainder of the UK. The Channel 3 licensees are collectively required to appoint a separate provider to make UK and international news programmes for the network. The programmes provided by this supplier must be “high quality” and capable of competing with other services, such as those provided by the BBC. In part quality is ensured through a requirement that the contractual relationship between the Channel 3 licensees and ITN is subject to approval by Ofcom. In particular, Ofcom assesses whether the financial terms of the contract are sufficient to secure high quality and competitive news programming. See [The Media Ownership \(Radio and Cross-media\) Order 2011](#)

capture potential ownership of a major television broadcaster by other news creators, which might also present plurality concerns, and the market share threshold (20%) applicable to this rule in the UK does not allow consideration of qualitative factors, such as the sustainability of Channel 3, quality and innovation. Moreover, neither this rule nor the merger controls in place in the UK effectively deal with the plurality risks posed by the closure of media operators.

We can see how in the future this rule might need to be updated to reflect growing online news consumption. This would be challenging because, as discussed below, there are currently no accepted industry metrics for online news consumption, in part due to the role of online intermediaries and algorithms in news consumption. This raises potential concerns over our ability as a regulator to fully measure and assess data. In our upcoming assessment (due summer 2022) of the potential concerns for media plurality we will also consider new approaches to understanding and measuring online news consumption, in order to better understand consumers' news consumption behaviours, habits and engagement with news content.

## Measuring Plurality

For Ofcom, our work to analyse news consumption has been at the heart of our plurality work to date and we believe that media regulators have an important role to play in developing and delivering audience measurement methodologies to assess both quantitative and qualitative aspects of media plurality. In 2015, we developed a media plurality measurement framework<sup>6</sup> which is based on three key features: availability, consumption, and impact of news, as well as a consideration of relevant qualitative contextual factors. When it comes to consumption, we consider both the number of people using news sources and the frequency and/or time that they spend consuming news and use a combination of industry data and consumer research. Of relevance to Question 2.3.2, in developing this framework, we noted that there are challenges to audience measurement approaches, namely:

- developing metrics capable of quantifying cross-media consumption
- limitations to the effectiveness of consumer research, e.g. relying on the recall of those surveyed (this is not unique to news consumption research).

This framework has been useful for our work to date, and in the context of questions about online media plurality has been helpful in showing us that, in the UK, TV is still the most-used platform to access news, closely followed by the internet (half of all adults now use social media to access news). As noted above, we recognise that changes in news consumption patterns, particularly on the internet and via intermediaries, might require us to change and expand our news consumption research. On that basis, we are currently considering new approaches for news consumption research to capture more detailed news consumption patterns on the internet and intermediary platforms.

Ofcom's measurement framework recognises that analysing media plurality is not a purely quantitative matter (for example the risk-based model of the Media Pluralism Monitor [MPM]<sup>7</sup>). We

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<sup>6</sup> [Measurement Framework for Media Plurality](#)

<sup>7</sup> <https://digital-strategy.ec.europa.eu/en/policies/monitoring-media-pluralism>

consider that qualitative information relating to the specific nature and features of each nation's market should also be included as part of the assessment of contextual factors. In our view, such an approach would also include a consideration of the sustainability of news sources in the various markets and describe relevant differences between news sources and organisations by looking at factors such as internal plurality, internal governance processes, editorial policy, impartiality requirements, market trends and future market developments.

