



UvA-DARE (Digital Academic Repository)

Media concentration 2.0

Regulating platform opinion power in a concentrated digital media ecosystem

Seipp, T.J.

Publication date

2024

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Seipp, T. J. (2024). *Media concentration 2.0: Regulating platform opinion power in a concentrated digital media ecosystem*. [Thesis, fully internal, Universiteit van Amsterdam].

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

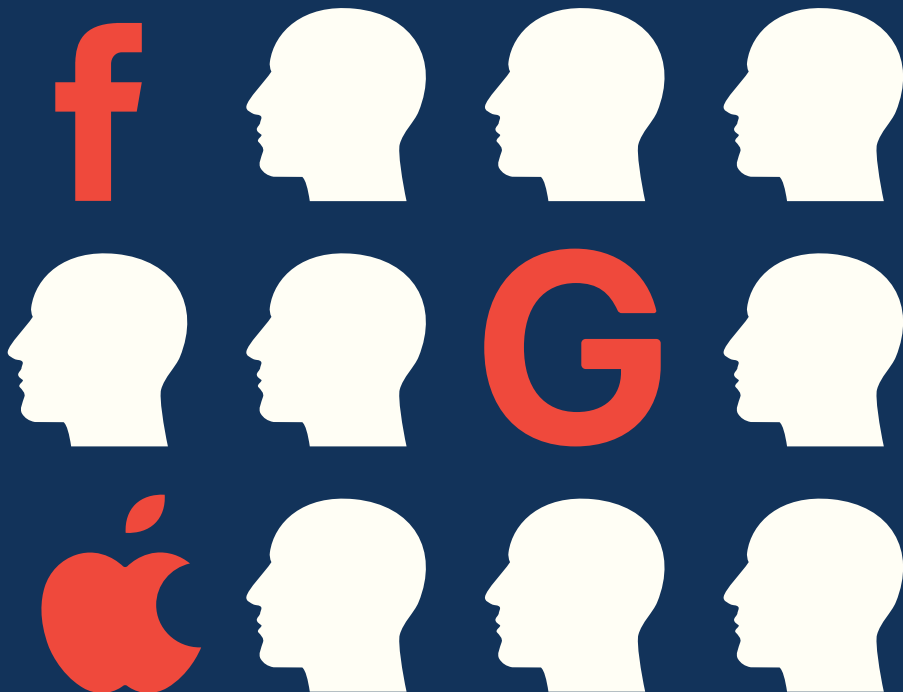
Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

HERESA JOSEPHINE SEIPP

MEDIA CONCENTRATION 2.0

REGULATING PLATFORM OPINION POWER IN A
CONCENTRATED DIGITAL MEDIA ECOSYSTEM



UNIVERSITY OF AMSTERDAM

MEDIA CONCENTRATION 2.0

Regulating Platform Opinion Power in a Concentrated Digital Media Ecosystem

By

Theresa Josephine Seipp

Amsterdam, 2024

Media Concentration 2.0: Regulating Platform Opinion Power in a Concentrated Digital Media Ecosystem

ISBN: 978-94-6496-268-0

The project is funded by the Research Priority Area grant 'Information, Communication and the Digital Society' (ICDS), University of Amsterdam

Cover: Theresa Josephine Seipp

Layout: Wendy Bour-van Telgen

Printed by: Gildeprint

Institute for Information Law (IViR), University of Amsterdam

P.O. Box 15514

1001 NA Amsterdam

The Netherlands

Theresa Josephine Seipp, 2024

All rights reserved. No part of this thesis may be reproduced, stored, or transmitted in any form or by any means without prior permission from the author or the copyright-owning journals for previously published chapters.

MEDIA CONCENTRATION 2.0

Regulating Platform Opinion Power in a Concentrated Digital Media Ecosystem

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. ir. P.P.C.C. Verbeek
ten overstaan van het College voor Promoties ingestelde commissie,
in het openbaar te verdedigen in de Aula
op vrijdag 20 december 2024, te 11.00 uur
door Theresa Josephine Seipp
geboren te München

PROMOTIECOMMISSIE

Promotores:

prof. dr. N. Helberger Universiteit van Amsterdam
prof. dr. C.H. de Vreese Universiteit van Amsterdam

Copromotores:

dr. J. Ausloos Universiteit van Amsterdam

Overige leden:

prof. dr. V. Pickard University of Pennsylvania
prof. dr. A. Gerbrandy Universiteit Utrecht
prof. dr. E. Brogi European University Institute
prof. dr. T. Poell Universiteit van Amsterdam
dr. T. McGonagle Universiteit van Amsterdam
dr. K.J. Cseres Universiteit van Amsterdam

Faculteit der Rechtsgeleerdheid

Table of contents

Chapter 1	INTRODUCTION	9
Chapter 2	BACKGROUND: OPINION POWER & MEDIA CONCENTRATION	15
Chapter 3	SHIFTING OPINION POWER IN THE DIGITAL MEDIA ECOSYSTEM	41
Chapter 4	MEDIA CONCENTRATION LAW – GAPS & PROMISES IN THE DIGITAL AGE	73
Chapter 5	“COUNTERPOWER” IN THE CONTEXT OF MEDIA CONCENTRATION & PLATFORM DEPENDENCE	97
Chapter 6	BLIND SPOTS IN REGULATING MEDIA CONCENTRATION & PLATFORM DEPENDENCY IN THE EU	137
Chapter 7	SUMMARY OF KEY FINDINGS	159
Chapter 8	CONCLUSION & WAY FORWARD	173
	REFERENCES	183
	ANNEX A: INTERVIEW GUIDE	207
	ANNEX B: AUTHOR CONTRIBUTIONS	211
	SUMMARY	215
	SAMENVATTING	221
	ACKNOWLEDGEMENTS	227

CHAPTER

INTRODUCTION

1

Let me tell you a cautionary tale...

... One that I hope will remain merely a cautionary tale, rather than a plausible forecast of the future. Imagine – in a not-so-distant future – you are waking up one morning. It is an exciting day because today is election day! The last years were marked by recessions, wars, and growing societal tensions and divisions. So, this is an important election – you think. You did your research too – every morning you stay up to date with the news by asking your conversational agent, like Xenia, to update you. You also read news on your smartphone – various newspapers and media outlets, not just one, of course, you want a diverse news consumption. You go to the ballot and register your vote – based on all the information and news you have read – you are sure you made the right choice.

In the end, the clear winner of the US presidential elections is Malon Esk – you are happy because, after all, you know him, followed him on X (formerly Twitter, which he owns now, too) for a long time already, admire his entrepreneurial and innovative spirit, and simply how powerful he is. He's now often compared to the Rupert Murdoch of the digital era, especially after acquiring the world's leading news outlets. Prior to these acquisitions, the media sector experienced major upheavals, with local and regional outlets either being bought out or vanished because they simply were not able to sustain themselves any longer. His takeovers also didn't end with Twitter, now X; he swiftly bought out emerging social media platforms and other start-ups as well. Now, his main rivals are Google and Microsoft, both continuously competing to unveil the latest Artificial Intelligence (AI) technologies.

As time progresses, economic and social divisions intensify, though. You take a moment to ponder – was he truly the right choice, or were you led to believe so? With his considerable opinion power– the capacity to shape public opinion – he could have the power not only to set the narrative for various news outlets but also control the information that reaches the public. Could he have introduced a new algorithm to silence dissenting or critical voices? Also, XNews, his news generating platform, produces news independently of other media sources. Is it possible that he manipulated the production, distribution, and consumption of information and news before the elections to secure his victory? Your friends and family have begun to feel the same way; but, as someone who prides themselves on critical thinking, you dismiss the possibility of being deceived in such a manner.

Still, this scenario is not beyond the realm of possibility if an actor or a small group of actors amass such extensive opinion power, which – let's not forget – in essence

is political power. Again, this scenario serves as a cautionary tale, stressing the critical need for proactive regulatory measures in the digital age. Without them, a concentration of opinion power could threaten the very foundations of democratic discourse, making it imperative to safeguard the plurality of voices and ensure the integrity of public debate. With committed interdisciplinary research and determined collaborations between stakeholders – including academia, civil society, industry, and policymakers – we can ensure that this scenario remains just a warning. Ultimately, a society that lacks the ability to form opinions freely and independently, one devoid of diversity and pluralism, and bereft of free and independent journalism, is on a path to a far graver problem – the erosion of democracy itself.

In 1992, the year I was born – almost 32 years ago, the well-known German media lawyer and constitutional judge, Wolfgang Hoffmann-Riem, wrote:

“Technological, economic and political changes in the media system also lead to changes in the media law.”¹

Given the unprecedented transformations in the media landscape brought about by digital technologies in the last decade, one might anticipate corresponding changes in the law. However, it appears that the legal frameworks are still trailing behind. The current era is marked by the emergence of “new” influential players wielding considerable economic, technological, opinion, and political power. However, these entities are not traditional media organisations that would typically fall under the scrutiny of media regulation. Rather, they are digital platform companies, to which I will refer to as “platforms” hereafter, disrupting the conventional media ecosystem.² This disruption has led to new power concentrations and left numerous news organisations grappling with dwindling revenues and struggling to develop new business models, in order to protect their autonomy amidst growing dependencies, while leveraging the advantages of innovation, technology, and AI.

When I began with this research, the then upcoming European Union (EU) platform regulation framework – most notably the ground-breaking Digital Services Act (DSA) and Digital Markets Act (DMA), which aimed at curbing the power of platforms in the online realm and digital marketplaces – was already on everybody’s mind.³ At the same time, the momentum was building around the formulation of an AI Act, signalling the EU’s ambition to pioneer the first all-encompassing AI legislation. In 2020, the EU Democracy Action Plan promised that “the Commission will also

1 Wolfgang Hoffmann Riem, ‘Trends in the Development of Broadcasting in Western Europe’ (1992) 7 *European Journal of Communication* 147.

2 Building on the definitions of “platforms” and “platform companies” by Gorwa (2019) and Simon (2022), I refer to “digital platform companies”, hereafter “platforms”, as (1) the services, platforms, and infrastructures of large platform companies, and (2) the firm’s or company’s corporate and business strategies. Henceforth, I particularly consider large platforms, including Alphabet (Google), Meta (Facebook and Instagram), Microsoft (Microsoft Bing), Amazon (AWS Cloud), ByteDance (TikTok) and Apple (iOS) and other services owned by them. Robert Gorwa, ‘What Is Platform Governance?’ (2019) 22 *Information, Communication & Society* 854; Felix Simon, ‘Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.’ (2022) 10 *Digital Journalism* 1832.

3 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ 2 277/01 [hereafter “Regulation (EU) 2022/2065, DSA”]; Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ 2 265/01 [hereafter “Regulation (EU) 2022/1925, DMA”]

analyse existing national media diversity and concentration rules to see whether and how they ensure a plurality of voices in digital media markets, especially in the light of the growing role of online platforms”.⁴ It was proposed that media pluralism be safeguarded by a new European Media Freedom Act (EMFA), though at that time, the specifics of such a proposal were unclear.⁵ Now, three years (and a few months) later, the DSA and DMA are in force, with the first investigations against violations underway, and the AI Act and EMFA have been passed after months of negotiations. Despite ongoing scrutiny and discussions about the efficacy of these regulations, the past few years have demonstrated a remarkable commitment to tackling the power of platforms and safeguarding the EU’s core values – including media freedom and media pluralism – which are continuously being jeopardised. Specifically, tackling the rising concentrations of power within the media is proving to be challenging due to the complex new dynamics and players that are disrupting traditional measurement methods. National media law reforms have been somewhat tardy in responding to these new challenges, except for the ongoing efforts in the UK (by Ofcom) and Germany (by KEK).⁶ Nevertheless, the DSA, DMA, and EMFA at EU level seem promising in providing some level of protection and harmonisation.

Based on that, I was driven by several probing questions from the outset of my PhD research. I sought to understand how exactly do platforms wield “opinion power”, and what is it actually? Platforms are not (and should not be seen as) traditional media, so how is it that they were able to become such powerful forces in the media ecosystem? I was curious about the legal framework’s role in this context: what actions the law has already taken, what more it ought to do, and, crucially, what we desire it to achieve? In other words, what normative goals should the law pursue? If the aim is to foster a media environment characterised by plurality, with the presence of sustainable and independent journalism, what strategies should be employed to mitigate dependencies and manage the imbalanced relationship between platforms and media? I was interested in how news organisations themselves perceive their dependency on platforms and the measures they undertake (or could undertake) to

-
- 4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on On the European democracy action plan COM/2020/790 final
- 5 Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) (“EMFA”)
- 6 KEK, ‘Sicherung Der Meinungsvielfalt Im Digitalen Zeitalter. Bericht Der Kommission Zur Ermittlung Der Konzentration Im Medienbereich (KEK) Ueber Die Entwicklung Der Konzentration Und Ueber Maßnahmen Zur Sicherung Der Meinungsvielfalt Im Privaten Rundfunk’ (KEK (Kommissions zur Ermittlung der Konzentration im Medienbereich) 2018); 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.’

safeguard their journalistic autonomy and professional values? Finally, I wanted to take a closer look at what exactly is suggested to address platform opinion power, to tackle digital media concentration, and to protect media pluralism, particularly against a backdrop where the intertwining of media and platforms disproportionately affects smaller and local news organisations. The central overarching endeavour is to investigate how EU legal frameworks can contribute to shaping a digital media ecosystem that promotes the dispersal of opinion power, ensures transparency, maintains media pluralism, and upholds fair competition amidst increasing concentrations of power.

To start, I will briefly shed light on my understanding of concepts like “power”, “opinion power” and “media concentration”, and explain the normative foundations of traditional media concentration laws. Here, I will continue by briefly pinpointing the specific challenges and shortcomings within these frameworks to address a new dimension – platform opinion power – shedding light on the significance of this research. Before moving into the detailed discussions of each chapter (which are based on journal articles as will be detailed), I will present the research questions tackled in each chapter and describe the methodologies employed. I wrap up by summarising the key findings and acknowledging limitations and questions that remained outside the scope of my research. I conclude by providing remedial points of departure for future approaches to regulating the digital media ecosystem.

CHAPTER

BACKGROUND: OPINION
POWER & MEDIA
CONCENTRATION

2

In this chapter, I will provide the foundational context in terms of norms and laws relevant to the questions introduced. I will start by defining concepts like “power” and “opinion power” as they pertain to my dissertation and outline the traditional role of media concentration laws in dispersing (opinion) power. Subsequently, I will explore how the emergence of platforms alters power dynamics within the digital media ecosystem and introduce the new factors contributing to these shifts in opinion and political power. I will also begin to examine the legal debates in this field, identifying and emphasising the existing gaps. This section aims to clarify the key concepts, norms, and legal principles fundamental to my research, while pinpointing and underscoring the gaps in research, thereby highlighting this dissertations’ relevance.

1. POWER & OPINION POWER

Beginning with one of the most contested concepts, the very notion of “power” prompts me to ask: what precisely do I mean in the context of this research? To tackle this, I turned to the works of Steve Lukes, whose dimensional analysis of power I find particularly comprehensive and capable of capturing the multidimensionality of power in a media and platform context, which is characterised by changing power relations and structures. Across the three editions of his book “Power: A Radical View” (published in 1974, 2005, and 2021), Lukes presents a nuanced examination of power, introducing three dimensions and offering insights into the multifaceted nature of power and its operation across various layers and processes within society.⁷ The first-dimensional view deals with decision-making power, the second with control over agendas and the power of non-decisions, and the third, as further developed in his 2021 edition, explores the subtler aspects of power through “domination” and influencing individuals’ beliefs and perceptions.⁸His later discussions on “domination” are particularly enlightening for understanding the nuances of power within the platform-media context. Lukes notes that power can be most effective when it “operate[s] unobserved and behind our backs and may be at its most effective when least observable to agents and observers alike”.⁹ This perspective underscores the structural and relational aspects of power, highlighting how power reinforces itself through dependencies and relationships.

In this vein, I also found Byung-Chul Han’s work on power as a relational construct to

7 Steven Lukes, *Power: A Radical View* (Third edition, Red Globe press 2021).

8 *ibid.*

9 *ibid.* 2.

be particularly relevant. He suggests in his book “What is Power” (2019) that power involves a reciprocal dynamic where the powerful are also dependent on those they dominate.¹⁰ He writes that the “more power someone holds, the more he or she is dependent on the advice and cooperation of subordinates”.¹¹ By combining the structural and relational view on power, particularly the idea that domination thrives when it becomes “routine and unconsidered” — embedded in the “everyday enactment of norms and practices, rules and roles that engender and sustain subordination, dependency, and powerlessness” — provides a comprehensive framework for understanding the dynamics of power on platforms, the dependencies and asymmetries in the platform-media relationship, and the concentrations of power in media ecosystem.¹² Thus, this research consistently embraces the view that power is both structural and relational.

Building on this perspective of power, let us delve further into the conceptualisation and definition of “opinion power”, a concept I further develop in the context of platforms as part of the first article. Traditionally, “opinion power” is understood as the media’s ability to shape individual and public opinion formation processes, distinguishing itself from broader communication power by its specific focus on the political influence wielded by the media.¹³ My understanding of “opinion power” is grounded in the analytical framework provided by Christoph Neuberger from the viewpoint of communication science, alongside the explorations of “opinion power” by Wolfgang Schulz and Natali Helberger from a legal standpoint.¹⁴ Accordingly, opinion power is rooted in: (a) influencing and steering information and news consumption, (b) controlling and deciding over content selection and agendas for debates, and (c) providing a forum for public discourse and political debates.¹⁵

Recognised as a form of political power, the integration of opinion power within legal and constitutional frameworks is deemed essential due to its significant role

10 Byung-Chul Han, *What Is Power?* (Daniel Steuer tr, English edition, Polity Press 2019).

11 *ibid.*

12 Lukes (n 7) 159–160.

13 Christoph Neuberger, ‘Meinungsmacht Im Internet Aus Kommunikationswissenschaftlicher Sicht’ [2018] UFITA; C Neuberger and F Lobigs, ‘Meinungsmacht Im Internet Und Die Digitalstrategien von Medienunternehmen. Neue Machtverhältnisse Trotz Expandierender Internetgeschäfte Der Traditionellen Massenmedien-Konzerne.’ [2018] Die Medienanstalten.

14 Natali Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (2020) 8 Digital Journalism; Neuberger (n 13); Wolfgang Schulz, ‘Kontrolle Vorherrschender Meinungsmacht - Rekonstruktion Eines Medienrechtlichen Schlüsselbegriffs’ (2017) 48 AfP 373.

15 Jesper Strömbäck, ‘In Search of a Standard: Four Models of Democracy and Their Normative Implications for Journalism’ (2005) 6 Journalism Studies 331; Josef Trappel and Tales Tomaz, ‘Democratic Performance of News Media: Dimensions and Indicators for Comparative Studies’ <<http://urn.kb.se/resolve?urn=urn:nbn:se:norden:org:diva-12100>> accessed 23 November 2023.

in democratic and political arenas.¹⁶ Although “opinion” can be understood in a broad sense, extending beyond news and politics to include the indirect influence of entertainment on people’s perceptions of reality, the notion opinion power in the context of media and constitutional law refers to the “political public”.¹⁷ It is important here to note that individual and public opinion formation are closely intertwined. As Neuberger explains, “public opinion emerges from the discourse, which at best incorporates the diversity of individual opinions of citizens. In the opposite direction, public opinion guides individual citizens in forming their own opinions”.¹⁸ Therefore, the legal recognition of opinion power hinges on the structural capacity to influence opinion formation, irrespective of intent or actual misuse.¹⁹ This approach aligns with broader theories of power that emphasise the potentiality over actuality or actual exercises of power.²⁰ Traditionally, to deal with opinion power, most European countries have media concentration laws in place that aim to proactively prevent dominant opinion power from accruing.

2. NORMATIVE & LEGAL FOUNDATIONS

Opinion power in democratic contexts underscores the media’s critical role in shaping political discourse, from setting agendas to facilitating public debate. Therefore, media concentration laws address the structural ability of media actors to accumulate predominant opinion power, thereby facilitating a diverse media landscape to ensure a balanced public discourse.

The normative reasons for regulating opinion power are based on the potential democratic threats if one media entity or individual is capable of wielding predominant opinion power. Media economist, Manfred Knoche, describes the intertwined nature of economic, journalistic, and political power as being evident, because “journalistic power stems from the economic power of media companies, more specifically, the capital owners of these companies”.²¹ Hence, a concentration of economic power in the media also enables journalistic and political power by being able to shape

16 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14).

17 Neuberger (n 13); Schulz, ‘Kontrolle Vorherrschender Meinungsmacht - Rekonstruktion Eines Medienrechtlichen Schlüsselbegriffs’ (n 14).

18 Neuberger (n 13). (Non-official translation)

19 *ibid* 57.

20 Lukes (n 7).

21 Manfred Knoche, ‘Media Concentration: A Critical Political Economy Perspective.’ (2021) 19 *tripleC* 371, 374-375.

information, opinions, and ideologies in line with the powerful actor's interests. Media concentration law is in place to address both, economic and opinion power, while promoting public values, particularly media pluralism. The objectives of media concentration law are, traditionally of a twofold nature: to maintain diverse and pluralistic media markets and to protect free and open individual and public opinion formation, both critical to upholding media pluralism and public values. Therefore, the distinctive feature of media concentration law, as opposed to mere competition law, is its focus on promoting and preserving pluralism.

In the following paragraphs, I will briefly present the core normative goals inherent in traditional media concentration law, which serve as foundational references for debates on regulating platform opinion power and digital media concentration, providing essential points of departure for reform initiatives and future regulations.

2.1. DISTRIBUTION OF POWER PRINCIPLE

“Dispersal of media ownership, like separation of powers, is a key structural safeguard for democracy”²²

Key principles providing regulatory legitimacy relate to the overarching democratic distribution of power principle. Its foundation lies in the principle of separation of powers, a fundamental element of the rule of law and a cornerstone of EU and constitutional law.²³ Within the context of media concentration and media and opinion power, this concept can be interpreted as the necessity for legal and governance mechanisms to prevent any single entity, whether state or private, from exerting dominant power over and suppressing the media, thereby obstructing its ability to act independently and perform its democratic and societal role (related to “media capture”).²⁴ Simultaneously, it demands a dispersal²⁴ of media and opinion power as well as fair and competitive media markets by avoiding market dominance of a single entity to the detriment of others.²⁵

22 Edwin C Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press 2007) 14.

23 Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps. COM/2019/163 final

24 Anya Schiffrin (ed), *Media Capture: How Money, Digital Platforms, and Governments Control the News* (Columbia University Press 2021).

25 Joseph E Stiglitz, 'Toward a Taxonomy of Media Capture' in Anya Schiffrin (ed), *In The Service of Power: Media Capture and The Threat to Democracy*, vol 9 (2017).

Due to its democratic and constitutional underpinnings, there is a need for laws that distribute power and guarantee that authorities responsible for overseeing media and competition law, such as media mergers, act independently from political interference. This democratic framework also mandates that the media can function autonomously to monitor and scrutinise those in power and, when necessary, contest the actions of governments or large companies. This connection between democracy, media, and media freedom and pluralism is best described in the words of Jesper Strömbäck as a “social contract”, where

“media and journalism require democracy as it is the only form of government that respects freedom of speech, expression and information, and the independence of media from the state. By respecting and protecting these necessary freedoms, democracy fulfils its part of the social contract with the media and journalism. [...] media in general and journalism in particular [...] fulfil their part of the social contract by providing citizens with the information they need in order to be free and self-governing, the government with the information it needs in order to make decisions in the common interest sensitive to public sentiments, an arena for public discussion, and by acting as a watchdog against abuse of power in politics and other parts of society”.²⁶

In short, without journalism there is no democracy, vice-versa.²⁷ The protection of media freedom and pluralism essentially goes hand in hand with the protection of democracy. Therefore, ensuring a separation of power and a dispersal of media and opinion power represents a vital framework that safeguards democratic governance, media freedom and pluralism, as well as individual and public fundamental rights.

Media concentration law, built on this foundational principle, encompasses values such as equality, participation, inclusivity and autonomy, freedom of expression, transparency, fairness, media freedom and (structural) media pluralism.²⁸ Those values are derived not only from national constitutional law, but also from the EU founding treaties, EU fundamental rights law, and (International) Human Rights

26 Strömbäck (n 15); L d'Haenens, Helena Sousa and Josef Trappel (eds), *Comparative Media Policy, Regulation and Governance in Europe: Unpacking the Policy Cycle* (Intellect 2018).

27 E.g. Carey, James W. (1999) “In Defense of Public Journalism”, in: Theodore L. Glasser (Ed.), *The Idea of Public Journalism*, New York: Guilford Press.

28 Baker (n 22); Kari Karppinen, *Rethinking Media Pluralism* (Fordham University Press 2013) <10.5422/fordham/9780823245123.001.0001>; Wolfgang Schulz, *Gewährleistung kommunikativer Chancengleichheit als Freiheitsverwirklichung* (1. Aufl, Nomos-Verl-Ges 1998).

Law.²⁹ As explained, democratic distribution of power is closely intertwined with the foundational ideas of democracy – more specifically, the principle of representative democracy as enshrined in Article 10(1) of the Treaty on the EU (TEU). It demands protection of democracy, equality, and the rule of law as affirmed as foundational values in Article 2 TEU.³⁰ Further, Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the EU Charter of Fundamental Rights (EU Charter) protect the rights to freedom of expression, media freedom, and media pluralism, which – under European traditional legal standards – trigger positive obligations on states to provide effective protection.³¹ These legal and democratic foundations anchor the intentions behind this research.

2.1.1. Individuals & Citizens

C. Edwin Baker's seminal work on media concentration provides a comprehensive and insightful analysis of the democratic dispersal of (communicative) power principle as the overarching goal of media concentration law.³² Despite being over a decade old, the core arguments he presented remain pertinent. He underscores the need for a "very wide and fair dispersal of power and ubiquitous opportunities to present preferences, views, and visions", thereby integrating the values of equality, participation, inclusivity, autonomy, and freedom of expression.³³ Concepts like equality and equal participation (to communicate) in the public sphere were explored in more depth by others, such as Wolfgang Schulz.³⁴ Accordingly, everyone should have the equal opportunity to participate in the political process and in public discourse, not only as recipients of diverse information but also expressors of opinion.³⁵ This right is enshrined in the principle of a representative democracy where citizens have equal guarantees to participate and be included, and receive and express opinions and information freely and autonomously.³⁶

29 Consolidated version of the Treaty on European Union [2012] OJ 1 326/13; Charter of Fundamental Rights of the European Union [2012] OJ 1 326/391; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

30 Article 2 and Article 10, Consolidated version of the Treaty on European Union [2012] OJ 1 326/13

31 Article 10, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); Article 11, Charter of Fundamental Rights of the European Union [2012] OJ 1 326/391; High Level Expert Group on Media Freedom and Pluralism. 2013. A Free and Pluralistic Media to Sustain European Democracy. Brussels: High Level Expert Group on Media Freedom and Pluralism.

32 Baker (n 22).

33 *ibid* 7.

34 Wolfgang Schulz, *Gewährleistung Kommunikativer Chancengleichheit Als Freiheitsverwirklichung* (Materialien zur rechtswissenschaftlichen Medien-und Informationsforschung, 1998).

35 *ibid*.

36 Amélie Heldt and others, 'Normative Leitbilder der Europäischen Medienordnung: Leitvorstellungen und rechtliche Anforderungen an die Governance für eine demokratische Öffentlichkeit' [2021] Arbeitspapiere des Hans-Bredow-Instituts <<https://www.ssoar.info/ssoar/handle/document/71716>> accessed 24 April 2024.

From this viewpoint, there cannot be total equality as some actors wield greater power to influence opinion forming processes than others.³⁷ The media wields such greater power, as they are tasked with the democratic function to inform the public with diverse and quality news, fulfil a gatekeeping function, set the agenda, and provide a forum for debate, scrutinise power, thereby wielding greater societal responsibility.³⁸ Because of this (unequal) power, strict media regulation is imposed with the aim to proactively prevent one media actor to wield too much power over these processes, while enabling the media to fulfil their democratic functions freely. These rules that proactively limit the media's ability to possess predominant opinion power are guided by several normative goals, most notably transparency, fairness, media freedom, and structural media pluralism.

2.1.2. Institutions & Ecosystem

“Media freedom is not an end in itself but a means to other ends, in particular the facilitation of the search for truth, democratic self-government, and individual autonomy and self-expression”³⁹

Media freedom is, first and foremost, an instrumental and functional right with the goal of serving the public interest.⁴⁰ The ability to operate independently and autonomously, which is essential for pluralism, is encompassed by media freedom. Independence in turn demands regulatory protections from (political) interference as well as enabling certain conditions for (economic) sustainability.⁴¹ Media freedom and pluralism are essential for democracy, a principle upheld by the European Court of Human Rights (ECtHR), which has repeatedly affirmed that “there can be no democracy without pluralism”.⁴² Although there is no universally accepted definition of “media pluralism”, we can agree that a pluralistic media environment cannot exist if one or few entities hold dominant power over the spaces, functioning, and relationships within the digital media ecosystem. Hence, the ECtHR confirmed that to safeguard media pluralism and the individual's right to receive information,

37 Baker (n 22).

38 Maxwell E McCombs and Donald L Shaw, 'The Agenda-Setting Function of Mass Media' (1972) 36 *Public Opinion Quarterly* 176; Maxwell E McCombs, *Setting the Agenda: The Mass Media and Public Opinion* (Reprinted, Polity Press 2007). Strömbäck (n 9); Trappel and Tomaz (n 9); Timothy Garton Ash, *Free Speech : Ten Principles for a Connected World* (Yale University Press 2016). Pamela J Shoemaker and Timothy Vos, *Gatekeeping Theory* (Routledge 2009).

39 Damian Tambini, *Media Freedom* (Polity Press 2021) 137.

40 Jan Oster, *Media Freedom as a Fundamental Right* (1st edn, Cambridge University Press 2015) 268; Tambini (n 36).

41 Tambini (n 39).

42 European Court of Human Rights (ECtHR), 25803/04, 25817/04, Judgement of 30 June 2009, 76

concentrations of power must be counteracted.⁴³ At the same time, policies directed at creating a diversity of ownership of media outlets generally assume that this leads to a diversity of content, which, however, says nothing about the diversity of exposure or the content consumed.⁴⁴

That is why media concentration law is an interesting avenue to take. It offers a more structural perspective, focusing on the “structural ability” to influence opinion formation.⁴⁵ For this dissertation, I like to draw upon Kari Karppinen’s work on media pluralism.⁴⁶ According to Karppinen, the ability to enable pluralism and equality in public opinion-formation hinges on the structural power relations underlying the media ecosystem.⁴⁷ That implies concentration laws need to aim at preventing a single entity to be able to monopolise public discourse by controlling media content, structures, infrastructures, and relationships.⁴⁸ Karppinen therefore builds on James Curran’s analysis that “a democratic media system should create spaces for the communication of opposed viewpoints and a common space for their mediation”.⁴⁹ Therefore, the necessity to distribute power across the “spaces” that shape opinion formation will be a persistent and integral part of my structural approach to media pluralism.

Expanding on that, to achieve this democratic ideal of media pluralism, one needs to be reminded of its intertwined nature with freedom of expression and media freedom.⁵⁰ This underpins the significance of individuals being exposed to a range of opinions and perspectives, enabling them to develop their own viewpoints autonomously and freely, which in turn demands (institutional) media freedom and pluralism, emphasising the importance of dispersing media power more broadly to ensure the capacity to scrutinise both public and private power.⁵¹

43 Manole and Others v Moldova [2009] ECtHR 13936/02; Centro Europa 7 S.r.l and Di Stefano v Italy [2012] ECtHR 38433/09; Sürek v Turkey (No 2) [1999] ECtHR 26682/95.

44 Natali Helberger, ‘Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity’ in Damian Tambini and Martin Moore (eds), *Digital Dominance* (Oxford University Press 2018) <<https://dare.uva.nl/search?identifier=a5578d82-3c74-4c66-9fb3-491c3806b48c>>; Philip M Napoli, ‘Deconstructing the Diversity Principle’ (1999) 49 *Journal of Communication* 7.

45 Neuberger (n 13) 57.

46 Karppinen (n 28).

47 *ibid.*

48 Philip M Napoli, ‘What Is Media Policy?’ (2023) 707 *The ANNALS of the American Academy of Political and Social Science* 29.

49 *ibid.*; James Curran, *Media and Power* (0 edn, Routledge 2012) <<https://www.taylorfrancis.com/books/9781134900381>> accessed 4 January 2024; James Curran, *Media and Democracy* (1. publ, Routledge 2011), 79-80.

50 Andrew T Kenyon, *Democracy of Expression: Positive Free Speech and Law* (Cambridge University Press 2021); Tambini (n 39).

51 Tambini (n 39).

In other words, democracy requires an “informed citizenry”, which also necessitates the existence of spaces and actors to enable that, including robust local journalism.⁵² As “national or large market” journalism has competitive advantages over local or community journalism, media policy needs to protect the latter to counteract market logic failures.⁵³ Therefore, enabling journalism to cater to minority and community interests demands an independent, sustainable, and resilient local news sector as a fundamental component of media pluralism and freedom of expression and information. Hence, as emphasised by Karpinen, media pluralism relates to much more than competition between media actors; instead, it should be seen as a normative ideal to disperse (opinion) power, address inequalities, and foster a democratic public sphere.⁵⁴

Beyond that, transparency and fairness are fundamental values in media concentration law to enable the creation of competitive media markets and to observe and control power. Clarity of media (ownership) structures is crucial for identifying the owners of media entities and enforcing limits when (an individual within) an organisation holds excessive media power.⁵⁵ As confirmed by various European and global reports, a lack of media (ownership) transparency and opacity of funding sources is one of the prime concentration threats.⁵⁶ A lack of transparency in media concentration poses a dual threat: firstly, the absence of transparency is inherently problematic from a scrutiny point of view, and secondly, within the realm of media concentration law, it complicates the identification of power concentrations, thereby increasing the risk. Hence, the objectives of transparency are closely linked to accountability and the necessity for robust safeguards ensuring the independence of national regulatory authorities who are tasked with the enforcement and supervision of these regulations. Further, transparency obligations are linked to the principle of fairness, particularly to avoid the distortion of competition and anti-competitive behaviour in media markets, whereas fairness can serve as a “normative bridge between law and society” and steer competition-related economic law towards the “common good”.⁵⁷ Transparency and

52 Nikki Usher and others, ‘Media Policy for an Informed Citizenry: Revisiting the Information Needs of Communities for Democracy in Crisis’ (2023) 707 *The ANNALS of the American Academy of Political and Social Science* 8.

53 *ibid*; Baker (n 22).

54 Karpinen (n 28).

55 European Commission. Directorate General for Communications Networks, Content and Technology. and others, ‘Study on Media Plurality and Diversity Online: Final Report.’ (Publications Office 2022) <<https://data.europa.eu/doi/10.2759/529019>> accessed 27 September 2023.

56 T Mendel, A García Castillejo and G Gómez, ‘Concentration of Media Ownership and Freedom of Expression: Global Standards and Implications for the Americas’ (UNESCO 2017); European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

57 Stefan Scheuerer, ‘The Fairness Principle in Competition-Related Economic Law’.

fairness in the media concentration context are particularly linked to the economic and competitive components of enabling media pluralism, and should, thus, not be confused with, for example, the “fairness doctrine” in the US discourse.⁵⁸ In short, the bedrock of these principles is the promotion of core democratic values including equality, non-discrimination, diversity, and pluralism, countering the dominance of any single viewpoint. New actors – platforms – introduce power dynamics that pose challenges to these principles, which I will further elaborate on.

3. PLATFORMS, OPINION POWER & MEDIA CONCENTRATION

“The largest tech platforms are more than economic entities. They affect politics and culture – areas where metrics, no matter how complex, can only fitfully and partially capture reality”⁵⁹

In recent years, numerous scholars have made a compelling case that platform power extends beyond mere economic power, making them powerful actors influencing the public sphere, media, culture, and politics in various ways.

Platforms act as content moderators, recommenders, facilitators, and governors of speech and communication as they acquire extensive influence over online expression and news consumption.⁶⁰ In this context, Natali Helberger highlighted that platforms are not just powerful in influencing political processes, but also in steering online attention, shaping exposure to information and news, and providing technology for media, thereby making themselves political actors.⁶¹ This observation is significant as today platforms – encompassing social media, search, chatbots and conversational agents – have emerged as key channels for news consumption. Hence, the dependency on platforms is increasing.⁶²

58 See for example, Jerome A. Barron, Federal Communications Commission's Fairness Doctrine: An Evaluation, 30 GEO. WASH. L. REV. 1 (1961).

59 Frank Pasquale, *New Laws of Robotics: Defending Human Expertise in the Age of AI*. (The Belknap Press of Harvard University Press 2020). 89.

60 Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2019) <<https://www.degruyter.com/document/doi/10.12987/9780300235029/html>> accessed 6 March 2024; Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14).

61 Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14).

62 As confirmed by the yearly Reuters Digital News Report. Nic Newman and others, 'Reuters Institute Digital News Report 2023'; Felix M Simon, 'Escape Me If You Can: How AI Reshapes News Organisations' Dependency on Platform Companies' [2023] Digital Journalism 1.

Beyond that, platforms govern a vast range of digital interactions and relationships. This encompasses not only interactions between users themselves and between news media and their audiences, but also engagements between businesses, transforming them into “makers and breakers” of connections and relationships.⁶³ The Reuters Institute for the Study of Journalism at the University of Oxford releases a yearly Digital News Report, which provides one of the most thorough analyses on the evolution of digital news. These reports consistently show a shift towards platforms for news consumption and in recent years especially to video-centric platforms like TikTok, a trend that is particularly pronounced among younger audiences.⁶⁴ However, the reports also highlight public concerns regarding the algorithmic curation and recommendation of news content, as well as concerns about being exposed to misinformation or disinformation. Especially the emergence of highly realistic synthetic media, AI-generated “deepfakes”, fabricated to mislead amplifies these concerns. This seems to lead to a significant decline in trust and in engagement, affecting the relationship between the media and audiences.⁶⁵

News organisations also find themselves grow increasingly dependent on platforms. This dependency extends to adapting platform strategies and logics for distribution, as well as implementing AI and technology and moving towards automation.⁶⁶ To connect with and understand their audiences, news organisations frequently depend on platforms for distribution while editors inside newsrooms use analytical tools, like audience metrics provided by platforms, to gauge the performance of news articles and to “best” serve their audience interests.⁶⁷ Let us remember, this “audience” is not a real representation of the audience but a datafied version of it, measured based on (somewhat opaque) metrics defined by platforms, which calls into question the

63 Rasmus Kleis Nielsen and Sarah Anne Ganter, *The Power of Platforms* (Oxford University Press 2022).

64 Newman and others (n 62).

65 *ibid.*

66 Gillespie, *Custodians of the Internet* (n 60); Balazs Bodó, ‘Selling News to Audiences – A Qualitative Inquiry into the Emerging Logics of Algorithmic News Personalization in European Quality News Media’ (1054) 7 *Digital Journalism* 1054; James Meese and Edward Hurcombe, ‘Facebook, News Media and Platform Dependency: The Institutional Impacts of News Distribution on Social Platforms’ (2021) 23 *New Media & Society* 2367; Tarleton Gillespie, ‘The Relevance of Algorithms’ in Tarleton Gillespie, Pablo J Boczkowski and Kirsten A Foot (eds), *Media Technologies* (The MIT Press 2014) <<https://academic.oup.com/mit-press-scholarship-online/book/14976/chapter/169333383>> accessed 24 April 2024. Nicholas Diakopolous, *Automating the News: How Algorithms Are Rewriting the News* (Harvard University Press 2019).

67 Angèle Christin, *Metrics at Work: Journalism and the Contested Meaning of Algorithms* (Princeton University Press 2020); Cw Anderson, ‘Between Creative and Quantified Audiences: Web Metrics and Changing Patterns of Newswork in Local US Newsrooms’ (2011) 12 *Journalism* 550; Diakopolous (n 66).

idea of journalism serving the public interest.⁶⁸ Hence, the integration of platform algorithms and the adoption of journalistic processes may affect professional values, like which content to produce and how and where to distribute. This dependency is starkly illustrated in an example from 2017 - 2018, when a Facebook algorithm update to favour content of friends and family over news affected traffic to news websites and left news organisations clueless. This clearly demonstrated the risks of news organisations relying on platforms.⁶⁹

At a macro level, platforms act as market-makers, marketplaces, and technology and infrastructure providers facilitating digital markets and the public sphere. They have evolved into indispensable actors exercising control over markets through their economic and infrastructural power.⁷⁰ Expanding the view of platform power through the infrastructural lens has been proposed as an increasingly relevant avenue by various scholars, in particular as it is argued that platform power extends beyond economic, competition, and opinion power and introduces a deeper infrastructural power.⁷¹ Building on these analyses, “infrastructure power of platforms” defines as the “control over the access to societal infrastructure and services of general interest (platformisation of infrastructure)” but also as platforms becoming “essential for social participation that one could consider them infrastructure for digital services of general economic interest (infrastructuralisation of platforms)”.⁷² In relation to journalism, the way platforms “transformed infrastructures of communication” affects not only the production and distribution of news, but also ownership structures and

68 Tomás Dodds and others, ‘Popularity-Driven Metrics: Audience Analytics and Shifting Opinion Power to Digital Platforms’ [2023] *Journalism Studies* 1.; other relevant research by John Cheney-Lippold, *We Are Data: Algorithms and the Making of Our Digital Selves* (New York University Press 2020) <<https://www.degruyter.com/document/doi/10.18574/nyu/9781479888702.001.0001/html>> accessed 17 April 2024.

69 James Meese and Edward Hurcombe, ‘Facebook, News Media and Platform Dependency: The Institutional Impacts of News Distribution on Social Platforms’ (2020) 23 *New Media & Society* 146144482092647.

70 Elettra Bietti, ‘A Genealogy of Digital Platform Regulation’ (2023) 2023 *Georgetown Law Technology Review* 1; Ulrich Dolata, ‘Internet Companies: Market Concentration, Competition and Power’ in Ulrich Dolata and Jan-Felix Schrape, *Collectivity and Power on the Internet* (Springer International Publishing 2018) <http://link.springer.com/10.1007/978-3-319-78414-4_5> accessed 7 February 2024; Wolfgang Hoffmann-Riem, ‘Digitale Disruption und Transformation. Herausforderungen für Recht und Rechtswissenschaft’ in Martin Eifert (ed), *Digitale Disruption und Recht* (Nomos Verlagsgesellschaft mbH & Co KG 2020) <<https://www.nomos-elibrary.de/index.php?doi=10.5771/9783748909491-143>> accessed 6 February 2024.

71 José Van Dijck, David Nieborg and Thomas Poell, ‘Reframing Platform Power’ (2019) 8 *Internet Policy Review* <<https://policyreview.info/node/1414>> accessed 19 February 2024; Julie Cohen, ‘Infrastructuring the Digital Public Sphere’ (2023) 25 *Yale J.L. & Tech.*; Jean-Christophe Plantin and others, ‘Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook’ (2018) 20 *New Media & Society* 293; Christoph Busch and others, ‘Uncovering Blindspots in the Policy Debate on Platform Power: Final Report.’ (European Commission) <<https://platformobservatory.eu/app/uploads/2021/03/05Platformpower.pdf>>; C Busch, ‘Regulation of Digital Platforms as Infrastructures for Services of General Interest’ <https://library.fes.de/pdf_files/wiso/17836.pdf>.

72 Busch (n 71) 7; Busch and others (n 71).

hence provides new potentials for concentration.⁷³ In that sense, the infrastructural component of platform power is considered a crucial aspect in discussing relevant regulatory responses.

Furthermore, the monopoly and oligopoly structures enable platforms to not only dominate in one market, but in various markets. Accusations against platforms abusing their dominance with anti-competitive practices are therefore no surprise.⁷⁴ Empowered by their economic power, capital, and wealth, power is reinforced by platforms acting as primary innovators and investors.⁷⁵ They turn into indispensable funders, not only in the journalism sector but also in the development and growth of tech and AI start-ups.⁷⁶ Google and Meta were consistent investors and funders of journalism and innovation, while by now both, and Meta in particular, are gradually withdrawing from news.⁷⁷ Although concerns about platforms capturing journalism through their investment schemes were not confirmed, their dominance as funders and investors over a significant period of time led to the creation of dependencies that affect the long-term and independent development of sustainable innovation strategies and business models.⁷⁸

Questions of who holds the reins over AI development and innovation in the media are becoming more critical. The fast pace at which AI and automation are reshaping the public sphere, media, and democracy in combination with the fact that a select few companies are leading these advancements is concerning.⁷⁹ The power imbalance is stark, not only because news organisations are at a disadvantage in negotiations with platforms, but also due to the absence of noteworthy competitors that possess a comparable combination of wealth, capital, and technological, computing, and

73 Augustin Ferrari Braun and Charis Papaevangelou, 'Studying the Infrastructural Transformation: Journalism in the Age of AI, Platformisation, and Regulation' (*AlgoSoc*, 27 May 2024) <<https://algosoc.org/results/studying-the-infrastructural-transformation-journalism-in-the-age-of-ai-platformisation-and-regulation>>.

74 Most recently, the EU started probes into Meta for continuously combining data from various services, thereby acting non-competitive.

75 Anna Gerbrandy and Pauline Phoa, 'The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-Power' in Huub Brouwer, Michael Bennett and Rutger Claassen, *Wealth and Power* (1st edn, Routledge 2022) <<https://www.taylorfrancis.com/books/9781003173632/chapters/10.4324/9781003173632-11>> accessed 21 November 2023.

76 Dolata (n 70); A Fanta and I Dachwitz, 'Google the Media Patron' (Otto-Brenner-Stiftung 2020); Gerbrandy and Phoa (n 75); Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14); Nielsen and Ganter (n 63).

77 Daniel Thomas, *Meta axes support for news in Europe Tech group draws ire of media companies after announcing pullback*, Financial Times (05.09.2023) <https://www.ft.com/content/f97420a9-5f32-440d-b8d4-b1c1ce60a1ff>

78 Charis Papaevangelou, 'Funding Intermediaries: Google and Facebook's Strategy to Capture Journalism' (2024) 12 *Digital Journalism* 234. Fanta and Dachwitz (n 76); Gabby Miller, 'Where Did Facebook's Funding for Journalism Really Go?' (*Columbia Journalism Review*) (27 February 2023)

79 Dolata (n 70); Simon, 'Escape Me If You Can' (n 62).

data capabilities, along with the required knowledge and expertise. In addition, as highlighted in the context of concentrated AI ownership, it was noted that “to wit: those with the money make the rules”, hence highlighting the political influence resulting from this power.⁸⁰

In a nutshell, as Ulrich Dolata put it, “they [platforms] not only dominate the basic offerings and markets of the internet, but, as operators of the central infrastructures, also regulate access to the web, structure the communication possibilities of users, [and] are key drivers of the innovation process”.⁸¹ Given the complex, interwoven roles, functions, and powers of platforms as described, they emerge as wielders of opinion and political power. Hence, discussing platform opinion power should be seen as part of a wider spectrum of power and control, where various aspects are significantly interlinked. For example, platforms’ power over algorithms, technology, and infrastructures grants them the potential ability to determine who can engage in public discourse, express opinions, or decide who receives which content, thereby significantly impacting individual and public participation and freedom of expression.⁸² As another example, the economic power of platforms within media markets concentrates control over wealth, capital, and resources. This enables opinion power as journalistic power stems from economic power, and those without economic and financial resources will be unable to effectively produce and distribute news, nor form a relevant counterweight.⁸³ Finally, in the context of platforms’ capital and innovation power, it might initially seem that investments and funding in the journalism sector would distribute economic power more evenly. Instead, this deepens dependencies and prevents the journalism industry from achieving independent, long-term sustainability. The overall effects on structural media pluralism, in particular with a view on strategies for local and regional journalism, as well as initiatives on behalf of the journalism sector to protect sustainability and resilience require particular attention in platform dominated media ecosystems.

80 Kak A, ‘Make No Mistake-AI Is Owned by Big Tech’ (MIT Technology Review, 5 December 2023) <https://www.technologyreview.com/2023/12/05/1084393/make-no-mistake-ai-is-owned-by-big-tech/?truid=3a0acfdeeadcf3e26957d1ae6c22d148> accessed 26 March 2024

81 Dolata (n 70) 86.

82 T Gillespie, ‘The Politics of “Platforms”’ (2010) 12 *New media & society* 347.

83 Knoche (n 21).

4. REGULATORY CHALLENGES TO TACKLE PLATFORM OPINION POWER & DIGITAL MEDIA CONCENTRATION

As laid out in the previous section, there seems to be widespread consensus on the far-reaching implications of platform power, also in their roles as shapers of opinion and of public discourse, similar to that of legacy media. However, there remains uncertainty about the most effective ways to tackle this aspect of platform power and its associated risks. The threats are complex and multifaceted, lacking a simple, one-stop-solution. At the same time, though, due to the democratic significance of dispersing opinion power as outlined in the normative foundation section, action is necessary. In Europe, states have negative as well as positive obligations to protect and facilitate media freedom and pluralism.⁸⁴ Consequently, states must enact laws that safeguard democracy and promote media pluralism. However, as opinion power now extends beyond legacy media to platforms that significantly influence news consumption, exposure, distribution, and production, fulfil functions comparable to those of legacy media, and as new threats to media pluralism arise from platform dominance, it is crucial to explore legal measures that address this evolving power dimension. I will delve into these discussions more thoroughly in the journal articles, but I want to outline three key considerations before moving on.

Before deciding over the relevant regulatory authority and legal framework that should tackle platform opinion power and digital media concentration, it is crucial to identify who actually has the competences and responsibilities. In its legislative processes, the EU is obligated to respect and uphold the rights enshrined in the EU Charter and the ECHR, including rights pertaining to freedom of expression, privacy, media freedom, and media pluralism.⁸⁵ Furthermore, Article 167 of the Treaty on the Functioning of the European Union (TFEU) specially requires the EU “to respect and to promote the diversity of its cultures”⁸⁶ This, however, does not automatically grant the EU exclusive authority to regulate these issues. It is important to remember that the EU can only act within the limits of the powers granted to it, adhering to the principle of conferral detailed in Article 5(2) TFEU. With regards to regulating aspects related to media pluralism and cultural matters, the EU’s limited competences naturally impede its ability to effectively and holistically address the

84 Kenyon (n 50); Tambini (n 39).

85 Article 51, Charter of Fundamental Rights of the EU, European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

86 Article 167, TFEU

challenges involved.⁸⁷ Nevertheless, the EU does have exclusive competence to regulate competition matters, and shared competences with the member states to regulate the internal market, as outlined in Articles 3 and 4 TFEU. While the EU's ability to directly regulate media pluralism is limited, it possesses the competence to regulate for fair competition in digital markets and a functional internal market. Consequently, various legislative measures at the EU level that impact the media sector are grounded in the legal framework established by Article 114 TFEU (the internal market competence), including the Audiovisual Media Services Directive (AVMSD) and the EMFA. This approach is taken because the media sector influences both cultural and economic dimensions, making it challenging to clearly delineate competences.⁸⁸

In the realm of regulating opinion power and media pluralism, “traditional” national media concentration laws serve as the key instruments. However, these laws have been consistently criticised for focusing solely on traditional media actors and markets, thus neglecting the emergence of new actors, contemporary threats to concentration, and evolving power dynamics. Some proposals have been advanced in the past to address these limitations, yet effective reform suggestions are still limited and fraught with unresolved issues.⁸⁹ For instance, in an effort to move away from the traditional approach to measure TV audience shares, a “Gesamtmedienmodell” was proposed in Germany.⁹⁰ It suggests defining the legally relevant audience share based on a cross-media evaluation of media usage, thus emphasising the perspective of the audience.⁹¹ So far, online services and internet content offerings without broadcasting participation are rarely included in national frameworks.⁹² However,

87 Kristina Irion and Peggy Valcke, ‘Cultural Diversity in the Digital Age: EU Competences, Policies and Regulations for Diverse Audiovisual and Online Content’ in Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union* (Palgrave Macmillan UK 2015) <http://link.springer.com/10.1057/9781137453754_7> accessed 24 April 2024.

88 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

89 *ibid*; Natascha Just, ‘Measuring Media Concentration and Diversity: New Approaches and Instruments in Europe and the US’ (2009) 31 *Media Culture & Society* 97; Natascha Just, ‘Media Concentration: Problem and Regulation’ in Jan Krone and Tassilo Pellegrini (eds), *Handbook of Media and Communication Economics: A European Perspective* (Springer Fachmedien Wiesbaden 2022) <https://doi.org/10.1007/978-3-658-34048-3_70-2>; Neuberger and Lobigs (n 13); KEK (n 6).

90 W Schulz and T Held, ‘Die Zukunft Der Kontrolle Der Meinungsmacht’ (FES (Friedrich-Ebert-Stiftung) 2006).

91 Schulz, ‘Kontrolle Vorherrschender Meinungsmacht - Rekonstruktion Eines Medienrechtlichen Schlüsselbegriffs’ (n 14).

92 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

linear broadcasting content does not reflect how public opinion is impacted anymore.⁹³ The question of whether to incorporate platforms as “mass media companies in the context of media concentration law” was raised by Paul Nemitz and Matthias Pfeffer, but this stance has encountered criticism.⁹⁴ Opposing arguments encompass that an overly broad definition could create conflicts with other legal frameworks and lead to legal uncertainty.⁹⁵ Despite the relevant intentions behind such proposals, the German Bundestag adds in response to the “Gesamtmedienmodell”, that “the particular effectiveness attributed to [the Gesamtmedienmodell] has not been empirically proven throughout and is more of a theoretical nature.

Overall, the concept of controlling the power of opinion in the Interstate Media Treaty also remains attached to television and its specific effective power, which makes it difficult to include structurally different effects in the regulatory system”.⁹⁶ Nevertheless, a narrow definition of “media” also poses problems in addressing the threats to media freedom and pluralism in the digital ecosystem (as criticised in the context of the EMFA) and contradicts international human rights standards, which suggest a broad notion of media that “encompasses all actors involved in the production and dissemination”.⁹⁷ The EMFA so far seems to add to the uncertainty by requiring a “media service provider” be involved in concentration assessments to take place, while at the same time acknowledging platforms could exercise the same kind of editorial control as media and could thus be considered “media service providers”.⁹⁸ It is essential to maintain clarity and consistency, as disjointed actions at the national level might result in increased legal uncertainty, lack of coherence, and division within European media policy. Given its nature as a global cross-border issue, it requires more harmonised and coordinated efforts as well as cooperation amongst European media authorities.

The factors that enable platform opinion power encompass economic, market, data,

93 Schulz and Held (n 90); Sarah Hartmann and Bernd Holznel, ‘Reforming Competition and Media Law: The German Approach’ in Martin Moore and Damian Tambini (eds), *Regulating Big Tech* (1st edn, Oxford University Press New York 2021) <<https://academic.oup.com/book/39213/chapter/338716737>> accessed 27 March 2024.

94 Elda Brogi and others, ‘The European Media Freedom Act: Media Freedom, Freedom of Expression and Pluralism’ (*STUDY Requested by the LIBE committee*, 2023).

95 Schulz and Held (n 90).

96 Bericht des Ausschusses für Bildung, Forschung und Technikfolgenabschätzung (18. Ausschuss) gemäß § 56a der Geschäftsordnung, Drucksache 20/4453, 11.11.2022, available at <https://dserver.bundestag.de/btd/20/044/2004453.pdf> (non-official translation)

97 Theresa Seipp, Ronan Ó Fathaigh and Max Van Drunen, ‘Defining the “Media” in Europe: Pitfalls of the Proposed European Media Freedom Act’ [2023] *Journal of Media Law* 1.; Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0

98 Recital 11, Regulation (EU) 2024/1083 (“EMFA”)

and technological aspects, areas in which the EU does indeed possess regulatory competence. A study from 2021 on European media policy mapped the legislative instruments at EU level relevant for the media sector.⁹⁹ It found that despite the incoherence and fragmentation, there are several regulatory sector-specific tools that impact the media sector.¹⁰⁰ These sector-specific frameworks find their basis in electronic and platform services law, competition law, telecommunications law, contract and consumer law, and IP law, as well as privacy and data protection law.¹⁰¹ Without going into extensive detail, I will outline several general parameters and approaches that the EU could employ within its regulatory scope to tackle platform opinion power.

A primary concern related to platform opinion power is their power over individual news consumption, exposure, and ultimately public opinion formation processes. Normative concerns here are often related to a lack of transparency in how individuals access and engage with content, which could undermine personal autonomy and agency and might lead to chilling effects on freedom of expression due to privacy concerns.¹⁰² To address these concerns, the EU can resort to frameworks related to the regulation of platform services, most notably under the DSA, and the protection of user data and privacy, most prominently the General Data Protection Regulation (GDPR).¹⁰³ For instance, enabling user choice, control mechanisms, and regulating so-called “dark patterns” and design choices could in fact be avenues for the EU to regulate this aspect of platform opinion power.

Additionally, the growingly complex and asymmetrical relationship between platforms and news media could undermine journalistic standards and professional values, such as journalistic autonomy and independence. This relationship may also impact the resilience, viability, and economic sustainability of news organisations. While direct regulation of journalism must be carefully examined to prevent state interference with journalistic freedoms, the shift of economic resources and (advertisement)

99 Stephan Dreyer and others, ‘The European Communication (Dis)Order: Mapping the Media-Relevant European Legislative Acts and Identification of Dependencies, Interface Areas and Conflicts’ [2020] Arbeitspapiere des Hans-Bredow-Instituts <<https://www.ssoar.info/ssoar/handle/document/71719>> accessed 23 April 2024.

100 *ibid.*

101 Stephan Dreyer, Theresa Josephine Seipp and Wolfgang Schulz, *The European Communication (Dis)Order: Mapping the Media-Relevant European Legislative Acts and Identification of Dependencies, Interface Areas and Conflicts* (Leibniz Institute for Media Research/Hans-Bredow-Institut (HBI) 2020).

102 Julie Cohen, ‘What Privacy Is For’ (2013) 126 *Cambridge: Harvard Law Review* 1904.

103 Regulation (EU) 2022/2065, DSA; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1–88

revenue from legacy media to platforms has made the media increasingly dependent on platforms, as well as leading to economic sustainability issues.¹⁰⁴ In the EU, as well as in other regions such as Australia, Canada, the US, and the UK, regulators are increasingly focused on addressing the imbalanced relationship between platforms and publishers. Such regulatory efforts focus primarily on “re-shifting” revenue from platforms “back” to the media as well as ensuring the protection of publishers’ IP rights and revenues. Australia was one of the first countries to tackle this question with the News Media Bargaining Code (NMBC), while in Europe efforts mostly focused on copyright instruments. In 2019, the EU implemented a revised Copyright Directive aimed at safeguarding publishers’ rights and curbing copyright violations by platforms.¹⁰⁵ Despite some noteworthy intentions, these regulatory efforts have faced significant resistance. Platforms have actively opposed and lobbied against such laws, underscoring the challenges in effectively regulating platforms and limiting their political influence and lobbying power. Throughout the dissertation, I will refer back to these regulatory efforts to discuss their effectiveness in achieving the overarching goals, and what they mean for regulating platform opinion power and media concentration.

Lastly, the concentration of economic, technological, and data power, along with the resultant political power in the media ecosystem, may lead to increased horizontal and vertical media concentration, threatening media pluralism, fair competition, transparency, and (independent and effective) oversight. Here, the EU has the competence to enforce transparency and fairness in digital media markets and to prevent the monopolisation of data power. Central to this discussion is the EU’s Digital Services Package, which includes the DSA and the DMA.¹⁰⁶ This package aims to ensure a safer digital space where the fundamental rights of all users of digital services are protected, and to promote a level playing field to foster innovation, growth, and competitiveness in the EU. The DSA focuses on protecting users and consumers, thereby replacing the long-outdated e-Commerce Directive that previously allowed platforms to benefit from certain liability exemptions.¹⁰⁷ Its objective is to prevent monopolistic practices and power structures by platforms from hindering access to services in the internal market or infringing upon the fundamental rights associated

104 James Meese, *Digital Platforms and the Press* (Intellect 2023) <<https://www.jstor.org/stable/jj.4908263>>.

105 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) PE/51/2019/REV/1, OJ L 130, 17.5.2019, p. 92–125

106 Regulation (EU) 2022/2065 (“DSA”)

107 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178, 17.7.2000, p. 1–16

with the use of digital services.¹⁰⁸ The DMA serves as the EU's tool for overseeing, regulating, and enabling competition in digital markets, specifically targeting the role of "gatekeepers" who control important ecosystems in the digital economy.¹⁰⁹ Additionally, the EU has introduced another relevant competition law tool with the Platform-to-Business (P2B) Regulation, aimed at enhancing fairness and transparency for business users of online intermediary services.¹¹⁰ The emphasis on fairness and transparency in competitive practices, crucial also in media concentration, underscores the importance of these regulations in the questions addressed in this dissertation. Finally, the Data Governance Act and Data Act emphasise fairer access to and sharing of data, which could be effective in countering platforms' dominant data power.¹¹¹

On a final note, to ensure adherence to existing rights and to maintain security and privacy in AI development and deployment, which could significantly impact the media sector (consider the access AI companies have to training data for large language models (LLMs)), the EU has introduced the pioneering AI Act. This legislation represents the first-ever legal framework on AI, aiming to mitigate AI-related risks and establish Europe as a global leader in this domain.¹¹² It thereby introduces harmonised rules for AI systems to ensure, on the one hand, innovation within the EU, and, on the other hand, create legal certainty and secure and safe implementations of AI while respecting fundamental rights.¹¹³ Although the AI Act does not specifically mention journalism, it may nonetheless have implications for automation and growing use of AI in news.¹¹⁴

In summary, although the EU has limited competence to regulate media and media pluralism directly, issues like platform opinion power and digital media concentration also intersect with legal areas beyond traditional media law. Therefore, various

108 Regulation (EU) 2022/2065 ("DSA")

109 Regulation (EU) 2022/1925 ("DMA")

110 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ 2 186/01

111 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) PE/85/2021/REV/1, OJ L 152, 3.6.2022, p. 1-44; Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) PE/49/2023/REV/1, OJ L, 2023/2854, 22.12.2023

112 European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts, COM/ 2021/206 final, Brussels, 21 April 2021 (hereafter: AI Act)

113 Natali Helberger, 'FutureNewsCorp, or How the AI Act Changed the Future of News' (2024) 52 Computer Law & Security Review 105915.

114 *ibid.*

strategies are being employed at the EU level (and elsewhere) to address platform power, protect fundamental rights, promote fair and transparent competition in digital markets, and ensure safety, security, and legal certainty around AI, which play a significant role in regulating digital media concentration. However, it is valuable to reassess media concentration laws and their normative foundations to better streamline regulatory actions and more effectively address the threats at hand.

5. RESEARCH QUESTIONS & METHODOLOGY

The following research questions and methodological approaches were applied to address the overarching research question of my dissertation: “How could or should platform opinion power and digital media concentration be regulated in Europe?”. As I will detail below, addressing this question requires an exploration across various legal fields and venturing into disciplines beyond the scope of my legal education. An interdisciplinary approach is essential, though. The research questions and methodologies were determined after conducting a literature review and were shaped by the guidance and advice from my supervisors.

Chapter 3 is based on the first (co-authored) journal article, titled “Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law” and published in 2023 in the Special Issue “The Platformization of News: Platform Logics, Journalism and the Future of Publics” in *Digital Journalism*.¹¹⁵ It addresses the following research question: How is opinion power shifting from legacy media to platforms, and why should we rethink media concentration law? Here, we re-conceptualise opinion power along three levels: the individual citizen, the institutional newsroom, and the media ecosystem.

To answer this question, a normative legal research method is used, investigating what the law should do in order to address the arising threats. Normative legal research helps to identify how the law should or could address the threats identified. A starting point of such normative legal research needs to understand how normative are derived, thereby establishing the “normative framework”.¹¹⁶ For that, both internal and external perspectives are available to define normative standards. Internally,

115 Theresa Josephine Seipp, Natali Helberger, Claes de Vreese, Jef Ausloos, ‘Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law’ (2023) *Digital Journalism*.11(8), 1542–1567. <https://doi.org/10.1080/21670811.2022.2161924>

116 Sanne Taekema, ‘Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice’ (2018) 02 *Law and Method*.

this involves looking at legal standards originating from constitutional law, principles of rule of law, and human rights. Externally, it involves engaging with broader social and political theories to critique and shape the legal framework according to ideals of justice, equality, and freedom. In this article, a combination of internal (EU law, human rights law, national constitutional law) and external (power dispersal, equality, and freedom) approaches is used.¹¹⁷

Chapter 4 is based on the second (single-authored) journal article titled “Media Concentration Law: Gaps and Promises in the Digital Age”, published in 2023 in the Special Issue “A Datafied Society: Data Power, Infrastructures, and Regulations” in *Media and Communication*.¹¹⁸ It investigates existing media concentration laws in Europe and addresses the question: What are the gaps and promises in current (national) media concentration laws? This article builds on the three-level conceptual framework of opinion power established in the first article, adopting both normative and descriptive/doctrinal methodologies. It engages in a discussion about the normative underpinnings of European media concentration law through a doctrinal review of existing regulatory frameworks and documents, research reports and studies, and literature. The latter is primarily informed by a Europe-wide mapping of media concentration laws, to which I also contributed.

Here, a mixed-method approach that combines normative and descriptive/doctrinal methods is applied. This dual approach enables an analysis of both the current legal status and the gaps that need addressing based on established normative values and regulatory objectives. Descriptive or doctrinal legal research helps delineating the current legal landscape and evaluating the efficacy of existing regulatory frameworks while normative perspectives help reflect on desired goals and policy outcomes.

Chapter 5 is single-authored and titled “The Great Reset: ‘Counterpower’ in the context of media concentration and platform dependency”. Parts of this chapter were presented at 24th Annual Conference of the Association of Internet Researchers (AoIR) and a summary of the presentation published as part of the conference selected papers collection.¹¹⁹ Additionally, some of the interview findings are included in a co-authored journal article with Dr. James Meese, titled “Revisiting Institutional

117 *ibid* 7.

118 Theresa Josephine Seipp, ‘Media Concentration Law: Gaps and Promises in the Digital Age’ (2023) *Media and Communication*, 11(2), 392–405 <https://doi.org/10.17645/mac.v11i2.6393>

119 Theresa Josephine Seipp, ‘The Great Reset: “Counterpower” In The Context Of Media Concentration And Platform Dependence’ (2023, October) Paper presented at AoIR2023: The 24th Annual Conference of the Association of Internet Researchers. Philadelphia, PA, USA: AoIR. Retrieved from <http://spir.aoir.org>.

Isomorphism: Are the Press Becoming Platforms?" which is currently under review for publication in *Digital Journalism*.¹²⁰ Chapter 5 conceptualises "counterpower" in the context of platform dependency and media concentration. It addresses two main research questions: First, based on a conceptual and empirical analysis, it asks, what is "counterpower" theoretically, and how does it look like in practice? The empirical part is based on 12 semi-structured interviews with news organisations of various sizes in the UK and the Netherlands to investigate the strategies followed and challenges faced in practice. Second, based on a normative legal analysis, it asks, how could the legal conditions be created to facilitate the formation of "counterpower"? The article concludes with a brief legal and policy analysis on current regulatory efforts.

Empirical legal research is of great importance to understand how laws actually function in practice, but also as evidence to steer more effective law-making.¹²¹ Legal research in the realm of platform opinion power and media concentration demands an interdisciplinary perspective, informed by empirical findings, and guided by a commitment to understanding and mitigating the risks associated with it. This involves a deep dive into understanding the processes of opinion formation and the interdependencies within the journalism sector and the media ecosystem more broadly.

Chapter 6 is based on the fourth (co-authored) journal article titled "Between the cracks: Blind spots in regulating media concentration and platform dependency in the EU", which is submitted and currently under peer review at *Internet Policy Review*.¹²² It investigates recent regulatory efforts at EU level to tackle media concentration and platform dependency. It aims to answer the question: How does the EMFA – or other EU regulatory frameworks – address dependencies on and power of platforms within the growing trends of media concentration?

Here, again, a normative and descriptive/doctrinal method is used that allows us to identify the blind spots in the current regulatory approaches and gives room to make suggestions for – more future-proof remedies. A combination of normative and descriptive methods – as described above – is applied to assess the current proposals and frameworks and to investigate potential blind spots in addressing the threats I

120 James Meese and Theresa Josephine Seipp, 'Revisiting institutional isomorphism: Are the press becoming platforms?' (2024, under review) *Digital Journalism*

121 P Ishwara Bhat, 'Empirical Legal Research: Nature, Features, and Expanding Horizons', *Idea and Methods of Legal Research* (2020).

122 Theresa Josephine Seipp, Natali Helberger, Claes de Vreese, Jef Ausloos, 'Between the Cracks: Blind Spots in Regulating Media Concentration and Platform Dependence in the EU' (2024 forthcoming) *Internet Policy Review*

have researched in the preceding articles.

The four articles, which provide the basis for chapters 3 to 6, are interlinked by conceptualising notions like “opinion power” and “counterpower” within the digital media and platform contexts. Further analyses are based on empirical insights into the strategies employed by news organisations in relation to platforms, examined from a normative legal perspective intended to highlight blind spots and enrich academic discourse with recommendations for future trajectories. In conducting this research, I ventured beyond the confines of legal studies, broadening my literature review and methodologies to encompass other fields, most notably communication science, journalism and media studies, and platform studies.

2

CHAPTER

SHIFTING OPINION POWER IN THE DIGITAL MEDIA ECOSYSTEM

3

Based on: Theresa Josephine Seipp, Natali Helberger, Claes de Vreese, Jef Ausloos, 'Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law' (2023) *Digital Journalism*.11(8), 1542–1567. <https://doi.org/10.1080/21670811.2022.2161924>

The platformised news environment affects audiences, challenges the news media's role, and transforms the media ecosystem. Digital platform companies influence opinion formation and hence wield "opinion power," a normatively and constitutionally rooted notion that captures the core of media power in democracy and substantiates why that power must be distributed. Media concentration law is the traditional tool to prevent predominant opinion power from emerging but is, in its current form, not applicable to the platform context. We demonstrate how the nature of opinion power is changing and shifting from news media to platforms and distinguish three levels of opinion power: (1) the individual citizen, (2) the institutional newsroom and (3) the media ecosystem. The reconceptualization at the three levels provides a framework to develop future (non-)regulatory responses that address (1) the shifting influence over individual news consumption and exposure, (2) the changing power dynamics within automated, datafied, and platform-dependent newsrooms, and (3) the systemic power of platforms and structural dependencies in the media ecosystem. We demonstrate that as the nature of opinion power is changing, so must the tools of control.

1. INTRODUCTION

Platforms play an ever-growing role in contemporary democracies. The largest platforms today are much more than mere economic parties by controlling different digital technologies, implementing AI tools and algorithms, and managing significant amounts of data and communication flows.¹²³ Platforms' ability to influence individual and public opinion formation within the media ecosystem leads to wielding what we call "opinion power," with potentially serious implications for democracy.

We are witnessing an ongoing debate about how to deal with the enormous power that platforms are amassing.¹²⁴ Recognizing the systemic risks posed by platform dominance has resulted in a push to regulate big tech leading to governments in Europe and worldwide taking up efforts to protect democracy and curtail concentrated platform power.¹²⁵ Yet, most of these initiatives target platforms' market power or focus on data protection, and are limited in their actual ability to sustain fundamental

123 Frank Pasquale, *New Laws of Robotics Defending Human Expertise in the Age of AI* (The Belknap Press of Harvard University Press 2020). p. 89

124 John Naughton, 'Platform Power and Responsibility in the Attention Economy' in Damian Tambini and Martin Moore (eds), *Digital Dominance* (Oxford University Press 2018).

125 Eli Noam, 'Overcoming Market Power in Online Video Platforms' in Damian Tambini and Martin Moore (eds), *Regulating Big Tech: Policy Responses to Digital Dominance* (Oxford University Press 2021).

values of the public communication sphere. Although hinted towards by the EU Commission in its Democracy Action Plan, media concentration law has not received too much attention so far.¹²⁶ This comes as a surprise, as it traditionally plays a central role in dealing with opinion power. Media law-specific instruments are necessary to safeguard media pluralism and equal chances to communicate, as merely economic-based instruments are not entirely capable of doing so.

With the increasing digitalisation and platformisation of the news environment, the very role of news media is challenged. Some have argued that because platforms have become essential sources of news and political information, they should be treated like the media within the framework of media concentration law.¹²⁷ Although we share the sense of urgency, it is also important to stress that media concentration law, as it currently stands, is rather useless for mitigating risks of concentrated opinion power held by platforms. If media concentration law is to play a meaningful role in regulating platforms' opinion power, it requires rethinking. Indeed, the current focuses on media ownership, broadcasting licenses and measurements of TV audience shares do not fully encompass the effects on opinion formation online and offline as we will argue.

While the call to reform media concentration law and adopt it to the contemporary digitalised media ecosystem is not new, there have not yet been substantial changes.¹²⁸ The reasons for that vary, including the lack of competence at the EU level, the fragmented and non-coherent nature of media laws across Europe and the world, the global impact of platforms and the special protections and privileges of the news media in democracies as the “fourth estate” or “watchdog.” Such incoherencies and fragmentations in the digital media environment make simple reforms difficult.¹²⁹ Instead, considering the normative function of media concentration law, we propose to move ahead and develop novel ways to deal with opinion power.

126 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. On the European democracy action plan, 2020. COM/2020/790 final.

127 Paul Nemitz and Matthias Pfeffer, ‘Determining Our Technological and Democratic Future: A Wish List’ in Damian Tambini (ed), *Regulating Big Tech. Policy Responses to Digital Dominance* (1st edn, Oxford University Press 2022), p. 348

128 Neuberger (n 13); Neuberger and Lobigs (n 13); Schulz, ‘Kontrolle Vorherrschender Meinungsmacht - Rekonstruktion Eines Medienrechtlichen Schlüsselbegriffs’ (n 14); Schulz and Held (n 90); Stigler, ‘Stigler Committee on Digital Platforms’ (2019) Final Report; KEK (n 6); Ofcom (n 6).

129 Stephan Dreyer and others, ‘The European Communication (Dis)Order: Mapping the Media-Relevant European Legislative Acts and Identification of Dependencies, Interface Areas and Conflicts’ (2020) Arbeitspapiere des Hans-Bredow-Instituts 199-201.

To move forward, we must first understand how opinion power is shifting. This article constitutes the first part of a larger research project that aims not only at better understanding shifts of opinion power, but also at developing ways and informing policy debates and regulatory thinking on how to deal with concentrated power in the media. We follow a normative approach to identify and develop the legal and regulatory conditions for a media environment that promotes media plurality, public values, and democracy in the age of platforms and AI. Hence, this first part (re) conceptualizes opinion power at the individual citizen, institutional newsroom, and media ecosystem levels to develop an initial understanding of the power dynamics and the failure of media concentration law to fulfil its normative goals. In short, this contribution aims to set the scene for a long-term rethinking of changing power dynamics in the media.

As mentioned, applying a normative legal research method, we begin by looking at the concept of “opinion power” (derived from the German concept of “Meinungsmacht”), embedded in the protection of freedom of expression and information, equality of chances to communicate and participate in the public sphere, media pluralism as well as privacy and data protection. We base our argumentation of developing a new digital media concentration law on the normative grounds developed by the German case. We believe that the notion of “Meinungsmacht” and its normative bases, particularly equal chances to communicate, media pluralism and power distribution, are useful values to conceptualise opinion power in the digital age and develop suitable (non-) regulatory responses. This does by no means imply that our research is primarily directed at Germany. Instead, it may provide useful guidance for effectively following the positive approach to protecting media freedom and plurality, which is prevalent in the whole of Europe.¹³⁰ Furthermore, building on Lukes’ theorisation of the three dimensions of “power” – decision-making power, agenda power and dominating power – we will map the shifting nature of opinion power at three levels: (1) At the individual citizen level, we analyse platforms’ ability to affect the exposure to news content and news consumption. (2) At the institutional newsroom level, we look at the implications of increasingly automated, data-driven and platform-dependent newsrooms. (3) At the media ecosystem level, we examine the systemic opinion power of platforms, which relates to the power over the digital communication infrastructure, technological and data power, and structural dependencies on platforms. Finally, we will use that conceptual framework to critically evaluate key concepts of existing media concentration law and point to the existing gaps while proposing new potential points of departure.

130 Tambini (n 39); Kenyon (n 50).

2. OPINION POWER

“Meinungsmacht”, also known as “opinion power”, refers to “the media’s ability to influence processes of individual and public opinion formation”.¹³¹ Because a functioning democracy necessitates a plurality of voices and a free media, constitutional law imposes positive obligations on states to implement (preliminary) measures to avoid dominant opinion power and promote power dispersal.¹³² Indeed, diversity of opinion describes a state in which there is no dominant opinion power, which is essential for a pluralistic media landscape and democracy. The goal of balanced diversity of opinion stems from freedom of broadcasting and press, which require the state to enable a diverse opinion market through legislation, specifically media concentration law. Germany has a long tradition of thinking about how to create optimal conditions to promote media pluralism and avoid dominant opinion power and media concentration as a result of its historical legacy and has developed media concentration legislation based on this normative idea of dispersing opinion power.

To advance our thinking about power over opinion formation in the context of new forms of media, it is worthwhile to take a closer look at the German case, the concept of “Meinungsmacht,” and how it has been shaped by the German Constitutional Court (hereafter “BVerfG”). “Meinungsmacht” provides a well-developed perception of the essence of media power in democracy and the grounds for dispersal, which helps in understanding the concept’s normative embeddedness in a broader context. Indeed, the BVerfG emphasises the importance of opinion power in relation to media pluralism, as well as the notion that imbalances in the ability to influence the process of public opinion formation can endanger a pluralistic media landscape and democracy.¹³³

More precisely, the underlying reason for the constitutional embedding of opinion power is the political power dimension of news media’s ability to influence individual opinion formation and public discourse. Crucially, Article 10(1) TEU refers to the principle of representative democracy and Article two TEU to democracy, equality, and the rule of law as fundamental democratic values upon which the EU is based. The media play a fundamental role in realising those values by serving as guardians of the flow of information, as the forum enabling the public to engage in debate and exchange opinions and viewpoints on a plurality of topics and issues and as

131 Neuberger (n 13) 53–68.

132 Tambini (n 39); Kenyon (n 50); Baker (n 22).

133 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14) 845.; BVerfGE 73, 118, 108 (1984) 4th Broadcasting decision

public watchdogs.¹³⁴ For the news media to fulfil their function, they hold special protections and are subject to enhanced duties and responsibilities.¹³⁵ In its eighth broadcasting decision, the BVerfG states that “free opinion formation as a prerequisite for both the development of personality and democratic order takes place in a process of communication that could not be sustained without the media, which disseminate information and opinions and express opinions themselves.”¹³⁶ In short, the news media are assigned great responsibility and power in a democracy. Hence, concentrations of such power must be averted.

The urgency to prevent dominant opinion power is equally emphasised by the European Court of Human Rights (ECtHR), according to which “there can be no democracy without pluralism.”¹³⁷ Media pluralism is a multi-faceted notion that requires a closer look.¹³⁸ First, internal diversity refers to the plurality of content and viewpoints provided by a single media outlet; Second, structural/external diversity targets the broader media ecosystem and affects the structure of the media market to measure power and ownership; Third – and most challenged in the digitalised sphere – exposure diversity refers to the extent to which audiences are exposed to, find, discover, and consume a plurality of content.¹³⁹ The distinct assessment levels – individual citizen, institutional newsroom, and media ecosystem – touch upon all facets of pluralism. Nonetheless, we want to emphasize that pluralism is less about individual choice or multiplicity of sources available than it is about balancing existing structural asymmetries in communicative power and in supporting political equality.¹⁴⁰ To sustain a healthy and thriving democracy, citizens need access to a variety of information, sources, and voices, allowing them to form opinions without the undue influence of one dominant actor wielding opinion power. We agree with Kari Karppinen that it is not enough to conceive media pluralism in terms of heterogeneity and a more diverse range of choices. Instead, the structural power relations within the media ecosystem, including the “struggles over the framing and agenda of public discussions, and political and corporate decisions about the architecture and

134 Trappel and Tomaz (n 15).

135 C Etteldorf and M Cappello (eds), ‘Journalism and Media Privilege’ 13–22 <<https://rm.coe.int/journalism-and-media-privilege-pdf/1680787381>>.

136 BVerfGE 90, 60 (1994) 8th Broadcasting decision

137 European Court of Human Rights (ECtHR), 25803/04, 25817/04, Judgement of 30 June 2009, 76.

138 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

139 Helberger, ‘Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity’ (n 44) 157–158; Philip M Napoli, ‘Deconstructing the Diversity Principle’ (1999) 49 7, 16.; European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

140 Karppinen (n 28) 80–81.

ownership of media systems," should be a focal point.¹⁴¹

A similar argument underlies the normative principle of "Kommunikative Chancengleichheit," which we translate as "equal chances to communicate." This notion, also developed in German law, primarily aims for fair and equal participation opportunities and inclusiveness in the democratic public sphere.¹⁴² As a constitutional concept, it guarantees the individual's participation in the political process through his or her involvement in the formation of public opinion.¹⁴³ C. Edwin Baker emphasises the "democratic distribution principle for communicative power" that reflects a "very wide and fair dispersal of power and ubiquitous opportunities to present preferences, views, and visions."¹⁴⁴ As the normative benchmark, the communication order should enable each person to benefit from a "structurally possible, real and equal chance to actively or passively participate in the communication and public opinion formation process" (Schulz 1998, 180). With opinion power, we must note that complete equality of actual communicative power is neither possible nor desirable.¹⁴⁵ Some positions of power and privilege, as for the media, are unavoidable. Accordingly, the BVerfG emphasised that opinion formation is "an intellectual and equal opportunity struggle which leaves economic power positions aside" and allows a "privileged position of the press only due to their function."¹⁴⁶ In that sense, the value of distributing communicative power does not only relate to ownership but should be implemented in all areas of "structural media policy" to avoid power concentrations.¹⁴⁷ Therefore, to enable pluralism and equality in public opinion-formation, the structural power relations underlying the media ecosystem are decisive, making it most relevant to investigate power structures.¹⁴⁸

In a nutshell, the normative and constitutional grounds of preventing dominating opinion power and media concentration may be summarised as ensuring equal communication opportunities, media pluralism, and (communicative) power distribution. These normative ideals underpin this article's conceptualisation of opinion power in the digital and platform age, as well as the corresponding failures to address identified challenges effectively.

141 *ibid* 80.

142 Schulz, *Gewährleistung Kommunikativer Chancengleichheit Als Freiheitsverwirklichung* (n 34).

143 *ibid*.

144 Baker (n 22) 7.

145 *ibid* 10.

146 BVerfGE 20, 162, 176 (1966) Spiegel decision.

147 Baker (n 22) 194.

148 Karpinen (n 28) 80; Victor Pickard, 'Restructuring Democratic Infrastructures: A Policy Approach to the Journalism Crisis' (2020) 8 *Digital Journalism*.

3. THEORETICAL UNDERSTANDING OF “POWER”

As the focus of our research is opinion power and its shifts, we want to dive a little bit deeper to understand how to theorise “power.” To disperse (opinion) power, the prime focus must be to avoid any structurally enabling circumstances for domination to accrue. Steven Lukes, who prominently defines three dimensions of “power,” confirms that “power is a potentiality, not an actuality – indeed a potentiality may never be actualized.”¹⁴⁹ Certainly, to prevent concentration, the “structural ability” to trigger effects on opinion formation alone is decisive, while the actual intention to abuse power or actual effects must not be proven.¹⁵⁰ Thus, to protect media pluralism and equality as vital for democratic functioning, the overriding objective should be to pre-emptively avoid dominant opinion power in the media ecosystem from occurring at all. Hence, structural power allocations must be thoroughly observed in an altering digital media environment.¹⁵¹

To analyse opinion power’s changing nature in the media, we consult the framing of power as developed by Lukes in three editions (1974, 2005 and 2021). He theorised the notion of power in the light of changing power relations and structures. In essence, Lukes stipulates that power is not only exercised “through overt decision-making covert non-decision making,” but also through the “influencing, shaping or determining” of people’s beliefs, values, and opinions.¹⁵² Those “who prevail in decision-making are those with more power in social life”.¹⁵³ Accordingly, Lukes’ first dimension of power concentrates on “behaviour in the making of decisions (...)”.¹⁵⁴ Following Bachrach’s and Baratz’s critique on the narrowness of Lukes’ one-dimensional view of power, he introduces non-decision-making power, relating to agenda power. They criticised that power is not only expressed through decisions but also through non-decisions about which potential issues do or do not enter the political arena.¹⁵⁵ In this respect, influencing how agendas come to be shaped sparks power. Similarly, Ben Bagdikian understands media power as “carefully avoiding some subjects while enthusiastically pursuing others,” thus being able to not only tell the readers what to think about but also shape how people think about issues.¹⁵⁶ In creating or reinforcing barriers

149 Lukes (n 7) 74.

150 Neuberger (n 13) 57. (non-official translation)

151 Neuberger and Lobigs (n 13) 25-27.

152 Lukes (n 7).

153 *ibid* 22-23.

154 *ibid* 24.

155 *ibid* 44, 24-29.

156 Ben Bagdikian, *The Media Monopoly* (Beacon Press 2000) 16; J Schlosberg, ‘Digital Agenda Setting: Re-Examining the Role of Platform Monopolies’ in Martin Moore and Damian Tambini (eds), *Digital Dominance* (Oxford University Press 2018) 204.

to “the public airing of policy conflicts” and thus influencing which topics enter public discourse, agenda power is also political power.¹⁵⁷ As phrased in one of the classic agenda-setting studies, “the media are the major primary sources of national political information; for most, mass media provide the best- and only-easily available approximation of ever-changing political realities,” which indeed confers upon (mass) media a crucial political and democratic function.¹⁵⁸ Hence, the power of the media over opinion formation and setting the agenda is political power.

In his later work, Lukes focuses on “domination” and how power can “operate unobserved and behind our backs and may be at its most effective when least observable to agents and observers alike”.¹⁵⁹ According to Lukes, domination is possible through the creation of (structural) dependencies and is defined as “the power to secure compliance with the interests of the powerful.”¹⁶⁰ In the debate on “domination as power,” Pettit also recognises that domination can be structural, giving it a more precondemning because it constitutes the background of what makes dominating relationships possible.¹⁶¹ Therefore, domination is most successful when it is “routine and unconsidered, the everyday enactment of norms and practices, rules and roles that engender and sustain subordination, dependency, and powerlessness”.¹⁶² While we agree with the systemic power potential stemming from creating dependencies, we refrain from using the term “dominance” to discuss opinion power to avoid confusion with the competition law analysis in which dominance has a very particular meaning. For this reason, we instead build on Helberger’s terminology and refer to “systemic opinion power” and/or “structural dependency,” both substantial enablers of domination.¹⁶³

157 Lukes (n 7) 25; Nayla Fawzi, ‘Beyond Policy Agenda-Setting: Political Actors’ and Journalists’ Perceptions of News Media Influence across All Stages of the Political Process’ (2017) 21 *Information, Communication & Society* 1134, 1145.

158 McCombs and Shaw (n 38) 185.

159 Lukes (n 7) 2.

160 *ibid* 3.

161 *ibid* 159–160.

162 *ibid* 159–160.

163 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14).

4. CHANGING NATURE OF OPINION POWER

4.1. INDIVIDUAL CITIZEN LEVEL: POWER OVER NEWS CONSUMPTION & EXPOSURE

The digitalisation and platformisation of the news media trigger changes of control in newsrooms, which, subsequently, affects individual opinion formation. Connecting to Lukes' first dimension of power, this means that an individual is presented with a variety of opinions and viewpoints, and each individual can consciously and autonomously decide, based on the available choices, what his or her preferences are. However, to make decisions freely, individuals should be sufficiently informed and knowledgeable about the opinions of others to make their own judgments. It is a key function of the news media to disseminate information, interpret events, and curate political news. Consequently, they exert editorial decision-making power, which influences individual opinion-formation by pre-selecting and presenting which viewpoints an individual gets to choose from, influencing behaviour by emphasising specific issues, and by interpreting news for the public. Ideally, those decisions are based on public values and interests because they considerably impact how individuals consume news, what news contents they are exposed to, and how their political behaviour and decisions are formed, i.e. in the context of elections. At the same time, free and open opinion formation is not just an "individual right." It is about protecting a democratic state, where individual expressions influence the environment of ideas, guaranteeing free and open public opinion formation.¹⁶⁴ The importance of protecting the individual communicative autonomy in the public sphere hence extends to safeguarding public will formation.¹⁶⁵ This is particularly important from the perspective of enabling a news environment allowing equal chances for a diversity of voices to participate.

Platforms and algorithms disrupt news media's power over individual news consumption and exposure. News recommendation algorithms is a prime example of prompting a shift of opinion power, as they filter the growing abundance of information and content online and actively guide and match individual readers with the news apt for them.¹⁶⁶ Despite an unprecedented availability and plurality of information of sources available, news consumption online is not simultaneously pluralistic as algorithmic control and the steering of access to information allow a

¹⁶⁴ BVerfGE 7, 198, 31 (1958) Lueth-Urteil.

¹⁶⁵ Schulz, *Gewährleistung Kommunikativer Chancengleichheit Als Freiheitsverwirklichung* (n 34) 168–172.

¹⁶⁶ Natali Helberger, 'On the Democratic Role of News Recommenders' (2019) 7 *Digital Journalism* 993, 994.

pre-selection of contents and enable control over communication and information flows.¹⁶⁷ As recommendations are based on user data held by platforms, they command powerful instruments to control the scarce attention of the user and keep them engaged on platforms for as long as possible.¹⁶⁸ That is, platforms' knowledge gained through data collection, as well as their ability to use that data and algorithmic tools to command and organise online attention and persuade, have the potential to create opinion power.¹⁶⁹

Despite enhanced individual autonomy and control over online news consumption, platforms still play a crucial role by guiding user attention to content based on personal interests and preferences. The vast amount of information available and the individual's inability to navigate through all content autonomously manifest the role of platforms in the news consumption process. Furthermore, free opinion formation is affected by the level of (perceived) privacy and data protection as abuse triggers distrust and possibly has a detrimental chilling effect on free expression and opinion formation.¹⁷⁰ Hence, individual informational autonomy is increasingly crucial to empower users in a media environment characterised by growing power concentration.

4.2. INSTITUTIONAL NEWSROOM LEVEL – POWER OVER EDITORIAL DECISIONMAKING & AGENDAS

As indicated earlier, Lukes considers “non-decisions” about which potential issues do or do not enter the political arena as agenda power.¹⁷¹ Power potential stems not only from influencing what issues people think about, but also how they think about them. Traditionally, the news media make choices about the public agenda based on their role to inform the public of ongoing debates and current issues. Notably, in reference to opinion power, the BVerfG famously grounded the function of the news media in politics and democracy in the Spiegel decision, arguing that “if citizens are to make

167 Helberger, ‘Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity’ (n 44); Napoli, ‘Deconstructing the Diversity Principle’ (n 138).

168 Helberger, ‘On the Democratic Role of News Recommenders’ (n 165) 1003; Naughton (n 123); Martin Moore, ‘Tech Giants and Civic Power’ [2016] Centre for the Study of Media, Communication and Power, Kings College London.

169 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14) 5.

170 Cohen, ‘What Privacy Is For’ (n 102) 1911; Neil M Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press 2015) <<https://search-ebscohost-com.proxy.uba.uva.nl/login.aspx?direct=true&db=e000xww&AN=932921&site=ehost-live&scope=site;>> Orla Lynskey, ‘Regulating “Platform Power”’ [2017] LSE Law, Society and Economy Working Papers 1/2017.

171 Lukes (n 7) 44, 24–29.I

political decisions, they must be fully informed, but also know opinions and viewpoints of others to weigh those up. (...) The press keeps this constant debate going, provides information, takes a stand and has an orienting effect on public debate."¹⁷² To that end, journalists' and editors' gatekeeping role and editorial decision-making power to make a news selection largely shapes public opinion as some topics might be pushed more while avoiding others. Due to the far-reaching implications of opinion power, the normative values of equality, pluralism and power distribution may be affected with new actors interfering with the role of traditional media.

As the news media are increasingly automated and data-driven, the way how newsrooms work and their normative role and editorial independence are affected.¹⁷³ Van Drunen and Fechner argue that "one way in which automation potentially challenges editorial independence is by changing the way in which editorial control is exercised, enabling non-media actors to directly influence the way in which a specific media organisation automates its editorial decision-making."¹⁷⁴ Journalistic editorial decision-making power, which affects the (political) agenda, is increasingly influenced by other factors than mere journalistic values. We observe that platforms may become "powerful agenda setters" because "journalistic standards of relevance are now competing with a probabilistic calculation of popularity" in determining the visibility of political actors and news.¹⁷⁵

Overall, platforms' algorithmic control, data processing and infrastructural control have implications for the entire "news circle" from observation to production and distribution of news, altering how newsrooms are setting the agenda.¹⁷⁶ In a so-called "hybrid news system" "information and the source of news circulate between traditional news media and social media, with the latter gaining a prominent position to determine whether certain information becomes news and if it ends up on the

172 BVerfGE 20, 162, 176 (1966) Spiegel decision

173 Diakopoulos (n 66) 203; Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2); MZ Van Drunen and D Fechner, 'Safeguarding Editorial Independence in an Automated Media System: The Relationship Between Law and Journalistic Perspectives' [2022] Digital Journalism 1.

174 Van Drunen and Fechner (n 172) 7.

175 Busch and others (n 71); Mike Ananny, 'Ch. 5 "Presence of Absence: Exploring the Democratic Significance of Silence"', *Digital Technology and Democratic Theory*, Lucy Bernholz (ed.), H el ene Landmore (ed.), Rob Reich (ed.) (University of Chicago Press 2021) <<https://doi.org/10.7208/chicago/9780226748603.003.0006>>.

176 Wiebke Loosen and Paul Solbach, 'K unstliche Intelligenz Im Journalismus?: Was Bedeutet Automatisierung F ur Journalistisches Arbeiten?' in Tanja K ohler (ed), *Fake News, Framing, Fact-Checking: Nachrichten im digitalen Zeitalter* (transcript Verlag 2020) 180 <<https://www.degruyter.com/document/doi/10.1515/9783839450253-010/html>> accessed 13 September 2023.

media and public agenda".¹⁷⁷ Thus, newsrooms increasingly analyse user behaviour and platform data to determine public preferences and trends. Newsrooms then adjust content production and curation based on information aggregation and distribution. Click-based audience metrics are a common way data-driven newsrooms measure real-time audience behaviour and engagement to better understand and reach audiences. As Diakopolous observes, "large flat-screen monitors reflecting real-time measurements of "most read" or "trending "stories hang from the walls of major newsrooms (...)"and thereby influence editorial decisions."¹⁷⁸

"Editors can examine the performance of their editorial choices as they scrutinise metrics in real time," according to Ferrer-Conill and Tandoc.¹⁷⁹ Thus, despite newsrooms being value-driven, editorial decisions and news making are increasingly influenced by datafied user interests shaped by platforms' "techno-commercial strategies", who act as "providers of AI services, tools and infrastructures, or as partners in research and development".¹⁸⁰ In all that, we need to be reminded that the roles and activities of platforms are fulfilled not in a "neutral" way as sometimes claimed, but based on the interests of private companies.¹⁸¹ It follows that while in democracies "broadcasters are usually constrained in what they broadcast and in the political views they can express," platforms "can command attention to promote their own views and services(...) can give them a political power comparable to that of a broadcaster" without constraints.¹⁸²

Besides that, platforms' direct funding strategies may provide a source of power and control of private companies over newsrooms and editorial decision-making. Influencing news coverage of big tech and topics around platform governance may solidify agenda power. We are not questioning journalists' professionalism or claiming to detect a lack of independence, we intend to remind that "power is a potentiality, not an actuality (...)" which, even if never actualised, may result in control.¹⁸³ Accordingly, we refer to Pickard, who pointed to some critics claiming that because "newspapers

177 Theo Araujo and Toni van der Meer, 'News Values on Social Media: Exploring What Drives Peaks in User Activity about Organizations on Twitter' (2020) 21 SAGE 633. 647.

178 Diakopolous (n 66) 184.

179 Raul Ferrer-Conill and Edson C Tandoc, 'The Audience-Oriented Editor: Making Sense of the Audience in the Newsroom' (2018) 6 Digital Journalism 436, 448.

180 Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2) 1; Jose Dijck, van, Martijn De Waal and Thomas Poell, *The Platform Society* (Oxford University Press 2018) 57 <<https://search-ebSCOhost-com.proxy.uba.uva.nl/login.aspx?direct=true&db=nlebk&AN=1901418&site=ehost-live&scope=site>>.

181 Nielsen and Ganter (n 33); Gillespie (n 38).

182 Moore (n 106) 29.

183 Lukes (n 7) 74.

have an incentive to protect its publisher's economic interests," the Washington Post – owned by Amazon's Jeff Bezos – may have so "aggressively criticised the then-presidential candidate Bernie Sanders' policy proposals" (to regulate big tech more stringently).¹⁸⁴ Thus, contentious investments of big tech companies into newsrooms should be scrutinised because they always follow their own political and economic agenda.

In brief, as few (private) platform companies gain control over many news media organisations worldwide, a concentration of power over data and technology is triggered, which could have serious consequences for editorial decision-making and agendas. Accordingly, safeguarding editorial independence and a resilient media are central aspects in creating counterpower.

4.3. MEDIA ECOSYSTEM LEVEL – SYSTEMIC POWER OF & STRUCTURAL DEPENDENCIES ON PLATFORMS

Systemic (opinion) power, which Helberger refers to as "the power to create dependencies and influence other players in a democracy," affects the media ecosystem level more generally by changing its very structure and power allocations.¹⁸⁵ As mentioned elsewhere, the entire news cycle from observation, production, dissemination, and consumption of news is (re)organised around platforms, their rules and logic and thus influenced and mediated by them. As a result, individuals and newsrooms are in a state of structural dependency on platforms, with implications for the broader functioning and power allocation within the media ecosystem. Thereby the normative values, particularly of structural media plurality and of a dispersal of (communicative)power, are undermined.

News media's concerns about the long-term effects of becoming too dependent on platforms have provocatively been phrased as the risk of becoming "slaves to the algorithm".¹⁸⁶ To illustrate, a simple change of Facebook's algorithm in 2018 to prioritise the content of friends and family over news content triggered a significant impact on news organisations' distribution strategies and required them to react.¹⁸⁷ Despite this acknowledgement, breaking the dependency on platforms is arduous,

184 Victor Pickard, *Democracy without Journalism* (Oxford University Press 2020).

185 Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14) 846.

186 Quote by Nick Denton, founder Gwaker Media in Nielsen and Ganter (n 63) 7.

187 Meese and Hurcombe (n 69) 7–11.

largely due to platforms' disproportionate data power and the unprecedented amounts of "knowledge" over users' interests, audience preferences and public trends, which, based on the notion that knowledge is power," further consolidates opinion power.¹⁸⁸ As previously alluded to, dependency plays a fundamental role in manifesting (platform) power. In their most recent work, Nielsen and Ganter describe platform power as "power exercised through socio-technical systems built by companies that draw many different third parties in by empowering them to do things that each of them value and want, while in the process leading them to become ever-more dependent on the platforming question, increasingly intertwined in highly asymmetric relations."¹⁸⁹ Hence, while the news media (mostly) benefits from these partnerships with platforms, ever-increasing dependencies also trigger ever-increasing power concentrations in the media.

More specifically, concentration trends are exacerbated by newsrooms becoming more platform-dependent and data-driven, resulting in a two-way dependency. First, platforms provide distribution infrastructures and technologies, making platforms mediators between newsrooms and their audiences and giving them the technological power to compel journalists to optimise news content to reach their readership. Accordingly, publishers make content "algorithm ready" and appropriate to the logic of platforms' underlying infrastructure.¹⁹⁰ As previously elucidated, platforms become digital communication infrastructures and "active agents," influencing the news production process. This vastly shifts power from the newsrooms to platforms and, at least to some extent, to the audience.¹⁹¹ Second, platforms provide data, for instance in the form of audience metrics, on which newsrooms rely in editorial decisions. Indeed, the need for newsrooms to be competitive and to serve the audiences' interests by producing popular content manifests dependency on platforms and their data. In essence, news media depend on platforms in many ways: as mediators between newsrooms and their audiences, as infrastructures compelling journalists to optimise news content to reach a readership, and as providers of data and technology. Structural dependencies, power asymmetries and concentrations of data and technological power are the result, with tremendous consequences for the media ecosystem as a whole (see for instance, Felix Simon).¹⁹²

188 The closest expression in Bacon's works is, perhaps, the expression "ipsa scientia potestas est," found in his *Meditationes Sacrae* (1597), which is translated as "knowledge itself is power."

189 Nielsen and Ganter (n 63) 2.

190 Anne Helmond, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) 1 *Social Media + Society*, 7.

191 Busch and others (n 71).

192 Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2).

Furthermore, journalism funds, such as the “Google News Initiative,” and heavy investments into newsroom innovation are strategic ways of maintaining systemic power in the media ecosystem and stipulating dependency. A report examining Google’s strategies in the German media ecosystem strikingly demonstrates that most newsrooms today are (at least) partially funded by Google with implications for the entire media ecosystem.¹⁹³ In addition, platforms are not only competitors or investors of news media but also business partners. As we have seen in recent years, they cannot be considered equal business partners though. Disproportionate negotiation powers between news media and platforms and between governments and platforms further spur structural dependencies as the following example shows. In early 2021, the Australian government proposed the so-called News Media Bargaining Code (NMBC), designed to make platforms pay publishers for hosting news content and address the bargaining power imbalance between platforms and the news media.¹⁹⁴ Facebook disagreed with entering into negotiations with news publishers or paying for hosting content. As a result, it banned all news content and critical health information about the COVID-19 pandemic from its platform, eventually pushing for (re)negotiations with the Australian government.¹⁹⁵ This episode demonstrates the immense power that platforms wield, not just over the news media but also in the broader communication sphere and with other actors.

Additionally, Van Dijck et al. highlighted platforms’ governance power through contracts and policies, such as terms of services and licence agreements.¹⁹⁶ The role of platforms in setting the terms and guidelines enables them to moderate interactions, also between news media and audiences. Within the frame of content moderation, Helberger argues in a like manner, stating that “making platforms the central locus of governance of online communication” and assigning them the task to moderate communication content on their platforms “strengthens their grip on the very process of democratic opinion formation”.¹⁹⁷ Governments now have limited possibilities to control content removals online while platforms become powerful and dependable

193 Fanta and Dachwitz (n 76).

194 Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill. 2021, March 19. Dijk, van, De Waal and Poell (n 42); Australian news media to negotiate payment with major digital platforms. 2020, July 31. <https://www.accc.gov.au/media-release/australiannews-media-to-negotiate-payment-with-major-digital-platforms>

195 Taylor, Josh. 2021. “Facebook’s Botched Australia News Ban Hits Health Departments, Charities and Its Own Pages.” *The Guardian*. February 18. <https://www.theguardian.com/technology/2021/feb/18/facebook-blocks-health-departments-charities-and-its-own-pages-in-botched-australia-news-ban>

196 José Van Dijck, David Nieborg and Thomas Poell, ‘Reframing Platform Power’ (2019) 8 *Internet Policy Review* <<https://policyreview.info/node/1414>> accessed 19 February 2024.

197 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14) 849.

actors for organising online information and communication.¹⁹⁸ Accordingly, any calls for more regulation coming from big tech companies should be viewed critically. The largest platforms could not only benefit from higher regulatory standards, when those may be hard to comply with for smaller competitors, but they also have an active part in shaping regulations, see only the NMBC. As Marietje Schaake put it “the false dichotomy of regulation versus no regulation ignores the benefits tech companies have enjoyed as a result of certain regulatory interventions.”¹⁹⁹ Not only do we need to call to mind that those platforms exert a vast influence on policymakers in Brussels, but some regulatory efforts, such as the Digital Services Act (DSA), may even manifest their role as rulers over the Internet and as (allegedly) merely being mediators without pursuing any own interests.²⁰⁰

5. NORMATIVE GOALS & CONCEPTS OF MEDIA CONCENTRATION LAW

Despite a relative lack of attention until then, media concentration law was hinted at in the Democracy Action Plan by the European Commission. As the Commission announced it “will also analyse existing national media diversity and concentration rules to see whether and how they ensure a plurality of voices in digital media markets, especially in the light of the growing role of online platforms.”²⁰¹ Although the EU has no specific competence to regulate media pluralism and there are no concrete media concentration or media ownership rules on EU level, some harmonising measures to protect media pluralism, like the Audiovisual Media Services Directive (AVMSD) and the EMFA, are indeed possible and pursued.²⁰²

198 Natali Helberger, ‘Die Regulierung von Sozialen Medien Aus Einer International Vergleichenden Perspektive’ in Wolfgang Schulz and Keno Potthast (eds), *Wissenschaftskommunikation und social media zwischen Rechtsschutz und Regulierungsbedarf* (Berlin-Brandenburgische Akademie der Wissenschaften 2021) 67 <https://leibniz-hbi.de/uploads/media/default/cms/media/qwsbbhi_Broschuere-WiD_15_PDF-A-1b.pdf>.

199 Schaake, Marietje. 2021. “Big Tech calls for ‘regulation’ but is fuzzy on the details.” *Financial Times*. July 26. <https://www.ft.com/content/a0a7f8de-f365-4e4e-a755-284df91c6e3a?segmentid=acee4131-99c2-09d3-a635-873e61754ec6a>

200 Helberger, Natali at TU Dortmund Institut fuer Journalistik. 2021, March 26. <https://wpj.ifj.tu-dortmund.de/news/die-redaktionen-sind-stark-von-den-plattformen-abhaengig/>

201 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. On the European democracy action plan. 2020. COM/2020/790 final.

202 Kristina Irion and Peggy Valcke, ‘Cultural Diversity in the Digital Age: EU Competences, Policies and Regulations for Diverse Audiovisual and Online Content’ (2015); i.e. Article 21(4) of the EC Merger Regulation explicitly states that Member States can take measures to protect the plurality of the media, although competition law is (primarily) a matter for EU competence. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24, 29.1.2004.

As powerful global players in the digital sphere, platforms contribute significantly to a concentrated digital environment, which is especially worrying when it comes to the media.²⁰³ Nemitz and Pfeffer note, “technological and economic dominance today is more than just a market phenomenon. It pertains to power over democracy.”²⁰⁴ Not least we argue that there are three elements that contribute to the changing nature of opinion power. First, deploying algorithms that enable control over the access and selection of information, content, and communication flows. Second, the ability to access user data and communication content that allows for creating user profiles based on personal interests and beliefs. Third, technological power, namely creating and providing software, algorithms, and filter technologies, triggers influence over communication infrastructure and architecture. In that, platforms can be seen as wielders of opinion power and as “active political actors in their own right”.²⁰⁵ Correspondingly, holistic and structural responses are needed. As media concentration law traditionally deals with exactly that, it is worth exploring.

5.1. PREVIOUS REFORM SUGGESTIONS

German legal scholar Hoffmann-Riem once wrote: “Technological, economic and political changes in the media system also lead to changes in the media law.”²⁰⁶ We agree with this observation but must add “should lead,” as, despite unprecedented changes in the media, real, substantial, and structural changes to media law are yet to be implemented.

In the context of media concentration law, Neuberger correctly asserted, “if the protective aim of media concentration law is the free, open and independent opinion formation, the relationship between opinion power, diversity and opinion formation must be more closely observed as it currently does not grasp the full complexity at hand.”²⁰⁷ As a matter of fact, while the goals and concepts of media concentration law become increasingly topical, widespread consensus exists about its inability to respond to the problem of platform power and dominant trends of convergence, digitalisation, and internationalisation adequately.²⁰⁸

203 Noam (n 124) 78–80.

204 Nemitz and Pfeffer (n 126) 344.

205 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14) 843.

206 Hoffmann Riem (n 1).

207 Neuberger (n 13) 28–30, 46–49. (Non-official translation)

208 Boris Paal, ‘Current Issues and Recent Developments on Media Concentration in the Context of Competition Law and Media Law’ (2017) 12 *Journal of Intellectual Property Law and Practice*.

It seems pertinent to look for possible approaches to updating media concentration law. Some suggestions to broaden the scope have been made in the past. Previously, Schulz and Held discussed moving to a system encompassing various media and focusing concentration control on the dangers and effects of influence on opinion, referred to as “Gesamtmedienmodell.”²⁰⁹ In 2018, KEK (German Commission for Controlling Concentration) proposed a new concept for securing plurality which should be based on an overall market model, moving away from the TV-centred approach and capturing all media markets relevant to opinion formation. In that context, Neuberger and Lobigs suggested looking at opinion power from an effect or relevance perspective, intending to understand the real effects on opinion formation better by concentrating on the characteristics of the offer (the editorial and political relevance), on user characteristics (how content is received at large through algorithmic persuasion and attention keeping of audiences), and on effect characteristics (how individual and public opinion formation is influenced).²¹⁰ In fact, taking a bottom-up approach to opinion formation might be relevant to better grasp real exposure and consumption. In addition, Ofcom in the United Kingdom (UK) and the Stigler report in the United States (US) (2019) both investigated the trends of media concentration and the normative and democratic implications and came to similar conclusions.²¹¹ In 2021, Ofcom suggested to “broaden the scope of the “Media Public Interest Test” framework beyond print newspapers and broadcasters to capture a broader range of “news creators” to be more reflective of the way people access and consume news today” and the Stigler report confirmed the need to develop targeted policies aimed at reducing concentrations of economic, media, data and political power of platforms, which are potentially dangerous for democracy.²¹²

Most recently, Nemitz and Pfeffer took up the question of whether media concentration law should apply to platforms like it does to traditional media.²¹³ They argue in the affirmative, asserting that “platforms are not only passive, but rather create content actively in some cases, and in all situations arrange and display it.” Therefore, they suggest that due to platforms’ power to aggregate (political) news and disseminate content tailored to personal profiles, they have become active actors in the public sphere. Despite true elements in the reasoning, the extent to which platforms can and should be subject to the same legal framework as mass media is debatable. We should not apply an overly broad definition of “media” as

209 Schulz and Held (n 90) 63.

210 Neuberger and Lobigs (n 13) 33. (Non-official translation)

211 Ofcom (n 6) 2; Stigler (n 127).

212 Stigler (n 127) 15.

213 Nemitz and Pfeffer (n 126) 347–348.

to safeguard legacy media protections and privileges, which would otherwise apply to other actors in the media ecosystem as well.²¹⁴ Nonetheless, the unaccounted role of platforms and other non-media actors to influence opinion formation and affect power allocations in the media ecosystem is becoming graver, while merely updating existing media concentration rules may be insufficient.

5.2. PROTECTION OF MEDIA PLURALISM

We turn to media concentration law due to its long tradition of dealing with opinion power. The traditional objective of media concentration law is to deal with economic market power and media influence over public opinion formation.²¹⁵ Hence, the normative goal to protect public values and media pluralism, as are threatened by power concentrations, sounds intuitively appealing.²¹⁶ Thus, for the age of digitalisation, we should re-visit the basic tenets of media concentration law.

Above all, under international human rights standards, states are required to take measures to promote an environment in which a diversity or range of information and ideas are available to the public, thus, to prevent media concentration.²¹⁷ Accordingly, measures to promote media pluralism are duly embedded in all EU member state legislations. The degree of their effectiveness to deal with new forms of opinion power and platform power is, however, questionable, not at least because of their strong focus on broadcasters. It is commonly agreed that in this context, any measures to protect media pluralism and avert media concentration must be taken proactively and preliminarily as counterbalancing dominant opinion power retrospectively is difficult and likely to have already affected public values negatively.²¹⁸

5.3. IMPORTANCE OF OWNERSHIP

Traditional media concentration law seems to assume that many media outlets and owners equal a pluralistic media landscape. To maintain a plurality of actors and voices and reduce market concentration, some EU member states have opted for implementing thresholds on the allocation of licences for broadcasters or the number

214 Recommendation of the Committee of Ministers to Member States on a new notion of media, 2011, CM/Rec (2011)7. Council of Europe.

215 Paal (n 207) 610.

216 Recommendation of the Committee of Ministers to Member States on promoting a favourable environment for quality journalism in the digital age, 2022, Rec. CM/Rec (2022) 4. Council of Europe. 12

217 Tambini (n 39); Kenyon (n 50).

218 See for example the German Constitutional Court's reasoning in BVerfGE 73, 118, 159–160 (1984) 4th broadcasting decision.

of newspapers owned. However, today's main problem with media concentration law is its narrow applicatory focus on traditional media, primarily TV and broadcasting. Accordingly, online services, search engines and internet content offerings without broadcasting participation would not be included.²¹⁹ In the platformised news environment, restricting power measurements to linear broadcasting content does not reflect the reality of how public opinion formation is impacted anymore. Furthermore, the assumption that many owners and outlets equal plurality is not true for the digitalised age.²²⁰ The perception that the greater the number of media actors, the greater the possibility of bringing diverse viewpoints and opinions in the public debate may not be completely true anymore. Instead, media pluralism today is increasingly concerned with how audiences are exposed to, find, discover, and consume content.²²¹ And although many owners do not automatically secure pluralism, ownership still matters.

Media ownership and cross-media ownership still implies high control over public opinion and can trigger opinion power.²²² Baker and Pickard both agree that in the digital environment, despite the belief that anyone could be a journalist or media producer, ownership matters and continues to be highly concentrated.²²³ Respectively, by enabling public access to production, publication and distribution tools, platforms have undermined Liebling's (1960) claim that "freedom of the press is guaranteed only by those who own one".²²⁴ Although a greater power distribution can be assumed based on technologically enhanced participation possibilities, we are faced with a reallocation of power and new concentrations.²²⁵

Consequently, in the future, measurement approaches must focus on the structural ability to influence opinion formation, instead of ignorantly limiting the scope to

219 Schulz and Held (n 90) 63.

220 Brogi, E., R. Carlini, I. Nenadić, P. L. Parcu, and M. Viola de Azevedo Cunha. 2021. "EU and Media Policy: Conceptualising Media Pluralism in the Era of Online Platforms. The Experience of the Media Pluralism Monitor." In *Research Handbook on EU Media Law and Policy*. Research Handbooks in European Law Series, edited by Parcu P. L. and E. Brogi, 16-31. Florence, Italy: European University Institute. 18.

221 Karppinen (n 28) 91–93; 110–111; Helberger, 'Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity' (n 44); Napoli, 'Deconstructing the Diversity Principle' (n 138).

222 Alison Harcourt and Robert G Picard, 'Policy, Economic, and Business Challenges of Media Ownership Regulation' (2009) 6 *Journal of Media Business Studies* 1.

223 Baker (n 22); Pickard, 'Restructuring Democratic Infrastructures: A Policy Approach to the Journalism Crisis' (n 147); Pickard, *Democracy without Journalism* (n 183).

224 Martin Moore and Damian Tambini (eds), *Regulating Big Tech: Policy Responses to Digital Dominance* (1st edn, Oxford University Press New York 2021) 278 <<https://academic.oup.com/book/39213>> accessed 18 September 2023.

225 Manuel Castells, 'Communication, Power and Counter-Power in the Network Society' (2007) 1 *International Journal of Communication* 238, 239; Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (Yale University Press 2016) 77–88; Neuberger and Lobigs (n 13).

broadcasters, newspapers, magazines and other traditional media. In other words, ownership still matters, but we need to better understand “whose” ownership of “what” matters. As Pickard put it, what matters is “monopoly ownership” as a broad and structural threat affecting the media ecosystem and the values it is based on.²²⁶ In short, limiting ownership ignores the fact that “the real issue is often “control,” for which ownership is a loose but imperfect proxy”.²²⁷ Rather, we must focus on control over the sources of power.

5.4. ECONOMIC & PUBLIC INTEREST GOALS

There is a strong interaction between the goals underlying competition law and media concentration law. It is deemed that functioning competition between many actors in the media market encourages media pluralism, while market-concentration can cause irreversible structural changes in the media sector and jeopardise media pluralism due to a diminishing number of competing companies.²²⁸ As a result, the influence of competition law in the media cannot be underestimated.

Concentrated market power poses political threats. Hence, free and functioning competition is an important aspect in ensuring media pluralism and controlling power over opinion-formation. Nonetheless, dealing with concentrated market power through competition law or merger controls alone cannot sustain media pluralism nor democracy as “competition law aims at creating fair conditions from an economic point of view and not to ensure diversity in the media sector”.²²⁹ Abuse of market power is identified ex post, while media concentration law follows an ex-ante approach to proactively prevent any structural abilities to trigger effects on opinion formation from the outset.²³⁰ That is where media concentration law comes in. It acts at the intersection of competition law, media law and constitutional law – all relevant for dealing with opinion power. Its rationale to aim at both the economic effects of media market concentration and creating the conditions for the realisation of public values are highly relevant for the digitalised news environment.

226 Pickard, *Democracy without Journalism* (n 183) 105.

227 Baker (n 22) 57.

228 Paal (n 207) 611.

229 Maja Cappello (ed), ‘Media Pluralism and Competition Issues’ <<https://rm.coe.int/iris-special-1-2020en-media-pluralism-and-competition-issues/1680a08455>>.

230 Neuberger (n 13).

6. DISCUSSION: PROPOSED DIRECTIONS FOR A NEW APPROACH

As previously defined, the algorithmic control and steering of information, the access to user data and communication contents, and the power to control communication infrastructures and technologies manifest the changing nature of opinion power in the platform context. As the nature of opinion power differs from its traditional understanding, we simply cannot rely on the traditional tools of media concentration law to prevent dominant opinion power anymore. We use the conceptual lens developed in Section “How Do we, Theoretically, Understand ‘Power’?” – distinguishing between the individual citizen, institutional newsroom, and media ecosystem levels of (opinion)power – to propose new points of departure.

We argue that a new approach should primarily focus on tackling the power imbalances and structural dependencies we identified, as well as become more wary of the far-reaching role and powers of new and non-media actors. Baker argued that to understand power in the media, we need to understand “who will have control,” instead of focusing too strictly on ownership.²³¹ He continues that whoever has control over policymakers and processes in fact has control. As previously argued, platforms increasingly exert political power by influencing individual and institutional choices and agendas, by controlling infrastructures and exerting influence over law-making processes. The overarching goal must be to develop the conditions for a plural media landscape, by facilitating individual autonomy, empowering a resilient news media, protecting editorial independence, and avoiding dependencies and lock-ins. That being said, we are faced with structural challenges requiring structural solutions.

6.1. INDIVIDUAL CITIZEN LEVEL: POWER OVER NEWS CONSUMPTION & EXPOSURE

As a starting point, we look at the shift of opinion power at the individual citizen level. Notably, how individuals come to shape their opinions shifts as powers over news consumption and media reach change. Unprecedented amounts of content online require individuals to navigate through heaps of information. Algorithmic selections help individuals, yet individuals must maintain a certain level of (intellectual) autonomy to be able to freely and openly, without external interferences, make choices.

Most EU member states have at least some rules in place that, amongst other

²³¹ Baker (n 22) 57.

measures, limit the (audience) reach a single media outlet shall have by measuring audience shares. Restrictions based on audience shares are used as thresholds to prevent ownership concentration and to increase pluralism, by limiting the potential power over individual news consumption and exposure.²³² A pluralistic media offer is, for instance, defined as being a “media offer through a plurality of independent and autonomous media and services reflecting the widest possible diversity of socio-cultural currents of expressions and ideas”.²³³ The goal is to limit the power that a single outlet has over the supply and availability of news content. In most member states however, audience share thresholds only apply to TV and radio, ignoring other non-media actors.²³⁴

As previously discussed, concentration of opinion power cannot effectively be measured if other factors, such as control over distribution and aggregation of news content, accessibility and discoverability of news content, and the use of technological tools to influence the dissemination and prominence of content are left out. That is, because we are no longer concerned with a concentration of audience shares, but with concentrated power over audience attention. It is evident that the approach of media concentration law to measure audience shares of traditional media cannot capture opinion power for various reasons. It ignores the fact that actors who do not directly own an outlet but control distribution infrastructures, algorithms and data that enables ranking, prioritising, and recommending news content, can manage attention, consumption, exposure and subsequently wield opinion power in new and sophisticated ways.

The extent to which users are (truly) free to choose between various sources and contents and enjoy what the Council of Europe has called “cognitive autonomy” needs to play a more prominent role in counterbalancing power.²³⁵ Hence, we might need to borrow from areas that so far have not yet played a role in media concentration law and include privacy and data and consumer protections as elements of a new media concentration law. Other elements may involve measures to avoid contractual

232 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

233 *ibid.*

234 K Jakubowicz, ‘New Media Ecology: Reconceptualizing Media Pluralism’ in P Valcke, M Sukosd and R Picard (eds), *Media Pluralism and Diversity: Concepts, Risks and Global Trend* (Palgrave Macmillan 2016). European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

235 Helberger, ‘Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity’ (n 16) 171; Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes, 2019, Decl(13/02/2019)1. Council of Europe. Available at <https://www.coe.int/en/web/data-protection/-/declaration-by-the-committee-of-ministers-on-the-manipulativecapabilities-of-algorithmic-processes>

and technical lock-ins by ensuring the overall design of digital choice architecture is built to enable autonomy. The DSA, for instance, takes such an approach in regulating recommenders and giving the opportunity to switch off personalisation. While this is no perfect solution, it does point to the need to give users choice and autonomy. Because measures to protect (vulnerable) consumers and safeguard individual (intellectual) autonomy typically fall under data protection law or consumer law, but neither intervention are designed to take into account public interest objectives, such as the ability to benefit from a diverse media offer and not to be exposed to excessive opinion power, media concentration law new style may have to include such elements.

6.2. INSTITUTIONAL NEWSROOM LEVEL – POWER OVER EDITORIAL DECISIONMAKING & AGENDAS

As alluded to, editorial decision-making is increasingly focused on making content platform- and algorithm-ready to comply with the logic and designs of platforms, which is crucial to keep the largest possible audience engaged and interested by feeding “popular” content. As discussed earlier, because of those developments, news media’s normative role and editorial independence are affected.²³⁶ Ownership limitations, typically restrictions relating to capital control, foreign ownership and transparency, are central nodes in media concentration law to ensure independence within media outlets and newsrooms. As concluded in a recent study, media ownership rules are largely focused on traditional media and “rarely take into consideration the take-up of new services and platforms, which results in the scarcity of set limits for digital news media”.²³⁷ The limitations in place ignore the way how data analytics and algorithmic tools have reshaped the relationship with the audience, allowing for far more fine-grained control over the flow of audience attention by new actors and platforms. Therefore, in the context of platforms, we need to discuss what kind of ownership really matters and how we should define ownership. We argue that ownership is no longer only concerned with owning shares or control over cable networks or programme content but is more about ownership or control over data, algorithms, and infrastructures. In fact, as mentioned elsewhere, the very concept of ownership is increasingly misleading, as one cannot “own” audience attention, popularity, user engagement or even personal data. Objects of control and ownership change, as audience data increasingly becomes a source of power inside

²³⁶ Van Druenen and Fechner (n 172).

²³⁷ European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

newsrooms.²³⁸ Additionally, the (technological) means to connect with the audience is increasingly outside the control of newsrooms and shifts towards platforms.²³⁹ Accordingly, a new paradigm is necessary to capture how these new critical resources can be instrumentalised to assert a position of opinion power.

Essentially, in many respects, the way we have conceptualised opinion power at the institutional newsroom level in the form of using data and algorithmic control to influence newsrooms' internal strategies can probably be better described as a newform of "undue influence" over the democratic opinion formation process. Van Drunen and Fechner highlight that current regulations fail to target "internal organisational matters" to safeguard "editorial independence in the sphere of private actors, specifically aimed at limiting external (commercial) influences or media concentrations".²⁴⁰ The potential power of external, non-media actors, who provide technologies and data and set the terms and conditions, with own political and commercial interests to affect opinion formation suffices to make it a matter of concern. In particular "autonomy" in editorial decision-making is a normative ideal that is seen as constitutive to journalism, and it is crucial to inform the public sufficiently to enable a public arena for free and independent opinion formation.²⁴¹ Here, traditional regulatory approaches alone may not be the best solution. As Van Drunen and Fechner points out, some aspects of editorial independence, such as professional values, own stances and opinions, may fall outside the scope of law.²⁴²

Counterbalances should also focus on making news media more resilient and independent from commercial financial sources. As previously mentioned, investments and funding by big tech companies influence newsrooms without direct ownership, which may create financial and technological dependencies.²⁴³ An opacity of funding sources could further lead to concentrated power over several news media organisations without being captured by the current tools. In that respect, creating the conditions for public investment and stimulating independent innovation could provide a pathway to break the economic and technological dependency on platforms. Diversifying funding within the media ecosystem can help overcome news media's dependency on platforms for financial survival and enhance competition in the media ecosystem between all actors involved. Pickard calls for diversifying

238 Ferrer-Conill and Tandoc (n 178) 448.

239 Nielsen and Ganter (n 63).

240 Van Drunen and Fechner (n 172) 22.

241 Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2) 12.

242 Van Drunen and Fechner (n 172) 22.

243 Fanta and Dachwitz (n 76).

news media's revenue streams and de-commercialising the media to make it less dependent on advertising, which is dominated by platforms and facilitated by access to users and their data.²⁴⁴ In fact, let us not forget, Google or Meta do not own the BBC, the NPO, or the Volkskrant, but still exert influence through funding. Crucially, we must rethink and enhance transparency of third-party funding streams, such as the financial flows from platforms to newsrooms, to get a better picture of the economic dependencies and power distributions.

6.3. MEDIA ECOSYSTEM LEVEL – SYSTEMIC POWER OF & STRUCTURAL DEPENDENCIES ON PLATFORMS

As previously identified, platforms wield systemic power, making them “regulatory structures of the social” and “facilitators of free speech”.²⁴⁵ Their function to provide communication and information infrastructures, their ability to influence news circulation and accessibility, and their broader influence on media actors and the media market by setting rules, terms, and conditions are striking. Current media concentration rules, neither ownership rules nor other limitations or transparency and oversight measures, can fully apprehend this far-reaching power potential. Especially with regard to mergers, Perusko highlighted that “beyond economic perspectives, and due to media goods’ economic and cultural role, media mergers cannot only drastically impact upon competition but also on the diversity and pluralism of opinions and views.”²⁴⁶ Accordingly, the anti-competitive behaviour of big tech companies and platforms in the media does indeed have an effect on pluralism.

Notably, dependencies and power imbalances in the media ecosystem may severely exacerbate concentration trends, particularly in business negotiations between news media organisations and platforms. Undoubtedly, it is inevitable to discover ways of dealing with disproportionate negotiation powers between old and new media, which must be a central focal point to break away from structural dependencies and protect independence. Any novel approach should aim at levelling powers and creating counterbalances by empowering users and news media.²⁴⁷ For instance,

²⁴⁴ Pickard, *Democracy without Journalism* (n 183).

²⁴⁵ Busch and others (n 71) 23.

²⁴⁶ Zrinjka Perusko, ‘The Link That Matters: Media Concentration and Diversity of Content’ in Beata Klimkiewicz (ed), *Media Freedom and Pluralism: Media Policy Challenges in the Enlarged Europe*. (Central European University Press 2022); European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55) 121.

²⁴⁷ Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14) 850; James Meese, ‘Journalism Policy across the Commonwealth: Partial Answers to Public Problems’ (2021) 9 *Digital Journalism* 255, 270.

by looking at balancing negotiation powers between platforms and news media through enhanced contractual obligations or guidelines guaranteeing a fair and equal value exchange. Still, we should be wary of examples such as the NMBC in Australia that aimed at levelling negotiation power imbalances but arguably strengthened platform power and may even have further contributed to concentration.²⁴⁸ Still, a well-developed concept of enabling collective bargaining powers and agreements could be a remedy, especially to enhance and stimulate local news media and their competitiveness towards other large media companies in the ecosystem, such as Springer or DPG.

Furthermore, transparency and oversight must go beyond the current limited means to deal with concentrated power. Suggestions involve, for instance, strengthening and expanding media authorities' power.²⁴⁹ Accordingly, Craufurd-Smith suggested an expansion of media authorities' "information-gathering powers" to help measure actual online news consumption as well as to allow for a better understanding of how these infrastructures work and better detect concentration trends.²⁵⁰ Complementarily, more holistic cooperation between national and European competition authorities, data protection authorities and media authorities could help detect possible threats of media concentration in the platform context where access to and control over data have much broader implications for competition and the media ecosystem.

In fact, media concentration interventions should increasingly focus on developing more measures, such as expanding data access rights for media authorities or imposing new transparency obligations on platforms, to better understand who controls data, how technical persuasiveness affects opinion formation and who controls attention. Future research should investigate the effectiveness of, for instance, the EU AI Act and the Data Act and how the provisions address the use and access of data and the level of "risk" connected to using algorithms and AI in journalism and what does that mean for countering dominant opinion power. Aspects such as fair data access rights may be crucial to balance power asymmetries in the media ecosystem and break dependencies.

Consequently, rethinking media concentration law as a complementary approach to

248 See for example: Seipp, Theresa. 2021. News media's dependency on big tech: should we be worried? *Internet Policy Review*. June 10.; AI, Media, and Democracy Lab. 2021. What would happen if Facebook and Google left your country tomorrow? *LSE Blog*. July 12.

249 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

250 Ofcom (n 6) 13.

platform regulation can help broaden the scope and refocus regulatory efforts on protecting public values and democracy. The idea of introducing thresholds resonates to a great extent with recent legislative proposals for the digital world. For example, the DSA is the first piece of legislation of its kind that regulates recommenders to give users more choice and recognises risks to media pluralism as “systemic risks.” The DMA and Data Act focus on creating counterbalances in the digital market and the recently proposed Media Freedom Act focuses on empowering a resilient media and protecting editorial independence.²⁵¹ Those are first approaches that need to be scrutinised further and in detail but may provide elements for a media concentration law new style.

Value-based regulation that takes a longer-term perspective and focuses not only on disciplining (economic) platform power and reacting to specific phenomena can help create lasting conditions for countering power more systematically, which is vital to prevent future technological innovations and market developments from ending in a legal vacuum. Finally, we need to highlight that the nature of platforms makes this a cross-border and international matter, which requires expanding international cooperation and coordination to tackle big tech power and protect democracy effectively.²⁵²

7. CONCLUSION

We established that new power dynamics call for re-examining and reinventing the regulatory approaches to addressing new power concentrations. The (re) conceptualisation of the shifting nature of opinion power and the demonstration of the gaps in the current media concentration toolbox to deal with it provides a basis for ongoing and continuing research. A simple reform of national media concentration, such as to include platforms in the scope of “media,” misses the point. We need to think of a completely new style of dealing with media concentration that is fit for the digital age.

The analysis at three levels can be applied to directly develop tools focussed on the threats faced by the respective level. Such as, for the individual citizen level, tools must focus on ensuring free and open opinion formation by creating counterpowers in the form of empowering individuals to be more autonomous. Doing so goes beyond

²⁵¹ Regulation (EU) 2022/2065 (“DSA”); Regulation (EU) 2022/1925 (“DMA”); Regulation (EU) 2024/1083 (“EMFA”)

²⁵² Paal (n 207) 616.

traditional approaches. For instance, protecting users' intellectual privacy and data should become part of a digital media concentration law. At the institutional level, measures should address the challenges for newsrooms in the age of automation, datafication and digitalisation, as well as growing data, technological and financial dependencies on platforms. A better understanding of the power dynamics within newsrooms and the effects on normative professional values, editorial independence and agenda-setting is needed. For instance, the traditional concept of media ownership does not fully capture who is in control and exerts influence. A better understanding of that in combination with building a more resilient and independent media is crucial for a new media concentration law. Lastly, the media ecosystem level allows us to examine the broader implications of growing structural dependencies and systematic opinion power on the media ecosystem. It emphasizes that any "attempts to 'platform-proof' democracies must always be accompanied by other structural measures, "as none of the current regulatory attempts will reverse "the processes of media change or changes in media use behaviour".²⁵³ Hence, oversight, transparency and control mechanisms are just few approaches that need to be further engaged with for structural solutions.

In a nutshell, we need adequate tools to create counterpowers while relying on the normative principles to safeguard media pluralism and equality for free and open opinion formation as well as promote a dispersal of communicative power. To do so, we need to look beyond the traditional scope of media concentration law. The locus of analysis must shift, as we showed, to new tools that so far are not part of the traditional media concentration toolbox. Now is the time for broadening our perspectives. We are in a phase of huge momentum for regulating platform power, and as Pickard underscored "now have most likely a fleeting window of opportunity for bold plans and structural reform".²⁵⁴ The present incentives to deal with platform power must be extended to capture the changes in the broader media landscape and strive for significant structural reform. We need a coherent framework that affirms the primacy of democracy and helps create countervailing powers to enable a structural distribution of opinion power.

253 Stephan Dreyer and others, 'European Media Law in Times of Digitality', *Law Of Global Digitality* (Taylor & Francis 2022) 201 <<https://library.oapen.org/bitstream/handle/20.500.12657/57619/9781000603767.pdf;jsessionid=354CEC2CBDA2AD76B95B0CDFEB37D243?sequence=1>>.

254 Moore and Tambini (n 223) 425.

CHAPTER

MEDIA CONCENTRATION LAW – GAPS & PROMISES IN THE DIGITAL AGE

4

Power concentrations are increasing in today's media landscape. Reasons for this include increasing structural and technological dependencies on digital platform companies, as well as shifts in opinion power and control over news production, distribution, and consumption. Digital opinion power and platformised media markets have prompted the need for a re-evaluation of the current approach. This article critically revisits and analyses media concentration rules. To this end, I employ a normative conceptual framework that examines "opinion power in the platform world" at three distinct levels (individual citizen, institutional newsroom, and media ecosystem). At each level, I identify the existing legal tools and gaps in controlling power and concentration in the digital age. Based on that, I offer a unifying theoretical framework for a "digital media concentration law," along with core concepts and guiding principles. I highlight policy goals and fields that are outside the traditional scope yet are relevant for addressing issues relating to the digital age. Additionally, the emerging EU regulatory framework—specifically the DSA, the DMA, and the European Media Freedom Act—reflects an evolving approach regarding platforms and media concentration. On a final note, the analysis draws from the mapping and evaluation results of a Europe-wide study on media pluralism and diversity online, which examined (national) media concentration rules.

1. INTRODUCTION

Today's media environment is characterised by shifting opinion power, changes in news production, distribution, and consumption, and increased structural and technological dependencies on platforms. It is observable that the power of platforms extends far beyond economic and data power, thereby affecting the entire media ecosystem, public sphere, and democracy.²⁵⁵ These changing power dynamics in the media ecosystem and platforms' ability to influence public opinion formation contribute to growing media concentration trends that raise concerns about media pluralism, particularly as the shifting media landscape threatens local and independent journalism.²⁵⁶ Such developments might endanger not only a pluralistic media landscape but democracy as a whole.²⁵⁷ While these developments are relevant to many democracies around the world, this article focuses on Europe and its tradition

255 Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14).

256 Pickard, *Democracy without Journalism* (n 183); Theresa Josephine Seipp and others, 'Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law' [2023] *Digital Journalism*.

257 Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14) 845.

of imposing positive obligations on states to prevent media concentration and promote pluralism and freedom.²⁵⁸ Accordingly, in a well-functioning democracy, measures should be put in place to disperse “opinion power” (stemming from the German notion “Meinungsmacht”), which is defined as “the ability of the media to influence processes of individual and public opinion formation”.²⁵⁹

Media concentration law is the relevant legal tool for doing exactly that. Namely, addressing concentration and preventing dominant opinion power from accruing. However, existing tools are unable to capture increased concentration trends driven by datafication, digitalisation, and platformisation of the media ecosystem while (national) reform initiatives have not yet proven successful.²⁶⁰ This is what prompted the EU to urge a review of media concentration laws and measurements in its recently proposed EMFA. Since creating concentration rules for the digital age is complicated, it is useful to revert to the normative foundations of traditional media concentration law, intersecting competition law, media law, and constitutional law. In this article, I propose a unifying theoretical framework for a novel “digital media concentration law” based on concentration rules’ traditional normative foundations and incorporating relevant policy goals, concepts, and guidelines from multiple legal areas, including data protection and privacy law, consumer law, contract law, competition law, (tele) communication law, media law, platform regulation, and AI law (see Figure 1).

A normative legal research method is used to investigate media concentration law and related policy responses. Because “normative choices have policy consequences”, understanding the underlying normative goals of legal tools is useful to assess long-term and institutional effects.²⁶¹ Economic and competition-driven policies generally fail to effectively protect media pluralism, public values, and democracy.²⁶² Hence, to deal with media concentration, the normative foundations of the respective rules are best equipped to inform effective policy choices. In the words of Lin and Lewis, discussions about the digitalisation of the news media shall focus on what AI and technology should (rather than could) do for them and democracy.²⁶³ To that

258 Tambini (n 36).

259 Neuberger (n 13) 56; Baker (n 22); Seipp and others (n 255).

260 KEK (n 6); Neuberger and Lobigs (n 13); Ofcom (n 6).

261 Pawel Popiel, ‘Regulating Datafication and Platformization: Policy Silos and Tradeoffs in International Platform Inquiries.’ (2022) 14 *Policy & Internet* 28, 33; Matthias Cornils, ‘Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries’ 14; Sarah Anne Ganter, ‘Governance of News Aggregators’ Practices across Five Emblematic Cases: Policy Regimes between Normative Acceptance and Resistance.’ (2022) 38 *The Information Society* 290.

262 Baker (n 22) 30.

263 Bibo Lin and Seth C Lewis, ‘The One Thing Journalistic AI Just Might Do for Democracy’ (2022) 10 *Digital Journalism* 1627, 2.

end, this article follows a normative and prescriptive approach. It discusses the normative foundations of European media concentration law, based on a (doctrinal) analysis of regulatory frameworks and documents, research reports and studies, and literature. Flowing from that, the normative findings are then woven together in a prescriptive narrative to propose potential remedies.

Of prime relevance for this analysis is the EU-wide “Media Pluralism and Diversity Online” study which maps and evaluates media concentration rules. The investigated elements of EU member states (including the UK) regulation are those aiming specifically at limiting media concentration and promoting media pluralism. I draw from this study’s findings and national examples, in addition to other relevant literature, studies, and regulatory frameworks. These include findings from an EU study on digital advertising and publishers and other relevant national studies to identify general approaches, several national examples are highlighted to support my arguments, though they are not compared in detail.²⁶⁴ Despite the complexity of this topic, due to space constraints, only a selection of examples is referred to. Furthermore, various gaps related to failures to assess concentration and opinion power, such as the inability of TV audiences to share measurements to genuinely represent news consumption and opinion formation, have previously been identified. Hence, my gap analysis as described in this article correlates with the significant power shifts in the media landscape at three levels: (a) the shifting impact over individual news consumption and exposure; (b) the shifting power dynamics inside automated, datafied, and platform-dependent newsrooms; and (c) the arrival of new players, particularly platforms and their systemic power and growing structural dependencies.²⁶⁵ The three-level conceptualisation of opinion power further guides the analysis and, for each level, I outline normative goals, gaps, and potential remedies for the digital age.

2. MEDIA CONCENTRATION LAW IN EUROPE

The relationship between media concentration and economic, journalistic, and political power seems evident as journalistic power stems from the economic power of media companies, more specifically, the “capital owners of these companies”.²⁶⁶ Those with journalistic power can “enforce information, opinion, legitimization, and

264 KEK (n 6); Neuberger and Lobigs (n 13); Ofcom (n 6). C Armitage and others, ‘Study on the Impact of Recent Developments in Digital Advertising on Privacy, Publishers and Advertisers.’

265 Seipp and others (n 255).

266 Knoche (n 21) 374–375.

ideology” that conforms with the interests and goals of those in power.²⁶⁷ Those in the media with “economic, journalistic, and political power” can influence individual and public opinion formation and, hence, wield what I call “opinion power.”

Media concentration law aims at ensuring the dispersal of “opinion power” by controlling and measuring the (economic) effects of media market concentration and through the promotion of public values, particularly media pluralism. As Helberger et al. stress, the public value(s) at stake depend on the context.²⁶⁸ Here, the relevant public values are the promotion of media pluralism, the safeguarding of equal opportunity to communicate and participate in the public sphere, of democratic power distribution, and of transparency.²⁶⁹ The dual goal of safeguarding competition and media pluralism encapsulates the intertwined nature of concerns about economic sustainability and public values in the digital media ecosystem. Both aspects need to be addressed to achieve the normative goals of media concentration law: preventing concentrated power over public opinion and encouraging the wider distribution of power to participate in public discourse.²⁷⁰ To attain these goals, media law alone is insufficient; all policy fields relevant to the media and communication sphere are applicable (Figure 1). Hence, I recommend including the normative underpinnings and aspired public values of media concentration law as well as measures enabling fair competition in any efforts to govern the digital media ecosystem.

In previous years, there has been a strong push to revisit media concentration laws, as seen in the European Media Freedom Act and similar national initiatives (e.g., by Ofcom and KEK). As previously mentioned, this article focuses on Europe, where states have positive and negative obligations to protect free expression, media freedom, and media pluralism.²⁷¹ Individual and public freedom of expression safeguards, envisaged in Article 10 of the ECHR and Article 11 of the EU Charter are needed to enable a free marketplace of ideas in which truth, self-government, and autonomy prevail. Media freedom is institutional in nature, and specific privileges and protections are indispensable due to their societal value in facilitating free speech and opinion formation.²⁷² Therefore, media freedom and pluralism are means to an end—truth, democracy, and individual autonomy—and not ends in

267 *ibid.*

268 Natali Helberger, Jo Pierson and Thomas Poell, ‘Governing Online Platforms: From Contested to Cooperative Responsibility.’ (2017) 34 *The Information Society* 1.

269 Baker (n 22); Karppinen (n 26); Schulz (n 26).

270 Baker (n 22); Edwin C Baker, ‘Media Concentration: Giving up on Democracy’ (2002) 54 *Florida Law Review* 839.

271 Tambini (n 36).

272 *ibid.*

themselves. In this respect, states are obliged to (proactively) guarantee a healthy media environment and prevent dominant opinion power and concentration as a democratic prerequisite.

The High-Level Group on Media Freedom and Pluralism, convened by the European Commission, drafted one of the most comprehensive reports setting forth principles for “a free and pluralistic media to sustain democracy,” highlighting the threats of concentration.²⁷³ Concentration jeopardises media freedom and pluralism and some form of global settlement for democracies to resolve doctrinal and constitutional differences is desired to address the issues coherently and globally.²⁷⁴ Henceforth, I resort to and refer to the following list of concentration threats in the gap analysis that has previously guided reports worldwide:²⁷⁵

- Threat 1: Excessive media ownership or advertising client influence;
- Threat 2: Commercial media ownership concentration;
- Threat 3: Changing business models and their consequences for the quality of journalism;
- Threat 4: Lack of media ownership transparency and opacity of funding sources;
- Threat 5: Potential conflicts of interest arising from journalists' closeness to business interests with implications for the political space.

The proposed remedies to address these threats are not exhaustive. Instead, broader realignments of future policy objectives are needed. The thinking here must go beyond existing rules and encompass policy fields not previously considered part of media concentration law. Although legal responses are necessary, as van Drunen and Fechner highlight, they are not the only way to achieve certain goals and establish norms.²⁷⁶ Professional ethical guidelines, internal organisational measures, and so on can contribute to tackling concentration threats, and thereby enabling media pluralism. Hence, I explore regulatory areas beyond the scope of existing media concentration law (Figure 1) and non-regulatory approaches to empower autonomous individuals and (news) institutions.

273 High Level Expert Group on Media Freedom and Pluralism. 2013. *A Free and Pluralistic Media to Sustain European Democracy*. Brussels: High Level Expert Group on Media Freedom and Pluralism. 15-16.

274 Tambini (n 36).

275 Mendel, García Castillejo and Gómez (n 50); on Media Centre and others (n 49).

276 Van Drunen and Fechner (n 149).

3. ANALYSIS: GAPS & PROMISES

This section presents the normative conceptual framework of shifting “opinion power” and explores how current media concentration laws are insufficient in addressing the increasing concentration threats in the digital media landscape at three levels: the individual citizen, institutional newsroom, and media ecosystem levels. At each level, I highlight potential remedies that can help fulfil the normative goals and protect public values and ensure fair competition.

4

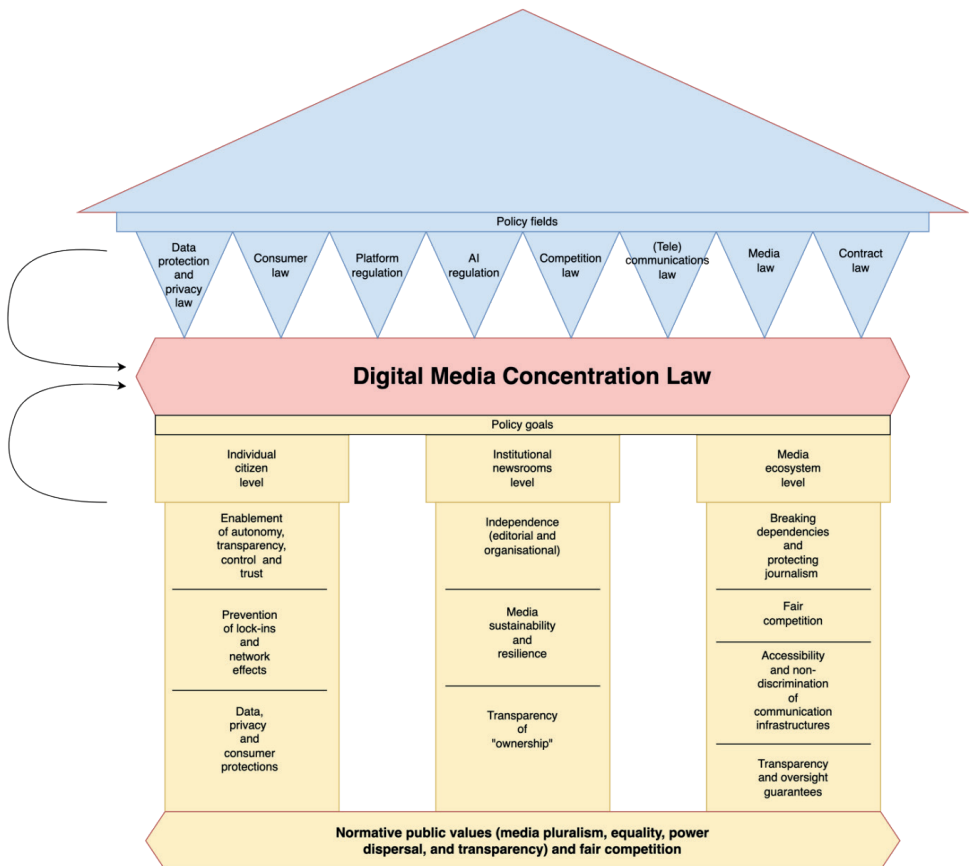


Figure 1. Illustration of a unifying theoretical framework for a “digital media concentration law” and the relevant policy goals and fields that feed into it.

3.1. INDIVIDUAL CITIZEN LEVEL

3.1.1. Normative Conceptual Framework: Power Over News Consumption & Exposure

Individual news consumption and exposure are increasingly governed by algorithms controlled by platforms and informed by data collected on user behaviour, such as traffic to news websites, personal interests and beliefs, and location data.²⁷⁷ Individual autonomy and freedom of choice are significant aspects of empowering users. Hence, the ability of profit-driven platforms to steer news exposure and control attention through algorithms, based on platform design choices, may affect how autonomous and free choices in news consumption and opinion formation are.²⁷⁸ Digital media concentration rules at the individual level intend to limit interference over user choice and autonomy to protect free and independent opinion formation. Normatively, this goal stems from the principle of equal opportunity to communicate by enabling everyone to benefit from a “structurally possible, real and equal opportunity to actively or passively participate in the communication and public opinion formation process”.²⁷⁹

3.1.2. Gaps

Several measures aim to minimise the influence of media owners or others on individual opinion formation (Threat 1). Media reach limitations focus on the supply, reach, and availability of one media source to the public. Audience shares measurements additionally aim to gauge “real consumption”. Some EU member states have set thresholds for the allocation of broadcasting licences, while others limit capital rights shares and voting rights shares to confine the power of individual actors within a media company.²⁸⁰ Media reach limitations, however, neglect the influence of online media, new services, and platforms on opinion formation.²⁸¹ Similarly, audience share measures mostly target traditional media. Only six EU member states (e.g., Croatia, Italy, and Germany) address online media.²⁸² However, here, online media refers to on-demand services offered by broadcasters, not online news services, let alone platforms. Some platforms, like Meta, focussed less on news and journalism. At the same time, the reliance on platforms, especially TikTok,

277 Diakopolous (n 59).

278 S Viljoen, J Goldenfein and L McGuigan, ‘Design Choices: Mechanism Design and Platform Capitalism.’ (2021) 8 *Big Data & Society* 2.

279 Schulz (n 26) 180.

280 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

281 *ibid* 204–207.

282 *ibid* 208.

Snapchat, and Instagram, amongst younger audiences keeps growing.²⁸³ Therefore, media reach constraints and audience share measurements focused on traditional media fail to capture the role of platforms in today's news consumption and exposure.

Furthermore, personalisation and recommendations are hugely relevant for individuals to navigate unprecedented amounts of information and news circulating in the digital public sphere. Changing business models and the effects on quality journalism (Threat 3) also affect consumption and exposure as does platforms' ability to algorithmically tailor news feeds, making "exposure diversity" gain importance. Intermediaries do not control access to the medium as gatekeepers, instead they "control powerful transmission nodes and direct user flows by continuously engaging user attention".²⁸⁴ Controlling algorithmic infrastructures that manage user attention on platforms provides power over exposure and diversity, as online news consumption is not inherently pluralistic, despite the unprecedented availability and diversity of information sources.²⁸⁵ The attention economy and changing audience behaviour online further render traditional audience share measurements obsolete. To gauge influence over opinion formation and set limits, one cannot ignore the far-reaching role of attention control and persuasive tools via algorithmic systems, as well as those new actors who have such direct and novel control over exposure. There is no easy way of doing so because by making effects part of the assessment, the threshold for application of media concentration law heightens. As Tambini highlighted, "the key metric is not audience share on [the] national level, but data consolidation".²⁸⁶ Hence, it might be easier to identify control over choice architectures (including data and targeting algorithms) than the effects of selective exposure. The following subsection deals with potential solutions at the individual citizen level, focussing on empowering users by allowing true autonomy and agency, which is needed to meet the normative goal of sustaining free and independent opinion formation.

3.1.3. Policy Goals & Potential Remedies

3.1.3.1. Enablement of Autonomy, Transparency, Control, and Trust

Autonomous news users, enhanced user control, and trust can help counter the negative effects of changing business models (Threat 3). Transparency obligations have played a significant role in measures to increase trust. For instance, the proposed EU AI Act and the German "Medienstaatsvertrag" (Die Medienanstalten, §83, §93) both

283 Newman, N and others, 'Digital News Report' (Reuters Institute for the Study of Journalism 2022).

284 Neuberger and Lobigs (n 13); Fernando Van der Vlist and Anne Helmond, 'How Partners Mediate Platform Power: Mapping Business and Data Partnerships in the Social Media Ecosystem.' (2021) 8 Big Data & Society.

285 Napoli, 'Deconstructing the Diversity Principle' (n 40).

286 Tambini (n 36) 154.

require that automatically generated content be labelled as such to enhance trust in automated tools. Yet, transparency obligations alone are not enough. Effective recommender transparency requires a certain level of AI literacy to comprehend the information and the technical interfaces used to control personalisation.²⁸⁷ Research shows that obligations to make transparent information about automated decision-making, like the GDPR requires or about the main parameters of platforms recommender systems are only a small (and slightly less relevant) portion of the information that is important to individuals' trust.²⁸⁸ From a normative viewpoint, to protect free and independent opinion formation, merely making more information transparent is insufficient. Instead, enabling user choice and enhancing accountability may be considered as a relevant complementary avenue.²⁸⁹

Connectedly, the EMFA proposes a "right of customisation" (of audio-visual media offer) in Article 19 and the Digital Services Act requires platforms that use recommenders to allow user choice, including enabling options for recipients of the service to modify or influence those main parameters (Article 27). The latter is the first provision of its kind, demonstrating the importance of increasing not only transparency but also control to enable independence and autonomy. Previous research confirmed that control mechanisms over news recommendation algorithms are "extremely valued" by users.²⁹⁰ Users need a certain level of trust in the quality of information to freely form opinions from a diverse pool of information and viewpoints. In fact, the media's ability to fulfil its role in society is predicated on citizens' ability to trust the media, while citizens cannot fulfil their role in the democratic process unless they can trust the media.²⁹¹ While it seems indispensable to enhance transparency and user control, merely requiring "alternative options" (e.g., Digital Services Act) may not suffice if the design and adoption of such alternatives remain at the discretion of very large online platforms.²⁹²

So far, media concentration rules do not fully encompass elements of transparency,

287 Mark Deuze and Charlie Beckett, 'Imagination, Algorithms and News: Developing AI Literacy for Journalism.' (2022) 10 *Digital Journalism* 1913.

288 M Van Duren, B Zarouali and N Helberger, 'Recommenders You Can Rely on: A Legal and Empirical Perspective on the Transparency and Control Individuals Require to Trust News Personalisation.' (2022) 13 *JIPITEC*.

289 MZ Van Drunen, N Helberger and M Bastian, 'Know Your Algorithm: What Media Organizations Need to Explain to Their Users about News Personalization' (2019) 9 *International Data Privacy Law* 220.

290 Jaron Harambam and others, 'Designing for the Better by Taking Users into Account: A Qualitative Evaluation of User Control Mechanisms in (News) Recommender Systems', *Proceedings of the 13th ACM Conference on Recommender Systems* (ACM 2019) <<https://dl.acm.org/doi/10.1145/3298689.3347014>> accessed 24 April 2024.

291 Van Duren, Zarouali and Helberger (n 266).

292 N Helberger and others, 'Regulation of News Recommenders in the Digital Services Act: Empowering David against the Very Large Online Goliath.' (*Internet Policy Review*, 26 February 2021).

control, and choice to empower users as “active agents.” I envision those elements as being part of an extended revision of media concentration rules for the digital. We can observe that the first elements of this are already emerging in the EU framework (e.g., Digital Services Act). Some open questions remain, though, such as the extent to which the ability to turn off personalisation is sufficient in providing users with choice, how exactly it promotes diversity, as well as how autonomous are users’ choices and how much control do they truly wield once they find themselves in technical and infrastructural lock-ins. The avoidance of lock-ins and network effects, as well as data, privacy, and consumer protections, are other elements to complete the puzzle for the individual citizen level.

3.1.3.2. *Prevention of Lock-In and Network Effects*

Preventing lock-ins helps to enable user autonomy, choice, and control, addressing the normative threat of concentration and influence of (commercial) power in the media (Threat 2). In Diakopolous’ words, “given their ability to influence attention, interaction, and communication, the choices made in the design of their interfaces and algorithms are anything but neutral,” and end-user autonomy is curtailed if they depend on established infrastructures and platforms.²⁹³ Accordingly, measures to avoid lock-ins and prevent network effects seem indispensable to fulfil the normative goals and to truly enable competition. The DMA also recognises that “core platform services have very strong network effects, the ability to connect many business users with many end users through the multi-sidedness of these services, a significant degree of dependency of both business users and end users, lock-in effects” (Preamble), which reduce end users’ choice in practice, affects fair competition, and threatens user rights. Preventing large platforms’ consumer profiling and enhancing contestability and transparency seem to be relevant initial steps to counter lock-ins and avoid dependencies.

3.1.3.3. *Data, Privacy, and Consumer Protections*

Platforms “collect a massive amount of personal data from consumers, who are not capable of making sufficiently voluntary and informed decisions about the collection and use of ‘their’ personal data...which endangers their informational self-determination and privacy”.²⁹⁴ Protective measures matter for media pluralism and freedom, as privacy concerns may have a chilling effect on free speech.²⁹⁵ As I will elaborate below, the protections of data rights and privacy envisaged in legal instruments like the GDPR and protected under Article 8 of the ECHR and Articles

293 Diakopolous (n 59) 183. Philip M Napoli, ‘Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers’ (2014) 39 Telecommunications Policy 751.

294 W Kerber and L Specht-Riemenschneider, ‘Synergies between Data Protection and Competition Law’ (Verbraucherzentrale Bundesverband eV 2021) 4.

295 Cohen, ‘What Privacy Is For’ (n 102); Richards (n 169).

7 and 8 of the EU Charter are, despite some flaws, significant initial steps towards constraining the collection, processing, and use of personal data.

Structural digital vulnerabilities are architectural, relational, and data-driven and can be triggered by asymmetric power relations.²⁹⁶ News consumption triggers vulnerability because data is analysed to target audiences and to capture attention through personalised news exposure, with significant ramifications for individual rights, public opinion, and democracy. As news travels via platforms, and personalised news exposure without user control may allow platforms to manipulate opinion, digital architectures must be designed in a way to not exclude or disadvantage news consumers' free and autonomous choices. Currently, architectural "dark patterns," namely "user interface design choices that benefit an online service by coercing, steering, or deceiving users into making unintended and potentially harmful decisions" may interfere with free and independent opinion formation.²⁹⁷

The DMA (Article 5) imposes limits on "gatekeepers," such as the prohibition to combine and cross-use personal data with third-party personal data, to limit data-driven competitive advantages.²⁹⁸ This is a welcome approach to limit private data power; however, under the GDPR, users can simply provide consent. Therefore, allowing end-user consent is not enough to make data-driven marketplaces competitive nor to protect consumers, as architectures could exploit user vulnerabilities and nudge towards consenting.²⁹⁹ Furthermore, Helberger et al. argue that realising public values in platform-based public activities requires "cooperative responsibility".³⁰⁰ Consequently, rules ought to not only allocate institutional accountability on and data collection constraints on platforms but also concentrate on architectural design decisions, such as the configuration of recommendation or sorting algorithms.³⁰¹

In sum, existing legal tools cannot effectively limit power or measure concentration because they are limited to traditional media and ignore how attention control influences news consumption and exposure. To deal with concentration and opinion power at the individual citizen level, we need to look beyond traditional, media-centred

296 N Helberger and others, 'Surveillance, Consent, and the Vulnerable Consumer. Regaining Citizen Agency in the Information Economy.' (BEUC 2021) 145.

297 *ibid* 6.

298 Article 5, Regulation (EU) 2022/1925 ("DMA")

299 Helberger and others, 'Surveillance, Consent, and the Vulnerable Consumer. Regaining Citizen Agency in the Information Economy.' (n 284). Graef I, 'Why End-User Consent Cannot Keep Markets Contestable: A Suggestion for Strengthening the Limits on Personal Data Combination in the Proposed Digital Markets Act' (Verfassungsblog, 2 September 2021).

300 Helberger, Pierson and Poell (n 256).

301 *ibid* 2.

tools and expand the toolbox with more audience- and user-centric remedies.

3.2. INSTITUTIONAL NEWSROOM LEVEL

3.2.1. Normative Conceptual Framework: Power Over Editorial Decision-Making & Agendas

At the institutional newsroom level, growing automation, datafication, digitalisation, and platformisation of newsrooms have implications for the media's normative role and editorial independence. Traditionally, opinion power is based on an editor's ability to curate and set an agenda in combination with the means to reach an audience.³⁰² As control over audience connection shifts from news media to platforms, opinion power and control inside newsrooms also shift.³⁰³ Henceforth, policy goals at this level aim at protecting editorial independence, enabling media resilience and sustainability, and imposing transparency obligations. This is informed by the normative objective to control those with power over the media and public opinion. Potential remedies should aim at promoting media pluralism, and specifically, measures to control the structural power relations within the media ecosystem, including the "struggles over the framing and agenda of public discussions, and political and corporate decisions about the architecture and ownership of media systems".³⁰⁴

3.2.2. Gaps

Ownership restrictions assume that "many owners" equal "plurality," which has traditionally been justified by "the normative assumption...that emphasises the importance of diverse ownership to guarantee equal distribution of communicative power".³⁰⁵ Traditional ownership constraints, however, ignore new sources of power and control in the media. In fact, current rules focus on traditional media actors, whereas in the digital age, new and extremely powerful actors have entered the stage. While limitations on media ownership remain important, its definition must be rethought for the digital age as objects and characteristics of control change. Baker observed decades ago that "the fundamental issue is control, for which ownership is a loose but poor proxy".³⁰⁶ The growing importance of control over data, skills, and knowledge is eroding traditional understandings of what it means to "own"

302 O Jarren, 'Normbildende Macht. Intermediäre Als Gesellschaftliche Herausforderung [Norm building Power. Intermediaries as a Social Challenge].' (2018) 24 *Epd Medien* 35.

303 Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2); Nielsen and Ganter (n 59).

304 Karppinen (n 27) 80.

305 [European Commission. Directorate General for Communications Networks, Content and Technology. and others, 'Study on Media Plurality and Diversity Online: Final Report.'](#) (Publications Office 2022).

306 Baker (n 258) 57.

competitive resources. The extent to which data are subject to traditional ownership and property rights remains a point of contention in Europe. Regardless, control over resources such as data, skills, and knowledge are currently not part of traditional media concentration measurements.

Indeed, existing constraints fail to recognise how changing business models and sources of power have challenged power dynamics, and thus fail to effectively address Threats 3, 4, and 5. According to Ferrer-Conill and Tandoc, data analytics and algorithmic tools have reshaped the relationship with the audience, allowing for far more fine-grained control over the flow of audience attention by new actors, particularly platforms.³⁰⁷ Journalists' and editors' reliance on audience metrics, often defined and controlled by external platforms, is another example of power shifting within newsrooms.³⁰⁸ As a result, newsrooms are becoming increasingly dependent on platforms that collect and analyse data to develop and build new tools (Simon, 2022), leading editors in today's newsrooms to be constrained by and reliant on the technological affordances of the tools they use.³⁰⁹ Latest advancements in generative AI have highlighted this issue even further. Although the consequences of generative AI such as ChatGPT on news organisations are far from foreseeable, it is apparent that few individuals and corporations control the resources and talents that underpin these AI capabilities, with potentially severe long-term institutional consequences.³¹⁰ And although there may be more competition in the "AI race," smaller actors will still depend on large companies for cloud access, computing infrastructure, and data, as well as financially. Hence, in the long-term, these developments may lead to further concentrating on the digital media environment and potentially exacerbating dependency.

In addition to being gateways to news and providing technologies and data, platforms remain relevant for funding skills, expertise, and research projects.³¹¹ Although previous research has not shown any direct interferences with journalists' editorial independence through funding, limitations on foreign ownership do not capture the money flowing from foreign private companies into (European) news organisations,

307 Ferrer-Conill and Tandoc (n 178) 448.

308 Tomás Dodds and others, 'Popularity driven Metrics: Audience Analytics and Shifting Opinion Power to Digital Platforms.' (2023) 24 *Journalism Studies* 403.

309 Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2); Ferrer-Conill and Tandoc (n 178) 448.

310 M Murgia, 'Risk of Industrial Capture Looms over AI Revolution.' *Financial Times* (22 March 2023) <<https://www-ft-com.ezp.lib.cam.ac.uk/content/e9ebfb8d-428d-4802-8b27-a69314c421ce>>.

311 Diakopolous (n 66) 179; Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2) 4.

which might pose potential for indirect influence.³¹² More concretely, ownership transparency rules that focus on media ownership disclosure and reporting and restrictions on foreign ownership of media companies (Threat 4) are relevant for traditional media markets but outdated for the digital age. In most EU member states, a foreign shareholder's maximum stake in a country may not exceed 49%.³¹³ The goal here is to limit the influence of a foreign owner (natural or legal person) on the European media market and ensure that the majority owner will never be a non-EU or EEA company, to protect from undue influence. It is evident that traditional ownership limits generally disregard the power dimension of platforms, which act not only as gatekeepers but also as political players.³¹⁴ Therefore, transparency obligations regarding the amounts and beneficiaries of funding (especially from Google and Meta) may need to be included in the current toolbox.³¹⁵ This is significant as platforms always pursue their own political and commercial agendas, and even Meta withdrawing from funding news could affect news organisations.

As a result, power and control inside newsrooms are increasingly characterised by control over things that cannot be owned in the traditional sense. This is problematic because those in control (often) fall outside the scope of ownership limitations despite wielding significant technological, commercial, and political power.

3.2.3. Policy Goals & Potential Remedies

The media serve a public and democratic purpose by upholding professional and journalistic ideals such as independence and autonomy.³¹⁶ And although states have positive obligations towards media freedom, any regulatory remedies must be proportionate in protecting editorial independence and promoting pluralism, while ensuring that states refrain from interfering too heavily with journalistic freedoms.

3.2.3.1. Independence (Editorial and Organisational)

Media concentration rules set objectives to safeguard media from political interference (Threat 5) and protect independence. In automated newsrooms, the specific rules may need to be rethought, as they have started to erode borders between editorial teams,

312 Fanta and Dachwitz (n 76).

313 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55) 219.

314 Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14).

315 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55) 401–402; Charis Papaevangelou, 'Funding Intermediaries: Google and Facebook's Strategy to Capture Journalism' [2023] *Digital Journalism* 1, 401–402.

316 McCombs and Shaw (n 38).

business departments, and third-party technology companies that often either fund and support R&D or externally develop and build technology is the norm.³¹⁷ In addition to regulatory measures, van Drunen and Fechner argue that “internal organisational matters have increasing relevance in ensuring editorial independence in the context of automation,” also to prevent external influences.³¹⁸ Despite some (limited) internal strategies and (risk) assessments of whether to use a certain tool, platforms are often the providers of new technology, skills, and knowledge and offer these based on their own terms and conditions.³¹⁹ Thus, alongside non-regulatory internal organisational measures, balanced contractual relationships between platforms and news organisations through contractual obligations could be established while respecting contractual freedoms.³²⁰ This could enable more direct channels of communication, more balanced negotiations, and fairer relationships between news organisations and platforms. Another approach could focus on procurement rules and creating better conditions for news organisations to develop and build their own in-house technology or in cooperation with academia or public interest research institutions.

3.2.3.2. *Media Sustainability and Resilience*

The role of platforms calls for remedies that address the principle of control better than ownership limitations and overcome the lack of media ownership transparency and opacity of funding sources (Threat 4). To address the deepening dependencies on platforms for technology, data, tools, staff, knowledge, services, and networks, a digital media concentration law needs to empower the media and enable sustainability and resilience. One way of doing so could be to look at media privileges (e.g., funding, distribution, tax breaks, and subsidies) and (long-term) financial support in the form of public funding and potentially increased state aid. Tambini states that “fiscal treatment of the press is...one of the key means through which states can create the conditions for the sustainability of journalism”.³²¹ Accordingly, Pickard and others have called for public funds and digital or “public media” taxes on platforms’ earnings to fund public interest journalism. This requires a delicate balance to be struck between regulatory action and public support while avoiding public interference with journalistic freedom.

317 Van Drunen and Fechner (n 172) 6.

318 *ibid* 22.

319 Simon, ‘Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.’ (n 2).

320 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14).

321 Tambini (n 37) 48.

3.2.3.3. *Transparency of “Ownership”*

Lastly, a redefinition of “ownership” limitations and information transparency obligations to measure concentration is needed. Ownership concerns two kinds of control over the media: allocation control (company policy and strategy and controlling mergers, acquisitions, or cutbacks) and operational control (internal distribution of resources, setting editorial strategies, delegating editorial control).³²² The EMFA proposes to mitigate “the risk of undue public and private interference in editorial freedom”. To do this, both public and private sources of financing for technology, skills (such as fellowships, research projects, and development), and services need to be made transparent. As the resources of control change, so must the approach towards “ownership.” That means that, to limit “control,” not only those who “own” media but also those who “control” the sources of power need to be accounted for.

3.3. MEDIA ECOSYSTEM LEVEL

3.3.1. *Normative Conceptual Framework: Systemic Power of and Structural Dependencies on Platforms*

Finally, platforms wield systemic opinion power which creates structural dependencies and influence over other democratic players.³²³ Platforms have the (economic) monopolistic and political power to influence policymaking, while existing transparency and oversight mechanisms, merger controls, and competition laws seem to fall short. Hence, the overarching normative goals at the media ecosystem level focus on structural media pluralism and on a democratic and balanced media ecosystem to enable equality and diversity. Since journalistic power stems from the economic power of media companies, measures to promote fair competition in the media market are indispensable in enabling media pluralism and power dispersal.

3.3.2. *Gaps*

To address Threats 1 and 2, media ownership limits and merger controls focus primarily on horizontal concentration and traditional media and “rarely take into consideration the take-up of new services and platforms, resulting in a scarcity of set limits for digital news media”.³²⁴ Rules at the media ecosystem level focus specifically on limiting concentrations of power and anti-competitive behaviour,

322 Helle Sjøvaag and Jonas Ohlsson, ‘Media Ownership and Journalism’ in Helle Sjøvaag and Jonas Ohlsson, *Oxford Research Encyclopedia of Communication* (Oxford University Press 2019) <<https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-839>> accessed 24 April 2024.

323 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14) 846.

324 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55) 246.

addressing Threats 1 and 2. They are sector-specific rules and are contained, for instance, in national telecommunications laws and include duties to interconnect, provide number portability, or transparency obligations.³²⁵ Those rules have been criticised as ineffective, causing general competition rules to be applied to the media. Only Germany and Austria explicitly recognise the media's democratic and opinion power for general competition and merger controls.³²⁶ Most ownership limitations constitute purely competition-focused rules and are evaluated by national competition authorities (NCAs; e.g., Slovakia, Estonia, and Luxemburg).³²⁷ Although traditional media merger assessments are conducted by both, national media regulatory authorities (NRAs) and NCAs, the former acts merely in a non-binding advisory role while the latter makes the final decision.³²⁸ NCAs can evaluate mergers' economic effects but not political power, which derives from opinion power.³²⁹ Media merger controls also typically focus on horizontal mergers and often lack clear restrictions on vertical mergers, where an individual or a company controls key elements of production, distribution, and related activities like advertising. This is a major limitation in effectively preventing digital media concentration. Broadly speaking, besides ineffective merger controls, no concrete rules can be found that address the imbalanced and asymmetric negotiation and market relations between platforms and news organisations effectively. This triggers the need to control power allocations of vertical integration and convergence in the media market better. Policymakers also need to regulate for enabling fairer conditions in negotiations, such as putting procedural safeguards in place to enforce "good faith" negotiations.

3.3.3. Policy Goals & Potential Remedies

To address the concerns described above in light of platforms' vast systemic power, the following policy goals should guide potential remedies: break structural dependencies, create counterpowers, enable fairer competition, combat negotiating power imbalances, and enhance collaboration mechanisms amongst regulatory bodies.

3.3.3.1. Breaking Dependencies and Empowering Journalism

To build an environment conducive to media pluralism and resilience, one priority is to ensure the survival of journalism, particularly independent and local forms.³³⁰

325 Just (n 293).

326 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

327 *ibid.* 209, 246.

328 *ibid.* 214–218.

329 *ibid.* 39.

330 Pickard (n 170).

Empowering local media has two main purposes: to reduce the dependency on platforms that provide resources (e.g., technical, financial, talent) and to counterbalance large media outlets (e.g., Springer), which is pivotal to avoid the emergence of media concentration. Journalism is at a competitive disadvantage for attention and advertising because of platform power, leading to an asymmetric power dynamic and increased reliance on platforms for services, data, and revenue, sparking increased concentration trends.³³¹ Hence, a pluralistic media environment requires special protections for independent, high-quality local journalism.

Collective bargaining agreements and other methods to strengthen news organisations' rights against platforms are an increasingly popular remedy. Regulatory initiatives in Australia, Canada, and the UK address this competition and market power imbalance. However, Australia's News Media Bargaining Code, for instance, has been criticised for not boosting small outlets' negotiation capacity sufficiently.³³² Hence, small outlets do still depend, to a degree, on collective bargaining agreements facilitated by external parties, like public interest foundations, to pursue negotiating objectives.³³³ Creating the conditions for more collective action could be important to further boost local news media's power in an asymmetric relationship. That may require an antitrust exception to allow publishers to negotiate with platforms collectively and share information about the progress of negotiations.³³⁴

Other remedies could concentrate on defining a balanced contractual relationship between platforms and news media while respecting contractual freedoms.³³⁵ Not only users but also the news media find themselves in situations where platforms have contractual control over their infrastructure and services.³³⁶ Besides regulatory options, internal rules on procurement and instructions on implementation processes of new technologies based on public values and standard-setting guidelines (e.g., Council of Europe Expert Committee on Resilience in Journalism) could offer contractual protections.³³⁷

331 Nielsen and Ganter (n 59).

332 D Bossio and others, 'Australia's News Media Bargaining Code and the Global Turn towards Platform Regulation' 14 Policy & Internet 136.

333 Minderoo Foundation. (2022, May 31). Minderoo Foundation and Google sign agreement for Google to support 24 digital publishers [Press Release]. <<https://www.minderoo.org/frontier-technology/news/minderoo-foundation-and-google-sign-agreement-for-google-to-support-24-digital-publishers>>

334 Bossio and others (n 307) 8.

335 Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14).

336 Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2) 12.

337 Council of Europe. MSI RES Committee of Experts on Increasing Resilience of Media. <https://www.coe.int/en/web/freedom-expression/msi-res>

3.3.3.2. *Fair Competition*

Current rules are limited mainly to horizontal merger controls and traditional media, thereby neglecting to account for platforms' increasing power over production, distribution, and infrastructure. Therefore, new rules on fair competition must better capture threats of vertical integrations to prevent concentration (Threats 1 and 2). Given the increasing vertical convergence of media sectors and businesses and the role of platforms as multi-sided markets (as gatekeepers, technology service providers, business partners, investors, and political players), it is vital to address media attention markets. That means explicitly considering power over data, technology, and infrastructure.

Especially data-driven advantages make newsrooms more dependent on platforms and the data they collect.³³⁸ At this moment, it seems unrealistic for a (large) news organisation's R&D team (nor researchers) to develop and build their own AI models to become more competitive since data and computing power remain heavily concentrated under the control of a select few platform companies. Rules on fair data access for all actors competing in the media ecosystem are needed to enable fair competition. The DMA and the Data Act aim to set new laws on who can use and access data in the EU across all economic sectors and limit strategic advantages from data power and lock-ins. It remains to be seen whether such provisions will make news organisations more competitive and less dependent on the data market. In addition, and complementary to the Data Governance Act, the EU has also announced a "European Data Space" to support media companies in sharing data and developing innovative solutions, which would better equip the media to scale up and become more competitive.³³⁹ It aims to support EU media stakeholders in handling data-driven business models and pool together sets of content, data, and metadata to produce new products and formats targeting expanded audiences. Such initiatives are vital elements for fairness, reduced (structural) dependencies, and power asymmetries from data monopolisation.

3.3.3.3. *Accessibility and Non-Discrimination of Communication Infrastructures*

Because platforms and media are all part of the larger digital communication infrastructure, it may be useful to take an infrastructural approach, seeking to learn lessons from (tele)communications law for avoiding "infrastructural capture" of the media, where a "scrutinising body is incapable of operating sustainably without the

338 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55) 39.

339 "Common European Data Spaces" (Shaping Europe's digital future) <https://digital-strategy.ec.europa.eu/en/policies/data-spaces> accessed April 22, 2024

physical or digital resources and service” of a business.³⁴⁰ Instagram and YouTube provide important platforms for civic engagement, social participation, and public opinion formation. Power is also increasingly concentrated in cloud infrastructures and data centres (e.g., Google Cloud, Amazon Web Services), smartphones, digital assistants, and wearables (iOS/Apple, Android/Google, Alexa/Amazon).³⁴¹ For digital news media markets, such dependency poses severe risks since media are supposed to scrutinise the power of these platforms, which control the infrastructures needed to connect with audiences and gather, produce, and disseminate news.³⁴²

In line with the EU’s electronic communications policy, regulating platforms as infrastructures for general-interest services offers a source of inspiration for improving competition, driving innovation, and boosting consumer rights. Indeed, a digital media concentration law could incorporate several new legal areas, as the focus of current discussions on the market and opinion power of digital platforms may be too narrow to fully reflect the deeper sources of platform power. Busch suggests a “platform infrastructure law” to address platforms as societal infrastructures and key actors in the sphere of services of general interest.³⁴³ Hence, a digital media concentration law could include stricter rules to guarantee infrastructural accessibility and non-discrimination, as well as a right to access “data-collection-free” and “non-personalised” digital services.

3.3.3.4. *Transparency and Oversight Guarantees*

NRAs, NCAs, and data protection authorities should increase efforts to cooperate and share data and expertise in assessing and preventing concentrations. Therefore, rules may be needed to improve cooperation between authorities and enable joint decisions, such as in media mergers. In spite of the fact that “the NCA should always have the power to block a merger on the basis of its competition concerns (including consumer choice),” the NRA should have the authority to do so based on its commitment to media pluralism.³⁴⁴ Collaborations could improve the exchange of data among authorities and create joint committees for institutional cooperation. Because economic and media plurality aims are linked, media mergers need to be “subject to the double, sometimes coordinated, but ultimately independent filter

340 Efrat Nechushtai, ‘Could Digital Platforms Capture the Media through Infrastructure?’ (2018) 19 *Journalism* 1043, 1043.

341 Busch (n 71) 5.

342 Nechushtai (n 340).

343 Busch (n 71) 5.

344 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55) 390.

of two authorities’.³⁴⁵

Furthermore, NRAs need enhanced access to data and information for monitoring and transparency purposes to address Threat 4. Measuring concentration and opinion power in digital media markets is extremely difficult. To do so effectively, other parameters than (TV) audience share measures need to be assessed. EU member states lack effective tools to measure cross-media concentration, despite some previous proposals (e.g., KEK, 2018).³⁴⁶ We need platform-based, dynamic media metrics, including metrics for algorithmic exposure. As proposed, centralised data-gathering frameworks to measure pluralism could be a starting point to assess exposure diversity in online news consumption.³⁴⁷

Finally, law and policymakers must be wary of platforms’ political and lobby power and their influences over democracy. The regulatory process of the News Media Bargaining Code in Australia and the emerging pressures from Meta on the Canadian government demonstrate platforms’ political power, which in turn presents ineffective democratic protections.³⁴⁸ In Europe, where ambitious regulations are underway to curb platform power and ensure fair competition, the largest platforms aggressively push their own agendas. Big tech’s lobbying clout in Brussels is not new, but how they aim to conceal their political influence is.³⁴⁹ This calls for enhanced transparency reporting obligations. Media concentration controls should acknowledge the broader political economy in which platforms operate and push agendas. Enhanced lobbying controls and transparency reporting obligations are significant first remedies.

4. CONCLUSION

In this article, I demonstrated that to account for growing opinion power and concentration in digital media markets, it is not enough to simply update existing media concentration laws. Seeing the complex dynamics between platforms, media organisations, and users, a new, far more holistic approach towards dealing with media concentration in the digital age is needed. This is an approach that considers the effects of the power of platforms to influence and control opinion at the individual

345 *ibid.*

346 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55).

347 *ibid* 376.

348 Emma Roth, ‘Facebook Warns It Could Block News in Canada over Proposed Legislation’ *The Verge* (23 October 2022).

349 C Goujard, ‘Big Tech Accused of Shady Lobbying in EU Parliament’ *Politico* (14 October 2022).

citizen, the institutional newsroom, and the ecosystem levels.

More specifically, I propose a greater focus on the role of users and enabling autonomous choices. This means that a new media concentration law will also have to incorporate elements of data protection, privacy, and consumer law. Finally, avoidance of lock-ins and network effects must be addressed by developing fairer data access rules that consider the characteristics of “attention markets” and the respective effects for individuals.

At the institutional newsroom level, I particularly call for measures to safeguard editorial independence and empower a resilient media. To do so, policymakers need to focus on the new sources of control, rather than solely on ownership limitations, to fulfil the normative goals of media concentration laws for the digital age. The sources of control in the digital, notably over data, technologies, funding, expertise, and knowledge, play a decisive role but are not “owned” in the traditional sense. Because of the necessity to strike a careful balance between public regulatory interference and journalistic freedom and independence, non-regulatory approaches, in particular, are significant in this context. Internal organisational measures, (procurement) rules, guidelines for implementing new technologies, and fair data access and sharing conditions could all be valuable avenues.

At the media ecosystem level, remedies should focus on platforms’ systemic opinion power and structural dependencies. More specifically, collective bargaining agreements, protecting local journalism, and ensuring contractual fairness between news media and platforms are ways to balance and challenge dominant power. Additionally, NRAs, NCAs, and data protection authorities need to build better cooperation mechanisms, such as for media mergers. Further, due to platforms’ indispensable infrastructural power, platform infrastructures can be seen as “utilities for democracy,” which need to be considered in any potential remedies. Lastly, the political power of platforms and the challenges they pose to democracy must be understood better and addressed through enhanced transparency reporting obligations.

States have positive obligations to create a media system capable of sustaining democracy. Thus, I argue that the normative goals at each level should guide choices in each policy field; only then can a digital media ecosystem based on public values be created. I have shown that elements of a digital media concentration law can be found in different policy fields (see Figure 1) as well as scattered across the new emerging regulatory framework from Brussels. Despite the complexity of the topic and the

need for additional research, what this article contributes is a unifying theoretical framework that anchors these individual elements as part of a more comprehensive reform of the rules on addressing media concentration with the goals to promote pluralism, equality, and democracy in digital media markets.

CHAPTER

“COUNTERPOWER” IN THE CONTEXT OF MEDIA CONCENTRATION & PLATFORM DEPENDENCE

5

Partly based on: Theresa Josephine Seipp, 'The Great Reset: "Counterpower" In The Context Of Media Concentration And Platform Dependence' (2023, October) Paper presented at AoIR2023: The 24th Annual Conference of the Association of Internet Researchers. Philadelphia, PA, USA: AoIR. Retrieved from <http://spir.aoir.org>; Meese J and Seipp TJ, ' Revisiting institutional isomorphism: Are the press becoming platforms?' (2024, under review) Digital Journalism

The growing concentration of power and dependency on few platforms in the media sector necessitate regulatory measures to counter the potential threats to media pluralism and editorial independence stemming from this concentration. While some legal initiatives aim to address the imbalanced power dynamics between platforms and news media, such as the efforts at the EU level through the DSA and DMA to establish a fair playing field in digital markets, it is crucial to empower countervailing forces. This article explores the concept of "counterpower" within the context of media concentration and platform dependency, delving into its theoretical and practical implications. The practical analysis is grounded in 12 semi-structured interviews conducted with news organisations of various sizes in the UK and the Netherlands, revealing a heightened awareness of the necessity to reduce dependencies and promote more direct and engaged journalism. The interviews identified specific strategies, albeit with some limitations, highlighting the need for additional support, especially for local news organisations striving for autonomy in reducing dependencies. In a nutshell, the article examines the legal prerequisites for news organisations to establish a "counterpower," serving as a complementary piece of the larger puzzle in addressing the broader challenges of media concentration and platform dependency. In conclusion, alongside the evolving EU regulatory framework, encompassing the DSA, DMA, and EMFA, there is a growing demand for enabling "counterpower" and developing robust media (concentration) laws in Europe, particularly focusing on safeguarding local journalism.

1. INTRODUCTION

There is widespread consensus about the dangers that (dominant) opinion power and concentration pose to media plurality and democracy.³⁵⁰ Opinion power is shifting, and news organisations are becoming increasingly dependent on platforms, particularly their services and infrastructures, in the digitalised and platformised media ecosystem. The relationship between and the dependency of news organisations on platforms has been widely discussed and analysed.³⁵¹ As Nielsen and Ganter explain, the power of platforms over publishers is relational in nature and "dominate" their connections and (commercial) relationships.³⁵² The mediating role of platforms in the relationship between news organisation and their audiences

350 Baker (n 22); Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14); Neuberger and Lobigs (n 13); Seipp and others (n 243).

351 E.g. Nielsen and Ganter (n 59); Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2).

352 Nielsen and Ganter (n 59).

is most conspicuous, as the dependency on platforms as distribution channels and consumption platforms remains prevalent. The growing digitalisation, datafication, and automation of news, and the flood of novel technologies and AI tools that promise facilitated, faster, and more effective journalistic processes further deepens dependency ties and concentrates power with few, as tools are often programmed and provided by big tech companies, such as Microsoft and Google.³⁵³ Platforms' systemic opinion power is more far-reaching though. Their lobbying force and political power to advance their own interests often goes to news organisations' interests, needs, and demands unheeded. The economic viability and sustainability of news organisations, particularly small and local, in a platform-dependent media ecosystem poses serious challenges. In this context, an oft discussed idea is facilitating the formation of some form of democratic "counterpower" (or "countervailing power") to safeguard news organisations' own interests, (professional and editorial) values, independence and autonomy, and economic viability and sustainability by enabling power dispersal.³⁵⁴ I acknowledge that while there are alternative perspectives on the term "counterpower", my focus here is specifically on its application within the context of platforms and media concentration and its role in countervailing power concentration and promoting pluralism.³⁵⁵

The concept of "counterpower" involves a structural perspective on addressing shifts in power dynamics by focusing on infrastructures and relationships. The normative expectations include securing autonomy and agency in audience relationships, achieving infrastructural and technological independence, and ensuring economic viability and sustainability, as I will explain in more detail. "Counterpower" could contribute to dispersing power in the media ecosystem, breaking dependency, and balancing the asymmetrical relationship between platforms and news organisations to meet at arm's length.³⁵⁶ Despite a general agreement on the need to deal with concentration and the potentials of creating a "counterpower", academics, policy- and lawmakers, industry and news organisations alike are unsettled as to how that could or should look like in practice, and to what extent that is desirable.

Discussions around the reliance of the media on platforms, and the potential

353 Simon, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (n 2).

354 E.g., Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14).

355 E.g., Castells (n 211). ; Marco Marsili, 'The Press: Fourth Power or Counter-Power?' (2021) *Revista de Arte* *artencia.com* N.º 2425 (2021): Ano XII. ; <https://www.tni.org/en/digital-counterpower>

356 Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14); Pickard (n 170); Seipp and others (n 243).

consequences of “quitting” or breaking this dependency are not new.³⁵⁷ Some news organisations have increasingly begun to act on one’s own accord by developing strategies vis-à-vis platforms.³⁵⁸ In terms of audience relationship, many news organisations seriously rethink their dependency on and the mediating role of platforms in distribution and consumption, but also in creating traffic and revenue. Here, not only aspects of editorial independence, trust, and quality, but also brand recognition and revenue growth play a role. In terms of technological innovation and AI tools, there equally is growing scepticism and concerns related to independence and resilience on the one hand, and security, data protection, privacy, and copyright infringements on the other. Furthermore, the media landscape is becoming increasingly concentrated and seriously jeopardises the survival of local journalism.³⁵⁹ As previous research demonstrated, current legal frameworks insufficiently tackle the challenges faced by news organisations, including to enable long-term sustainability and innovation.³⁶⁰

This article aims to meaningfully contribute to current (legal and policy) debates by conceptualising “counterpower” and analysing its potential to contribute to normative, legal discussions around regulating power concentration and platform dependency in the media. I begin with a literature review of the current state of discussion drawing from legal and policy literature on opinion power, media concentration, media

357 Mathew Ingram, ‘Should the Media Quit Facebook?’ *Columbia Journalism Review* (9 May 2019).

358 Eleanor Ainge Roy, ‘New Zealand’s Stuff Newspaper Group Joins Facebook Boycott as “Experiment”’ *The Guardian* (6 July 2020); Associated Press (AP), ‘Sweden Public Radio Exits Twitter, Says Audience Already Has’ *Associated Press (AP)* (18 April 2023); Sherwin Chua and Oscar Westlund, ‘Platform Configuration: A Longitudinal Study and Conceptualization of a Legacy News Publisher’s Platform-Related Innovation Practices’ (2022) 1 *Online Media and Global Communication* 60.

359 Pickard (n 134).

360 Courtney Radsch, ‘Platformization and Media Capture: A Framework for Regulatory Analysis of Media-Related Platform Regulations’ (2023) 28 *UCLA Journal of Law & Technology, Platforms and the Press* 75; Theresa Josephine Seipp, ‘Media Concentration Law: Gaps and Promises for the Digital Age’ (2023) 11 *Media & Communication*.

pluralism,³⁶¹ as well as from platform and media studies.³⁶² Thereafter, I conceptualise “counterpower” by building on social and political theorists’ works on power, most notably Steven Lukes and Byung-Chul Han, and define how “counterpower” could contribute to recalibrating power concentrations and platform dependencies.³⁶³ The analysis of the potential of “counterpower” in practice is based on empirical evidence gathered from 12 semi-structured interviews conducted with news organisations of varying sizes in both the United Kingdom (UK) and The Netherlands. In this context, this article addresses two main research questions. First, based on the conceptual and empirical analysis, I aim to address RQ1 “What is “counterpower” theoretically, and how does it look like in practice?”. Second, based on a normative legal analysis, I address RQ2, which asks “How could the legal conditions be created to facilitate the formation of “counterpower”?”, thereby concluding with a legal and policy analysis.

2. POWER CONCENTRATION & PLATFORM DEPENDENCY

“Counterpower” in a concentrated and platform-dependent media ecosystem must be understood in the context of recent discussions and literature on the risks of platform dependency,³⁶⁴ concepts such as “infrastructure capture” of news organisations,³⁶⁵ as well as of the notion of opinion power (of legacy media and platforms) in the media ecosystem.³⁶⁶ Moreover, it is crucial for discussions on power in the media to emphasise that power does not need to be activated. It is a “capacity, not the exercise” and the mere potential power to “bring about significant effects, specifically by furthering their own interests and/or affecting the interests of others,

361 Baker (n 22); Baker (n 270); Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14); Karppinen (n 28); Meese (n 104); Martin Moore and Damian Tambini, *Regulating Big Tech: Policy Responses to Digital Dominance* (1. Edition, Oxford University Press 2022); Neuberger (n 13); Neuberger and Lobigs (n 13); Pickard, *Democracy without Journalism* (n 183); Schulz and Held (n 90); Seipp and others (n 255); Seipp (n 360); Schulz, *Gewährleistung kommunikativer Chancengleichheit als Freiheitsverwirklichung* (n 28).

362 Mathias-Felipe De-Lima-Santos and others, ‘Google News Initiative’s Influence on Technological Media Innovation in Africa and the Middle East’ (2023) 11 *Media and Communication* <<https://www.cogitatiopress.com/mediaandcommunication/article/view/6400>> accessed 13 September 2023; Lisa Merete Kristensen and Jannie Møller Hartley, ‘The Infrastructure of News: Negotiating Infrastructural Capture and Autonomy in Data-Driven News Distribution’ (2023) 11 *Media and Communication* <<https://www.cogitatiopress.com/mediaandcommunication/article/view/6388>> accessed 13 September 2023; Nielsen and Ganter (n 63); Simon, ‘Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.’ (n 2); Papaevangelou (n 78).

363 Lukes (n 7); Han (n 10).

364 Nielsen and Ganter (n 59); Simon, ‘Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.’ (n 2).

365 Kristensen and Hartley (n 338); Nechushtai (n 317).

366 Neuberger (n 13); Seipp and others (n 243).

whether positively or negatively” suffices.³⁶⁷ The same applies to the prevention of the emergence of dominant “opinion power”, defined as the “power of the media over opinion formation”.³⁶⁸ In a nutshell, “counterpower”, as well as opinion power, is relational as powerful actors (legacy media, but also platforms) can influence individual and public opinion formation.³⁶⁹ It does not require an intent to exercise power (or to manipulate for that matter). Instead, the structural ability to influence opinion is enough.³⁷⁰ While media laws exist to pre-emptively avoid the structural emergence of dominant opinion power, most do not apply to platforms, with few exceptions.³⁷¹

With the arrival of platforms and new technologies, power dynamics in the media ecosystem have changed. Many news organisations can now produce news more cost-efficiently and faster, distribute news more widely to reach and target new audiences, and create traffic to their websites.³⁷² Also, many news organisations allegedly have benefitted from investments and funding of platforms for technological innovation, for skill and knowledge, and simply for generating funds and receiving money.³⁷³ Over the years, news organisations have grown so dependent on platforms that production processes and business models optimise around the logics determined and decided by platforms, although to varying degrees.³⁷⁴ The growing power of platforms in different industries and sectors, has led to a monopolisation of data and market power which now makes the relationship between platforms and news organisations not “mutually beneficial”, but rather creates an asymmetrical power dynamic in which news organisations are dependent on platforms in various ways.³⁷⁵

There is plenty research arguing for the normative need to regulate platform power, opinion power, media concentration, and platform dependency, due to the

367 Lukes (n 12), p. 75.

368 Neuberger (n 13).

369 Nielsen and Ganter (n 59); Neuberger (n 13).

370 Schulz (n 14).

371 Eg Deutsches Telemediengesetz vom 26. Februar 2007 (BGBl. I S. 179, 251; 2021 I S. 1380), das zuletzt durch Artikel 3 des Gesetzes vom 12. August 2021 (BGBl. I S. 3544) geändert worden ist’.

372 Diakopolous (n 62); Nielsen and Ganter (n 59).

373 De-Lima-Santos and others (n 72); Papaevangelou (n 72); Fanta and Dachwitz (n 70).

374 E.g. Jose Dijk, van, Martijn De Waal and Thomas Poell, *The Platform Society* (Oxford University Press 2018) <<https://search-ebscohost-com.proxy.uba.uva.nl/login.aspx?direct=true&db=nlebk&AN=1901418&site=ehost-live&scope=site>>; Diakopolous (n 20); Tomás Dodds and others, ‘Popularity-Driven Metrics: Audience Analytics and Shifting Opinion Power to Digital Platforms’ [2023] *Journalism Studies* 1

375 Nielsen and Ganter (n 59).

potential threats posed to media freedom, pluralism, and democracy.³⁷⁶ In a previous article, the authors of this paper analysed opinion power shifts at three levels, and equally called for the need to protect the normative and public values at stake.³⁷⁷ At the individual level, news consumption and exposure are increasingly influenced by platforms and organised by opaque algorithms.³⁷⁸ At the institutional newsroom level, news organisations have become more and more dependent on platforms, not only to distribute news content and reach their audiences, but also for large parts of the news production processes as well as for technological innovation.³⁷⁹ At the media ecosystem level, the systemic opinion power and political power of platforms pose further challenges in terms of fairness, competition, and regulatory rigour.³⁸⁰

In a nutshell, platforms wield such structural and systemic power that leads to deeply interwoven dependencies, triggering the risk of “infrastructural capture”.³⁸¹ The issue is complicated and goes far beyond the traditional scope of media law and policy. In recent years, there has been an increasing push to curtail the power of platforms in the media and over opinion formation not only in Europe (EU), but also in Australia, Canada, and the UK. The regulation thereof is, however, a complex task for various reasons.

First, in the EU, the regulation of the media is a matter of Member State competence.³⁸² Therefore, regulatory approaches to dealing with platform power, such as the DSA, the DMA, and the EMFA find their legal basis in internal market goals and consequently lack a concrete normative commitment to the media sector.³⁸³ It is indeed questionable, to what extent an economic regulatory tool can achieve

376 Eg Pickard (n 8); Paul Nemitz and Matthias Pfeffer, ‘Determining Our Technological and Democratic Future: A Wish List’ in Damian Tambini (ed), *Regulating Big Tech. Policy Responses to Digital Dominance* (1st edn, Oxford University Press 2022); Moore and Tambini (n 13); Natali Helberger, ‘Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity’ in Damian Tambini and Martin Moore (eds), *Digital Dominance* (Oxford University Press 2018).

377 Seipp and others (n 243).

378 Also, Helberger, ‘On the Democratic Role of News Recommenders’ (n 152).

379 Eg Raul Ferrer-Conill and Edson C Tandoc, ‘The Audience-Oriented Editor: Making Sense of the Audience in the Newsroom’ (2018) 6 *Digital Journalism* 436; Wiebke Loosen and Paul Solbach, ‘Künstliche Intelligenz Im Journalismus?: Was Bedeutet Automatisierung Für Journalistisches Arbeiten?’ in Tanja Köhler (ed), *Fake News, Framing, Fact-Checking: Nachrichten im digitalen Zeitalter* (transcript Verlag 2020 Nielsen and Ganter (n 3); Simon (n 3).

380 Eg Dijck, van, De Waal and Poell (n 179); Fanta and Dachwitz (n 76); Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14); Helberger, ‘Die Regulierung von Sozialen Medien Aus Einer International Vergleichenden Perspektive’ (n 197); Gillerspie (n 189).

381 Nechushtai (n 317).

382 Irion and Valcke (n 82).

383 Regulation (EU) 2022/2065 (“DSA”); Regulation (EU) 2024/1083 (“EMFA”).

normative goals, such as the protection of media freedom and pluralism.³⁸⁴ At the same time, media concentration laws at national levels are largely outdated and don't account for the new power dynamics.³⁸⁵ Simple reforms of national media concentration rules would also not address the issues at stake effectively as the questions around platform power require a much broader view, also involving considerations from contract, privacy, consumer, and data protection law, as well as platform and AI regulation, which are increasingly dealt with at EU level.

Additionally, there are several regulatory proposals to rebalance the relationship between platforms and publishers, which have been discussed widely.³⁸⁶ Bargaining and negotiation codes, making platforms pay for news content and similar regulatory proposals to balance the asymmetrical relationship by making revenue flow back to the publishers as content creators are laudable efforts.³⁸⁷ However, these efforts are flawed. For example, as online advertising money mostly moved to big tech platforms like Google and Meta/Facebook, an approach to fund journalism is to make platforms pay for news content. This predicates, however, that platforms consider news as important and profitable, and in fact display news content.³⁸⁸ Otherwise, the equation will not work.

Another fundamental issue with these regulatory proposals is that platforms wield not only economic and market power, but also political power. That means, the specific provisions of certain codes, who are beneficiaries, and so on, are influenced by those actors whose power the laws aim to curtail. Just look at the events of Meta/Facebook blocking news sites in Australia and in Canada amid new laws and legal proposals.³⁸⁹ As Radsch (2023) highlighted, there is a risk of capture through platformisation that is not well understood by policymakers, while some policy interventions may have broader implications on infrastructure capture.³⁹⁰

In a similar vein, legal proposals at stake are criticised for neglecting the protection

384 Lynskey (n 156); Baker (n 1)

385 Seipp (n 336).

386 Meese (n 104); Courtney Radsch, 'Frenemies: Global Approaches to Rebalance the Big Tech v Journalism Relationship' (2022) <<https://www.brookings.edu/articles/frenemies-global-approaches-to-rebalance-the-big-tech-v-journalism-relationship/>>; Radsch (n 360); Papaevangelou (n 78).

387 Radsch (n 336).

388 Kari Paul, 'Elon Musk to Strip Headlines off News Links on Twitter in Latest Overhaul' *The Guardian* (23 August 2023); Paul Sawers, 'Meta to Deprecate Facebook News in the UK, Germany and France' *TechCrunch* (5 September 2023)

389 Mathew Ingram, 'Canada Imitates Australia's News-Bargaining Law, but to What End?' *Columbia Journalism Review* (16 March 2023); Theresa Josephine Seipp, 'News Media's Dependency on Big Tech: Should We Be Worried?' (*Internet Policy Review*, 10 June 2021)

390 Radsch (n 336).

of small and local news. Many smaller and local news organisations' business models partly rely on external fundings from philanthropies or platforms, most notably by Google or Meta/Facebook. The withdrawal from news funding in Europe by large players like Open Society Foundation, Luminare (funded by Omidyar which is owned by eBay), and Meta/Facebook demonstrates a lack of independent funding, resilience, and sustainability of local news in Europe.³⁹¹ Additionally, the representation of local news and their interests at political level seems limited, potentially risking a further dependency on powerful players, increasing media concentration, and ultimately triggering a decline of media pluralism.

This article focuses on the situation in Europe (EU) and the UK, but will also refer to examples elsewhere, such as Australia and Canada. The aim is not to provide a full-fledged comparative legal analysis, but rather introduce a somewhat provoking concept, namely that of facilitating and enabling “counterpower” as a complementary means to countervail power concentrations. The potential lies in empowering news organisations, regardless of their size, to protect their independence, autonomy, agency, and control, which is vital in fulfilling their democratic function, offering a countervailing power to concentration, while presenting a less intrusive means in terms of state interference with journalistic freedoms.

3. CONCEPTUALISATION OF “COUNTERPOWER” IN THE CONTEXT OF DIGITAL MEDIA

3.1. THEORETICAL ANALYSIS OF “COUNTERPOWER”

In his influential works, political and social theorist Steven Lukes (2021) takes a multidimensional definitional approach to “power” as being (1) observable forms of power like decision-making power, (2) non-decision-making power that influences the behaviour of others and shapes decisions over the public and political agenda, thereby triggering political power, and (3) “domination”, which is the most hidden form of power and enables shaping people’s perceptions, preferences, and beliefs to conform to the interests of those in power.³⁹² The latter works best when “routine and unconsidered” and part of “norms and practices, rules and roles that engender

391 Mathew Ingram, ‘Is Facebook Quitting the News Business?’ *Columbia Journalism Review* (7 December 2022); Mathew Ingram, ‘Will Facebook Changes Leave News Media out in the Cold?’ *Columbia Journalism Review* (28 July 2022)

392 Lukes (n 7) 2–3.

and sustain subordination, dependency, and powerlessness”.³⁹³ In the context of the power in the media, and particularly between platforms and news organisations, Lukes’ work is relevant as he provides a comprehensive framework for understanding power dynamics in society that extend beyond traditional notions of authority and coercion. Of particular relevance is the third dimension, which has an “infrastructural” component due to the “underlying and habituated” nature of interactions,³⁹⁴ and is enabled through structural dependency and systemic opinion power.³⁹⁵

Power is relational, and as cultural and social theorist Byung-Chul Han (2019) discusses, “complex interdependencies mean that there is reciprocity of power”.³⁹⁶ He continues that “the more power someone holds, the more he or she is dependent on the advice and cooperation of subordinates”.³⁹⁷ Nielsen & Ganter (2022) argue in a similar vein in terms of platform power vis-à-vis publishers. Although news organisations are much more dependent on platforms than the converse,³⁹⁸ platform power is reciprocated by the media’s (and societies’) growing reliance and dependency on them. If the media do not act in accordance with platforms’ will, power is breaking away. Accordingly, Han explains that “the numerous dependencies of the holder of power become a source of power for the subordinates”.³⁹⁹ If we think of dependencies on platforms, and the normative role of news organisations to inform the public with quality news, produced in accordance with professional values, we can argue that news organisations naturally wield some form of “counterpower”. To achieve this, they must possess the ability to operate autonomously and independently, driven by their own editorial and strategic decisions, rather than being swayed by the dictates of the platforms. Only as long as news organisations “voluntarily follow the will” of platforms, does their power reach its peak. However, when news organisations wield their influence to pursue their own agenda, it inevitably results in “a structural dispersal of power”.⁴⁰⁰

Furthermore, power and freedom are interrelated. As Han (2019) said, “power and freedom are not opposed to one another but are manifestations of the same

393 *ibid* 159–160.

394 Julie E. Cohen, *Turning Privacy Inside Out*, 20 *THEOR. INQ. L.* 1, 17-20 (2018).

395 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14).

396 Han (n 10).

397 *ibid* 4.

398 Thomas Poell, David B Nieborg and Brooke Erin Duffy, ‘Spaces of Negotiation: Analyzing Platform Power in the News Industry’ (2022) *Digital Journalism* 1.

399 Han (n 10) 4.

400 *ibid*.

power”.⁴⁰¹ In fact, despite platforms’ power in the media, they do not “single-handedly shape the transformations in the news landscape”, but the “strategic decisions of news publishers play a crucial role in how this landscape evolves”.⁴⁰² This confirms the relational nature of power, as well as demonstrates the potential of news organisations forming a “counterpower”. Free, independent, and autonomous media are best equipped to challenge dominant platforms, which in turn is needed to ensure a dispersal of power and to counter power concentration.

3.1.1. Definition of “Counterpower”

There are various forms of news organisations exercising counterpower. To understand how counterpower could look like, we need to understand that those who control spaces and connect wield power. In fact, even when power is “concentrated at the top or in one person, it cannot be based on this top”. Instead, power needs “space that carries it, affirms it and provides it with legitimacy”. Separation or dispersal of power are detrimental to that concentration.⁴⁰³ Forming a “counterpower” means for news organisations to wield control over the spaces that carry power, such as the digital infrastructures and architectures. Furthermore, “power creates a continuum”, thereby reinforcing the argument that power exists in relationships.⁴⁰⁴ Michel Foucault is most famous for conceptualising power as relational and emphasising the fundamental role of relationships in the exercise of power. Without diving too deeply into an analysis of Foucault’s works on power, we simply want to highlight, as Lukes did, that power operates through structural relationships, institutions, strategies, and techniques.⁴⁰⁵ Accordingly, for the effective exercise of power, or “counterpower”, some sort of strategy and organisation are crucial aspects. “Counterpower” of news organisations therefore entails taking agency and autonomy over their relationship with platforms, but also with citizens.

Generally, “counterpower” can be understood as resistance, strategies, or initiatives undertaken by various actors, such as news organisations, journalists, activists, or citizens, to challenge or balance the power of dominant platforms in the media. It can encompass a range of actions aimed at reclaiming control, fostering independence, promoting alternatives, and addressing the imbalances of power within the media landscape. Therefore, in the context of the above and for the purposes of this article, “counterpower” in the context of power concentration and platform dependency in

401 Han (n 10).

402 Poell, Nieborg and Duffy (n 374) 14.

403 Han (n 10) 67.

404 *ibid* 69.

405 Lukes (n 7) 93–95.

the media can be defined as:

“Deliberate and coordinated efforts to challenge and scrutinize by (1) seizing control over relationships, and (2) reclaiming influence over spaces, thereby acting to reduce dependencies”

The following section discusses the potential forms and forces of “counterpower”, followed by the empirical findings of the interviews to analyse how “counterpower” looks like in practice, and how it could and/or should be facilitated.

4. FORMS & FORCES OF “COUNTERPOWER” IN THE CONTEXT OF DIGITAL MEDIA

“Counterpower” can take various forms and forces. In the context of this paper, “counterpower” specifically relates to the process of challenging and reshaping the power dynamics prevalent in media, communication, and platform environments, thereby promoting greater pluralism, democratic engagement, and autonomy within the media ecosystem. While the focus of this article is “counterpower” as exercised by news organisations vis-à-vis platforms, we acknowledge the involvement of other actors in the construction and conceptualisation of counterpower, including citizens, governments, foundations and councils, and alternative providers. The reason for focussing on news organisations is that news media are well-positioned to counter media concentration because of the inherent power dynamics they share with platforms, their crucial role in shaping public opinion, and the necessity for a sustainable and pluralistic media environment to uphold democracy.

For the purposes of this article, we will discuss three themes of counterpower in the platform context: (a) audience relationship and engagement, (b) technological innovation and independence, and (c) economic viability and sustainability, as those are aspects most critical in terms of power concentration and platform dependency in the media.

4.1. AUDIENCE RELATIONSHIP & ENGAGEMENT

In terms of audience relationship and engagement, “counterpower” addresses spaces by re-analysing the platforms and infrastructures through which news organisations reach their audiences and build relationships. As platforms remain relevant spaces for audiences to consume news and for news organisations to distribute news, they

increasingly fulfil a mediating role between the two. The 2023 Digital News Report by the Reuters Institute confirms that consumption via social media platforms keeps growing, indicating a continuous decline in direct traffic to news websites, while access to news through particularly video-led social media, like TikTok, continues to rise.⁴⁰⁶ Particularly reaching younger audiences, among age groups 18-24, presents a unique challenge, as their engagement with social media differs from that of older generations.

Additionally, from the perspective of news organisations, the mediating role of platforms becomes ever more conspicuous as the editorial processes are increasingly steered towards making sense of audience behaviour and attention on external platforms.⁴⁰⁷ Accordingly, “counterpower” at audience level serves two purposes. On the one hand, by reinforcing a more direct relationship with the audience and regaining better control over how and where news content is placed, brand recognition and trust is stabilised, ultimately boosting editorial independence. On the other hand, editorial control and brand recognition enhance trust in quality journalism, thereby empowering citizens to exercise their own “counterpower” by forming opinions autonomously, push against disinformation and fake news, and demand higher privacy and transparency standards than are currently fulfilled by platforms. Accordingly, the media’s ability to fulfil its democratic role is predicated on citizens’ ability to trust the media, while citizens cannot fulfil their role in the democratic process unless they can trust the media.⁴⁰⁸ Therefore, any relevant strategies related to audience relationship and engagement primarily target the strengthening of a healthy and mutually trustful direct relationship between news organisations and audiences, existing and new.

According to previous research, some of the key concerns expressed by the media in relationship with platforms relate to a loss of control over audiences, brand recognition, (editorial) autonomy and independence, access to data, infrastructural and financial dependencies through traffic and revenue, as well as sustainability and resilience.⁴⁰⁹ Previous research also demonstrates that there is not only a willingness, but also a normative commitment to break dependency on platforms and to regain control over content and relationships. Chua & Westlund conclude

406 Nic Newman and others, ‘Digital News Report 2023’ (Reuters Institute for the Study of Journalism 2023); EPRA, ‘Online Platforms: Inevitable Partners in the Battle for Attention?’ (EPRA 2023)

407 Ferrer-Conill and Tandoc (n 165); Dodds and others (n 64).

408 Drunen and Fechner (n 355).

409 Chua and Westlund (n 334); De-Lima-Santos and others (n 72); Kristensen and Hartley (n 338); Nechushtai (n 317); Nielsen and Ganter (n 59); Simon, ‘Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.’ (n 2).

in a recent article on platform configuration that “some publishers are gradually implementing strategic countermeasures to wrangle back control of their audiences, data, and revenues from platforms, which includes the development of proprietary platforms and data capabilities”.⁴¹⁰ Consequently, we argue that the formation of a “counterpower” takes various forms, some more direct, others more subtle. In a wider sense, “counterpower” challenges and reshapes the power dynamics in the media. Same as for the public sphere more broadly, the media ecosystem must “expand and take into account the location, the space, and its structures, and the devices and technologies shaping the communicative space as conditions for access and participation in the debate”.⁴¹¹

Furthermore, according to previous research, there already are some strategic and organised forms of “counterpower” related to the infrastructures (spaces) and relationships in the digital media ecosystem.⁴¹² For instance, despite the normative expectation to inform the public, few organisations have “quit” social media, thereby directly breaking the dependency through autonomous and independent action. Also, the role of the audience in influencing news organisations strategies and counteractions cannot be undermined, as shown by an example of the Swedish public radio that “quit Twitter” because “the audience already has”.⁴¹³ As mentioned, a strong citizen-media relationship is crucial for the formation of “counterpower” because media’s democratic role relies on mutual trust with citizens.

In a nutshell, “counterpower” at the audience level concerns strategies empowering news organisations and citizens to counterbalance the dependency on platforms as a mediator in opinion formation. As mentioned in the 2023 Reuters Digital News Report, “innovation, flexibility and a relentless audience focus” are key ingredients for success. Because engaging with audiences, especially young ones, demands new strategies, it raises the question of whether they should maintain a presence on social media platforms or not.⁴¹⁴ The question remains how desirable and viable is this, what are the (legal) challenges involved, and how can the conditions to enable

410 Chua and Westlund (n 334).

411 Cornelia Brantner, Joan Ramon Rodríguez-Amat and Yulia Belinskaya, ‘Structures of the Public Sphere: Contested Spaces as Assembled Interfaces’ (2021) 9 *Media and Communication* 16.

412 Eleanor Ainge Roy, ‘From Police Beat to Stuff Owner: Meet Sinead Boucher, New Zealand’s Newest Media Mogul’ *The Guardian* (23 June 2020 Ainge Roy (n 10)); Digiday, ‘Danish Publisher Zetland Is Driving More New Members since Quitting Facebook.’ *Digiday* (10 July 2020 Ingram, ‘Should the Media Quit Facebook?’ (n 9); Molly Killeen, ‘Publishers Eye Collective Bargaining as Way to Take on Platforms’ *Euractive* (14 July 2021); Caithlin Mercer, ‘News Site Stuff Left Facebook. Seven Months Later, Traffic Is Just Fine and Trust Is Higher’ *Reuters Institute for the Study of Journalism* (Oxford University, 24 February 2021)

413 Associated Press (AP) (n 334).

414 EPRA (n 382).

it to be created?

4.2. TECHNOLOGICAL INNOVATION & INDEPENDENCE

“Counterpower” strategies taken by news organisations regarding technological innovation and independence aim at breaking dependency and enabling autonomy and independence. Dependency of news organisations on platforms in the digital media ecosystem are characterised by the need to rely on AI tools, infrastructures, technologies, and other services provided by platforms. By taking initiatives to break away from dependency, news organisations are regaining autonomy while countering the dominance of platforms in the field. The continuous growth of generative AI has further exacerbated the situation of potentially irreversible dependency on platform companies.

At the same time, novel technological opportunities also provide a momentum to form a “counterpower”. As Simon stated, because “technology is a chance for the news media if used wisely”, “it is up to news organisations to make the right choices in how they use this technology and prevent a race to the bottom — and up to us as a society that we demand that the right choices are being made”, thereby pointing to the need to take own (counter) initiatives.⁴¹⁵ The normative commitment at this level stems from the demand to be able to act autonomously and independently and to have internal control over editorial and organisational decision-making processes. As Van Drunen & Fechner phrase it, “internal organisational matters have increasing relevance in ensuring editorial independence in the context of automation,” also to prevent external influences.⁴¹⁶ Despite some internal strategies, guidelines, and risk assessments on the use of certain tools, few of the largest platform companies remain the prime providers of technology, AI, skills, and knowledge, which are crucial elements of being innovative.⁴¹⁷ Additionally, applicable terms and conditions of using those technologies, and hence of the innovative strategies of an organisation, are at least in part steered by few external powerful platforms.

An equally oft discussed approach to break the dependency on platforms is to develop own tools and build own datasets. Needless to say, well-resourced news organisations have different opportunities to “negotiate the degree of [infrastructure] capture”

415 Felix M Simon, ‘AI Will Not Revolutionise Journalism, but It Is Far from a Fad’ (*Oxford Internet Institute*, 6 March 2023)

416 Drunen and Fechner (n 24), 22.

417 Simon, ‘Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.’ (n 2).

than smaller and local news organisations would have.⁴¹⁸ News organisations are no tech companies. Hence, it is unrealistic that news organisations, regardless of their size, would be able to compete with big tech companies as they simply do not and will not have the same sheer volume of data. Additionally, this issue exacerbates with the growing use of complex AI tools. Being innovative and competitive seems to require integrating third-party tools into their internal journalistic processes. For instance, a “publisher had increased its commitment to using third-party analytics for generating metrics, which saw it incorporate platform-related analytics tools in all five editorially oriented activities”.⁴¹⁹ Hence, “counterpower” for technological innovation is most challenging due to unequal power over data, technology, skill, and knowledge. Still, measures to further develop independent innovation, demand transparency, fair contractual conditions and safeguards can be seen as forms of “counterpower”.

4.3. ECONOMIC VIABILITY & SUSTAINABILITY

News organisations, particularly smaller and local ones, are grappling with the challenge of achieving economic viability and sustainability within a platform-dominated media landscape. Actions aimed at establishing “counterpower” in terms of economic viability and sustainability extend beyond just securing independent funding, sustainable business models, fair competition, and revenue. They are intricately connected to achieving a sustainable level of autonomy from platform infrastructures for audience engagement and other essential resources such as knowledge, networks, and expertise. Aspects of “counterpower” related to audience, attention, and technology are thus deeply intertwined with the broader issues surrounding economic viability and sustainability.

Although previous research has scrutinised the influence of platforms’ funding on journalism, particularly regarding media capture and editorial independence, interference of platforms with news organisations’ agenda-setting or editorial decision-making remains unproven.⁴²⁰ The more persistent concern revolves around “infrastructure capture,” which Nechushtai defines as “circumstances in which a scrutinising body is incapable of operating sustainably without the physical or digital resources and services provided by the businesses it oversees and is therefore dependent on them”.⁴²¹ Moreover, De-Lima-Santos and others rightly emphasise

418 Kristensen and Hartley (n 338).

419 Chua and Westlund (n 334) 82.

420 Fanta and Dachwitz (n 70); Papaevangelou (n 72).

421 Nechushtai (n 317) 1043.

that close partnerships between platforms, exemplified by the case study of the Google News Initiative (GNI), and the news industry, as well as financial support for journalism, often result in reduced sustainability.⁴²² This is because business models become structured around dependency on platforms for funding, infrastructure, skills, and knowledge. Consequently, despite the positive impact of significant funding contributions from Google and Meta/Facebook to journalism, especially at the local level, it fails to ensure long-term sustainability, underscoring the need to develop alternative business models. As an example, there is ongoing discussion and experimentation with a co-creational model for the news media, based on a public participation principle. This model is being explored and tested in the UK by various organisations and the potential lies in its ability to enhance financial sustainability while also serving the public interest.⁴²³

Small and local news organisations are at threat of “news desertification” due to changes and challenges brought about by increasing concentration and threats of capture triggered by digitalisation and platformisation.⁴²⁴ Specially building long-term sustainable business models proves difficult due to platform dependency for traffic, advertisement, funding, and revenue. Empowering small and local news organisations to become a “counterpower” can provide not only a counterbalance to the influence wielded by very large and conglomerate news media organisations within an increasingly concentrated media landscape but is crucial in the platformised media ecosystem to not exacerbate dependency on platforms, while larger organisations can grow more powerful.

As technology and AI continue to advance, the importance of implementing public interest-based regulations and fostering approaches that promote fairness and competition cannot be overstated. Media sustainability has long required state support, for instance through media privileges, such as funding, tax breaks, subsidies, or through state aid and direct financial support.⁴²⁵ As Tambini states “fiscal treatment of the press is [...] one of the key means through which states can create the conditions for the sustainability of journalism”.⁴²⁶ However, as mentioned earlier, any such state intervention and public support must be carefully balanced with the potential for

422 De-Lima-Santos and others (n 72).

423 Jonathan Heawood and Fabienne Peter, ‘Co-Creational Media: Committing to Truth and Public Participation’ (Public Interest News Foundation 2023).

424 European University Institute., *Uncovering News Deserts in Europe: Risks and Opportunities for Local and Community Media in the EU*. (Publications Office 2024) <<https://data.europa.eu/doi/10.2870/741398>> accessed 9 April 2024.

425 Tambini (n 37).

426 *ibid* 48.

inferences with journalistic freedoms. While regulatory actions aimed at curbing power concentration, ensuring fair competition, and establishing oversight and accountability are essential, one must be wary of the potential creation of new dependencies on the state. For the latter, independent oversight mechanisms would need to be put in place to prevent threats of “media capture”.⁴²⁷ Accordingly, news organisations themselves could have the potential to adopt less intrusive measures as part of a “counterpower” strategy to safeguard their economic sustainability and advocate for increased fairness.

5. “COUNTERPOWER” IN PRACTICE

Building on this conceptualisation of “counterpower” at the three thematic levels, I conducted semi-structured interviews with news organisations to, first, discuss how “counterpower” is manifesting or has been observed in practice (RQ1), and second, how the legal conditions could be created to facilitate the formation of “counterpower” (RQ2). Understanding the perspective of news organisations helps to bridge the gap between theoretical conceptualisations, the goals, strategies, and challenges experienced in practice, as well as integrating those findings into more concrete legal discussions.

Between March and September 2023, I conducted 12 semi-structured interviews, both in person and via Zoom, of approximately 45-60 minutes, with experts inside news organisations from the UK [7] and the Netherlands [5]. Nine of the interviewees were of large, commercial, or public organisations, while only three were with small or local ones. Scheduling interviews with local organisations proved more difficult, possibly due to constraints on their time and resources, a self-perceived lack of knowledge on the topic, or indications that they were owned by a larger organisation more suitable for my inquiries.

Interviewees included key personnel, such as directors and experts in areas such as public policy, legal affairs, innovation, data and technology, platform, and commercial strategy. Semi-structured interviews appeared as the appropriate method to assess the concept of “counterpower” in practice, as it allowed me to delve into conversations with relevant actors in the news industry from various perspectives. The background and roles of the interviewees varied; therefore, it is not possible to make representative conclusions. Instead, the interviews are intended to contribute

⁴²⁷ Schiffrin (n 24).

an industry perspective to the (legal) debates surrounding platform dependency, power concentration, and media pluralism.

While acknowledging the differences between the UK and the Netherlands, both were chosen due to practical reasons of being affiliated to research institutions in both countries, therefore having a certain network at avail, and without language constraints. Because both represent media systems experiencing similar power dynamics, in which many organisations are going through profound transformations in the light of digitalisation, automation, and platformisation, it is possible to make some general observations of trends. Furthermore, both countries, despite different legal systems, share a commitment to upholding fundamental and human rights, including media freedom and pluralism,⁴²⁸ and there are ongoing regulatory debates concerning platform power, platform dependencies, and the implications of AI and technology for the media sector in both countries. While discussions in the Netherlands predominantly focus on EU initiatives such as the DSA, DMA, EMFA, and the AI Act, the UK pursues a separate policy discourse that tackles similar concerns through distinct regulatory initiatives.⁴²⁹ These include the Online Safety Bill, a sector and context-specific approach to regulating AI, and policy proposals on safeguarding media plurality by Ofcom, the UK media regulator.⁴³⁰

After recording and transcribing the interviews using Otter.ai, the conversations were analysed based on a close reading and by coding statements using a qualitative method with Atlas.ti. I used a mixed method of deductive and inductive coding.⁴³¹ First, building upon my conceptualisation of “counterpower”, I conducted, analysed, and coded the interviews along the three main themes: A: audience relationship and attention, B: technological innovation and independence, and C: economic viability and sustainability. Within each theme, using an inductive approach, I coded relevant passages, and identified the goals, strategies, and challenges related to “counterpower”.

On a final note, the time period coincided with intense discussions about the implementation and future of AI within the media, specifically generative AI. While this article primarily explores the power of platforms in the media, it's worth noting

428 As envisaged, for instance, in the Charter of Fundamental Rights (CFR) and the European Convention on Human Rights (ECHR)

429 Regulation (EU) 2022/2065 (“DSA”); Regulation (EU) 2022/1925 (“DMA”); Regulation (EU) 2024/1083 (“EMFA”); AI Act.

430 Online Safety Act 2023 c. 50; Ofcom, ‘Media plurality and online news’ (2022).

431 Rens Vliegthart, ‘Framing in Mass Communication Research - An Overview and Assessment: Framing in Mass Communication Research’ (2012) 6 *Sociology Compass* 937.

that many of these companies, such as Google and Microsoft, are leading the way in developing and providing AI. The consequences of their shifting focus on AI and the gradual withdrawal by some from the news industry remain uncertain. However, these developments undoubtedly play a role in ongoing regulatory and policy debates and in shaping strategies aimed at balancing power dynamics in the industry.

5.1. INTERVIEW FINDINGS

As explained, the interviews were (semi-)structured along the three themes, as introduced in the conceptualisation: A: audience relationship and attention, B: technological innovation and independence, and C: economic viability and sustainability. The questions to the interviewees primarily revolved around three key areas: (a) goals of the news organisation, encompassing normative commitments, commercial objectives, and strategic aims; (b) strategies employed, which delved into concrete examples of news organisations taking organised actions vis-a-vis platforms to achieve the mentioned goals; and (c) challenges faced, involving discussions with interviewees about existing legal frameworks, obstacles, concerns, and potential regulatory suggestions that could benefit them. This structure allowed for a comprehensive exploration of the subject matter.

5.1.1. Audience Relationship & Engagement

In the first thematic block, interviewees were questioned about their audience strategies within the context of platforms. These questions covered the news organisation's social media presence, methods for attracting and engaging with both new and existing audiences, and the extent to which they rely on platforms for distributing their news content.

5.1.1.1. Goals and commitments

Many interviewees expressed concerns about striking the right balance of using platforms for monetisation, reaching current, new, and young audiences, and driving website traffic while not losing control over their content and audience relationships.

As one interviewee said: "There's always a trade-off and assessment. (...) you want to monetise your content, get advertising revenue, create traffic to your websites, and be present where the audiences are and they do spend a lot of time on platforms, especially search as a key gateway through which people get access to news and information, but also social media. On the other hand, you want to avoid platforms to mediate the way your journalism is consumed." [interview quote]

While news organisations acknowledge their responsibility and commercial interest in meeting their audience where they are, concerns of control loss over their content and the possibility of "losing audiences in the platform environments" [interview quote] prompted some to take countermeasures.

The interviews show that counteraction is not just about commercial interests or a normative commitment to informing the audience; it's also a response to a perceived "loss of trust" in journalism, triggering the importance of cultivating direct, reliable relationships with their audience, anchored in delivering quality information, based on professional and journalistic values. Providing high-quality journalism isn't just a trust booster; it's also a brand enhancer.

5

Therefore, interviewees highlighted some strategies aimed at fostering a strong and trustful connection with the audience. To attain these overarching goals, the following strategies were discussed as forms of "counterpower".

5.1.1.2. "Counterpower" strategies

It is worth noting that not every interviewee felt the need to directly counter platforms. Several interviewees - while fully aware of platform dependency and concerned of certain privacy and security risks - emphasised their responsibility to meet audiences where they are.

As one interviewee said: "We have an obligation to distribute our news content on social media (...) but that doesn't mean that we have to push our content to any cost". [interview quote]

Therefore, regaining some control and remaining on the platform does not need to be an either-or decision. Some form of "counterpower" could therefore mean to define their own limits.

Of the interviewed organisations, none considered entirely "quitting" social media as a viable step and all still rely on social media to some extent. This decision stems from the need to be where the audiences are, while being aware of the risks. When targeting younger audiences on platforms like TikTok, particularly concerns regarding security and privacy were voiced.

When relying on platforms, interviewees highlighted worries about sudden traffic drops due to non-transparent algorithm changes. As one interviewee put it: "traffic levels can change significantly from one week to another without explanation."

[interview quote]

This led several interviewees to discuss counteractions, such as diversifying methods, withdrawing from formats in which audiences “get lost in the platform environments”, and building direct ways of communication with audiences.

All interviewees recognise the need to diversify their audience outreach methods and reduce their reliance on platforms. In that context, some large organisations mentioned that they do not heavily depend on social media for generating traffic anymore.

One interviewee explained their significant shift in approach over recent years, stating that they've "moved away from optimising their content solely for Facebook or Google" and no longer consider it a “core part of their internal business strategy”.
[interview quote]

Most interviewees expressed their approach to [at least] diversify their presence across multiple platforms to help mitigate the vulnerability of depending solely on one (or few) platforms, thereby reducing the risk of “single points of failure” if that platform becomes unavailable or unreliable. Consequently, facilitating some form of ‘multihoming’, not only for audiences but also for news organisations, could provide a solution to reduce dependencies.

Second, interviewees concerned about losing their audiences within platform environments emphasised the need to build their online presence and establish direct communication with their audiences. Some interviewees even described withdrawing from certain platforms as a strategic move to safeguard content, nurture audience relationships, and protect their brand recognition.

As one interviewee explained, they rejected some content publishing formats, like Facebook Instant News Articles (FINA) (which now is discontinued since April 2023), because despite being "paid for it," it simply "did not work for us" because "consumers remained within the platform environment." [interview quote]

Third, despite the traffic generated via platforms, relying on it is viewed as "risky", thereby underscoring the importance of establishing a dedicated online presence. Building trust and cultivating a solid and loyal readership are considered crucial. Many interviewees mentioned simple steps like "creating their website" or "implementing newsletters" in their efforts to counterbalance their existing dependency on platforms

for audience engagement by adhering to their commitment to providing quality news and information.

As one interviewee expressed it: "Our narrative is that we offer news checked and written by individuals with objective journalistic values, a narrative we consider crucial (...) emphasising how news supports our democratic values." [interview quote]

Another interviewee added: "Our motivation is to have control over our business operations, reliability over audience reach, and independence from choices made by platforms. (...) So, our reason to not completely quit social media is because the audiences are there, and they bring some extra traffic, but we don't rely on it. (...) Instead, we focus on direct communication and connection with our audience (...)". [interview quote]

Lastly, several interviewees pointed to the fact that unpredictable behaviour by platforms, including withdrawal from certain environments, algorithmic changes, and a general lack of trust towards (some) platforms led them to truly rethink how reliant they are on them in their relationship with the audience. Most voiced the need to have own control over audience engagement as the core focus of any news organisations' strategy as well as due to their normative commitments.

5.1.1.3. (Legal) challenges

As evident from the preceding discussion, there are several challenges associated with implementing a strategy to counteract platforms in terms of audience relationship and engagement.

First, a significant challenge lies in connecting with younger audiences. Engaging this demographic while countering dependency on social media remains difficult, as they are less inclined to engage with conventional methods such as visiting websites or subscribing to newsletters. TikTok was particularly recognised as the primary platform for reaching young audiences, while most news organisations raised concerns regarding its security and privacy standards. To effectively utilise platforms like TikTok for connecting with and engaging young audiences, all interviewees insisted on the necessity for enhanced legal certainty regarding security and privacy standards. They also stressed the importance of not overly politicizing these platforms.

As one interviewee expressed it, "The signals of politics on the threats to publish news with TikTok are also very mixed." [interview quote]

Another challenge arises from the fact that social media enables news organisations to directly target, reach, and engage with their desired audiences. Among the interviewed news organisations, especially smaller and local ones, the goal isn't necessarily to "reach a vast number of people but rather the right people." [interview quote] While small and local news outlets are exploring alternative business models such as co-creational, participatory, and membership-based models, they still maintain a sense of community involvement and interaction with specialised audiences through social media.

As one interviewee put it in this context: "Whatever our personal feelings, we need to rely on the platforms because we have no alternative". [interview quote]

Furthermore, to ensure greater certainty and predictability, interviewees emphasised the necessity for higher standards of algorithmic transparency. They highlighted the importance of receiving prior warnings and explanations from platforms regarding any changes that could impact website traffic. While the UK Digital Markets and Competition Bill (DMCB) (Principle 2)⁴³², as well as the DSA (Articles 14, 15, 17)⁴³³ incorporate some aspects of algorithmic transparency,

one interviewee stressed: "platforms need to give notice before such major changes. (...) They change their algorithms all the time. So prior notice is important, not just afterwards." [interview quote]

5.1.2. Technological Innovation & Infrastructures

The second interview theme focused on how news organisations approach novel technologies and their reliance on platforms for data, algorithms, and infrastructures, and their strategies for staying innovative and competitive while adhering to professional and journalistic values, such as preserving independence. It involved questions about their internal decision-making processes when adopting new technologies and the obstacles they encounter in this endeavour.

5.1.2.1. Goals and commitments

As mentioned earlier, interviewees generally acknowledge that technological innovation and advancements in AI can offer opportunities to "streamline tasks and make journalism faster and cheaper" [interview quote], thus enhancing their

432 Competition and Markets Authority (CMA), 'The Competition and Markets Authority's response to government's White Paper, 'AI regulation: a pro-innovation approach' (2023).

433 Regulation (EU) 2022/2065 ("DSA")

competitiveness. However, they are also aware of the risks associated with relying on external third-party technology providers. Given that it's more affordable or simply the only possibility to acquire "off-the-shelf tools" provided by big players, many interviewees realise they don't have full control over how and which tools to use. Consequently, principles such as integrity, control, and independence regarding the infrastructures for journalistic processes and their relationships with platforms and external providers guide any counterbalancing actions.

As one interviewee put it: "We need to make sure we are not compromising anything in the deployment of that technology (...) in terms of editorial rigour and quality". [interview quote]

5

In this regard, ethical and professional guidelines, as well as an innovative digital transformation and AI strategy are pursued by some organisations, but this cannot be generalised as a recent report also confirms.⁴³⁴ The latter is closely intertwined with aspects of economic viability and sustainability, as financial and other resources are essential in facilitating innovation and independence.

5.1.2.2. "Counterpower" strategies

One of the most frequently discussed methods for larger, well-resourced organisations to secure their independence is by developing their own tools and datasets using proprietary tracking technologies. This necessitates a clear innovation and digital transformation strategy, which, in turn, calls for investments in research and development (R&D) as well as of relevant skill and expertise. Sufficient resources to implement such strategies are (usually) only available to larger organisations.

The importance of investment in the field to enable independent innovation was highlighted by several interviewees: "Because digital is so important for us, we are investing heavily in datasets, people R&D, etc., despite the fact that funding has shrunk". [interview quote]

One interviewed organisation said there is a lot of "investment into building [our] own ad tech, so you don't have to be on par with Google and Facebook in terms of

⁴³⁴ Charlie Beckett and Mira Yaseen, 'Generating Change A Global Survey of What News Organisations Are Doing with AI' (JournalismAI Polis 2023). In the report, they write: "Around 1/3 of the respondents said their organisation had an AI strategy or were currently developing one, similar to the results we saw in our 2019 survey. Responses to this question reflected strongly the diversity among the participants; in terms of experience with AI, strategy building objectives and approaches. Some newsrooms have had integrated AI technologies at an institutional level for some time now and are conducting strategy reviews to better leverage AI across the organisations."

advertising technology". [interview quote]

In fact, they said to have stopped using Google Analytics altogether in a strategic move to become more independent in terms of technological innovation, advertisement, data, and tracking, thereby building their own "central data infrastructure".

Not only investments in the digital transformation, R&D, data science, machine learning, talent, and skills are important for most (larger) organisations. Collaborations with external researchers and labs, including universities, help increase knowledge-sharing. Additionally, other methods of collaborative knowledge-sharing and developments, such as joint ventures, are pursued by some.

One interviewee explained: "There's a mix of relying on third parties, because they have the knowledge, and creating own technology, often in collaboration of others. (...) For instance, we have a joint venture ad tech." [interview quote]

Nevertheless, the rise of more advanced technologies and AI tools, that news organisations cannot develop themselves, triggered the need to establish internal guidelines on the ethical and responsible usages of these tools. Several interviewees stressed a clear awareness of the need to develop internal AI and platform strategies to better assess the risks involved in the expanding presence of digital technologies and AI tools. Some organisations have specific guidelines in place, based on which tools considered as too risky were refused.

One interviewee explained that they have "previously refused to work with some tools due to information privacy concerns (...) as assessed by an internal ethics committee." [interview quote]

Therefore, opting not to utilise certain tools offered by big tech companies because of privacy and security concerns can be considered a manifestation of counterpower. Nonetheless, not all organisations may have the flexibility to forgo specific tools, particularly when considering factors like cost and efficiency. Nevertheless, given the rapid advancements in AI, most large organisations are actively involved in drafting (internal) guidelines for the deployment and utilisation of AI to align with the core journalistic and professional values.

5.1.2.3. (Legal) challenges

During the interviews, few strategies that can be defined as "counterpower" were mentioned. It is crucial to emphasise that the extent to which an organisation can

actively pursue these actions is heavily contingent on its size and available resources. This dynamic can give rise to a new set of challenges, specifically the potential for increased media concentration. Well-funded organisations may have the capacity to become more innovative and independent, whereas smaller and local ones could find themselves becoming even more dependent on "off-the-shelf" tools and solutions offered by a few powerful platforms. Consequently, several interviewees also underscored the importance of regulatory intervention to ensure security and privacy standards, accountability, fair competition and data access, and measures to control media concentration.

However, even for the largest organisations, it will be impossible to compete with platform giants like Google and Microsoft simply because of the sheer volume of data, knowledge, and expertise at their disposal. Especially in the realm of AI, news organisations are fully aware that they will be "consumers rather than collaborators" [interview quote] primarily due to their limited capacity to develop their own AI.

In conclusion, despite individual efforts, interviewees unanimously advocated for regulatory intervention to protect fundamental rights. Concerns were voiced about the expansion of generative AI and the use of large language models (LLMs). Most interviewees expressed reservations to deploy generative AI on a large-scale due to transparency issues in data collection, uncertainty about compliance with consumer, privacy, and data protection laws, and potential copyright infringements. To address these risks and promote responsible usage, interviewees emphasized the need for effective legislation, placing the responsibility on governments.

5.1.3. Economic Viability & Sustainability

The last section focused on broader questions about economic viability and sustainability, particularly in terms of ensuring independence in revenue and funding. Interviewees were asked about their strategies for long-term sustainability and independence from platform revenue and traffic, with concerns extending to issues of competition law, fairness, and power abuses.

5.1.3.1. Goals and commitments

Implementing one's own "counterpower" strategies to safeguard economic viability and sustainability is notably challenging, primarily because, as one interviewee noted, "problems of market and data power are essentially structural obstacles" [interview quote]. Nevertheless, particularly among smaller and local organisations, there seems to be a move towards adopting alternative business models that do not rely on generating traffic and revenue solely from platforms, while becoming

more resilient to external funding cuts, as done by Meta. Ultimately, the objective is to establish business models that enable long-term sustainability.

Among larger organisations is a strong focus on developing strategies that promote a mutually beneficial coexistence with platforms, primarily by establishing commercial agreements with platforms to cultivate beneficial partnerships. While collaborating with platforms can potentially strengthen their power, due to its relational nature, some of these larger organisations indicated their reluctance to engage with some platforms that have demonstrated unreliability or a disregard for security and privacy standards. This, in turn, could be viewed as a form of "counterpower," as it allows them to exert influence over each individual platform relationship based on their own interests. Furthermore, some interviewees advocated for specific privileges for the media industry. These requests included relaxing media concentration laws to permit media mergers and collective competition against platforms, as well as economic benefits such as tax exemptions and public subsidies.

Lobbying and advocating for fairer conditions in terms of competition, as well as changing the culture of news being considered a "public good" and stronger protection for local and public interest journalism were highlighted as distinctive objectives for action. While it's evident that these goals are challenging to attain, a few concrete strategies could be identified.

5.1.3.2. "Counterpower" strategies

Economic dependency is primarily driven by the dependency on the advertising sector. While some interviewees acknowledged their continued heavy reliance on Google for advertising, one interviewee articulated their ongoing efforts to contest this status quo. They aim to reassert control over their business operations by developing their own digital advertising platform, thereby reducing their reliance on Google's ecosystem, as discussed in the previous section.

In terms of building their own advertising platform, the same interviewee said that "(...) resulted actually in two things. So, one, we earn way more money, because normally, in this entire chain of digital advertising, 40% is least earned by the tax system of Google." [interview quote]

Therefore, according to that interviewee, independently building own datasets not only creates independence from platforms' ad business, infrastructure, and technology, but actually "creates financial benefits (...) and also qualitative benefits." [interview quote]

Furthermore, several organisations vouched for arranging for a world with platforms. However, they clarified that they are actively pursuing more equitable terms and conditions in their commercial contracts and licensing agreements with platforms. While they have established contracts with certain platforms, dealing with others appears to be more challenging.

As one interviewee said: “it’s a complete fantasy that [they] shouldn’t have commercial contracts in place to pay for news content.” [interview quote]

Other interviewees pointed out that the issue primarily lies with platforms that are unreliable and lack formalised contracts. In such cases, the interviewee stated that they have no intention of establishing partnerships, as their goal is to cultivate trustworthy and cooperative partnerships. Moreover, the interviewed organisations, especially larger ones, generally viewed the prospect of forced negotiations, and the possibility for collective negotiations, with platforms as positive.

As one interviewee stressed: “negotiations probably would not have happened if it wasn’t for the NMBC [Australia’s News Media Bargaining Code].” [interview quote]

One interviewee of a local organisation brought another perspective, however, and explained that such codes could be used by large platforms as an excuse to government to not tax them as “all the money is going to journalism anyway” while pointing out that “the model in Australia has been very much that all of that money goes to the big companies anyway.” [interview quote]

Despite disagreement about the extent to which small and local organisations were neglected, there is reasonable concern that they just don’t have an effective spot at the negotiating table. That is also seen in the fact that such local organisations that received money still usually depended on collective bargaining to reach terms. Accordingly, the interests and demands of local organisations remains disproportionately respected in comparison of those of large ones.

Furthermore, it’s crucial to acknowledge the significant role that the media sector could play in lobbying and advocating for fairer conditions and public support, as well as the role of governments in creating the necessary conditions and incentives.

One interviewee said, “platforms will continue to exist, and partnerships need to be created. But governments can put incentives in place to make platforms more responsible and accountable.” [interview quote]

Large organisations themselves could be seen as wielding some special responsibilities in advocating and lobbying for regulations that facilitate a healthy media ecosystem for all, considering that small and local organisations are more severely affected in terms of sustainability.

5.1.3.3. (Legal) challenges

Despite awareness and efforts, challenges persist. Insufficient funding continues to pose a challenge to the financial stability of local news, which is progressively dwindling, hence leaving less space for pursuing counteractions. As one interviewee from a local news organisation said, we “just get the money from wherever [we] can get money, because you know, we need money.” [interview quote]

Not to neglect the far-reaching economic and market power of platforms, requiring structural and regulatory solutions. As phrased by one interviewed news organisation, “the obstacles are structural in terms of how these markets operate (...) [platforms] have huge amounts of market power and accrue huge amounts of data which further entrenches their position.” [interview quote]

Finally, the political power of platforms and their aggressive lobbying force needs to be better managed. And as some interviewees accentuate, regulatory proposals are good but may be too late, as regulators are “fighting yesterday’s battle, (...) as technology and business move far faster than legislation and regulatory enforcement”. [interview quote]

6. DISCUSSION & CONCLUSION

Exploring the idea of “counterpower” within the context of the news media yields valuable insights for understanding how “counterpower” manifests in real-world scenarios. The qualitative analysis of the empirical data illustrates overarching goals of exercising “counterpower”, identifies specific strategies used to achieve these goals, and sheds light on the primary challenges and (legal) obstacles encountered. This discussion connects the theoretical framework of “counterpower” and the empirical findings from a legal and policy viewpoint.

6.1. GOALS & COMMITMENTS

First and foremost, the literature review and conceptualisation of “counterpower” already discuss a variety of grounds to exercise “counterpower”. The difficulty to

reach certain audiences and to build direct relationships, due to the persistent mediating role of platforms in news consumption and distribution, triggers some organisations to implement “strategic countermeasures to wrangle back control of their audiences”.⁴³⁵ The interviews confirmed a two-fold commitment to exercise “counterpower”: on the one hand, normative and professional journalistic values, and on the other hand, commercial and strategic control over (economic) operations.

6.1.1. Public Interest Driven: Normative & Professional Values

The interviews uncovered that news organisations typically integrate their democratic mission as a fundamental aspect of their core identity. The news organisations that were interviewed concern what we might refer to as “quality news media”, namely those that uphold a certain minimum level of journalistic values, consequently excluding, for example, tabloid media. Their dedication to serving the public interest and upholding values is particularly evident in their commitment to delivering quality news to inform and engage audiences. For instance, their primary motivation for staying on social media platforms, despite concerns about privacy, security, and dependency, is the imperative “to meet their audiences where they are”. The strategies outlined by interviewees primarily revolve around building trust and cultivating direct relationships to ensure long-term sustainability through loyal readership and subscriptions. Additionally, there is a clear emphasis on upholding ethical and professional principles such as integrity, control, and (editorial and organisational) independence as essential counteraction objectives. Concerns about losing control of their news contents in platform environments, and the dependency on external infrastructures for journalistic processes have prompted a re-evaluation of the extent of dependency on only few providers. Lastly, interviewees are motivated by a deep commitment to transforming the culture and public perception of journalism as a “public good”. Several interviewees emphasised that it is not only society but also lawmakers and policymakers who must genuinely recognise “journalism” as a public good and establish incentives and legislation that ensure its survival is not contingent on market logics but protected through alternative public means.

6.1.2. Economic Interest Driven: Commercial & Strategic Control

Beyond normative aspirations, interviewed news organisations are also motivated by economic interests and a determination to maintain control over their commercial and strategic decision-making processes. Interviewees distinctly underscored the objective of preserving integrity and autonomy, particularly concerning their digital and innovation strategies. The overarching aim is to exercise control over the

⁴³⁵ Chua and Westlund (n 334).

infrastructures employed, as well as over data, technologies, and the acquiring of own skills, expertise, and knowledge. Furthermore, ensuring independence from external funding sources for the establishment of sustainable business models is of paramount importance from an economic perspective. On the whole, the prevailing goals in decision-making processes related to counteraction include the autonomous development of innovative and digital strategies, control over the selection and implementation of technologies and AI, and the creation of long-term, economically sustainable business models. Nonetheless, organisations remain aware of the limits imposed by external forces and economic and market pressures on their ability to exercise complete control.

6.2. "COUNTERPOWER" STRATEGIES

A number of strategies were mentioned and discussed during the interviews. While some are more comprehensive, others appear less effective. I want to highlight two primary "counterpower" strategies that the interviews exposed.

6.2.1. *Direct & Engaged Journalism*

Building direct and engaged journalism appears as an effective form of "counterpower" to achieve both normative and economic goals. Building direct relationships with and engaging individuals as described by several interviewees can help enhance overall trust in journalism and increase new subscriptions. A recent study found "the first causal evidence that engaged journalism can affect the economic viability of local news sites and local news sites' relationships with the communities they serve".⁴³⁶ Although the study focused on local news, building brand recognition, trust and a loyal readership are logical methods to enhance subscriptions and direct website visits. Turning (random) visitors into paying audiences, as the study suggests, could effectively enhance long-term sustainability. Furthermore, as mentioned, engaged journalism could go beyond economic benefits and lead to "pro-democratic" effects through increased participation, political knowledge,⁴³⁷ and independent opinion formation. As previously described, a trustful relationship between the audience and the news media is crucial in enabling both to fulfil their democratic function.⁴³⁸

436 Natalie Jomini Stroud and Emily Van Duyn, 'Curbing the Decline of Local News by Building Relationships with the Audience' (2023) 73 *Journal of Communication* 452-458.

437 Sophie Lecheler and Claes H De Vreese, 'News Media, Knowledge, and Political Interest: Evidence of a Dual Role From a Field Experiment: News Media, Knowledge, and Political Interest' (2017) 67 *Journal of Communication* 545.

438 Van Drunen and Fechner (n 159).

Nevertheless, as explained by several interviewees, despite a commitment to engage with their audience directly and build loyalty, trust, and brand recognition, much of those interactions still occur via social media. Therefore, enhancing a trustful mutual relationship does not necessarily necessitate an unequivocal departure from platforms or absolute independence from them. It raises the question of whether "counterpower" implies complete disengagement from platforms or if the true essence lies in independently defining the extent and limits of dependency on platforms.

6.2.2. Diversify Dependency

This leads to another important "counterpower" strategy, complementing direct and engaged journalism. Several interviewees described their strategies of gaining control over the extent and limits of dependency and of diversifying dependency, which could form an effective strategy to break platforms' "feedback loop". As mentioned in the theoretical and conceptual section of this paper, power is a relational concept. When news organisations excessively depend on one or few platforms, it results in a "feedback loop", further enhancing platform power and influence, leading to increased concentration.

With technological innovation and constraints related to disproportionate access to data, skill, and knowledge required to develop own tools, news organisations must make choices regarding the extent of their dependency and the terms governing their use of these tools. In this context, "counterpower" does not imply complete independence but rather entails exerting control over the usage of tools, over the relationship with providers, and ensure the adherence to professional and ethical standards. While news organisations aspire to be innovative and competitive, with some investing significant resources in developing their tools, setting standards, and acquiring relevant skills and knowledge, they will still rely on tools created by third parties. As Simon reminded us, "technology is an opportunity for the news media if used wisely" and as historical developments of new technologies has shown, "it is easier at the beginning to shape them and the way they are used. Once they gain their own momentum, this becomes increasingly difficult".⁴³⁹

Additionally, Poell and others argue that "platforms certainly do not single-handedly shape the transformation of the news landscape (...) [instead] the strategic decisions of news publishers play a crucial role in how this landscape evolves."⁴⁴⁰ Hence, news

439 Simon, 'AI Will Not Revolutionise Journalism, but It Is Far from a Fad' (n 391).

440 Poell, Nieborg and Duffy (n 374).

organisations need to, and in fact do, increasingly shape how decisions regarding the use of technology are made, for instance regarding technology procurement. Accordingly, diversifying dependency as “counterpower” can mean to (1) ensure reliance on a variety of platforms and providers, (2) make a conscious decision of relying on alternative providers, or such who ensure higher privacy and security standards, or (3) decide to invest and concentrate resources on developing own tools, datasets, and digital (advertising) platforms.

6.3. LEGAL CHALLENGES

Stakeholders are fully aware of the complex interdependencies and asymmetric power dynamics at play. Nevertheless, efforts to address this imbalance or to empower news organisations to form a “counterpower” through regulating platforms have often encountered resistance and aggressive lobbying by big tech. Legal frameworks should be designed to enhance autonomy, independence, and agency in shaping the use of spaces/infrastructures and relationships. Simultaneously, these frameworks should be built upon fulfilling the normative and constitutional prerequisites for dispersing structural power.⁴⁴¹ Doing so requires implementing measures to systematically control and restrict power concentrations, while promoting media pluralism, particularly through institution specific safeguards for local news.

6.3.1. Democratic Power Distribution

Some interviewees from larger organisations directly advocated for more relaxed concentration controls on legacy media. They argued this would empower them economically and technologically, thereby enhancing their competitiveness against platforms. However, it is important to stress that “counterpower” should not imply shifting power to large legacy media organisations.

While indeed some scholars argued that media conglomerates are better equipped to resist external pressure, finance investigative reporting, invest in digital transformations, and protect independence, a concentration of power and resources should always be rejected from a democratic and normative viewpoint.⁴⁴² The focus on easing media merger controls and resource concentrations to few media organisations, in order to leverage opportunities created by technology and AI, misses the point from a normative standpoint. Market-driven logics fail to address public interest concerns and may jeopardise (local) journalism, as its societal and

⁴⁴¹ Baker (n 22).

⁴⁴² *ibid* 51.

democratic contributions cannot be measured solely in economic terms.⁴⁴³

The dispersal of power and prevention of concentrations are fundamental constitutional and normative principles that require no justification.⁴⁴⁴ The argument presupposes that power in the public sphere should always be distributed and concentrations of power, whether over ownership, economics, opinion formation, or infrastructures, must be prevented and regulatory solutions be structured to facilitate fair, equal, and democratic power distribution within the media ecosystem.

6.3.2. *Protection of Local and Public Interest Journalism*

Most interviewed organisations emphasised the role of governments and regulations in establishing fairness, competition, and transparency within the digital media landscape. Building on the foregoing, some regulatory proposals that aim to address power asymmetries and empower news organisations were discussed during the interviews but need to be viewed critically.

In this brief discussion, I will illustrate that some current proposals fail to effectively tackle the root causes, which are structural in nature. Some proposals seem promising initially but could exacerbate concentration and jeopardise local journalism. Rather, the conditions for all media to better build direct relationships and engage with audiences as well as creating an environment that allows for diversifying dependencies need to be created. Those should be steered towards promoting healthy competition, removing barriers for alternative platforms and providers, and encouraging the in-house development of technology.

Several interviewees of large organisations emphasised the positive effects of bargaining codes, such as the NMBC in Australia and similar initiatives in the UK and Canada. These codes could rectify power imbalances and lead to fairer compensation for news content. However, criticisms regarding the benefits for “speciality” and small and local organisations remain present,⁴⁴⁵ and Meese stresses that “mandatory platform payments do not address platform dependency.”⁴⁴⁶ This approach fails to tackle the root issue, namely the structural power concentration within platforms. Legal approaches building on the reliance on payments by platforms in fact further deepen dependency ties and makes news media more vulnerable to decisions, and potentially power abuses, by platforms. Furthermore, mandating platforms

443 Baker (n 22).

444 *ibid*; Schulz and Held (n 85).

445 Radsch (n 336).

446 Meese (n 99).

to pay for news, same as voluntary investments into the news sector, could hinder long-term sustainability as it discourages the development of independent business models.⁴⁴⁷ For local news organisations even the short-term benefits of payments as additional revenue are most likely only realised when relying on standardised terms or collective bargaining. This is contrary to the goals of dispersing power, preventing concentration, and promoting independence and pluralism.

The interview discussions about regulatory proposals to the challenges faced demonstrated another issue. While large news organisations may be able to develop own tools and build infrastructures (as part of diversifying dependencies), small and local organisations simply lack the capacity of doing so. This finding is backed by Meese, who acknowledges this issue: “We have seen these larger news outlets able to build new forms of infrastructure that could potentially reduce their dependency while securing new revenue streams from platforms. Conversely, smaller outlets have less capacity to extract themselves from dependencies.”⁴⁴⁸ Therefore, it is important to stress that the discussion at hand to enable “counterpower” depends significantly on an organisation’s size and resources. Heavy investments in own technology development are reserved to very large and well-resourced organisations, and can therefore not present a holistic structural solution, but rather be seen as a complementary approach for large organisations. To maintain media pluralism and prevent the emergence of dominant opinion power, regulatory efforts should ensure both large and small and local news organisations can achieve long-term sustainability.

Applying traditional concentration controls to new power sources, which are increasingly shaped by the spaces and infrastructures upon which the media operate, could be an interesting approach here. For instance, one could argue for moving away from traditional concepts such as ownership and control in media (concentration) law to focusing on how the “underlying and habituated” arrangements shape the spaces on which the media industry operates and influence the relationships and power dynamics of all involved actors.⁴⁴⁹ Measurements need to systematically assess and control infrastructural power and its impact on opinion formation. This approach prioritises democratic power dispersal, thereby ensuring small and local journalism’s inclusiveness.

447 De-Lima-Santos and others (n 72).

448 Meese (n 99) 98.

449 Julie Cohen, ‘Turning Privacy Inside Out’ (2018) 20 *Theoretical Inquiries in Law* 17.

Local journalism has so far relied quite heavily on external funding, also from Google and Meta/Facebook. The consequences of a loss of funding sources for local journalism is seen in the increasing “news desertification” in Europe,⁴⁵⁰ and points to another issue. Reliance on platforms like Google and Meta/Facebook for funding are not sustainable business models but deepen the dependencies.⁴⁵¹ One could also question why Google or Meta/Facebook should be relied on to fund the survival of local journalism in the first place. This is a democratic concern and states have positive obligations to protect media freedom and pluralism by creating laws that allow for journalism to fulfil its democratic function. Specifically, media law and policy need to enable protection of (local) journalism from external and market-driven pressures.⁴⁵² Digital media policy and governance can play a crucial role in creating financial incentives for long-term sustainability, while also avoiding over-reliance on public funding. This multifaceted approach can involve multiple small donors and leveraging digital technologies to support local news.⁴⁵³

6.4. CONCLUSION

Several regulatory proposals and new regulations aim to address power asymmetries, enable fairer competition, level the playing field, and protect values such as media freedom and pluralism. Most notably, the DSA, DMA, EMFA, and AI Act in Europe, but also in the UK, for instance with the Online Safety Bill and the Digital Markets, Competition, and Consumer Bill.⁴⁵⁴ Several interesting proposals can be found in the provisions, but also limitations in terms of their effectiveness.

To build direct and engaged journalism, power over the connection and relationship between news media and the audience needs to be dispersed. For instance, the DSA plays a pivotal role in recognising and tackling systemic risks arising from the utilisation of recommender algorithms, while also providing enhanced transparency and user control. More specifically Article 27 of the DSA mandates that very large online platforms (VLOPs) employing recommender systems must clearly outline the primary parameters employed in their recommender systems and offer users options

450 International Media Support (IMS), ‘Lack of Independent Media Funding Is a Major Cause of News Desertification around Europe’ *International Media Support (IMS)* (10 July 2023).

451 De-Lima-Santos and others (n 72).

452 Damian Radcliffe and Nick Mathews, ‘Tow Report: Building a Stronger Local Media Ecosystem: The Role of Media Policy’ *Columbia Journalism Review* (20 April 2023).

453 Lucy Bernholz, Hélène Landemore and Rob Reich (eds), *Digital Technology and Democratic Theory* (University of Chicago Press 2021) 268.

454 Digital Markets, Competition and Consumers Bill [2023]

to adjust or influence these primary parameters.⁴⁵⁵ This may contribute to a regaining of control over the relationships and hence to the formation of “counterpower”.

Furthermore, the EMFA specifically addresses issues related media concentration. Due to the limited competences of the EU to regulate media pluralism and concentration, the proposal highlights the fragmentation within the EU to assess and regulate media concentration. While some countries have more delicate assessments in place, others conduct only competition assessments for the media. The EMFA correctly emphasises that EU Member States, independently from competition law assessments, should provide for rules and procedures in national law to ensure assessment of media market concentrations that could have a significant impact on media pluralism or editorial independence (Recital 50). Furthermore, the EMFA recognises the role of platforms in the media as access and distribution services. Platforms’ roles in opinion formation should be respected in concentration assessments, as the EMFA requires Member States to pass legislation that will be able to effectively assess media concentration in the digital age. Although platforms are not and should not be considered as “media”, future media concentration laws need to consider their power. The implications for media pluralism and editorial independence need to be more coherently addressed throughout Europe, which can be considered as a significant step for countries without concrete media concentration laws (Article 22).⁴⁵⁶ More concrete guidance as to the elements to be considered in media concentration assessments are needed, while taking specific caution in protecting local and regional news media. Finally, the concrete role and responsibilities of national media authorities need to be clarified, not only for reasons of competence, but also legal certainty.

To enable news organisations to diversify dependencies, requires a diverse offer of alternative providers. That asks for competition law to deal with market and data power abuses and remove barriers of entry for competitors. The DMA takes aim at “dominant” platforms in the digital economy, aiming to curb their monopolistic practices. By imposing stricter obligations on these platforms, the DMA seeks to counterbalance market concentration, paving the way for alternative providers to thrive. This, in turn, could foster diversification within the news industry, thus empowering a counterpower. Specifically, the DMA addresses several key points that can bolster this counterpower: It ensures a fairer business environment for business users relying on gatekeepers, provides new opportunities for innovators and tech

455 Regulation (EU) 2022/2065 (“DSA”)

456 Regulation (EU) 2024/1083 (“EMFA”)

start-ups to compete and innovate without unfair restrictions, offers consumers a wider array of services, the ability to switch providers, direct access to services, and more equitable pricing. Gatekeepers are not prohibited from innovating and introducing new services, but they are prevented from employing unfair practices against the businesses and customers dependent on them, thus preventing them from gaining an unfair advantage.

Additionally, news organisations need certain guarantees that the technologies they use, and platforms and providers they rely on, fulfil certain security and privacy standards, do not violate copyright protections, or abuse their (political) power to circumvent laws. Therefore, effective enforcement of existing privacy, data protection, security, and copyright laws are important to allow leveraging the benefits of digitalisation. Additionally, AI regulation needs to be drafted in a manner to remove concerns about a lack of transparency in the development and programming phase, particularly concerning copyright infringements. Finally, to support and protect local and public interest journalism, existing tax laws in the digital media ecosystem need to be reframed to, on the one hand, proportionately support and subsidise journalism, and, on the other hand, prevent big tech companies to exploit their monopoly position and lobby to avoid heavier taxes.

In a nutshell, "counterpower" should be a central consideration in any legal and policy discussions addressing power concentration and platform dependency in the media as a complementary piece of the larger puzzle to enable a distribution of communicative power in the media. This means to empower all news organisations to set the conditions that enable them to exert control over the spaces and infrastructures on which they operate, and fostering greater independence, autonomy, and agency in their relationships with audiences, platforms, and other stakeholders. All this needs to be done while carefully striking a delicate balance between safeguarding the media, promoting pluralism, and removing barriers, all the while safeguarding journalistic freedoms and preventing excessive regulation that could stifle innovation and create legal uncertainty.

CHAPTER

BLIND SPOTS IN REGULATING MEDIA CONCENTRATION & PLATFORM DEPENDENCY IN THE EU

6

The EU's EMFA is, amongst other goals, designed to oversee media concentration in "the online environment". While this initiative is commendable, there are noticeable gaps in how the EMFA, and other EU regulations, tackle the issues of dependency on, and the power of, platforms amidst the rising trend of media concentration. An essential aspect that needs attention is the technological power of these platforms, beyond their economic and political power. It is important to move beyond viewing platforms solely as "gatekeepers" and to address their roles as providers of infrastructure, technology, and AI, which are pivotal in regulating both horizontal and vertical media concentration. Moreover, while the EMFA intends to promote media pluralism, it overlooks the protection of small, local, and regional news entities, which are especially at risk due to the increasing concentration threats and dependencies on platforms within the media ecosystem. The article concludes with recommendations for preserving media pluralism and editorial independence, particularly in managing platform's opinion power and dominance over infrastructures and relationships, as well as digital media concentration.

1. INTRODUCTION

The EU is venturing into uncharted waters when it comes to media regulation. In addition to a wave of regulatory measures to curtail platform power with the Digital Services Act (DSA) and to protect fair competition in digital markets with the DMA, as well as the pioneering efforts to establish the first comprehensive AI legislation with the EU AI Act, the EU also turned its attention to a topic that so far sailed under the radar of the Commission: The protection of media freedom and pluralism as outlined in the European Media Freedom Act (EMFA). This is a noteworthy manoeuvre considering the EU's limited competences to regulate matters related to media pluralism and culture.⁴⁵⁷ The EMFA comes as a response to the increasing threats to media freedom and pluralism in Europe, proposing new rules aimed at safeguarding editorial independence, media pluralism, ensuring transparency and fairness, and enhancing cooperation. The legal basis to regulate in this realm is derived from concerns about the negative impacts of diminishing media freedom and pluralism on the functioning of the EU internal market (Article 114 of the Treaty on the Functioning of the European Union (TFEU)). Specifically, the concentration of media (markets) is seen as detrimental to a functioning internal market while it also

⁴⁵⁷ Irion and Valcke (n 201); Regulation (EU) 2022/2065 ("DSA"); Regulation (EU) 2022/1925 ("DMA"); Regulation (EU) 2024/1083 ("EMFA"); Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (AI Act) COM/2021/206 final [2021].

poses threats to public values and democracy. The EU's effort through the EMFA to address the issue of media concentration, a longstanding matter of concern for both scholars and industry professionals, is noteworthy. However, the question remains: How does the EMFA – or other EU regulatory frameworks – address dependencies on and the power of platforms within the growing trends of media concentration? This article sets out to explore this very question.

Previous reform attempts have demonstrated the challenges in adopting media concentration rules to the digital realities.⁴⁵⁸ Today, platforms hold significant opinion and political power within the media, stemming from their economic, algorithmic, technological, and infrastructural capabilities, positioning them as key systemic players.⁴⁵⁹ Despite this growing power potential and the increasing dependency of the news media on their infrastructures, platforms are still not sufficiently regulated by current European media laws or EU frameworks, especially regarding their role in shaping opinions and contributing to digital media concentration. The failure of existing media concentration laws is evident, with media concentration increasing despite existing ownership regulations, and threats to editorial independence from political and commercial pressures not diminishing but growing, especially amid the media's economic crisis.⁴⁶⁰ This is likely due to evolving media market structures that disrupt traditional journalism business models and further bolster platforms' economic and technological power. Neither traditional media laws, nor the evolving EU regulatory framework, has (yet) adequately addressed these facets of media concentration.⁴⁶¹ In response to this critical issue, the EU's 2020 Democracy Action Plan called for effective action against media concentration and for safeguarding media pluralism, proposing strategies for addressing media concentration "in the online environment" through the EMFA.⁴⁶²

Through the conceptual lens of opinion power and media concentration in the platform context, as will be set out in the first part, we conduct a (descriptive/normative)

458 KEK (n 6); Ofcom (n 6).

459 Dolata (n 70); Helberger, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (n 14).

460 Brogi and others (n 94) 68.

461 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55); Natascha Just, 'Governing Online Platforms: Competition Policy in Times of Platformization'; Neuberger and Lobigs (n 13); Pascal Schneiders and others, 'Meinungsmacht unter der Lupe: Ein Ansatz für eine vielfaltssichernde, holistische Plattformregulierung' in Marlis Prinzing and others (eds), *Regulierung, Governance und Medienethik in der digitalen Gesellschaft* (Springer Fachmedien Wiesbaden 2024) <https://link.springer.com/10.1007/978-3-658-42478-7_6> accessed 29 February 2024; Seipp (n 360).

462 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. On the European democracy action plan, 2020. COM/2020/790 final.

analysis of the proposed approach in the EMFA to assess media concentration and aim to answer the following question: What are the core blind spots in the EMFA in regulating media concentration in the context of platform dependency, and what are possible solutions or frameworks better suited in addressing these gaps? This research contributes to scholarly discourse by offering an analysis of media concentration in the context of platform dependency, which highlights the limitations and gaps currently addressed within the EMFA and other EU regulatory frameworks. This underscores the importance of venturing beyond traditional legal fields to address issues of opinion power and concentration within the digital media landscape.

2. UNDERSTANDING OPINION POWER & MEDIA CONCENTRATION IN A PLATFORM CONTEXT

Addressing the complexity of media concentration is not simple. Many scholars, most notably Baker, have previously highlighted the necessity of curbing media concentration to safeguard democracy, a viewpoint not only reinforced by traditional national media law and constitutional frameworks, but is also embraced at the broader EU level.⁴⁶³ The term ‘media concentration’ refers to both economic market power and media influence over the public process of opinion formation.⁴⁶⁴ This represents the dual nature of media concentration: both, economic and opinion power concentration entail substantial risks for media pluralism⁴⁶⁵. The dispersal of ‘opinion power’, which refers to the power of the media to influence public and individual opinion formation (translating to political power), is central in developing laws to preventing media concentration.⁴⁶⁶ This is because economic, journalistic, and political power are deeply intertwined, with journalistic power often originating from the economic power of media corporations, allowing for “the shaping of information, opinions, legitimization, and ideologies”⁴⁶⁷. Consequently, laws targeting media concentration strive to disperse ‘opinion power’ by overseeing the economic impacts of media market concentration and promoting core public values, particularly media pluralism. However, the challenge in regulating opinion power and media

463 Baker (n 22); In 1991 already the CJEU underlined in case *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* (C -260/89) that a monopoly is “unacceptable not only in the context of the freedom to provide services but also to ensure a range of voices are available to the public” (European Parliament, 2015).

464 Paal (n 207).

465 Just (n 293); Paal (n 194); Schulz (n 14).

466 Baker (n 22); Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14); Neuberger (n 13).

467 Knoche (n 21) 374–375.

concentration today lies in the inadequacy of traditional ownership limitations and TV audience measurement centred tools in addressing the new power dynamics brought by platforms.

The impact of platforms and platform dependency on media concentration challenges conventional regulatory approaches. Regarding media concentration and platform dependency, we aim to emphasise two core issues that align with Nielsen and Ganter's insights on platform power in the news media.⁴⁶⁸ As other research also suggested, the power of platforms in the media relates to influence over the spaces and infrastructures on which it operates as well as over the relationships between relevant actors (Han, 2019; Hartley et al., 2023; Kristensen & Hartley, 2023; Nielsen & Ganter, 2022; Poell et al., 2022). As dependency on a powerful actor can reinforce power (Han, 2019), platform dependency – both in terms infrastructures and relationships – is a suitable lens to understand growing concentration in a platform-dominated media ecosystem. Addressing these dynamics would be indispensable in any legal efforts designed to offer structural remedies to media concentration.

First, platforms' infrastructural power, underpinned by their technological and data power⁴⁶⁹, turns them into "leaders and opinion-makers in public discourse".⁴⁷⁰ Moreover, Plantin et al. (2018) define infrastructural power as power manifested through ownership and management of "sociotechnical systems that are centrally designed and controlled, typically in the invention and development phases of new technologies".⁴⁷¹ The dimension of infrastructural power, bolstered by platforms' resources, capital / wealth, and capacity for innovation, fundamentally and continuously reinforces both economic and political power.⁴⁷² These existing dynamics, as well as the manifestation and expansion thereof, are further strengthened as digital technologies and AI are changing the entire news reporting value chain, from the gathering of information through to the production, distribution, and consumption of news.⁴⁷³ In this context, platforms, formally reduced to their 'gatekeeping' role, are increasingly fulfilling the function of digital infrastructure and AI providers on which the media sector operates.⁴⁷⁴ Their impact thus penetrates the fundamental

468 Nielsen and Ganter (n 63).

469 Raul Ferrer-Conill, Helle Sjøvaag and Ragnhild Kr Olsen, 'Datafied Societies: Digital Infrastructures, Data Power, and Regulations' (2023) 11 Media and Communication 291; Sofie Flensburg and Signe Sophus Lai, 'Follow the Data! A Strategy for Tracing Infrastructural Power' (2023) 11 Media and Communication

470 Dolata (n 66).

471 Kristensen and Hartley (n 338).

472 Giacomo Corneo, 'Media Capture in a Democracy: The Role of Wealth Concentration' (2006) 90 Journal of Public Economics 37; Gerbrandy and Phoa (n 70).

473 Helberger, 'FutureNewsCorp, or How the AI Act Changed the Future of News' (n 108).

474 Cohen, 'Infrastructuring the Digital Public Sphere' (n 67).

structure of the media, fostering greater dependencies through structural and systemic power. This leads to the danger of ‘infrastructural capture’, which is defined as “circumstances in which an overseeing institution becomes incapable of operating sustainably without the physical or digital resources provided by the organizations it formally oversees”.⁴⁷⁵ In a nutshell, infrastructural power, related dependencies, and potential risks of capture, lead to hard-to-dismantle vertical power concentrations, granting platforms the ability to shape public and individual opinion. They do that not only through the control over algorithms and content consumption, but most notably in their powerful role controlling the “underlying and habituated” arrangements that shape the spaces on which the media industry operates.⁴⁷⁶ Although research on digital infrastructures and infrastructural power and dependency is growing, questions about how to achieve effective regulation and governance thereof, especially within the media dealing with its effects on pluralism and democracy, remain.

The concentration of infrastructural power in the media poses a significant obstacle to the fulfilment of core (normative and constitutional) objectives of media concentration law, which are to foster structural power dispersion in the media—a prerequisite for democracy, equality, and (structural) media pluralism. This echoes Schulz’s notion of ‘Kommunikative Chancengleichheit’, translated to ‘equal opportunities to communicate’, highlighting the importance of individual participation in political processes through free and independent public opinion formation.⁴⁷⁷ ‘Media pluralism’, though complex to define uniformly (on Media Centre et al., 2022; Tambini, 2021), is safeguarded by Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the EU Charter and focuses on regulating the democratic distribution of underlying power structures within the media.⁴⁷⁸ The described dynamics demand ex-ante rules to prevent a concentration of power proactively and preliminarily, thereby avoiding the risk of creating irreversibly harmful conditions while ensuring the opportunity to participate in the (digital) public sphere and to form opinions freely and independently.⁴⁷⁹

Expanding upon that, platforms exert significant relational power within the media

475 Nechushtai (n 306).

476 Cohen (n); Dolata (n); Gillespie (n).Cohen, ‘Infrastructuring the Digital Public Sphere’ (n 67); Dolata (n 66); Gillespie (n 76).

477 Schulz, *Gewährleistung Kommunikativer Chancengleichheit Als Freiheitsverwirklichung* (n 34); Baker (n 22); Karppinen (n 28); Seipp and others (n 255); Tambini (n 39).

478 European Commission. Directorate General for Communications Networks, Content and Technology. and others (n 55); Tambini (n 39); Karppinen (n 28).; Article 11 EU Charter of Fundamental Rights [2012]; Article 10 European Convention on Human Rights (ECHR) [1950]

479 For Example, German Constitutional Court rules on this in BVerfGE 73, 118, 159–160 (1984) 4th broadcasting decision

ecosystem. They serve as mediators between media entities and their audiences as well as with other stakeholders. The relationship is deeply asymmetrical, though, “with even large, digitally developed news media organizations feeling they have very little leverage with platforms”.⁴⁸⁰ One can only imagine the tenuous situation that leaves small, local, and regional news organisations in, particularly concerning leveraging their interests vis-à-vis-platforms. This asymmetrical power relationship triggers dependencies that further shift resources away from legacy media and other entities towards platforms, leading to greater concentration of resources and destabilising traditional business models.⁴⁸¹ In connection to platforms’ infrastructural power, media concentration may further exacerbate as small, local, and regional news media lack own resources and skill to develop tools, not only deepening dependencies but also jeopardising the development of long-term sustainability in the sector.⁴⁸² This becomes increasingly pertinent as fostering media pluralism entails establishing an environment that supports the development and sustainability of alternative and local journalism. Under the current conditions, though, these organisations find themselves in a precarious position, struggling with dwindling resources and declining (economic) sustainability driving them into ever-growing dependencies on platforms, triggering increased media concentration. These trends are also putting the constitutional and normative objectives of media concentration law to the test, specifically the aim to cultivate pluralism, which necessitates sustainable journalism as critical countervailing and scrutinising forces in democratic societies.⁴⁸³ Consequently, the independence and long-term sustainability of journalism are intrinsically linked to media pluralism. This represents a significant concern given the decline of local journalism and, subsequently, the growing concentration of power over resources within the hands of few large platforms and media organisations.

3. ANALYSIS: BLIND SPOTS IN THE EMFA

In the light of these democratic reasons to counter media concentration, disperse opinion power, and promote media pluralism, the EU outlined some specific rules on

480 Nielsen and Ganter (n 63) 93.

481 Meese (n 104).

482 Emily Bell and others, ‘The Platform Press: How Silicon Valley Reengineered Journalism’ (Tow Center for Journalism, Columbia Journalism School 2017) <<https://www.mediatechdemocracy.com/all-work/the-platform-press>> accessed 11 November 2022; Helberger, ‘FutureNewsCorp, or How the AI Act Changed the Future of News’ (n 113); Pickard, *Democracy without Journalism* (n 183); Felix M Simon, ‘Artificial Intelligence in the News: How AI Retools, Rationalizes, and Reshapes Journalism and the Public Arena’ (Tow Center for Journalism, Oxford Internet Institute, University of Oxford 2024) <<https://doi.org/10.7916/ncm5-3v06>> accessed 19 February 2024.

483 Pickard, *Democracy without Journalism* (n 183).

media concentration in the EMFA. Questions of dealing with media concentration at EU level first arose in the 1990s. Despite significant efforts to regulate media ownership concentration, notably with the 1992 Media Concentration Green Paper and a 1996 Proposal for a Directive on media pluralism, those ultimately failed.⁴⁸⁴ While these attempts primarily focused on legacy media and did not (yet) address the changing power dynamics and arrival of platforms, the EMFA is the first regulation at EU level directly addressing opinion power and media concentration. It thereby recognises platforms as wielders of opinion power (Recital 50) and even compares their role to media-like functions, which represents a major leap in previous approaches (Recital 11). The EMFA on media concentration assessments is unique as it focuses not only on the economic implications, but also emphasises the risks posed to media pluralism and editorial independence. Article 22 of the EMFA requires that member states and relevant national authorities – especially those not currently evaluating the implications of concentration on media pluralism and editorial independence and only focus on competition-related aspects – incorporate these into their national media legislation and concentration assessments. Since national authorities are responsible for the practical application and enforcement of the assessments, concerns arise regarding the effectiveness and sufficiency of democratic protections, especially in light of non-democratic trends and potentially weakening autonomy of media regulators in certain EU member states. Notably, the 2011 Hungarian media law, which was decisive in limiting the independence of media authorities, exemplifies these concerns.⁴⁸⁵ Hence, the enforcement of concentration assessments remains a responsibility of member states and is contingent on the independence of national media authorities.

Beyond these political and legal questions, we detect a number of blind spots in addressing the above-described concentration trends in relation to platforms. Particularly in Article 22 and Recitals 11 and 50, the EMFA highlights the role of the media and platforms in shaping public opinion, and the need for member states to provide rules to “ensure assessment of media market concentrations that could have a significant impact on media pluralism or editorial independence”, underscoring a significant normative evolution – what Brogi et al. call a soft harmonisation of the ‘media pluralism test’.⁴⁸⁶ While the EMFA serves as a *lex specialis* to the DSA and DMA,

484 Meijers Committee, ‘Promoting and Safeguarding Media Pluralism through EU Law’ (*Meijers Committee CM2113*); Beata Klimkiewicz, ‘Media Pluralism: European Regulatory Policies and the Case of Central Europe’ (2005) EUI Working Papers RSCAS No. 2005/19 <https://cadmus.eui.eu/bitstream/handle/1814/3368/05_19.pdf?sequence=1&isAllowed=y>.

485 Christina Holtz-Bacha, ‘Freedom of the Media, Pluralism, and Transparency. European Media Policy on New Paths?’ (2024) 39 *European Journal of Communication* 37.

486 Brogi and others (n 94).

not focusing on regulating platforms but rather attempting to fill the gaps regarding the media, the power dynamics of platforms as outlined in this article, significantly drive media concentration. The EMFA's reference to 'the online environment' in assessing opinion power makes you wonder, though, how it attempts to address the above-described dynamics. Therefore, we discuss the core blind spots in offering long-term remedies to media concentration, making a deeper analysis worthwhile.

3.1. INFRASTRUCTURAL POWER – PLATFORMS CHANGING ROLE FROM 'GATEKEEPERS' TO 'DIGITAL INFRASTRUCTURE & AI PROVIDERS'

3.1.1. Blind Spots

In addressing the issue of how platforms' infrastructural power impacts media concentration, the EMFA falls short in two key areas. Firstly, it makes a vague mention of 'the online environment' without providing detailed insights into its implications. This omission leaves the risks associated with infrastructural power and capture to media pluralism and editorial independence in the dark, raising questions about the extent to which the EMFA considers the complexities of the online landscape. Secondly, and possibly as a clarification to the first point, the applicability of media concentration assessments under the EMFA seems limited to traditional 'media service providers', thereby excluding a broader range of actors active in the media ecosystem. This limitation further restricts the EMFA's effectiveness in addressing the full spectrum of factors influencing media concentration.⁴⁸⁷

The EMFA highlights platforms as critical access points for media services, organisers, and curators of online content, as well as significant players in online advertising, which impacts the economic sustainability of news media (Recitals 4, 11, and 50). However, this view neglects the growing dependencies in journalism production and the essential infrastructures for journalism, particularly related to AI. In relation to AI, we must note that platforms are evolving beyond their traditional roles as mere 'hosting services', driven by their vast access to data, talent, capital, and users. They are increasingly taking on a new role as technology providers. Prime examples of this transformation can be seen in companies like Google and Meta, both of which are actively developing their own AI models. Viewing these platforms solely as hosting services is becoming an increasingly limited perspective and overlooks them becoming key players in AI innovation and serving as one-stop shops for audiences, advertising revenues, and cutting-edge technology.

⁴⁸⁷ *ibid*; Marta Cantero Gamito, 'The European Media Freedom Act (EMFA) as Meta-Regulation' (2023) 48 Computer Law & Security Review 105799; Seipp and others (n 255).

Merely factoring in ‘platforms’ in concentration assessments, as suggested in the European Parliament’s proposed amendments, may be equally inadequate, though.⁴⁸⁸ Accordingly, the EMFA reignites the question of how to deal with the growing power of non-legacy actors – notably platforms – and the corresponding consequences. As Brogi et al. note, “The role of large online platforms and their impact on the media market must be taken into consideration in evaluating the power of the resulting media on public opinion, but the concentrations involving the online platform themselves are not included in the scope of this article (unless a media provider is involved)”.⁴⁸⁹ According to the definition under Article 2(13) of the EMFA, at least one ‘media service provider’ must be involved and concentrations primarily involving platform companies and/or non-media entities are excluded, despite their potential impact on media pluralism and editorial independence. Although this limitation suggests a continued focus on legacy media, the EMFA adds further confusion in this regard. Recital 11 of the EMFA acknowledges the role of platforms in digitalised media markets, recognising that some “providers of video-sharing platforms or very large online platforms may exercise editorial control” and “may fall under the definition of ‘media service provider’”. The lack of clear guidance on how to interpret this in terms of concentration assessments leads to additional uncertainty.

The question how to address platforms and other non-media actors is a contentious issue, particularly considering that their evolving role extends beyond distribution and access services to encompass production, infrastructure, and technological support for news processes⁴⁹⁰. Although there is good reason to recognise the role of platforms in media concentration law (see for example Nemitz and Pfeffer, 2022), such proposals should be carefully evaluated.⁴⁹¹ As noted, defining platforms as media actors in the context of concentration assessments would “risk making the new rules very difficult to implement” and may trigger overlaps with other regulations, such as under the DMA.⁴⁹² We argue that platforms differ fundamentally from legacy media and, thus, warrant distinct treatment under media law, while current definitions within media law do not fully account for the emerging dependencies in the media ecosystem, especially on digital infrastructures, underscoring the limitations of rigid actor categorisations.

488 Mark Cole and Christina Etteldorf (2023) Research for CULT Committee – European Media Freedom Act - Background Analysis, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels

489 Brogi and others (n 94) 68.

490 Andreas Jungheer and Ralph Schroeder, ‘Artificial Intelligence and the Public Arena’ (2023) 33 *Communication Theory* 164.

491 Nemitz and Pfeffer (n 126).

492 Brogi and others (n 94).

The function of platforms within the digital media ecosystem extends well beyond their role as ‘gatekeepers’, as they control the digital infrastructure on which the public sphere – the media sector – operate.⁴⁹³ The EMFA does not reflect this, while the DSA categorise platforms as “very large online platforms (VLOPs) and very large online search engines (VLOSEs) to address societal risks associated with their operations” and the DMA as “gatekeepers”, namely companies with a significant influence and impact on the market. Cohen emphasises, while the ‘gatekeeper’ terminology signals the concerns of “structural domination of multiple, interlocking domains of economic and social activity” (...) “the infrastructure work done by dominant platforms” is broader as they “are structured arrangements in the ordering of human activity that burrow deep into the fabric of economic, social, and political life”.⁴⁹⁴ The consequences of such infrastructural power of platforms for the public sphere and opinion formation are well described by Dolata and Hoffmann-Riem.⁴⁹⁵ The provision of the digital infrastructure leads to economic, technological, and political power in their ability to define business models and influence markets, control technological and social infrastructures, as well as significantly influence the relationships with other actors in the media ecosystem.⁴⁹⁶ As a result, the functions of platforms keep expanding, beyond their hosting, gatekeeper, and distributor role, while growing in relevance as digital infrastructure, technology, and AI providers, and potentially future (news) producers.

3.1.2. Way Forward

To move forward, it is essential to acknowledge that this concentrated – horizontal as well as vertical – power of platforms gradually encroaches into the deep foundations of media structures and that this infiltration poses a risk of platforms gaining an overwhelming amount of economic, technological, and political power, thereby reshaping the media landscape in potentially irreversible ways. Platforms have become powerful actors in (almost) every facet of the media supply chain, resulting in heightened vertical consolidation. They are relevant in the creation, dissemination, and consumption of news. More and more, platforms’ overarching power shapes a range of decisions within media organisations, from commercial and strategic to editorial and economic.⁴⁹⁷ This power is compounded and maintained through control over the digital infrastructures essential to the media sectors’ functioning.

493 Dolata (n 66).

494 Cohen, ‘Infrastructuring the Digital Public Sphere’ (n 71) 27–28.

495 Dolata (n 70); Hoffmann-Riem (n 70).

496 Dolata (n 70); Hoffmann-Riem (n 70).

497 Chua and Westlund (n 358); Thomas Poell, David B Nieborg and Brooke Erin Duffy, ‘Spaces of Negotiation: Analyzing Platform Power in the News Industry’ (2022) 11 *Digital Journalism* 1391.

It is important to understand, though, that the EMFA was not explicitly crafted to tackle infrastructural or vertical power of platforms, as the DSA and DMA already cover aspects of platform power as *lex generalis*, with the EMFA acting as a complementary measure where needed.⁴⁹⁸ Therefore, it is critical to examine the DSA and DMA as indirect approaches affecting media pluralism and editorial independence, despite them not offering a tailored solution for the media.⁴⁹⁹ The DSA and DMA mark a significant change in digital market regulation, combining traditional (ex-post) competition law with ex-ante responsibilities.⁵⁰⁰ Digital markets are prone to monopolistic structures as price factors are less determinative than access, infrastructure, and network power, highlighting the need to consider infrastructural power in any attempts to regulate digital media markets or media concentration.

In this context, the DSA and DMA may have the potential to meaningfully address platform power in the media by fostering a fair and competitive digital market and creating a safe digital space, protecting fundamental rights, and establishing a level playing field. The DSA addresses media pluralism in Articles 34 and 35, where systemic risks for “freedom and pluralism of the media, enshrined in Article 11 of the Charter” should be considered in cases of risk assessment and risk mitigation by VLOPs.⁵⁰¹ These risk mitigation measures are noteworthy as they reach down into the deeper technological and infrastructural levels. Additionally, the DSA mandates transparency for platform recommender systems, promoting user choice and control (Article 27). However, the DSA does not directly address journalism’s dependency on platform infrastructures and the associated vertical concentrations. Furthermore, the DMA imposes new rules on ‘gatekeepers’, like fair access to data and services for third-party businesses, potentially lowering market entry barriers for European competitors and fostering fairer conditions. Despite the noteworthy shift of the DMA in providing ex-ante rules for enabling fairer markets, it is driven by consumer protection goals and is thereby not able to effectively address and protect the normative objectives of media concentration law – most notably, media pluralism. Additionally, it stops short of fully tackling the role of platforms as providers of digital infrastructure and AI, which the media sector increasingly relies upon. While these frameworks take steps towards harmonisation with a ‘media pluralism test’ (EMFA) and regulation of platform (DSA) and digital market power (DMA), the infrastructural power dimension of platforms remains an unresolved issue. In Busch’s (2021) words, “the current regulatory approach which focuses on market power and opinion power is too narrow

498 Brogi and others (n 94); Cantero Gamito (n 487).

499 Dreyer and others (n 99).

500 Brogi and others (n 94).

501 *ibid.*

and needs to be complemented with a third pillar that addresses the infrastructure power of digital platforms”.

To do so, Busch proposes regulating platforms as digital infrastructure providers, with (ex-ante) public interest responsibilities.⁵⁰² He correctly stresses that, despite rules to promote media pluralism – under the EMFA, but also the AVMSD before – specific regulation of the infrastructural power of platforms have been lacking so far.⁵⁰³ Our assessment confirms Busch’s that “there is a glaring gap in the emerging regulatory framework for the platform society that needs to be closed.⁵⁰⁴ Competition and media law need to be complemented by a new type of ‘platform infrastructure law’ that covers digital platforms as societal infrastructures and increasingly important actors in the area of services of general interest”. This might be an essential complementary step – in addition to the EMFA, DMA, and DSA – not just for the media industry, but also for the diversity of infrastructure providers that support the public sphere and digital markets. While vertical concentrations could be more directly tackled through such a platform infrastructure law, more research – going beyond the scope of this article – will be needed concerning the potentialities and realities of such a proposal. A potential path forward might involve acknowledging that current views on power concentration are primarily of economic and political nature, while there is an emerging necessity to consider technological power as a key factor in vertical concentration. This would entail a closer examination of the influence of technological and infrastructural power on innovation and the accessibility of essential resources needed to develop (alternative) technological infrastructures, like data, computing power, and expertise. Implementing measures such as mandatory fair negotiations, similar to traditional telecommunications regulations, along with a review of procurement and contractual terms, could serve as initial measures to dismantle the vertical concentrations that arise from the growing dominance in technology, innovation, and infrastructure. Finally, as noted by Pickard, digital journalism today is often steered by commercial and private interests – particularly following platform logics –, fostering non-commercial and publicly funded alternatives could further help counterbalance the concentrated power held by private digital infrastructure providers, redirecting a more public interest focused media sector.⁵⁰⁵

502 Busch (n 71).

503 *ibid*; Van Dijck, Nieborg and Poell (n 195) 9.

504 Busch (n 71) 20.

505 Victor Pickard, ‘Monopoly Control over Digital Infrastructures’ in Victor Pickard, *Democracy without Journalism?* (Oxford University Press 2020) 134 <<https://academic.oup.com/book/35132/chapter/299308100>> accessed 1 December 2023.

3.2. RELATIONAL POWER AND DEPENDENCIES – SUSTAINABILITY CHALLENGES FOR (LOCAL) JOURNALISM

3.2.1. *Blind Spots*

The EMFA is designed to safeguard media pluralism and editorial independence as part of concentration assessments. It mandates that member states conduct a 'media pluralism test', considering the element of economic sustainability as envisaged in Article 22(2)(c).⁵⁰⁶ However, the proposal has notable blind spots regarding the relational power of platforms and the long-term sustainability challenges confronting local journalism. Firstly, it overlooks the consequences of structural dependencies, which can lead to concentration through declining autonomy and the threat of infrastructural power, concepts that are inadequately captured by the term 'online environment'. Secondly, while Article 22 acknowledges economic sustainability, it fails to address the broader impact on journalism as a public good. For example, economically speaking, mergers may be beneficial and pass the assessment test. However, they could still further facilitate the creation of monopolistic structures, in particular through resource concentration and infrastructural dependencies. This scenario could trigger local news desertification as particularly small, local, and regional news organisations are in a weak position regarding resource allocation.⁵⁰⁷ Economically, their only option might be to merge, which overlooks the intrinsic value of (local and independent) journalism as a public good, transcending consumer demand.⁵⁰⁸ While changes brought by platforms are not the sole factor in journalism's sustainability issues, one must question how the EMFA plans to protect media pluralism and editorial independence without also defending the independence of local and regional journalism. A recent study further verifies that the economic and market difficulties confronting local and regional journalism result in commercial and political dependencies, which are not adequately offset by existing legal or policy initiatives, nor are they fully addressed by public support measures.⁵⁰⁹

The EMFA appears to adopt a narrow approach that emphasises professional service and economic activity in its scope of defining 'media service providers', potentially excluding other democratic actors such as independent journalists, bloggers, and NGOs from its protective measures. With the requirement in Article 22 of the EMFA that at least one 'media service provider' needs to be involved for media concentration assessments to apply, the EMFA may overlook various entities contributing media

506 Brogi and others (n 94).

507 Blagojev and others (n 400).

508 Baker (n 22).

509 Blagojev and others (n 400).

concentration without meeting this narrow definition. Making things even more complicated, Article 18 of the EMFA seems to delegate responsibility to VLOPs to assess whether a 'self-declared' media service provider fulfils the criteria of 'editorial independence', which places an unrealistic responsibility (but also power) on them and could further skew the power dynamic between news media and platforms. This risks leaving some journalistic actors outside the scope of EMFA's benefits, like structured dialogues with platforms. As noted by Helberger et al., the success of such structured dialogues in addressing the platform-media relationship hinges on the negotiation power balance, or "who will join the dialogue".⁵¹⁰ While large media organisations wield greater leverage in this regard, small, local, and regional media, which may actually be more impacted by interventions from platforms, could be at a disadvantage due to their lesser negotiation power. This could further deepen dependencies and negatively affect "media pluralism, journalistic resilience and independence and fair distribution of economic and opinion power".⁵¹¹ Excluding some media from the EMFA scope is described by Tambini (2021) as "the paradox of privilege," where defining 'the media' for the purpose of granting protections can inadvertently lead to media control and the establishment of an 'authorised' media with special status.⁵¹²

It seems paradoxical that legislation aimed at safeguarding media pluralism and editorial independence neglects to explicitly safeguard the most vulnerable entities. The EMFA's concentration criteria and media definitions prioritise economic and professional dimensions over a rights-based framework that could protect independent journalism as a public good.⁵¹³ Additionally, other efforts to correct the power imbalances that endanger local journalism may, in fact, inadvertently deepen these dependencies to the detriment of local news. While the EMFA cites the Copyright Directive as a tool for ensuring the financial sustainability of the media (EMFA, Explanatory Memorandum, p. 4), it overlooks how copyright reforms and publisher fees – as seen in Spain and France – could worsen power imbalance and increase dependencies that disproportionately harm small, local, and regional news media.⁵¹⁴ Beyond Europe, efforts to address the asymmetrical relationship between platforms and media, like Australia's NMBC, have been criticised for their potentially

510 Natali Helberger and others, 'Expert Opinion on Draft European Media Freedom Act for Stakeholder Meeting 28 February 2023' (*DSA Observatory*, 29 March 2023) <<https://dsa-observatory.eu/2023/03/29/expert-opinion-on-draft-european-media-freedom-act-for-stakeholder-meeting-28-february-2023/>>.

511 *ibid.*

512 Tambini (n 39); Damian Tambini, 'What Is Journalism? The Paradox of Media Privilege' (2021) 5 *European Human Rights Law Review*, 523.

513 Cantero Gamito (n 487).

514 Brogi and others (n 5).

harmful impacts.⁵¹⁵ The requirement for platforms to share revenue with news organisations falls short of addressing the core sustainability issues, nor does it present a long-term structural policy solution. It appears to reinforce the dominant market positions of both the platforms and large publishers, leading to a more consolidated media landscape.⁵¹⁶ The trend of major publishers like Associated Press (AP) and Springer entering into agreements with AI firms, including Open AI, highlights the significance of the issue in the context of AI, as the largest platforms and the largest publishers may further entrench their power. This situation could not only create further obstacles for local journalism to prosper and leverage advancements in technology and AI, but it might also prioritise short-term, opportunistic policies above sustainable, long-term solutions, thereby exacerbating the issue of media concentration.

3.2.2. *Way Forward*

One may argue that it is hardly surprising that the EMFA faces certain restrictions given its legal basis in establishing a functional internal market. However, the dual role of the media deserves emphasis. Brogi et al. underline the significance of media services both in the internal market and for democratic discourse, suggesting that recognising this dual importance is crucial for rethinking the balance between media and digital platforms.⁵¹⁷ This includes advocating for special protections and privileges for journalism. To effectively address media concentration and protect pluralism, (local) journalism need to be assigned a higher level of protection, to avoid vulnerabilities of market-driven and consumer logics.⁵¹⁸ That requires acknowledging journalism as a public good and emphasising that the news industry operates differently from typical markets, holding value even if not consumed. Journalism's societal value extends beyond competitiveness or revenue, benefiting society through well-informed citizens and scrutiny of power. In this context, Van Dijck et al. propose a shift from consumer welfare to citizen wellbeing in tackling platform power, as "in addition to being consumers and producers, users are also citizens who for their democratic and civic duties have come to depend on services offered by platform companies".⁵¹⁹ The conditions to allow local journalism to build long-term, independent, and sustainable business models need to be created in order for journalism to function as a public good, serving not consumer but citizen and democratic interest. A variety of alternative

515 Meese (n 99).

516 Feld, H. (2021, December 7). America needs a public interest approach to solving Big Tech Harms to news. Public Knowledge. <https://publicknowledge.org/america-needs-a-public-interest-approach-to-solving-big-tech-harms-to-news/>

517 Brogi and others (n 94).

518 Baker (n 22).

519 Van Dijck, Nieborg and Poell (n 195).

business models are already developing, including membership and subscription models, community-funded approaches, publicly funded media, and cooperative ownership.⁵²⁰ Initiatives such as the Public Interest News Foundation in the UK are relevant examples in promoting such models and supporting local organisations.⁵²¹

Therefore, the apparent gap within the EMFA could further incentivise member states to better meet their positive obligations towards safeguarding media pluralism.⁵²² This could involve more precise delineation of supportive and incentive-based policies aimed at bolstering local journalism, such as through subsidies or various forms of privileges and protections.⁵²³ While policies aimed at enhancing media pluralism and public subsidies generally fall under the responsibilities of individual member states, this doesn't imply the EU should remain passive. Brogi et al. advocate for an increase in funding within the 'Creative Europe' programme allocated to news media.⁵²⁴ They suggest designing programmes that encourage innovation in newsrooms, support new journalistic collaborations, investigative journalism, and local and community media initiatives. Specifically, they propose the establishment of a 'European Fund for Journalism' to ensure the long-term sustainability and independence of the journalism sector, funded for instance through a digital tax.⁵²⁵ Policy measures aimed at bolstering local journalism should also be linked to commitments to the public interest, like transparency and diversity standards, to guarantee that financing is both effective and supports democratic principles. Specifically, strategies such as requiring platforms to make payments to the news industry—through copyright reforms or mandated contributions—, or digital taxes, require some form of obligations to guarantee equitable distribution of revenue within the media sector and not leaving this to the media actors with the highest leveraging power. This could include ensuring that the funds are genuinely invested in journalism – supporting a pluralistic media landscape – or mandating publishers to “provide transparency on how they intend to allocate these funds”.⁵²⁶

In essence, to tackle the relational power aspect and dependencies within the media ecosystem that lead to increased concentration, individual partners in

520 Elda Brogi and Helle Sjøvaag, 'Good Practices for Sustainable News Media Financing' (2023) Prepared by the Committee of experts on increasing resilience of media (MSI-RES) MSI-RES(2022)08.

521 Public Interest News Foundation. <https://www.publicinterestnews.org.uk>

522 Tambini (n 37).

523 Pickard (n 170); Tambini (n 37).

524 Brogi and others (n 94).

525 *ibid.*

526 Krümel, O. (2021, February 24). Hanson-young and MEAA call for visibility of Facebook and google payments. Mumbrella. <https://mumbrella.com.au/hanson-young-and-meaa-call-for-visibility-of-facebook-and-google-payments-670190>

their relationships with platforms need to be empowered, thereby creating a counterbalance. This could be done, for instance, by balancing negotiation powers for all journalistic actors. However, future regulatory strategies must examine the legal frameworks governing these relationships, including IP and copyright law, contract law, and competition law, from a novel perspective aimed at ensuring the principle of equal opportunities to communicate.⁵²⁷ Consequently, upcoming EU impact assessments might need to more thoroughly evaluate the impact of proposed legal frameworks on the power dynamics among stakeholders and their effects on communication equality, as currently those aspects seem to be addressed incoherently.⁵²⁸ This includes considering protective measures for the more vulnerable entities, such as small, local, and regional news outlets.

Finally, policies and initiatives protecting (local) journalism are especially relevant in an era of increasing dependencies triggered by AI, posing risks of skill and resource concentration that could further render small, local, and regional news organisations less independent than their larger counterparts.⁵²⁹ Emphasising the protection of public interest and local journalism is particularly vital in times of democratic regression. Without it, there is a risk of ending up with a highly concentrated media landscape dominated by very few platforms and media companies, which could significantly influence political opinion formation. Such a scenario could have dire, perhaps even irreversible, consequences for democracy, leaving it in a fragile state.

4. MAIN TAKEAWAYS

- Increased concentration trends exacerbate the dependency of news media on platforms, particularly due to a concentration of power over resources, data, skill, and knowledge.
- The growing infrastructural power of platforms transforms their role from gatekeepers to providers of digital infrastructure and AI, further expanding their economic, technological, and political power. Technological power could be seen as the new political power in the digital economy due to its potential of further deepening (horizontal and vertical) power concentrations.
- The dependency on platforms and media concentration especially harm small,

527 Schulz, *Gewährleistung Kommunikativer Chancengleichheit Als Freiheitsverwirklichung* (n 34).

528 Dreyer and others (n 99).

529 Emily Bell and others, 'The Platform Press: How Silicon Valley Reengineered Journalism' (Tow Center for Journalism 2017); Helberger, 'FutureNewsCorp, or How the AI Act Changed the Future of News' (n 97); Simon (n 55).

local, and regional journalism, undermining their long-term independence and sustainability, which is essential for fostering media pluralism and acting as a counterbalance to media concentration ("counterpower").

- The existing strategy within the EMFA to assess media concentration fails to consider the infrastructural and vertical power dynamics within the media landscape. This suggests that imposing restrictions on specific actors is not effective in the constantly changing media landscape. Rather, regulating the relationships and power structures within media ecosystems could be a more appropriate approach. Furthermore, implementing specific rules to address 'digital infrastructure concentration' might lead to more equitable and pluralistic media ecosystems.
- Legal frameworks like the DSA, designed to address platform power in online services, and the DMA, designed as a competition law tool to foster a more competitive platform economy, are more suitable to address platform power and may indeed benefit consumers and enhance online competition for businesses, thereby helping to reduce (economic) concentration. However, these frameworks fall short in addressing the imbalance of power between platforms and news media, and they do not adequately protect local journalism, which is vital for the long-term sustainability and independence of the media sector, essential for media pluralism. This limitation also applies to other regulatory efforts that aim to redirect revenue to the news media, such as Copyright reforms – specifically the neighbouring rights for press publishers – and mandated payments (seen outside of Europe in places like Australia, Canada, and the U.S.). These measures could actually intensify platform dependency and disproportionately impact small, local, and regional news media.
- The EMFA does not explicitly address or safeguard (local) journalism, which should be interpreted as encouraging member states to enhance public subsidies, funding, incentives, and support for local journalism, acknowledging journalism as a public good. Although this falls within the purview of member states, it does not imply that the EU should remain passive. Any funding or reallocation of revenue in the media sector should, however, be subject to public interest obligations to ensure equality and diversity. Finally, the implications of legal frameworks for the relational power balance in the media need to be better scrutinised.

5. CONCLUSION

We identified two fundamental blind spots in the current EU regulatory approaches to tackle media concentration and platform dependency effectively. The first issue

pertains to platforms' infrastructural power, making them digital infrastructure and AI providers, a role that extends well beyond their current classifications as mere gatekeepers. While the DSA and DMA are relevant in adopting a structural approach to govern digital markets, they fall short in comprehensively addressing the expanding infrastructural power of platforms, which in turn, amplifies their economic and political power. Our analysis underscores that a strict, actor-centric approach to 'media' as well as to 'platforms' is insufficient for addressing media concentration due to the continuous evolution of roles within the ecosystem. We suggest that a more effective approach would involve a comprehensive examination of the structural dynamic frameworks, dependencies, and relationships, moving past mere market structures to reflect the influence of (social) infrastructural power more accurately on concentration trends.⁵³⁰ Secondly, the existing regulations overlook the impact of platform dependency and resulting media concentration on smaller, local, and regional journalism, as these frameworks remain primarily driven by economic and market principles. However, considering journalism's vital role as a public good, it demands special protections and support through public incentives or otherwise.

On a final note, in the evolving media landscape, special caution is required regarding the growing concentration trends and the transformative role of platforms, particularly with the advent of AI. Simon envisions the possibility of large platforms deploying AI-driven news services, generating their own contents by using their extensive infrastructures, thereby potentially bypassing traditional publishers.⁵³¹ This potential scenario is underscored by the concentration of infrastructural and relational power, with AI developments intensifying this concentration. Growing concentration trends are driven by the need for substantial data and computational resources, which largely controlled by platforms like Google, Microsoft, and Amazon, as noted by Murgia.⁵³² Höppner and Streatfeild highlight the significant barriers to entry in computing, data creation, and foundational AI modelling, suggesting that the rise of AI could further entrench the power of established big tech giants, making them more dominant and less open to competition.⁵³³ Additionally, AI start-ups, similar to OpenAI's early stages, often depend on VC funding or require integration into larger tech firms to gain substantial influence. Accordingly, a key aspect of big tech's dominance is their capacity to acquire competing businesses and start-ups. Economic and technological

530 Pickard (n 170); Van Dijck, Nieborg and Poell (n 182).

531 Simon, 'Escape Me If You Can' (n 62).

532 Murgia (n 310).

533 Thomas Höppner and Luke Streatfeild, 'ChatGPT, Bard & Co.: An Introduction to AI for Competition and Regulatory Lawyers' [2023] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4371681>> accessed 22 April 2024.

power is thereby translated into innovative power, enabling them to define and structure the rules and norms of the media market and of business models.⁵³⁴

Professionals in media and journalism are actively investigating the potentials that digital technologies, including AI, can offer, in a need to develop new business models and achieve efficiencies and value-added services in a fiercely competitive digital market.⁵³⁵ In this context, Helberger and Simon also warn that market forces, dependencies, and managerial strategies could amplify the push towards market-driven optimisation, potentially diminishing professional autonomy. Understanding the implications of platforms as digital infrastructure and AI providers is critical in developing future-proof concentration assessments and digital media policies capable of limiting power concentrations while putting in place specific protections for public interest and local journalism.⁵³⁶

Failing to prevent power concentrations from emerging before they can trigger potentially irreversible consequences and turning a blind eye on those entities most vulnerable, while being distracted by seemingly attractive, short-term fixes accomplishes nothing. At best, it might foster a false sense of security that these matters are being taken care of, while in the background the issue only exacerbates.

534 Dolata (n 66); Hoffmann-Riem (n 66).

535 Helberger, 'FutureNewsCorp, or How the AI Act Changed the Future of News' (n 113).

536 *ibid*; Simon, 'Escape Me if You Can' (n 62).

CHAPTER

SUMMARY OF KEY
FINDINGS

7

In this dissertation, I carried out an interdisciplinary study on how regulation addresses opinion power and media concentration. This led me to investigate the regulatory strategies intended to tackle media concentration issues. I conclude with summarising my key findings, offering insights that answer the central research question of this dissertation: How could or should platform opinion power and digital media concentration be regulated in Europe? Given the constraints of a three-year research period, there are inevitably remaining open questions to be explored. Consequently, I present outlooks for future research and acknowledge the limitations inherent to this body of work.

As examined throughout this dissertation, I conclude that opinion power shifts in the digital and platform contexts. In Chapter 3, I develop a three-level conceptualisation of opinion power in the platform world. At the individual citizens level, opinion power over individual news consumption is shifting. This affects both individual and public opinion formation, and thereby challenges normative values like autonomy, agency, privacy, and freedom of expression. The institutional newsroom level demonstrates shifting power dynamics inside news organisations, seemingly impacting the wider media sector. Given the increasing impact of offering distribution platforms, providing technology, and driving and funding digital innovations and transformations, there are several implications for normative values such as editorial independence, as well as challenges to the sustainability and resilience of journalism. Finally, the media ecosystem level takes a broader look at the consequences of systemic power and (structural) dependencies within the media, as triggered by the shifting of opinion and political power to platforms. The implications of that are far-reaching and pose a threat to media pluralism and democratic power distribution. I have chosen to develop this three-level conceptualisation of opinion power to demonstrate the varying aspects of platform opinion power and to outline the affected normative principles more distinctly. This layered approach not only highlights the threats and implications of shifts in opinion power but could also guide (future) regulatory efforts more effectively, as it highlights how these issues intersect with different actors, legal domains, and normative principles.

Chapter 4 investigates the gaps and promises of media concentration law in dealing with these new power dimensions. Here, I explore how the traditional legal tool – media concentration law – addresses these new dimensions of opinion power. I found that traditional regulatory mechanisms fall short in effectively mitigating the risks posed by platform opinion power. The overarching problem with media concentration law is that it does not (always) consider platforms and their power potential. While there are discrepancies at the national levels, the predominant

stance remains to exclude non-legacy media actors. Traditional media concentration laws, which usually focus on TV audience shares or media ownership limitations, do not adequately address the role of platforms as gatekeepers who influence access, visibility, and exposure, and as providers of technology and infrastructure that control the media's operating structures and the digital public sphere. The foundational normative principles of media concentration law, which aim to balance competition and public interest goals, still offer a valuable perspective for addressing these challenges, though.

***“Normative choices have policy consequences”*⁵³⁷**

The foundational normative principle of media concentration law is the democratic dispersal of power. This is connected to the principles of autonomy, equality, participation, inclusivity, freedom of expression, transparency, media freedom, and structural media pluralism. As clearly stressed by Nemitz and Pfeffer (referring to Heinrich Popitz arguments in “Phenomena of Power”), there is an undeniable need for a “separation of digital powers” as “the linchpin of all power control in modern society is the control of technical action”.⁵³⁸ Having that in mind, throughout my dissertation I discovered the importance of reaffirming these normative principles underpinning traditional laws on media concentration to shape future directions. That is because, traditionally, laws governing media concentration have been designed to preserve competitive markets and media pluralism and safeguard the freedom and openness of both individual and public opinion formation. Those values hold steadfast in our digital interactions and lives. However, with the evolution of the digital media landscape, it is imperative to re-affirm these objectives in regulating media concentration in the platform and digital ecosystem. Future laws addressing digital media concentration – encompassing a wide range of legal areas, but in particular media and tech policy – should continue to be guided by the normative goals discussed throughout.

The scholar Philip Napoli emphasised in a paper discussing “What is Media Policy” that media and tech policy today is inextricably intertwined, confirming the need to align the relevant normative goals.⁵³⁹ In particular, he stresses that “technology policy does not typically concern itself with, for example, ensuring that citizens have access to a diversity of viewpoints, or that we have an informed electorate,

537 Popiel (n 248) 33.

538 Nemitz and Pfeffer (n 115).

539 Napoli, ‘What Is Media Policy?’ (n 44).

or that local communities' critical information needs are being met".⁵⁴⁰ Given that the normative framework selected by lawmakers will have significant long-term implications, it becomes increasingly clear that if we want digital media governance to be steered towards public values, such as media pluralism, a clearer alignment of the normative frameworks chosen in media and tech policy is needed.⁵⁴¹ I thereby aim to offer insights for future research and policy development.

1. INDIVIDUAL CITIZEN LEVEL: PROTECT INDIVIDUAL AUTONOMY, EQUALITY, INCLUSIVITY, PARTICIPATION, FREEDOM OF EXPRESSION & PRIVACY

In an environment saturated with information, the algorithmic curation, recommendation, and personalisation of content and news plays a pivotal role in determining the individual's exposure to specific information, opinions, and viewpoints. At the individual citizen level, opinion power is shifting to actors who control such algorithms and online content exposure, hence wielding significant influence over audience reach and individual and public opinion formation. More specifically, I discussed how platforms use their algorithmic, data, and technological capabilities to steer users' online attention and behaviour, influencing both the intensity and duration of exposure to specific content and news.⁵⁴² This power significantly impacts how individuals form their opinions, which in turn shapes public discourse and affects the broader public sphere. By exercising this form of opinion power, platforms have the potential ability to influence individual and public decision-making, including in electoral contexts, thus highlighting the political component of opinion power.

In Chapter 4, I turned to the legal responses to address this dimension of opinion power. Traditional legal frameworks aimed at regulating the power of legacy media on individual opinion formation and public discourse typically involve measuring TV audience shares to assess a specific media entity's opinion power. These efforts are generally targeted at legacy media and broadcasters. Developing a user-centric approach to quantifying this new form of opinion power in the platform context, extending beyond mere TV audience shares, is needed to accurately capture the true extent of exposure and power. Creating metrics that accurately measure online

540 *ibid* 34.

541 Matthias Cornils, 'Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries' (Algorithm Watch 2020) 14.

542 This finding is confirmed in Ofcom's most recent report on online news consumption. Ofcom, 'Online News: Research Update' (Ofcom 2024).

exposure to content and news and pinpoint the influence of algorithms and platforms on these democratic processes, is highly complex.

Regulatory responses and measures are needed though as, if not regulated, platform opinion power at the individual citizen level can severely affect normative values like autonomy, equality, inclusivity, participation, freedom of expression, and privacy and increase the potential risk of opinion manipulation. Legal responses should be guided by the objectives to foster individual autonomy by ensuring transparency and enhancing control mechanisms, therefore protecting not only individual's rights but also enhance citizens' trust in news and journalism. To achieve this, some remedies could concentrate on preventing lock-ins and network effects, protecting users' data and privacy, and strengthening consumer rights. Solutions within this realm can be identified across various legal and policy domains, such as rules pertaining to data protection, privacy law, consumer law, and media law. As demonstrated throughout this dissertation, the novel EU regulatory framework does indeed already align with some of these goals. For instance, the DSA mandates that platforms with recommendation systems offer users options to tailor or influence the main algorithmic parameters, a move that promises to boost user empowerment and individual choice.⁵⁴³ The EMFA also recognises a "right for customisation" while acknowledging platforms as wielders of opinion power and gatekeepers to information and news.⁵⁴⁴

Despite these regulatory advancements, there is a continuous need to reaffirm the normative principles that should guide the regulation of platform opinion power at the individual and public level. To recap, the essence of dispersing opinion power lies in establishing equal opportunities for participation, inclusivity, and autonomy in public discourse, while protecting fundamental rights of freedom of expression, diversity, and privacy. Consequently, when formulating norms for the regulation of platforms, technologies, and infrastructures, it is imperative to consider the potential risks, including the potential exclusion of certain individuals or groups, the possibility of manipulating how people access news and information and form opinions, the degree to which they are exposed to specific content, and the shaping of the conditions and rules under which public discourse occurs. In developing effective regulation in this regard, it is vital to understand the degree of dependency on platforms in democratic opinion forming processes. Doing so requires collecting empirical evidence on individual's news consumption behaviours as well as impose

543 Article 29, Regulation (EU) 2022/2065 ("DSA")

544 Recital 11 Regulation (EU) 2024/1083 ("EMFA")

obligations and rules on platforms for how to operate this digital public sphere. Such rules pertain to obliging platforms to allow users to choose whether or not they want to be subject to personalisation, whether or not data can be collected and shared, and enabling more algorithmic transparency to better understand the metrics based on which content and news are recommended.

2. INSTITUTIONAL NEWSROOM LEVEL: PROTECT (EDITORIAL) INDEPENDENCE AND ENABLE (ECONOMIC) SUSTAINABILITY & RESILIENCE

Opinion power also shifts at the institutional newsroom level. In Chapters 3, 4, and 5, I shed light on the institutional transformations occurring within news organisations, affecting journalistic and professional values. This transformation seems to grant platforms (indirect) influence over editorial decisions, agendas, and commercial and strategic decisions within news organisations. The power shift is notably marked by increasing dependencies on platforms for technology, infrastructure, data, knowledge (like audience insights), funding, and other support schemes. In this context, it is important to highlight that dependencies in themselves are not inherently problematic and have always been a part of the media environment to varying extents. Also in the past, new organisations were dependent on (external) actors responsible for production and distribution processes. Just think of printing facilities, telecommunication networks, radio, and broadcasting. These kinds of dependencies are, however, largely regulated under telecommunications, (electronic) communications, and media law,⁵⁴⁵ while the new reality relating to platform dependency can raise issues when it clashes with the public values, including media pluralism and editorial independence.

Newsrooms are undergoing incremental but steady digital transformations and become increasingly automated, and data driven.⁵⁴⁶ Although the degree of (direct) influence of platforms on internal processes concerning production, distribution, and strategic, innovative, and commercial decision-making is difficult to assess, this dissertation emphasised that concerns about the impact of dependencies on normative values are valid. For example, in a collaborative article with Tomas Dodds, Natali Helberger, Claes de Vreese, Valeria Resendez, and myself, we explore how the implementation of audience metrics in newsrooms can influence editorial decisions

⁵⁴⁵ EU Electronic Communications Code (EECC)

⁵⁴⁶ See especially research by Diakopolpous, for instance in Diakopolous (n 62).

and agendas by prioritising topics that appeal to a “datafied audience”, whose metrics are shaped by platforms.⁵⁴⁷ This scenario highlights the possible integration of platform values into news organisations and the increasing reliance on platforms not only as distributors but also as providers of data, technologies, and metrics. By setting agendas and prioritising certain political discussions over others, the digital tools, with which platforms communicate to news media what they should focus on, become important instruments of opinion power.

Furthermore, my research shows that platforms begin to wield greater power and influence inside news organisations. This occurs as platforms enhance their role as mediators between news organisations and their audiences, acting as providers of technology and infrastructure, and as funders and innovators in journalism. Hence, as platforms increasingly control the relationships between stakeholders in the digital media ecosystem, and provide the necessary digital infrastructure, clouds, technologies, and data that news organisations rely on, there is a gradual shift in opinion power not only at the institutional level, but with implications for the broader media ecosystem level by creating vertical concentrations.

The fundamental issue in the relationship between news organisations and platforms is its asymmetrical nature and the unequal bargaining power in setting the conditions under which media can use tech. Chapter 5 of this dissertation, which involved interviews with news organisations, further uncovered that even the largest media entities do not possess adequate bargaining power when interacting with platforms like Google, Microsoft, or Meta, and are frequently limited to adopting “off-the-shelf” solutions or sign predetermined contracts. This situation influences the power dynamics inside news organisations, as both large and small ones are not only reliant on platforms for technology and infrastructure but also find themselves unable to escape this dependency due to the highly asymmetrical relationship. The disparity in knowledge, skills, data power, computing power, and other capabilities is so great that devising strategies to effectively counteract this dependency seemed unsuccessful. Instead, organisations are often forced to simply accept this new reality of dependency. However, this becomes problematic when such dependencies start to infringe upon normative principles, particularly (editorial) independence. At that point, platform power over the media becomes a way to exercise opinion power.

In Chapter 4, I explored how platform opinion power at the institutional newsroom level is regulated within existing legal frameworks. I assessed the effectiveness of

547 Dodds and others (n 64).

traditional media concentration rules in addressing potential threats arising from shifts in power and control within news organisations. Specifically, how do these evolving power concentrations impact editorial independence, sustainability, and resilience, and how could the law be adapted to address these effects? As stated, “power and control inside newsrooms are increasingly characterised by control over things that cannot be owned in the traditional sense”. Media concentration laws typically impose media ownership limits based on the assumption that having multiple and distinct owners promotes pluralism. The described digital transformations are altering the sources of power and control within news organisations, making them no longer solely definable by ownership structures. Therefore, a critical gap emerges as the control over competitive resources, such as data, technology, skill, and knowledge, within newsrooms is increasingly concentrated with platforms who manage these assets. These resources typically operate outside the conventional bounds of media ownership limitations, despite enabling platforms to wield substantial opinion and political power. Therefore, traditional limits on ownership structures, such as restrictions on foreign capital and requirements for transparency, fall short in regulating platform opinion power and digital media concentration. This necessitates enhanced efforts to reform traditional media concentration law and create effective remedies that extend beyond its traditional boundaries. Areas such as contract laws, procurement rules, copyright laws, and AI governance need updating to bolster news organisations amidst rapid technological progress and increasing dependency on platforms.

2.1. “COUNTERPOWER”

As a complementary means to regulating platform opinion power and digital media concentration, I also explored how news organisations themselves can be empowered, and what legal conditions are needed for them to build “counterpower”, as explored in Chapter 5. In light of growing power concentrations in the media, an oft discussed idea is the formation of some form of democratic “counterpower” (or “countervailing power”) to safeguard news organisations’ own interests, (professional and editorial) values, independence and autonomy, and economic viability and sustainability by enabling power dispersal. Through a blend of theoretical exploration and practical insights from 12 semi-structured interviews, I explored the “counterpower” notion in depth. The theoretical analysis helped me conceptualise “counterpower” as acts of resistance, strategies, or initiatives by various stakeholders (here focussing on news organisations) designed to deliberately confront and scrutinise platform power and dependency by gaining control over relationships and reclaiming influence over spaces and infrastructures. Viewing power as well as counterpower existing

within spaces / infrastructures and relations has been an instrumental perspective throughout this dissertation. Insights from the interviews revealed some strategies, particularly the diversification of dependencies through the development and building of own technology and datasets as well as perhaps relying on alternative providers (for instance offering higher security or privacy standards). Additionally, fostering a direct relationship based on trust with audiences emerged as a vital strategy, enhancing brand recognition, boosting subscriptions, and ultimately contributing to financial stability and sustainability.

However, the most significant finding emerged unexpectedly. Aiming for a comprehensive grasp of “counterpower” across the media sector, I reached out to a balanced mix of large, commercial, public, and small, local, and regional organisations. Yet, it was predominantly the small, local, and regional news organisations that declined participation, citing either ownership by larger entities or a lack of resources, knowledge, and time to engage in discussions on such topics. The few smaller organisations I managed to interview presented a starkly different perspective on “counterpower” compared to their larger counterparts. This highlighted a clear disparity in the capability and resources available to enact “counterpower”, along with a distinct set of challenges faced. This realisation underscored a critical flaw in the ongoing discourse on (regulating) platform dependency and media concentration: the unique circumstances of small, local, and regional news organisations are often overlooked by the very discussions purported to protect “media pluralism” and journalism, exemplified by the shortcomings in the EMFA in addressing the needs of these local entities. Alarming, instead of advocating for a balanced and pluralistic media sector, some larger organisations argued in favour of loosening concentration controls, enabling them to merge or acquire smaller and regional entities, thereby capturing local audiences; thus, concentrating power and resources. Their rationale – to amass power within legacy media as a “counterweight” or “counterpower” to platform power – is understandable but fundamentally misconstrues the objective of media concentration control, which aims to distribute power within the media landscape and prevent the dominance of any single viewpoint, whether by large media organisations or platforms. The research presented across the chapters of this dissertation underscores the necessity to not only reconsider traditional approaches to regulating media concentration but also emphasises the need for a more refined understanding of the implications of dependencies and the specific challenges confronting local journalism, which further jeopardise media pluralism.

3. MEDIA ECOSYSTEM LEVEL: CREATE TRANSPARENCY, ENABLE DEMOCRATIC DISPERSAL OF POWERS, AND PROTECT (STRUCTURAL) MEDIA PLURALISM & FREEDOM

Finally, in examining the role of platforms at the broader media ecosystem level, it became evident throughout this dissertation that structural dependencies facilitate “systemic power” by influencing other actors in a democracy, a concept further explained by Natali Helberger.⁵⁴⁸ Platforms’ capacity to create and maintain dependencies, especially in controlling technology and infrastructure, and “make and break relationships”, positions them as influential political players. As indicated, platforms exercise considerable influence at both individual and institutional levels by creating and sustaining dependencies. They not only wield power over public and political discourse by controlling the forums where these discussions occur but also have power to decide over the inclusion or exclusion of voices, exerting considerable discretionary power to discriminate. This has repercussions for the distribution of power within the broader media ecosystem and impacts values like democratic power dispersal and structural media pluralism.

Platforms possess considerable political power, which has been further strengthened by their technological and infrastructural capabilities. By analysing the wider media ecosystem, the link between economic, opinion, and political power becomes clear as platforms are more than “gatekeepers” and turned into political actors with their own agendas. Systemic power and structural dependencies enable them to advance and protect these interests effectively. As explored throughout this dissertation, this is evident in instances like the events around the NMBC in Australia and copyright reforms in Spain and France where platforms systematically used their political influence to protect own (commercial) interests.⁵⁴⁹

As I explored in Chapter 4, traditional concentration controls fail to fully recognise the systematic and political dimension of platform opinion power. That said, few national media laws acknowledge the shifting power dynamics, with some still focussing solely on competition factors and neglecting associated broader public interest concerns. The EMFA is noteworthy for mandating that member states include a “media pluralism test” in concentration assessments. Yet, as I discussed in Chapter 6, it fails to fully address the complexities of vertical integration, infrastructural power, and platform

548 Helberger, ‘The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power’ (n 14).

549 Garrahan M and Khan M, “Google Criticised for Push against EU Copyright Reform” (June 26, 2018).

dependency. To meet the normative goals of media concentration laws described in the introduction, it is essential to safeguard “traditional” values like media pluralism, fair competition, and ownership transparency as well as to incorporate “newer” values such as privacy, data protection and algorithmic transparency. Possible areas for exploration involve developing legislation that tackles digital media concentration by focussing on legal strategies to curb concentration in infrastructure, technology, and AI, and refining traditional approaches within competition and media law to adopt to the changing set of challenges and threats.

3.1. EU EFFORTS TO REGULATE PLATFORM OPINION POWER & DIGITAL MEDIA CONCENTRATION: THE EMFA, DSA & DMA

In Chapter 6, I examined the regulatory measures at the EU level, particularly focusing on the EMFA, the DSA, and the DMA, and their role in managing media concentration within a platform environment. The EU has the capacity to indirectly influence media pluralism, utilising both media-specific instruments like the AVMSD and the EMFA, as well as non-media-specific instruments. The latter includes the DSA and the DMA, which play a vital role in regulating platform power and digital market monopolisation. I argue in Chapter 6 that, while the EU acknowledges the dangers of media concentration in the EMFA, its broader regulatory strategy falls short in tackling the issues effectively.

First, it fails to address infrastructural power of platforms. The expanding infrastructural power of platforms seems to shift their role from mere gatekeepers to that of infrastructure, technology, and AI providers, thereby amplifying their economic, technological, and political power. I concluded that technological power increasingly represents a form of political power, with the potential to further consolidate power both horizontally and vertically. Although the EMFA is not specifically designed to address platform power, it does tackle some aspects of platform power, particularly by acknowledging platforms’ ability to exclude journalists and media organisations (Article 18), as well as their role in opaque audience measurement systems (Article 24).⁵⁵⁰ Nevertheless, other legal frameworks like the DSA and DMA are more suited to address platforms. These legal instruments aim to regulate platform power, thus protecting consumer rights and promoting competition in digital markets, thereby addressing the economic dimensions of media concentration. The DSA and DMA both reference publishers and acknowledge “media pluralism” under the systemic risks provision, with the DSA particularly emphasising fundamental rights

⁵⁵⁰ Article 18 and Article 24, Regulation (EU) 2024/1083 (“EMFA”)

(see Articles 34 and 35). Nonetheless, the primary emphasis remains on general economic power, with no explicit commitment to protecting journalism and media pluralism online. While this is partly due to the limited competencies at the EU level, maximum harmonisation may also hinder more culturally oriented interventions at the national level, potentially compromising the EU's cultural diversity.

Therefore, a second significant shortcoming in the current EU regulatory framework is its ineffectiveness in protecting local, regional, and public interest journalism. The latter requires legal protections beyond market and consumer logics, for which reason the EMFA initially appeared as a promising avenue. Protecting media pluralism and local journalism is essential, as true diversity involves meeting the critical information needs of minority and local communities through dedicated journalism. A notable inconsistency in the EMFA is its acknowledgment of platforms as key influencers in opinion formation, similar to traditional media (Recital 11), yet their role in media concentration assessments is still largely unspecified.⁵⁵¹ Despite initial promises, the EU continues its economic and competition-driven approach to regulating platforms and digital media. In short, the EU's current strategy seems to create something like an "unexplored territory" that lies between regulating platform and gatekeeper power and traditional media concentration laws and policies aimed at protecting media pluralism and journalism. However, it falls short in effectively tackling the crucial issues that exist in this space between, which requires an approach more tailored to the public interest concerns outlined throughout this dissertation.

4. CONCLUSION

In summary, as evidenced across three levels, opinion power is shifting towards platforms, resulting in new forms of media concentration, primarily due to the changing sources of opinion and political power. I found the following new power dynamics and dimensions facilitating these power shifts: (1) The expanding algorithmic control and the steering of access and exposure to information; (2) The ability to access user data and communication contents; (3) The control over communication and digital infrastructures; and (4) The knowledge, wealth, and capital to drive future innovation and developments in technology and AI. In sum, my research shows that traditional media concentration law is not capable of effectively addressing platform opinion power because it largely disregards these new sources of opinion power. However, its underlying normative principles can serve as a foundation from

⁵⁵¹ Recital 11, Regulation (EU) 2024/1083 ("EMFA")

which to develop new strategies to ensure a fair distribution of opinion power. These principles remind us that addressing opinion power requires us to not only assess economics and competition, as is the prime focus of current EU efforts to reign in platform power, but also public interest concerns such as media pluralism.

CHAPTER
CONCLUSION & WAY
FORWARD

8

Based on my findings, the normative principles that underpin traditional media concentration law can serve as a valuable source for crafting remedies tailored to the digital media ecosystem. More specifically, I would like to highlight two key points of departure finding their basis in traditional media concentration law. First, distributing power over the spaces, infrastructures, and relationships that shape the digital media ecosystem. Second, public interest driven measures to promote media pluralism, including the protection of journalism as a “public good”. In the context of increasing structural dependencies and asymmetries discussed throughout the dissertation, I consider these two aspects as indispensable. On a final note, I aim to briefly shed light on how these foundational principles can guide regulatory and governance strategies to address the expanding use and implementation of AI in the media.

1. POWER DISTRIBUTION OVER SPACES, INFRASTRUCTURES & RELATIONSHIPS

First and foremost, based on the normative principle of a democratic dispersal of (communicative) power, as analysed prominently by C. Edwin Baker, digital media concentration regulation should target the underlying power dynamics that influence the receiving of content, and the conditions and spaces on which opinion formation takes place. That includes, on one hand, direct distribution channels, be it media or platforms, and, on the other hand, the technological infrastructures. This dissertation discussed how these dynamics unfold at various levels. At the individual citizen level, social media platforms, search engines, chatbots, and conversational agents shape access to content and the conditions under which individuals and the public interact and form opinions. At the institutional newsroom level, the focus is on the platforms’ infrastructures and technologies that support the operations of news organisations and the broader media ecosystem. This infrastructural power enables platforms to increasingly dominate the media ecosystem by fostering dependencies and asymmetries, which in turn lead to growing horizontal and vertical concentrations, as “infrastructures are technical-social assemblages infused in politics and power relations”.⁵⁵² For that reason, as Van Dijck et al. argued, “power concentration and asymmetry can only be remedied if we widen the scope of legal frameworks to include the sociotechnical and political-economic relations in which these frameworks are

552 Benedict Kingsbury and Nahuel Maisley, ‘Infrastructures and Laws: Publics and Publicness’ (2021) 17 Annual Review of Law and Social Science 353.

embedded".⁵⁵³ The normative foundations of media concentration law support this claim. Accordingly, the power over infrastructures triggers a potential to manipulate communication, influence media operations, and shape the media ecosystem, which justifies and demands regulatory measures. It is not about actual abuse or intent to abuse power but about preventing anyone from holding so much power that could disrupt democratic media functions.⁵⁵⁴ Accordingly, regulatory measures should focus on dispersing power over infrastructure, technology, and data, which are closely interconnected and afford one another. Some of these aspects are picked up by the DMA and DSA, as argued in Chapter 6, but especially the infrastructural power dimension of platforms so far is not sufficiently recognised. Hence, something like an infrastructure-focused concentration law could enable a more democratic digital media ecosystem and digital public sphere.

As discussed throughout Chapter 6, I want to re-emphasise Julie Cohen's suggestion to shift focus from traditional notions like ownership and control to questions about how "platformized communication systems and their associated capabilities for data-driven patterning configure and govern the digital public sphere", thereby paying attention to the infrastructures that determine how communication and content is "transmitted, received and recirculated".⁵⁵⁵ Important to note, infrastructures in this context should be interpreted in a wide sense, including data, cloud and organisational infrastructures. It means to understand, assess, and mitigate power concentration in the "underlying and habituated" arrangements that shape the spaces on which the media industry operates rather than within the actors themselves.⁵⁵⁶ Also Christopher Busch, who describes platforms as "systemic infrastructures" endowed with systemic and political power, proposes an infrastructural perspective that would allow regulating power without categorising actors strictly as "media" and without being overly restrictive by limiting their roles to just "access, distribution services" and "gatekeeping" functions. To understand how control over media through infrastructural power manifests, further interdisciplinary research is required.

The normative foundations of traditional media concentration laws can provide a useful starting point for this investigation. Acknowledging the need for further research, it is important to explore how the integration of platforms' infrastructural and technological power, which leads to vertical media concentration, can be addressed by developing new measurement approaches. The objective is to

553 Van Dijck, Nieborg and Poell (n 195) 2.

554 Neuberger (n 13).

555 Cohen, 'Infrastructuring the Digital Public Sphere' (n 71).

556 *ibid* 11.

understand not only who owns a media organisation but also who holds power over the systems that affect how news is accessed and distributed as well as the terms and conditions under which a news organisation operates. Therefore, in developing such an approach to measure vertical concentration and incorporate infrastructural power as assessment components we need to be able to better comprehend how key processes in the media supply chain are affected by digital transformations, particularly through interdisciplinary communication science, journalism, and media studies research. Based on that, a clearer understanding of the use of specific tools and technologies, and the corresponding providers and “owners” will help to better understand the sources of control over infrastructural and technological capabilities within a news organisation.

To delve a bit deeper, we must identify the key tools used in news production and editing, their purposes, and who controls them.⁵⁵⁷ Additionally, from both institutional and individual perspectives, what are the primary tools for news distribution, access, and consumption?⁵⁵⁸ For example, what proportion of news distribution and consumption is dominated by a single provider? At the commercial, organisational, and strategic levels, how do specific platforms exert influence? For instance, who funds innovation and digital transformation projects, and who provides the infrastructures supporting the operation of the media sector?⁵⁵⁹ I recognise that there are numerous unresolved issues with such an approach, including acquiring all the relevant information and data needed for these assessments. However, the key point is that developing strategies identifying the dominant providers and controllers of infrastructure and technology across the media supply chain is a valid starting point to enable a genuine dispersal of power in the digital media ecosystem. As platforms expand their roles from gatekeepers and distributors to providers of infrastructure, technology, and AI, as well as funders and investors in both the media and AI start-up sectors (consider Microsoft and OpenAI as an example), it becomes crucial to develop a sufficiently broad strategy that measures and curtails both horizontal and vertical power within the media sector and public sphere.

557 E.g. Tools: Generative AI, Automated Journalism (Robo-Journalism), Audience Metrics, Predictive Analytics, Fact-checking

558 E.g. Content Personalisation, Recommender Systems, Conversational Agents, Social Media, Search Engines, News Aggregators, Voicebots / Chatbots

559 E.g. Funding, Digital Infrastructure, Internet access, Software, Hardware, Cloud Infrastructure, Data Storage, Lobbying, Investments

2. PROMOTE MEDIA PLURALISM, PROTECT LOCAL JOURNALISM & JOURNALISM AS A PUBLIC GOOD

Media pluralism is a crucial goal in regulating media concentration, emphasising the need for diverse journalistic institutions – local, regional, community, and minority – to cater to audience and democratic needs. The logic is clear: even when a media conglomerate produces “local content”, a form of “editorial concentration” inevitably occurs.⁵⁶⁰ Media content created centrally and distributed locally diminishes opinion diversity. Thus, having local or regional branches within large media conglomerates, purportedly serving “local, regional, or community/minority interests” (internal pluralism), falls short. What’s truly required is genuinely independent local journalism to ensure a real diversity of opinion.

This dissertation illustrates how current dynamics are driving increased concentration, imperilling media pluralism with particularly stark effects on local and regional journalism. Moreover, existing regulatory frameworks are proving inadequate in safeguarding the integrity and diversity of local and regional journalism. Major factors contributing to the severe impact on local journalism are the dependencies and asymmetries, along with their limited capacity to counter these dependencies and develop sustainable independent business models. We are witnessing not only a shift of power from legacy media to platforms but also a growing disadvantage for local and regional news within the traditional media sector. Larger news organisations are increasingly aligning with platforms and AI companies, securing deals that side-line local and regional news outlets and risk creating local news deserts.⁵⁶¹

We need journalism – including local, regional, investigative, and public interest journalism, which is widely recognised as a public good, and not “just” news. Measures to promote media pluralism, for instance in the form of public incentives like state aid, direct or indirect subsidies, and tax breaks or exemptions, have been integral to media concentration law.⁵⁶² Nevertheless, these protections seem ineffective to truly protect journalism as a public good and withstand market and competition forces. Accordingly, as policy and law-making have largely neglected local journalism and existing policies do not address the structural dependencies that are at the core of the issue effectively, I want to stress the following. As mentioned repeatedly throughout

⁵⁶⁰ Perusko (n 232).

⁵⁶¹ European University Institute., *Uncovering News Deserts in Europe: Risks and Opportunities for Local and Community Media in the EU*. (Publications Office 2024) <<https://data.europa.eu/doi/10.2870/741398>> accessed 9 April 2024.

⁵⁶² Tambini (n 37).

this dissertation, local and regional journalism seems to be disproportionately affected by platform dependency. A clear example is the economic challenges these outlets face when platforms such as Meta and Google reduce their funding for journalism. This reveals a deeper, structural problem. In recent years, significant financial support, and investment in innovation for local news have primarily come from big tech, with governments seemingly taking a backseat. This dynamic has led to local journalism becoming heavily dependent on platforms, hindering its ability to independently develop sustainable business models and strategies for innovation. I discussed the precarious position in which (local) journalism finds itself throughout this dissertation and find this one of the most significant flaws in current regulatory approaches. Policy and law need to truly address the underlying structural dependencies, rather than promising short-lived financial solutions. At this point, the normative perspective of integrating the protection of media pluralism as a public value and the protection of local and regional journalism as a public good, is still neglected by European lawmakers.

In this context, I propose to expand upon the ideas and analysis from Chapter 5, where I delved into the concept of “counterpower” and its practical applications, to illuminate another potentially valuable and complementary approach. The concept of “legal mobilization” as counterpower, discussed by Jeff Handmaker and Sanne Taekema, presents a promising approach to enhancing public values such as diversity and inclusivity, addressing deficits in the rule of law, and protecting fundamental rights.⁵⁶³ Legal mobilization involves law-based, civic-led advocacy that highlights the role of democratic actors and utilises strategies like legislative lobbying, court-based or strategic litigation, and broad-based campaigning to challenge inequalities and tackle the “David versus Goliath scenario” – often used to illustrate the power imbalances between media and platforms.⁵⁶⁴ This approach finds its legitimacy in constitutional law and the principle of separation of powers, serving as a means to distribute power and prevent its concentration, targeting not just governments but also corporations. Further research in the field of socio-legal studies would be necessary to advance this concept for the context of countering media concentration, though. To ensure that “mobilizing legal values can serve as a form of counterpower” we first need to identify the legal values at stake, identify the key civic actors involved, such as philanthropic organisations, journalistic collaborations, and NGOs, and determine which legal instruments are relevant for “strategic litigation” to strengthen to role of the courts.⁵⁶⁵

563 Jeff Handmaker and Sanne Taekema, ‘O *Lungo Drom* : Legal Mobilization as Counterpower’ (2023) 15 *Journal of Human Rights Practice* 6.

564 *ibid* 12.

565 *ibid* 20.

Although this requires more research, two practices of “legal mobilization” could be relevant to promoting public values.

First, strategic litigation could play a crucial role in enforcing existing laws, contributing to legal interpretation, and influencing political decisions. The EU Charter, for instance, can serve as a valuable legal source for strategic litigation, protecting, inter alia, media pluralism. This approach provides a method to better highlight and address the specific threats to local and public interest journalism, which in turn jeopardise media pluralism. Moreover, increased litigation that underscores the necessity of protecting media pluralism could aid in developing case law for interpreting the EU’s new legal frameworks, particularly the EMFA, DSA, and DMA. This is especially important given the significant litigation anticipated from big tech companies. In Chapter 6, I highlighted the importance of enforcing the media pluralism test in concentration assessments by national media authorities and the absence of clear guidelines for its implementation. Developing case law on the interpretation of the test (or the EMFA more generally) in EU courts (notably the CJEU) would be appropriate to assure that the EMFA is not merely a “dead letter”.⁵⁶⁶

Second, “media exposure and engagement” – considered a key practice of “legal mobilization” – can be used to amplify the voices of civic advocates who challenge state or private actors legally.⁵⁶⁷ This strategy effectively shapes public opinion by emphasising journalism’s role as a public good, particularly at local and regional levels, and fosters effective enforcement through raising awareness of the threats triggered by digital media concentration. Furthermore, it prompts a critical examination of the societal and democratic responsibility of large commercial and public media entities (with far wider reach and opinion power) to uphold and represent public values, as explored in this dissertation, rather than yielding to the economic and political interests of the most powerful. In a nutshell, despite demanding further research, the direction of policy and regulatory solutions in this realm must not be decided by large platforms and large media conglomerates behind closed doors but should facilitate equal representation of interests – also those of local and regional media as well as civil society organisations – in the policy making processes.

⁵⁶⁶ Kati Cseres and Judit Bayer, ‘Without Enforcement, the EMFA Is Dead Letter’ (*Verfassungsblog*, 13 June 2023

⁵⁶⁷ Handmaker and Taekema (n 498). 11.

3. CONCLUDING REMARKS

“Make no mistake – AI is owned by big tech”⁵⁶⁸

In its beginning phase, this dissertation’s prime focus was on platforms in their gatekeeping function. The unprecedented pace at which newly evolving AI tools have infused the media landscape and affected journalistic processes shifted that focus. As I have argued, a narrow definition of actors – media or platforms – is misguided under the circumstances we observe. Platforms evolve into indispensable AI and infrastructure providers, moving beyond their role as gatekeepers. The significance of this for media concentration is that the ownership of AI is also heavily concentrated, with a small group of companies possessing the large majority of AI capabilities. As AI becomes more prevalent in journalism, it risks entrenching the already concentrated power structures in AI into the media. As Simon stated in the context of concentration of control over AI, “structural dependencies around AI will likely chip away at news organizations’ autonomy — potentially undermining their business models and thus their long-term viability — leading many to reconfigure themselves in ways that bring them yet closer to the logics of the technology sector and platform companies”.⁵⁶⁹ The danger here consists in the difficulty in reversing concentrations of power triggered by control over infrastructure and AI, once embedded in media structures.

Advancements in AI appear to generate new concentration dynamics and amplify existing ones, particularly evident in the challenges faced by local and regional news within the context of AI implementation and the pursuit of fair and equitable conditions for them. Large media entities are increasingly forming partnerships with platforms and AI firms, tapping into their bargaining power, while local and regional outlets are missing these opportunities. This discrepancy is likely to worsen existing imbalances, impacting both the dynamics between news organisations and platforms and the relationship between large and local media entities. This issue is highlighted in current negotiations over access to training data for large language models (LLMs), where firms like OpenAI tend to negotiate exclusively with larger outlets.⁵⁷⁰ While partnerships could help protect media organisations’ interests, maintain a balance of

568 Kak A, Meyers West S and Whittaker M, ‘Make No Mistake-AI Is Owned by Big Tech’ (MIT Technology Review, 5 December 2023).

569 Simon, Felix M., ‘Artificial Intelligence in the News: How AI Retools, Rationalizes, and Reshapes Journalism and the Public Arena’ 39 <<https://academiccommons.columbia.edu/doi/10.7916/ncm5-3v06>> accessed 28 May 2024.

570 Notable examples are major publishers like Associated Press (AP) and Springer entering agreements with AI firms, such as OpenAI. E.g. Thomas D and Murgia M, ‘Axel Springer’s OpenAI Deal Sets New Template for Media Ties with Big Tech’ (December 15, 2023).

power in the AI context, and safeguard copyrights, this approach has a fundamental flaw. I concur with Rasmus Kleis-Nielsen and Sarah Anne Ganter's observation in their book "Platform Power" that partnerships are frequently driven by short-term, opportunistic motives and lack long-term, structural solutions. It is understandable that there is a desire to address copyright issues, but policymakers, industry, and other stakeholders need to be cautious about the potential impact of such strategies on media pluralism. Therefore, returning to my starting point, media pluralism and the protection of local and regional journalism must occupy a more central role in discussions about how to interact with AI companies, regulate them, and implement AI within news organisations, especially as dependencies and concentrations in the AI realm are expected to increase.⁵⁷¹ In summary, the normative principles found in traditional media concentration law can provide relevant guidance to address AI concentration. AI governance for the media should be steered by normative principles aimed at distributing power in the digital media ecosystem and the public sphere to safeguard media pluralism, support local and regional journalism, and uphold journalism as an essential public good. It is fundamental to remember that without a dispersal and separation of power and without media freedom and media pluralism, democracy cannot thrive.

Let me conclude with a few final thoughts. This dissertation discussed how society and the media are deeply immersed in digital transformations, marked by increasing use of social media and growing dependency on platforms, technology, and big tech companies for digital tools and infrastructures. These changes profoundly affect not only media operations but also how citizens inform themselves, shape opinions, discuss viewpoints, and choose communication methods. Over the years, these companies have evolved from platforms for sharing content to influential political actors, significantly impacting societal interactions and (political) decision-making. Different companies wield power in various domains and to varying degrees, highlighting the challenges in following an actor-specific approach in regulation.⁵⁷² Despite more than a decade of digital developments and transformations, leading to severe societal and institutional changes, as well as political and legal efforts to protect economic interests and fundamental rights, (recent) regulatory solutions still fail to adequately address the growing power over opinion formation and the resulting concentrations in the digital media ecosystem. This is problematic, as a concentrated media ecosystem cannot fulfil its democratic ideals of being free and

571 Simon, 'Escape Me If You Can' (n 58).

572 In particular: social interactions (social media platforms, especially Instagram, TikTok), data storage and infrastructure (cloud infrastructures such as Amazon/AWS), information access (through search, most commonly, Google), and technological and AI development (Microsoft)

pluralistic. Therefore, the research conducted as part of this dissertation underscores the urgent need for more effective and normative-driven regulatory frameworks to manage the profound power of these actors on media and society. In moving forward, this dissertation has sought to construct a robust theoretical framework to deepen our understanding of platform opinion power and digital media concentration. Therefore, this research adds another critical perspective to the ongoing debate by contributing a systematic assessment framework and potential points for intervention, highlighting the need for legal and governance approaches based on normative values, as outlined. The path forward requires an interdisciplinary investigation into several legal areas, including media and tech policy, infused by insights from communication science, journalism studies, and platform studies, as well as in close collaboration with industry and the media sector specifically. Such comprehensive exploration is vital for gathering empirical evidence that will enable us to craft both regulatory and non-regulatory strategies, ultimately shaping a future where journalism and democracy can thrive in harmony with technological advancements.

REFERENCES

Literature

Ainge Roy E, 'From Police Beat to Stuff Owner: Meet Sinead Boucher, New Zealand's Newest Media Mogul' *The Guardian* (23 June 2020) <<https://www.theguardian.com/world/2020/jun/24/from-police-beat-to-stuff-owner-meet-sinead-boucher-new-zealands-newest-media-mogul>>

——, 'New Zealand's Stuff Newspaper Group Joins Facebook Boycott as "Experiment"' *The Guardian* (6 July 2020) <<https://www.theguardian.com/world/2020/jul/06/new-zealands-stuff-newspaper-group-joins-facebook-boycott-as-experiment>>

Ananny M, 'Ch. 5 "Presence of Absence: Exploring the Democratic Significance of Silence"', *Digital Technology and Democratic Theory*, Lucy Bernholz (ed.), H  l  ne Landemore (ed.), Rob Reich (ed.) (University of Chicago Press 2021) <<https://doi.org/10.7208/chicago/9780226748603.003.0006>>

Anderson C, 'Between Creative and Quantified Audiences: Web Metrics and Changing Patterns of Newswork in Local US Newsrooms' (2011) 12 *Journalism* 550

Araujo T and van der Meer T, 'News Values on Social Media: Exploring What Drives Peaks in User Activity about Organizations on Twitter' (2020) 21 *SAGE* 633

Armitage C and others, 'Study on the Impact of Recent Developments in Digital Advertising on Privacy, Publishers and Advertisers.' <<https://op.europa.eu/en/publication-detail/-/publication/8b950a43-a141-11ed-b508-01aa75ed71a1>>

Associated Press (AP), 'Sweden Public Radio Exits Twitter, Says Audience Already Has' *Associated Press (AP)* (18 April 2023) <<https://apnews.com/article/twitter-sweden-public-radio-musk-038a4e4a2555c66f82b6eb960e64e257>>

Bagdikian B, *The Media Monopoly* (Beacon Press 2000)

Baker EC, 'Media Concentration: Giving up on Democracy' (2002) 54 *Florida Law Review* 839

——, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press 2007)

Beckett C and Yaseen M, 'Generating Change A Global Survey of What News

Organisations Are Doing with AI' (JournalismAI Polis 2023)

Bell E and others, 'The Platform Press: How Silicon Valley Reengineered Journalism' (Tow Center for Journalism, Columbia Journalism School 2017) <<https://www.mediatechdemocracy.com/all-work/the-platform-press>> accessed 11 November 2022

Bernholz L, Landemore H and Reich R (eds), *Digital Technology and Democratic Theory* (University of Chicago Press 2021)

Bhat PI, 'Empirical Legal Research: Nature, Features, and Expanding Horizons', *Idea and Methods of Legal Research* (2020)

Bietti E, 'A Genealogy of Digital Platform Regulation' (2023) 2023 Georgetown Law Technology Review 1

Blagojev T and others, 'News Deserts in Europe: Assessing Risks for Local and Community Media in the 27 EU Member States' (2023) EUI, RSC, Preliminary Report

Bodó B, 'Selling News to Audiences – A Qualitative Inquiry into the Emerging Logics of Algorithmic News Personalization in European Quality News Media' (1054) 7 *Digital Journalism* 1054

Bossio D and others, 'Australia's News Media Bargaining Code and the Global Turn towards Platform Regulation' 14 *Policy & Internet* 136

Brantner C, Rodríguez-Amat JR and Belinskaya Y, 'Structures of the Public Sphere: Contested Spaces as Assembled Interfaces' (2021) 9 *Media and Communication* 16

Brogi E and others, 'The European Media Freedom Act: Media Freedom, Freedom of Expression and Pluralism' (STUDY Requested by the LIBE committee, 2023)

Brogi E and Sjøvaag H, 'Good Practices for Sustainable News Media Financing' (2023) Prepared by the Committee of experts on increasing resilience of media (MSI-RES) MSI-RES(2022)08

Busch C, 'Regulation of Digital Platforms as Infrastructures for Services of General Interest' <https://library.fes.de/pdf_files/wiso/17836.pdf>

Busch C and others, 'Uncovering Blindspots in the Policy Debate on Platform

Power: Final Report.' (European Commission) <[https:// platformobservatory.eu/app/uploads/2021/03/05Platformpower.pdf](https://platformobservatory.eu/app/uploads/2021/03/05Platformpower.pdf)>

Cantero Gamito M, 'The European Media Freedom Act (EMFA) as Meta-Regulation' (2023) 48 *Computer Law & Security Review* 105799

Cappello M (ed), 'Media Pluralism and Competition Issues' <<https://rm.coe.int/iris-special-1-2020en-media-pluralism-and-competition-issues/1680a08455>>

Castells M, 'Communication, Power and Counter-Power in the Network Society' (2007) 1 *International Journal of Communication* 238

Centre on Media Pluralism and Media Freedom, Centre and others, 'Study on Media Plurality and Diversity Online.' <<https://op.europa.eu/en/publication-detail/-/publication/475bacb6-34a2-11ed-8b77-01aa75ed71a1>>

Cheney-Lippold J, *We Are Data: Algorithms and the Making of Our Digital Selves* (New York University Press 2020) <<https://www.degruyter.com/document/doi/10.18574/nyu/9781479888702.001.0001/html>> accessed 17 April 2024

Christin A, *Metrics at Work: Journalism and the Contested Meaning of Algorithms* (Princeton University Press 2020)

Chua S and Westlund O, 'Platform Configuration: A Longitudinal Study and Conceptualization of a Legacy News Publisher's Platform-Related Innovation Practices' (2022) 1 *Online Media and Global Communication* 60

Cohen J, 'What Privacy Is For' (2013) 126 *Cambridge: Harvard Law Review* 1904

—, 'Turning Privacy Inside Out' (2018) 20 *Theoretical Inquiries in Law* 17

—, 'Infrastructuring the Digital Public Sphere' (2023) 25 *Yale J.L. & Tech.*

Corneo G, 'Media Capture in a Democracy: The Role of Wealth Concentration' (2006) 90 *Journal of Public Economics* 37

Cornils M, 'Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries' <<https://algorithmwatch.org/de/wp-content/uploads/2020/05/Governing-Platforms-legal-study-Cornils>>

May 2020 AlgorithmWatch.pdf>

—, 'Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries' (Algorithm Watch 2020)

Cseres K and Bayer J, 'Without Enforcement, the EMFA Is Dead Letter' (Verfassungsblog, 13 June 2023) <<https://verfassungsblog.de/without-enforcement-the-emfa-is-dead-letter/>>

Curran J, *Media and Democracy* (1. publ, Routledge 2011)

—, *Media and Power* (0 edn, Routledge 2012) <<https://www.taylorfrancis.com/books/9781134900381>> accessed 4 January 2024

De-Lima-Santos M-F and others, 'Google News Initiative's Influence on Technological Media Innovation in Africa and the Middle East' (2023) 11 *Media and Communication* <<https://www.cogitatiopress.com/mediaandcommunication/article/view/6400>> accessed 13 September 2023

Deuze M and Beckett C, 'Imagination, Algorithms and News: Developing AI Literacy for Journalism.' (2022) 10 *Digital Journalism* 1913

Diakopolous N, *Automating the News: How Algorithms Are Rewriting the News* (Harvard University Press 2019)

Digiday, 'Danish Publisher Zetland Is Driving More New Members since Quitting Facebook.' Digiday (10 July 2020) <<https://digiday.com/?p=372341>>

Dijck, van J, De Waal M and Poell T, *The Platform Society* (Oxford University Press 2018) <<https://search-ebscohost-com.proxy.uba.uva.nl/login.aspx?direct=true&d-b=nlebk&AN=1901418&site=ehost-live&scope=site>>

Dodds T and others, 'Popularity driven Metrics: Audience Analytics and Shifting Opinion Power to Digital Platforms.' (2023) 24 *Journalism Studies* 403

—, 'Popularity-Driven Metrics: Audience Analytics and Shifting Opinion Power to Digital Platforms' [2023] *Journalism Studies* 1

Dolata U, 'Internet Companies: Market Concentration, Competition and Power'

in Ulrich Dolata and Jan-Felix Schrape, *Collectivity and Power on the Internet* (Springer International Publishing 2018) <http://link.springer.com/10.1007/978-3-319-78414-4_5> accessed 7 February 2024

Dreyer S and others, 'The European Communication (Dis)Order: Mapping the Media-Relevant European Legislative Acts and Identification of Dependencies, Interface Areas and Conflicts' [2020] *Arbeitspapiere des Hans-Bredow-Instituts* <<https://www.ssoar.info/ssoar/handle/document/71719>> accessed 23 April 2024

——, 'European Media Law in Times of Digitality', *Law Of Global Digitality* (Taylor & Francis 2022) <<https://library.oapen.org/bitstream/handle/20.500.12657/57619/9781000603767.pdf;jsessionid=354CEC2CBDA2AD76B95B0CDFEB37D243?sequence=1>>

Dreyer S, Seipp TJ and Schulz W, *The European Communication (Dis)Order: Mapping the Media-Relevant European Legislative Acts and Identification of Dependencies, Interface Areas and Conflicts* (Leibniz Institute for Media Research/Hans-Bredow-Institut (HBI) 2020)

Drunen MZ van and Fechner D, 'Safeguarding Editorial Independence in an Automated Media System: The Relationship Between Law and Journalistic Perspectives' (2022) *0 Digital Journalism* 1

EPRA, 'Online Platforms: Inevitable Partners in the Battle for Attention?' (EPRA 2023) <https://www.epra.org/news_items/reuters-digital-news-report-2023-declining-engagement-and-uncertain-business-environment>

Etteldorf C and Cappello M (eds), 'Journalism and Media Privilege' <<https://rm.coe.int/journalism-and-media-privilege-pdf/1680787381>>

European Commission. Directorate General for Communications Networks, Content and Technology. and others, 'Study on Media Plurality and Diversity Online: Final Report.' (Publications Office 2022) <<https://data.europa.eu/doi/10.2759/529019>> accessed 27 September 2023

European University Institute., *Uncovering News Deserts in Europe: Risks and Opportunities for Local and Community Media in the EU.* (Publications Office 2024) <<https://data.europa.eu/doi/10.2870/741398>> accessed 9 April 2024

Fanta A and Dachwitz I, 'Google the Media Patron' (Otto-Brenner-Stiftung 2020)

Fawzi N, 'Beyond Policy Agenda-Setting: Political Actors' and Journalists' Perceptions of News Media Influence across All Stages of the Political Process' (2017) 21 *Information, Communication & Society* 1134

Ferrari Braun A and Papaevangelou C, 'Studying the Infrastructural Transformation: Journalism in the Age of AI, Platformisation, and Regulation' (AlgoSoc, 27 May 2024) <<https://algosoc.org/results/studying-the-infrastructural-transformation-journalism-in-the-age-of-ai-platformisation-and-regulation>>

Ferrer-Conill R, Sjøvaag H and Olsen RKr, 'Datafied Societies: Digital Infrastructures, Data Power, and Regulations' (2023) 11 *Media and Communication* 291

Ferrer-Conill R and Tandoc EC, 'The Audience-Oriented Editor: Making Sense of the Audience in the Newsroom' (2018) 6 *Digital Journalism* 436

Flensburg S and Lai SS, 'Follow the Data! A Strategy for Tracing Infrastructural Power' (2023) 11 *Media and Communication* <<https://www.cogitatiopress.com/mediaandcommunication/article/view/6464>> accessed 19 February 2024

Ganter SA, 'Governance of News Aggregators' Practices across Five Emblematic Cases: Policy Regimes between Normative Acceptance and Resistance.' (2022) 38 *The Information Society* 290

Garton Ash T, *Free Speech : Ten Principles for a Connected World* (Yale University Press 2016)

Gerbrandy A and Phoa P, 'The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-Power' in Huub Brouwer, Michael Bennett and Rutger Claassen, *Wealth and Power* (1st edn, Routledge 2022) <<https://www.taylorfrancis.com/books/9781003173632/chapters/10.4324/9781003173632-11>> accessed 21 November 2023

Gillerspie T, 'The Politics of Platforms' (2010) 12 *New Media & Society* 347

Gillerspie T, Foot K and Boczkowski PJ, 'The Relevance of Algorithms', *Media Technologies : Essays on Communication, Materiality, and Society* (The MIT Press 2014) <https://search-ebscohost-com.proxy.uba.uva.nl/login.aspx?direct=true&db=nlebk&AN=691932&site=ehost-live&scope=site&ebv=EB&ppid=pp_Cover>

Gillespie T, 'The Politics of "Platforms"' (2010) 12 *New media & society* 347

Gillespie T, 'The Relevance of Algorithms' in Tarleton Gillespie, Pablo J Boczkowski and Kirsten A Foot (eds), *Media Technologies* (The MIT Press 2014) <<https://academic.oup.com/mit-press-scholarship-online/book/14976/chapter/169333383>> accessed 24 April 2024

——, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2019) <<https://www.degruyter.com/document/doi/10.12987/9780300235029/html>> accessed 6 March 2024

Gorwa R, 'What Is Platform Governance?' (2019) 22 *Information, Communication & Society* 854

Goujard C, 'Big Tech Accused of Shady Lobbying in EU Parliament' *Politico* (14 October 2022) <<https://www.politico.eu/article/big-tech-companies-face-potential-eu-lobbying-ban>>

Haenens L d', Sousa H and Trappel J (eds), *Comparative Media Policy, Regulation and Governance in Europe: Unpacking the Policy Cycle* (Intellect 2018)

Han B-C, *What Is Power?* (Daniel Steuer tr, English edition, Polity Press 2019)

Handmaker J and Taekema S, 'O Lungo Drom : Legal Mobilization as Counterpower' (2023) 15 *Journal of Human Rights Practice* 6

Harambam J and others, 'Designing for the Better by Taking Users into Account: A Qualitative Evaluation of User Control Mechanisms in (News) Recommender Systems', *Proceedings of the 13th ACM Conference on Recommender Systems (ACM 2019)* <<https://dl.acm.org/doi/10.1145/3298689.3347014>> accessed 24 April 2024

Harcourt A and Picard RG, 'Policy, Economic, and Business Challenges of Media Ownership Regulation' (2009) 6 *Journal of Media Business Studies* 1

Hartley JM and others, 'Autonomies and Dependencies: Shifting Configurations of Power in the Platformization of News' (2023) 11 *Digital Journalism* 1375

Hartmann S and Holznagel B, 'Reforming Competition and Media Law: The German

Approach' in Martin Moore and Damian Tambini (eds), *Regulating Big Tech* (1st edn, Oxford University Press New York 2021) <<https://academic.oup.com/book/39213/chapter/338716737>> accessed 27 March 2024

Heawood J and Peter F, 'Co-Creational Media: Committing to Truth and Public Participation' (Public Interest News Foundation 2023)

Helberger N, 'Challenging Diversity - Social Media Platforms and a New Conception of Media Diversity' in Damian Tambini and Martin Moore (eds), *Digital Dominance* (Oxford University Press 2018) <<https://dare.uva.nl/search?identifier=a5578d82-3c74-4c66-9fb3-491c3806b48c>>

—, 'On the Democratic Role of News Recommenders' (2019) 7 *Digital Journalism* 993

—, 'The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power' (2020) 8 *Digital Journalism*

—, 'Die Regulierung von Sozialen Medien Aus Einer International Vergleichenden Perspektive' in Wolfgang Schulz and Keno Potthast (eds), *Wissenschaftskommunikation und social media zwischen Rechtsschutz und Regulierungsbedarf* (Berlin-Brandenburgische Akademie der Wissenschaften 2021) <https://leibniz-hbi.de/uploads/media/default/cms/media/qwsbbhi_Broschuere-WiD_15_PDF-A-1b.pdf>

—, 'FutureNewsCorp, or How the AI Act Changed the Future of News' (2024) 52 *Computer Law & Security Review* 105915

Helberger N and others, 'Surveillance, Consent, and the Vulnerable Consumer. Regaining Citizen Agency in the Information Economy.' (BEUC 2021)

—, 'Regulation of News Recommenders in the Digital Services Act: Empowering David against the Very Large Online Goliath.' (*Internet Policy Review*, 26 February 2021) <<https://policyreview.info/articles/news/regulation-news-recommenders-digital-services-act-empowering-david-against-very-large>>

Helberger N and others, 'Expert Opinion on Draft European Media Freedom Act for Stakeholder Meeting 28 February 2023' (DSA Observatory, 29 March 2023) <<https://dsa-observatory.eu/2023/03/29/expert-opinion-on-draft-european-media-freedom-act-for-stakeholder-meeting-28-february-2023/>>

Helberger N, Pierson J and Poell T, 'Governing Online Platforms: From Contested to Cooperative Responsibility.' (2017) 34 *The Information Society* 1

Heldt A and others, 'Normative Leitbilder der Europäischen Medienordnung: Leitvorstellungen und rechtliche Anforderungen an die Governance für eine demokratische Öffentlichkeit' [2021] *Arbeitspapiere des Hans-Bredow-Instituts* <<https://www.ssoar.info/ssoar/handle/document/71716>> accessed 24 April 2024

Helmond A, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) 1 *Social Media + Society* 205630511560308

Hoffmann Riem W, 'Trends in the Development of Broadcasting in Western Europe' (1992) 7 *European Journal of Communication* 147

Hoffmann-Riem W, 'Digitale Disruption und Transformation. Herausforderungen für Recht und Rechtswissenschaft' in Martin Eifert (ed), *Digitale Disruption und Recht* (Nomos Verlagsgesellschaft mbH & Co KG 2020) <<https://www.nomos-elibrary.de/index.php?doi=10.5771/9783748909491-143>> accessed 6 February 2024

Holtz-Bacha C, 'Freedom of the Media, Pluralism, and Transparency. European Media Policy on New Paths?' (2024) 39 *European Journal of Communication* 37

Höppner T and Streatfeild L, 'ChatGPT, Bard & Co.: An Introduction to AI for Competition and Regulatory Lawyers' [2023] *SSRN Electronic Journal* <<https://www.ssrn.com/abstract=4371681>> accessed 22 April 2024

——, 'ChatGPT, Bard & Co.: An Introduction to AI for Competition and Regulatory Lawyers'

Ingram M, 'Should the Media Quit Facebook?' *Columbia Journalism Review* (9 May 2019) <https://www.cjr.org/the_new_gatekeepers/should-the-media-quit-facebook.php>

——, 'Will Facebook Changes Leave News Media out in the Cold?' *Columbia Journalism Review* (28 July 2022) <https://www.cjr.org/the_media_today/will-facebook-changes-leave-news-media-out-in-the-cold.php>

——, 'Is Facebook Quitting the News Business?' *Columbia Journalism Review* (7 December 2022) <https://www.cjr.org/cjr_outbox/is-facebook-quitting-the-news-

business.php>

——, 'Canada Imitates Australia's News-Bargaining Law, but to What End?' *Columbia Journalism Review* (16 March 2023) <https://www.cjr.org/the_media_today/canada-australia_platforms_news_law.php>

International Media Support (IMS), 'Lack of Independent Media Funding Is a Major Cause of News Desertification around Europe' International Media Support (IMS) (10 July 2023) <<https://www.mediasupport.org/news/lack-of-independent-media-funding-is-a-major-cause-of-news-desertification-around-europe/>>

Irion K and Valcke P, 'Cultural Diversity in the Digital Age: EU Competences, Policies and Regulations for Diverse Audiovisual and Online Content' in Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union* (Palgrave Macmillan UK 2015) <http://link.springer.com/10.1057/9781137453754_7> accessed 24 April 2024

——, 'Cultural Diversity in the Digital Age: EU Competences, Policies and Regulations for Diverse Audiovisual and Online Content' (2015)

Jakubowicz K, 'New Media Ecology: Reconceptualizing Media Pluralism' in P Valcke, M Sukosd and R Picard (eds), *Media Pluralism and Diversity: Concepts, Risks and Global Trend* (Palgrave Macmillan 2016)

Jarren O, 'Normbildende Macht. Intermediäre Als Gesellschaftliche Herausforderung [Norm building Power. Intermediaries as a Social Challenge].' (2018) 24 *Epd Medien* 35

Jungherr A and Schroeder R, 'Artificial Intelligence and the Public Arena' (2023) 33 *Communication Theory* 164

Just N, 'Measuring Media Concentration and Diversity: New Approaches and Instruments in Europe and the US' (2009) 31 *Media Culture & Society* 97

——, 'Governing Online Platforms: Competition Policy in Times of Platformization'

——, 'Media Concentration: Problem and Regulation' in Jan Krone and Tassilo Pellegrini (eds), *Handbook of Media and Communication Economics: A European Perspective* (Springer Fachmedien Wiesbaden 2022) <https://doi.org/10.1007/978-3-658-34048-3_70-2>

Karppinen K, *Rethinking Media Pluralism* (Fordham University Press 2013) <10.5422/fordham/9780823245123.001.0001>

KEK, 'Sicherung Der Meinungsvielfalt Im Digitalen Zeitalter. Bericht Der Kommission Zur Ermittlung Der Konzentration Im Medienbereich (KEK) Ueber Die Entwicklung Der Konzentration Und Ueber Maßnahmen Zur Sicherung Der Meinungsvielfalt Im Privaten Rundfunk' (KEK (Kommissions zur Ermittlung der Konzentration im Medienbereich) 2018)

Kenyon AT, *Democracy of Expression: Positive Free Speech and Law* (Cambridge University Press 2021)

Kerber W and Specht-Riemenschneider L, 'Synergies between Data Protection and Competition Law' (Verbraucherzentrale Bundesverband eV 2021)

Killeen M, 'Publishers Eye Collective Bargaining as Way to Take on Platforms' Euractiv (14 July 2021) <<https://www.euractiv.com/section/media/news/publishers-eye-collective-bargaining-as-way-to-take-on-platforms/>>

Kingsbury B and Maisley N, 'Infrastructures and Laws: Publics and Publicness' (2021) 17 Annual Review of Law and Social Science 353

Klimkiewicz B, 'Media Pluralism: European Regulatory Policies and the Case of Central Europe' (2005) EUI Working Papers RSCAS No. 2005/19 <https://cadmus.eui.eu/bitstream/handle/1814/3368/05_19.pdf?sequence=1&isAllowed=y>

Knoche M, 'Media Concentration: A Critical Political Economy Perspective.' (2021) 19 tripleC 371

Kristensen LM and Hartley JM, 'The Infrastructure of News: Negotiating Infrastructural Capture and Autonomy in Data-Driven News Distribution' (2023) 11 Media and Communication <<https://www.cogitatiopress.com/mediaandcommunication/article/view/6388>> accessed 13 September 2023

Lecheler S and De Vreese CH, 'News Media, Knowledge, and Political Interest: Evidence of a Dual Role From a Field Experiment: News Media, Knowledge, and Political Interest' (2017) 67 Journal of Communication 545

Lin B and Lewis SC, 'The One Thing Journalistic AI Just Might Do for Democracy' (2022)

10 Digital Journalism 1627

Loosen W and Solbach P, 'Künstliche Intelligenz Im Journalismus?: Was Bedeutet Automatisierung Für Journalistisches Arbeiten?' in Tanja Köhler (ed), *Fake News, Framing, Fact-Checking: Nachrichten im digitalen Zeitalter* (transcript Verlag 2020) <<https://www.degruyter.com/document/doi/10.1515/9783839450253-010/html>> accessed 13 September 2023

Lukes S, *Power: A Radical View* (Third edition, Red Globe press 2021)

Lynskey O, 'Regulating "Platform Power"' [2017] LSE Law, Society and Economy Working Papers 1/2017

Marsili M, 'The Press: Fourth Power or Counter-Power?' (2021) *Revista de Arte* *artciencia.com* N.º 2425 (2021): Ano XII

McCombs ME, *Setting the Agenda: The Mass Media and Public Opinion* (Reprinted, Polity Press 2007)

McCombs ME and Shaw DL, 'The Agenda-Setting Function of Mass Media' (1972) 36 *Public Opinion Quarterly* 176

Meese J, 'Journalism Policy across the Commonwealth: Partial Answers to Public Problems' (2021) 9 *Digital Journalism* 255

—, *Digital Platforms and the Press* (Intellect 2023) <<https://www.jstor.org/stable/jj.4908263>>

Meese J and Hurcombe E, 'Facebook, News Media and Platform Dependency: The Institutional Impacts of News Distribution on Social Platforms' (2020) 23 *New Media & Society*

—, 'Facebook, News Media and Platform Dependency: The Institutional Impacts of News Distribution on Social Platforms' (2021) 23 *New Media & Society* 2367

Meese J and Seipp TJ, 'Revisiting institutional isomorphism: Are the press becoming platforms?' (2024, under review) *Digital Journalism*

Meijers Committee, 'Promoting and Safeguarding Media Pluralism through EU Law'

(Meijers Committee CM2113)

Mendel T, García Castillejo A and Gómez G, 'Concentration of Media Ownership and Freedom of Expression: Global Standards and Implications for the Americas' (UNESCO 2017)

Mercer C, 'News Site Stuff Left Facebook. Seven Months Later, Traffic Is Just Fine and Trust Is Higher' Reuters Institute for the Study of Journalism (Oxford University, 24 February 2021) <<https://reutersinstitute.politics.ox.ac.uk/news/news-site-stuff-left-facebook-seven-months-later-traffic-just-fine-and-trust-higher>>

Moore M, 'Tech Giants and Civic Power' [2016] Centre for the Study of Media, Communication and Power, Kings College London

Moore M and Tambini D (eds), *Regulating Big Tech: Policy Responses to Digital Dominance* (1st edn, Oxford University Press New York 2021) <<https://academic.oup.com/book/39213>> accessed 18 September 2023

——, *Regulating Big Tech: Policy Responses to Digital Dominance* (1. Edition, Oxford University Press 2022)

Murgia M, 'Risk of Industrial Capture Looms over AI Revolution.' *Financial Times* (22 March 2023) <<https://www-ft-com.ezp.lib.cam.ac.uk/content/e9ebfb8d-428d-4802-8b27-a69314c421ce>>

Napoli PM, 'Deconstructing the Diversity Principle' (1999) 49 7

——, 'Deconstructing the Diversity Principle' (1999) 49 *Journal of Communication* 7

——, 'Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers' (2014) 39 *Telecommunications Policy* 751

——, 'What Is Media Policy?' (2023) 707 *The ANNALS of the American Academy of Political and Social Science* 29

Naughton J, 'Platform Power and Responsibility in the Attention Economy' in Damian Tambini and Martin Moore (eds), *Digital Dominance* (Oxford University Press 2018)

Nechushtai E, 'Could Digital Platforms Capture the Media through Infrastructure?'

(2018) 19 Journalism 1043

Nemitz P and Pfeffer M, 'Determining Our Technological and Democratic Future: A Wish List' in Damian Tambini (ed), *Regulating Big Tech. Policy Responses to Digital Dominance* (1st edn, Oxford University Press 2022)

Neuberger C, 'Meinungsmacht Im Internet Aus Kommunikationswissenschaftlicher Sicht' [2018] UFITA

Neuberger C and Lobigs F, 'Meinungsmacht Im Internet Und Die Digitalstrategien von Medienunternehmen. Neue Machtverhältnisse Trotz Expandierender Internetgeschäfte Der Traditionellen Massenmedien-Konzerne.' [2018] *Die Medienanstalten*

Newman, N and others, 'Digital News Report' (Reuters Institute for the Study of Journalism 2022)

Newman N and others, 'Digital News Report 2023' (Reuters Institute for the Study of Journalism 2023) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2023-06/Digital_News_Report_2023.pdf>

—, 'Reuters Institute Digital News Report 2023' ([object Object] 2023) <<https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2023>> accessed 26 March 2024

Nielsen RK and Ganter SA, *The Power of Platforms* (Oxford University Press 2022)

Noam E, 'Overcoming Market Power in Online Video Platforms' in Damian Tambini and Martin Moore (eds), *Regulating Big Tech: Policy Responses to Digital Dominance* (Oxford University Press 2021)

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.'

—, 'Online News: Research Update' (Ofcom 2024) <https://www.ofcom.org.uk/_data/assets/pdf_file/0030/281298/0324-online-news-research-update.pdf>

Oster J, *Media Freedom as a Fundamental Right* (1st edn, Cambridge University Press 2015) <<https://www.cambridge.org/core/product/identifier/9781316162736/type/book>> accessed 5 April 2024

Paal B, 'Current Issues and Recent Developments on Media Concentration in the Context of Competition Law and Media Law' (2017) 12 *Journal of Intellectual Property Law and Practice*

Papaevangelou C, 'Funding Intermediaries: Google and Facebook's Strategy to Capture Journalism' [2023] *Digital Journalism* 1

——, 'Funding Intermediaries: Google and Facebook's Strategy to Capture Journalism' (2024) 12 *Digital Journalism* 234

Pasquale F, *New Laws of Robotics: Defending Human Expertise in the Age of AI*. (The Belknap Press of Harvard University Press 2020)

——, *New Laws of Robotics Defending Human Expertise in the Age of AI* (The Belknap Press of Harvard University Press 2020)

Paul K, 'Elon Musk to Strip Headlines off News Links on Twitter in Latest Overhaul' *The Guardian* (23 August 2023) <<https://www.theguardian.com/technology/2023/aug/22/elon-musk-x-twitter-changes-news-links#:~:text=The%20platform%20will%20no%20longer,address%20and%20an%20abridged%20headline>>

Perusko Z, 'The Link That Matters: Media Concentration and Diversity of Content' in Beata Klimkiewicz (ed), *Media Freedom and Pluralism: Media Policy Challenges in the Enlarged Europe*. (Central European University Press 2022)

Pickard V, *Democracy without Journalism* (Oxford University Press 2020)

——, 'Restructuring Democratic Infrastructures: A Policy Approach to the Journalism Crisis' (2020) 8 *Digital Journalism*

——, 'Monopoly Control over Digital Infrastructures' in Victor Pickard, *Democracy without Journalism?* (Oxford University Press 2020) <<https://academic.oup.com/book/35132/chapter/299308100>> accessed 1 December 2023

Plantin J-C and others, 'Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook' (2018) 20 *New Media & Society* 293

Poell T, Nieborg DB and Duffy BE, 'Spaces of Negotiation: Analyzing Platform Power in the News Industry' (2022) 11 *Digital Journalism* 1391

Poell T, Nieborg DB and Duffy BE, 'Spaces of Negotiation: Analyzing Platform Power in the News Industry' [2022] *Digital Journalism* 1

Popiel P, 'Regulating Datafication and Platformization: Policy Silos and Tradeoffs in International Platform Inquiries.' (2022) 14 *Policy & Internet* 28

Radcliffe D and Mathews N, 'Tow Report: Building a Stronger Local Media Ecosystem: The Role of Media Policy' *Columbia Journalism Review* (20 April 2023) <https://www.cjr.org/tow_center_reports/building-a-stronger-local-media-ecosystem-the-role-of-media-policy.php>

Radsch C, 'Frenemies: Global Approaches to Rebalance the Big Tech v Journalism Relationship' (2022) <<https://www.brookings.edu/articles/frenemies-global-approaches-to-rebalance-the-big-tech-v-journalism-relationship/>>

—, 'Platformization and Media Capture: A Framework for Regulatory Analysis of Media-Related Platform Regulations' (2023) 28 *UCLA Journal of Law & Technology, Platforms and the Press* 75

Richards NM, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press 2015) <<https://search-ebSCOhost-com.proxy.uba.uva.nl/login.aspx?direct=true&db=e000xww&AN=932921&site=ehost-live&scope=site>>

Roth E, 'Facebook Warns It Could Block News in Canada over Proposed Legislation' *The Verge* (23 October 2022) <<https://www.theverge.com/2022/10/23/23418928/facebook-warns-block-news-canada-legislation-meta>>

Sawers P, 'Meta to Deprecate Facebook News in the UK, Germany and France' *TechCrunch* (5 September 2023) <https://techcrunch.com/2023/09/05/meta-to-deprecate-facebook-news-in-the-u-k-germany-and-france/?guc-counter=1&guc_referrer=aHR0cHM6Ly93d3cubGlua2VkaW4uY29tLw&guc_referrer_sig=AQAAABmo4kbm1-K6S-O3jnTzq3BIU5tB50BFiYesP4Y7nTc7j8M-S32KEYYdA0pzLU2xEEg6MOKmwU8NtAuxu66KWofvQ3hWYjg0jzdWiR_b8MyPhvd-fjKKANiL8Tu2qP1TAPgQt2Gc5f1hISmtk7J8joNGxRanSwncKKhQwzDQHgVHnj>

Scheuerer S, 'The Fairness Principle in Competition-Related Economic Law'

Schiffirin A (ed), *Media Capture: How Money, Digital Platforms, and Governments Control the News* (Columbia University Press 2021)

Schlosberg J, 'Digital Agenda Setting: Re-Examining the Role of Platform Monopolies' in Martin Moore and Damian Tambini (eds), *Digital Dominance* (Oxford University Press 2018)

Schneiders P and others, 'Meinungsmacht unter der Lupe: Ein Ansatz für eine vielfaltssichernde, holistische Plattformregulierung' in Marlis Prinzing and others (eds), *Regulierung, Governance und Medienethik in der digitalen Gesellschaft* (Springer Fachmedien Wiesbaden 2024) <https://link.springer.com/10.1007/978-3-658-42478-7_6> accessed 29 February 2024

Schulz W, *Gewährleistung kommunikativer Chancengleichheit als Freiheitsverwirklichung* (1. Aufl, Nomos-Verl-Ges 1998)

——, *Gewährleistung Kommunikativer Chancengleichheit Als Freiheitsverwirklichung* (Materialien zur rechtswissenschaftlichen Medien-und Informationsforschung, 1998)

——, 'Kontrolle Vorherrschender Meinungsmacht - Rekonstruktion Eines Medienrechtlichen Schlüsselbegriffs' (2017) 48 AfP 373

Schulz W and Held T, 'Die Zukunft Der Kontrolle Der Meinungsmacht' (FES (Friedrich-Ebert-Stiftung) 2006)

Seipp T, Fathaigh RÓ and Van Drunen M, 'Defining the "Media" in Europe: Pitfalls of the Proposed European Media Freedom Act' (2023) *Journal of Media Law* 1

Seipp TJ, 'News Media's Dependency on Big Tech: Should We Be Worried?' (*Internet Policy Review*, 10 June 2021) <<https://policyreview.info/articles/news/news-medias-dependency-big-tech-should-we-be-worried/1562>>

——, 'Media Concentration Law: Gaps and Promises for the Digital Age' (2023) 11 *Media & Communication* <<https://doi.org/10.17645/mac.v11i2.6393>>

Seipp TJ, Helberger N, De Vreese C, Ausloos J, 'Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law' (2023) *Digital Journalism* 11(8), 1542–1567

——, 'Between the Cracks: Blind Spots in Regulating Media Concentration and Platform Dependence in the EU' (2024, forthcoming) *Internet Policy Review*

Shoemaker PJ and Vos T, *Gatekeeping Theory* (Routledge 2009)

Simon F, 'Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy.' (2022) 10 *Digital Journalism* 1832

Simon, Felix M., 'Artificial Intelligence in the News: How AI Retools, Rationalizes, and Reshapes Journalism and the Public Arena' <<https://academiccommons.columbia.edu/doi/10.7916/ncm5-3v06>> accessed 28 May 2024

Simon FM, 'AI Will Not Revolutionise Journalism, but It Is Far from a Fad' (Oxford Internet Institute, 6 March 2023) <<https://www.oii.ox.ac.uk/news-events/news/ai-will-not-revolutionise-journalism-but-it-is-far-from-a-fad/>>

—, 'Escape Me If You Can: How AI Reshapes News Organisations' Dependency on Platform Companies' [2023] *Digital Journalism* 1

—, 'Artificial Intelligence in the News: How AI Retools, Rationalizes, and Reshapes Journalism and the Public Arena' (Tow Center for Journalism, Oxford Internet Institute, University of Oxford 2024) <<https://doi.org/10.7916/ncm5-3v06>> accessed 19 February 2024

Sjøvaag H and Ohlsson J, 'Media Ownership and Journalism' in Helle Sjøvaag and Jonas Ohlsson, *Oxford Research Encyclopedia of Communication* (Oxford University Press 2019) <<https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-839>> accessed 24 April 2024

Sowman-Lund S, 'After Three Years Away, Stuff Has (Accidentally?) Returned to Facebook' *The Spinoff* (8 March 2023) <<https://thespinoff.co.nz/media/08-03-2023/after-three-years-away-stuff-has-accidentally-returned-to-facebook/>>

Stigler, 'Stigler Committee on Digital Platforms' (2019) Final Report

Stiglitz JE, 'Toward a Taxonomy of Media Capture' in Anya Schiffrin (ed), *In The Service of Power: Media Capture and The Threat to Democracy*, vol 9 (2017)

Strömbäck J, 'In Search of a Standard: Four Models of Democracy and Their Normative Implications for Journalism' (2005) 6 *Journalism Studies* 331

Stroud NJ and Van Duyn E, 'Curbing the Decline of Local News by Building Relationships with the Audience' (2023) 73 *Journal of Communication* 452

Taekema S, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 02 *Law and Method*

Tambini D, *Media Freedom* (Polity Press 2021)

—, 'What Is Journalism? The Paradox of Media Privilege' (2021) 5 *European Human Rights Law Review*, 523

Trappel J and Tomaz T, 'Democratic Performance of News Media: Dimensions and Indicators for Comparative Studies' <<http://urn.kb.se/resolve?urn=urn:nbn:se:norden:org:diva-12100>> accessed 23 November 2023

Usher N and others, 'Media Policy for an Informed Citizenry: Revisiting the Information Needs of Communities for Democracy in Crisis' (2023) 707 *The ANNALS of the American Academy of Political and Social Science* 8

Van der Vlist F and Helmond A, 'How Partners Mediate Platform Power: Mapping Business and Data Partnerships in the Social Media Ecosystem.' (2021) 8 *Big Data & Society*

Van Dijck J, Nieborg D and Poell T, 'Reframing Platform Power' (2019) 8 *Internet Policy Review* <<https://policyreview.info/node/1414>> accessed 19 February 2024

Van Drunen MZ and Fechner D, 'Safeguarding Editorial Independence in an Automated Media System: The Relationship Between Law and Journalistic Perspectives' [2022] *Digital Journalism* 1

Van Drunen MZ, Helberger N and Bastian M, 'Know Your Algorithm: What Media Organizations Need to Explain to Their Users about News Personalization' (2019) 9 *International Data Privacy Law* 220

Van Duren M, Zarouali B and Helberger N, 'Recommenders You Can Rely on: A Legal and Empirical Perspective on the Transparency and Control Individuals Require to Trust News Personalisation.' (2022) 13 *JIPITEC* <<http://www.jipitec.eu/issues/jipitec-13-3-2022/5562>>

Viljoen S, Goldenfein J and McGuigan L, 'Design Choices: Mechanism Design and Platform Capitalism.' (2021) 8 Big Data & Society

Vliegenthart R, 'Framing in Mass Communication Research - An Overview and Assessment: Framing in Mass Communication Research' (2012) 6 Sociology Compass 937

Regulations

Charter of Fundamental Rights of the European Union [2012]

European Convention on Human Rights [1950]

Consolidated version of the Treaty on European Union [2012]

Consolidated version of the Treaty on the Functioning of the European Union [2012]

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022]

Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022]

Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) [2024]

Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (AI Act) COM/2021/206 final [2021]

Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2018]

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending

Directives 96/9/EC and 2001/29/EC (Copyright Directive) [2019]

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016]

Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation) [2019]

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

Soft Law

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on On the European democracy action plan (Democracy Action Plan) COM/2020/790 final [2020]

Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps COM/2019/163 final [2019]

European Commission (EC) Media Concentration Green Paper COM(92) 84 final [1992]

High Level Expert Group on Media Freedom and Pluralism. A Free and Pluralistic Media to Sustain European Democracy. Brussels: High Level Expert Group on Media Freedom and Pluralism [2013]

Council of Europe (CoE) Recommendation of the Committee of Ministers to Member States on a New Notion of Media, CM/Rec(2011)7 [2011]

Kommission zur Ermittlung der Konzentration im Medienbereich (KEK) Sicherung Der Meinungsvielfalt Im Digitalen Zeitalter. Bericht Der Kommission Zur Ermittlung Der Konzentration Im Medienbereich (KEK) Ueber Die Entwicklung Der Konzentration Und Ueber Maßnahmen Zur Sicherung Der Meinungsvielfalt Im Privaten Rundfunk' (KEK (Kommissions zur Ermittlung der Konzentration im Medienbereich) [2018]

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 [2022]

Stigler, 'Stigler Committee on Digital Platforms' Final Report [2019]

Case Law

Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas [1991] CJEU (C -260/89)

Herri Batasuna and Batasuna v Spain [2009] ECtHR, 25803/04, 25817/04

Manole and Others v Moldova [2009] ECtHR 13936/02

Centro Europa 7 S.r.l and Di Stefano v Italy [2012] ECtHR 38433/09

Sürek v Turkey (No 2) [1999] ECtHR 26682/95

4th Broadcasting decision [1984] German Constitutional Court, BVerfGE 73, 118, 159–160

Spiegel decision [1966] German Constitutional Court, BVerfGE 20, 162, 176

Lueth-Urteil [1958] German Constitutional Court, BVerfGE 7, 198, 31

ANNEX A: INTERVIEW GUIDE

Main question: What strategies do (or don't) news organisations follow in relation to platforms, and what legal conditions are required to facilitate an independent and resilient news media?

- 1) Would you please briefly describe your position in [org/reg] and your fields of work?
- 2) What is your professional background and how long have you been at the role in [org/reg]?

Mapping and Clustering of Initiatives: reasons, strategies, challenges, and legal regulatory conditions

- 1) What is your strategic approach towards platforms?
- 2) If you don't have a strategy, why?
- 3) Would you say your strategy has changed in recent years? If so, does it change anything for you?

A: Audience and attention

- 1) There is much discussion about the dependency on platforms, especially social media platforms like Instagram and TikTok, to reach (younger) audiences. How important are platforms in your strategy to reach (younger) audiences?
- 2) There are some newsrooms that have quit social media (Facebook) altogether. Has there been any talks about this? Is this something you would consider? If no, why not?
- 3) What would you say does your audience value most about [X] news content, and how do you ensure you adhere to these values?
- 4) How do you reinforce your relationship with the audience?
- 5) What are the key challenges in reinforcing your relationship with the audience? What would you say is needed?
- 6) What are the legal issues related to social media, esp. TikTok, and how to you plan to overcome them?

B: Technological independence

- 1) There has been much debate about the rise of new digital technologies and AI tools, like ChatGPT and Microsoft's Bing search engine, Google's Bard search engine, Meta announced they are working on generative AI products, etc.
- 2) How reliant is [X] on external providers?
- 3) What factors are relevant when deciding to use external technology or build your own. How feasible is it to develop own AI technology?
- 4) How are decisions about the implementation and use of a new tool made internally? Who is involved?
- 5) What are the legal obstacles you run into when doing so?
- 6) Increasing growth in technologies and AI may trigger deeper dependencies. Do you agree?
- 7) If yes, how so? What does [X] plan to do from a legal perspective to sustain some

form of independence?

- 8) What do you expect from the lawmaker to support news organisations? Do you consider any legal proposals in this regard, be it the AI Act, Data Act or Data Governance Act, DSA/DMA, ... as helpful? Where do you see the limitations?

C: Economic viability and resilience

- 1) Meta has reportedly withdrawn from supporting journalism through its funds. What do you think about this, and is [X] directly affected by that move?
- 2) What role does digital tech play in developing new business models?
- 3) To what extent does [X] economic viability depend on funding from platforms?
- 4) What do you know about the relevant level frameworks in this context? Is there anything that laws or regulations could do to help overcome those obstacles?
- 5) What role does digital tech play in developing your business model? How relevant are platforms in [X] business model?
- 6) In enabling competition, what do you expect the lawmaker to do? Do you reckon there should be privileges for the media?
- 7) How do you think can a digital media ecosystem truly become more competitive, and how can power better be controlled?
- 8) Do you see some sort of responsibility in using you political power to advocate for fairer conditions for small/local news?

D: Other actors

- 1) Who are other important actors in the ecosystem of [X], and why?
- 2) Are there any obstacles regarding [X] relationship with these other actors in the ecosystem? Would there be anything specific that could be done to overcome those obstacles?

E: Legal conditions

- 1) Could you specify some of the legal obstacles you run into?
- 2) What do you know about the upcoming legal frameworks dealing with the topics we discussed?
- 3) From your point of view, what is the one most important aspect that needs to be considered? Are there any laws in place that you think hinder you in following your strategies? And are there any laws that you think could support you in following your strategies?
- 4) What do you expect from the EU regulator / national (media) regulator? What would be useful?

Conclusion

- 1) How do you think [X] ideal relationship with platforms will look like in the future? How realistic do you consider this? How do you consider [org] role in shaping the future?
- 2) Is there anything else you would like to add?

3) Who else would you say should I speak to on this topic?

ANNEX B: AUTHOR CONTRIBUTIONS

In this annex, I outline the role of the co-authors of the articles on which Chapter 3 (Seipp TJ et al., 'Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law' (2023) *Digital Journalism* 11(8), 1542-1567) and Chapter 6 (Seipp TJ et al., 'Between the Cracks: Blind Spots in Regulating Media Concentration and Platform Dependence in the EU', (2024, forthcoming) *Internet Policy Review*) are based. These are co-authored articles, for which I was the first author.

The other articles (providing the basis for Chapters 4 and 5) are single authored. Nevertheless, for each article, I received substantial feedback from my supervisors (prof. dr. Natali Helberger, prof. dr. Claes de Vreese, and dr. Jef Ausloos) as well as from other individuals who are not listed as authors. In particular, significant feedback was received from the supervisors and dr. Tomas Dodds and dr. Hannes Cools in the drafting of the interview guide (Annex A). The interviews themselves were conducted by me. Chapter 5's findings were (after completion of the chapter included in this dissertation) presented and summarised at the AoIR conference.⁵⁷³ Additionally, some interview findings were later included in a co-authored paper with Dr. James Meese, which is currently under review for publication in *Digital Journalism*.⁵⁷⁴ All other chapters in this dissertation, namely Chapters 1, 2, 7, and 8, have benefited from feedback from my supervisors and others.

Chapter 3

Authors of the published version (2023) in *Digital Journalism* titled "Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law": Theresa Josephine Seipp, Natali Helberger, Claes de Vreese, and Jef Ausloos.

For this journal article, the early conceptualisation and outline were prepared collaboratively by all contributing authors. Based on that, Theresa Josephine Seipp researched and wrote the article. The peer reviewer suggestions were collaboratively analysed and discussed, and the article was eventually revised by Theresa Josephine Seipp for publication.

⁵⁷³ Theresa Josephine Seipp, 'The Great Reset: "Counterpower" In The Context Of Media Concentration And Platform Dependence' (2023, October) Paper presented at AoIR2023: The 24th Annual Conference of the Association of Internet Researchers. Philadelphia, PA, USA: AoIR. Retrieved from <http://spir.aoir.org>.

⁵⁷⁴ James Meese and Theresa Josephine Seipp, 'Revisiting institutional isomorphism: Are the press becoming platforms?' (2024, under review) *Digital Journalism*

Chapter 6

Authors of the article (2024, forthcoming) at Internet Policy Review titled “Between the Cracks: Blind Spots in Regulating Media Concentration and Platform Dependence in the EU”: Theresa Josephine Seipp, Natali Helberger, Claes de Vreese, and Jef Ausloos.

For this article, the conceptualisation and discussion of regulatory developments were conducted collaboratively by all contributing authors. In particular, the refinement of scope and focus was strongly influenced by the legal expertise of Natali Helberger and Jef Ausloos. The article was researched and written by Theresa Josephine Seipp and is currently under peer review.

SUMMARY

This dissertation explores the shifting opinion power from legacy media to platforms and the consequential trends leading to increased digital media concentration. This shift is driven by significant digital transformations and developments affecting how individuals consume news, how the public forms opinions, and how the media and journalism sector operates. In particular how it affects news production, distribution, and the business of journalism. These changes introduce new sources of power, particularly in data, technology, and infrastructure, which are predominantly controlled by platforms, creating structural dependencies within the digital media ecosystem. Consequently, platforms become political actors with substantial power over opinion formation by controlling the spaces and infrastructures and the relationships between various actors involved, resulting in increased media concentration in the digital realm. Therefore, this research aims to investigate how such platform opinion power and growing digital media concentration could and should be regulated in Europe.

Chapter 1 of this dissertation starts by presenting a 'cautionary tale' to highlight the democratic and societal risks associated with concentrated opinion power and provides a brief introduction as to the motivation and intention behind this research. Chapter 2 then delves into the concepts of "power", "opinion power", and "media concentration". The definition of power in this research draws heavily on the works of Steve Lukes and Byung-Chul Han, viewing power as both structural and relational. Opinion power is defined from both communication science and legal perspectives. It is understood as the media's ability to shape individual and public opinion formation, distinguishing it from broader communication power by its specific focus on political power. Hence, opinion power is rooted in: (a) influencing and directing information and news consumption, (b) controlling and deciding content selection and agendas for debates, and (c) providing a forum for public discourse and political debates.

Setting the scene with a clear definition of opinion power is crucial for understanding the normative foundations of media concentration law, which traditionally addresses both economic and opinion power while promoting public values, especially media pluralism. Therefore, the goals of media concentration law are twofold: to maintain diverse and pluralistic media markets and to protect free and open individual and public opinion formation. These objectives are essential for upholding media pluralism and public values. Unlike competition law, the distinctive feature of media concentration law is its additional focus on promoting and preserving pluralism. Chapter 2, which establishes the normative and conceptual foundations of this research, concludes by emphasising that as power shifts to platforms and new concentration trends emerge, questions arise regarding which regulatory measures

can effectively limit this power. The Chapter closes with a brief outline of the research questions addressed in the subsequent chapters and introduces the methodologies used.

Chapter 3 delves into the analysis of shifting opinion power within the digital media ecosystem and discusses the relevance of revisiting media concentration law, particularly its normative foundations, to address this new power dynamic. These shifts are primarily driven by the digitalisation and platformisation of the news environment, which impacts audiences, challenges the traditional role of news media, and transforms the media ecosystem. The chapter reaffirms the normative and constitutional importance of opinion power, emphasising its importance to media power in a democracy and the necessity of a fair dispersal of power. The chapter concludes that opinion power is indeed shifting from legacy media to platforms, as described at three levels: (1) the individual citizen, (2) the institutional newsroom, and (3) the media ecosystem. These three levels form the basis for analyses in the subsequent chapters and introduce a framework for developing future (non-) regulatory responses. These responses should aim to address (1) the shifting influence over individual news consumption and exposure, (2) the changing power dynamics within automated, data-driven, and platform-dependent newsrooms, and (3) the systemic power of platforms and the resulting structural dependencies within the media ecosystem.

Building on that, Chapter 4 explores traditional media concentration laws in Europe and their normative foundations. The chapter aims to critically revisit and analyse existing while offering a unifying theoretical framework for a digital media concentration law, including core concepts and guiding principles. The analysis is structured around the three levels (individual citizen, institutional newsroom, and media ecosystem), starting with the relevant normative framework, identifying gaps, and suggesting potential remedies for each level. The analysis reveals that while most European countries have specific media concentration laws designed to disperse opinion and economic power within the media sector, these laws generally exclude platforms from their scope and do not effectively address the new sources of power in the digital media ecosystem. While traditional rules remain relevant, the new dynamics and power dimensions disrupt the media ecosystem, rendering traditional rules ineffective for addressing platform opinion power. Therefore, the chapter concludes that a regulatory approach to platform opinion power and digital media concentration must extend beyond the traditional scope to include other legal fields, notably data protection and privacy law, platform regulation, and AI regulation, to protect the normative values at stake.

Chapter 5 focuses on the institutional newsroom level and conceptualises "counterpower" from both theoretical and practical perspectives. The practical insights are drawn from 12 semi-structured interviews conducted with news organisations of varying sizes in the UK and the Netherlands. The concept of "counterpower" is significant in addressing digital media concentration to empower countervailing forces as a relevant remedy to balance asymmetries. Based on theoretical analysis, this chapter defines "counterpower" as "deliberate and coordinated efforts to challenge and scrutinise [power] by (1) seizing control over relationships, and (2) reclaiming influence over spaces, thereby acting to reduce dependencies". This definition builds on the concepts of power and opinion power discussed in earlier chapters. The interviews identified few concrete strategies employed by news organisations to form a counterpower, highlighting the need for additional (legal) support, particularly for local and regional news organisations seeking autonomy to reduce dependencies. These strategies identified relate to building direct and engaged journalism to enhance the audience-media relationship and diversifying dependencies, which requires a fair and competitive digital media ecosystem. The chapter concludes with an examination of the legal conditions required for news organisations to form a "counterpower" as to play a relevant role to address media concentration and platform dependency. This involves implementing non-regulatory remedies alongside stricter concentration rules and the evolving EU framework, including the DSA, DMA, EMFA, and, to some extent, the AI Act.

Accordingly, Chapter 6 analyses the EU's regulatory efforts to address media concentration and platform dependency. Significant regulatory developments at the EU level aim to limit platform power, foster fairer and more competitive digital markets, and introduce the first AI law to reduce related risks. The EMFA is another key development in this context, designed to oversee media concentration in "the online environment". This Chapter aims to scrutinise the effectiveness of the EMFA in doing so while highlighting several blind spots. One crucial shortcoming in the EMFA needing more attention is the technological and infrastructural power of platforms, in addition to their economic power. This technological power increasingly forms a new dimension of political power of platforms with their possibilities to create and sustain dependencies as well as control democratic spaces. Therefore, platforms must be viewed as more than "just" gatekeepers but also as providers of infrastructure, technology, and AI, which are central to controlling the digital public sphere. Furthermore, while the EMFA aims to promote media pluralism, it fails to adequately mention and provide protections for small, local, and regional news entities, which are particularly