## **Risks to Media Plurality**

Our November 2021 Media Plurality Statement also considered whether developments in the market context might mean that there are now threats to media plurality which are not covered by the existing regulatory framework. Our Statement drew some conclusions relevant to questions in Sections 1 and 2 of the Commission's Consultation. We found three features of the UK media landscape that might present a risk to media plurality:

1. Online intermediaries and their algorithms control the prominence given to different news sources and stories. This issue presents a potential concern about the level of influence any one intermediary might be able to exercise over the range of viewpoints that citizens can access and consume, including where these might restrict the variety of viewpoints that citizens might be exposed to, and over the political agenda and political process.
2. The basis upon which online intermediaries serve news via their algorithms is not sufficiently transparent. This issue presents a potential concern about the ability of citizens to be sufficiently informed in their news consumption choices. It also presents a potential concern about our ability as a regulator to fully observe and assess influence over the news agenda and political process.
3. Consumers do not always critically engage with the accuracy and partiality of online news. This issue also presents a potential concern about the ability of citizens to be sufficiently informed in their news consumption choices. While the same concerns might also relate to more traditional media, the rise of online news, and the potential concerns highlighted above, have increased the scale of the challenge consumers face.

Alongside the questions in Section 1 of the Consultation, we believe that these factors are relevant to assessing the state of media plurality in any given national market. In particular, the role of intermediaries might make it difficult for users to accurately assess the diversity of news providers available, and the quality and trustworthiness of the content offered by providers in the EU media market and might raise questions about users' exposure to a diversity of views.

## **Conditions for healthy media markets**

The role that online intermediaries and their algorithms play in controlling the prominence given to different news sources and stories presents a potential concern about the level of influence any one intermediary might be able to exercise over the range of viewpoints that citizens can access and consume.

The literature on these concerns about availability and consumption is already extensive, and is particularly well summarised by the OSCE in its recent Policy Manual<sup>8</sup> on artificial intelligence and freedom of expression, which outlines how algorithmic curation affects the formation of opinions and access to a diversity of opinion and ideas, and considers the potentially negative impact on media plurality from the perspective of both availability (decreased funding for professional journalism) and consumption (access to diverse and accurate information). However, there is still a task to fully examine the dependencies of news media on platforms as distributors (i.e. as intermediaries between content creators and their readers) and the dependencies of news media on online advertising market intermediaries, as well as the risks and effects of these dependencies.

In order to further understand the conditions that are impacting (negatively or positively) on the health of the media industry we are now working to:

- Conduct further analysis of sustainability challenges in the UK news media market, to help us better interrogate claims made by stakeholders in response to our Call for Evidence, and
- Better understand the structural dependencies across new and traditional news media within the UK.

## Plurality, Public Service Media and Prominence

As noted above, the shift to online consumption has put the focus on the prominence given to content by online intermediaries and the implications this has for media plurality. Questions of prominence and prioritisation have been under consideration by regulators for several years now, particularly in the context of the public service broadcasting framework, which at its heart aims to ensure that all citizens have access to diverse, high-quality, entertaining and informative content. Ofcom has published recommendations for new prominence requirements twice in recent years, in a standalone report on the subject<sup>9</sup> and as part of our latest Public Service Media (PSM) review.<sup>10</sup> In short, we considered that the increasing importance of connected TV platforms in the distribution of audiovisual content meant that both PSM providers and platforms should be obliged to ensure audiences can find PSM content easily. Innovation is key in this context, and any rules or guidance that are developed now should be able to adapt to a fast-changing market.

A pluralistic media diet depends on citizens having access to, and being able to find, a diverse range of trustworthy and quality content. It is therefore entirely right that the Commission should be considering questions of prominence in the Consultation. In the context of Question 3.2(5) of its Consultation, the issues which future-proofing guidance or legislation could usefully consider include:

- What constitutes public interest or general interest content, where inspiration can be drawn from public service media obligations around quality, editorial standards, and universality

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<sup>8</sup> [510332\\_0.pdf \(osce.org\)](#)

<sup>9</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf)

<sup>10</sup> [https://www.smallscreenbigdebate.co.uk/data/assets/pdf\\_file/0023/221954/statement-future-of-public-service-media.pdf](https://www.smallscreenbigdebate.co.uk/data/assets/pdf_file/0023/221954/statement-future-of-public-service-media.pdf)

- How criteria should be defined and applied, which is explored in a recent Council of Europe guidance note on public interest content prioritisation online<sup>11</sup>
- How the public recognises such content, where indicators of trustworthy content and media literacy initiatives can be useful, as described in EDMO’s recent study on trustworthiness indicators<sup>12</sup> and in the Council of Europe’s 2018 report on supporting quality journalism through MIL,<sup>13</sup> and
- How decisions about prominence are taken by intermediaries, including online platforms where content is primarily found and consumed, and how transparent these decisions are (or should be).

## On Regulatory Cooperation and an Enabling Regulatory Environment

As the media landscape changes, we are happy to see the role of ERGA and of regulatory authorities being considered in the Consultation. Independent media authorities play a crucial role in safeguarding media pluralism and trust in media, as recognised by the criteria for regulatory independence introduced into the AVMS Directive. National level approaches – and consequently regulators’ responsibilities – vary greatly in this area, and one valuable outcome of this Consultation process would be a comprehensive mapping of those different approaches to complement the risk-based analysis of European pluralism carried out by the MPM.

Ofcom’s experience of cooperation among European regulators is extensive and goes back many years. While the UK is no longer part of the AVMS Directive framework, we continue to benefit hugely from sharing expertise and best practice bilaterally and through networks like ERGA and EPRA, and we look forward to continuing to work together with our EU counterparts in the coming years. We also agree that regulatory cooperation between EU regulators is an essential part of effective enforcement of the AVMS Directive and application of the Country-of-Origin principle (and therefore the functioning of the EU media market). We note of course the substantial work that ERGA has done in taking cooperation to the next level of efficacy.

Regarding the questions in Section 3.2 of the Consultation, we would note that regulatory cooperation can take many forms. For example, the exchange of best practice and expertise can promote common approaches and standards in matters of media policy, and Ofcom continues to actively participate in such cooperation through EPRA. Regulatory cooperation can also have a positive impact on the way that regulators apply rules and standards in a more coherent way, even where those rules and standards seem to diverge. In addition, it might be worth considering how greater cooperation with regulators and networks covering other, relevant regimes (e.g. competition, data protection) could help to deliver the intended outcomes of the Media Freedom

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<sup>11</sup> <https://rm.coe.int/cdmsi-2021-009-guidance-note-on-the-prioritisation-of-pi-content-e-ado/1680a524c4>

<sup>12</sup> <https://edmo.eu/wp-content/uploads/2021/12/Enhancing-Content-Reliability-by-Prominence.-Indicators-for-Trustworthy-Online-Sources-Report.pdf>

<sup>13</sup> <https://rm.coe.int/draft-version-of-msi-jog-study-report-rev-v6-2/168098ab74>

Act.<sup>14</sup> In the UK, Ofcom is part of the Digital Regulation Cooperation Forum (DRCF)<sup>15</sup>, which is looking to build a common understanding of the disruptive effects of digital platforms across the regulatory regimes for which its members are responsible. This type of cooperation at the EU level could help to advance the cause of media plurality, for example through the implementation of the Digital Services Act and Digital Markets Act, and could enable a shared understanding and coherent approach to mitigating any risks that might be posed to media sustainability by the current online advertising ecosystem. Under Section 5 of the Consultation, the Commission might also wish to consider what role a strengthened ERGA could play in coordination with other EU-level and international networks. This type of regulatory interaction can also help to create an enabling environment for innovative media (Section 3.4 of the Consultation) by supporting media sustainability.

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<sup>14</sup> The topic of cross-sectoral regulation was explored by EPRA in 2021 in this paper co-authored by Ofcom [https://cdn.epra.org/attachments/files/4071/original/Plenary\\_54th\\_epra\\_Plenary\\_Background\\_paper\\_final.pdf?1638973456](https://cdn.epra.org/attachments/files/4071/original/Plenary_54th_epra_Plenary_Background_paper_final.pdf?1638973456)

<sup>15</sup> <https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum>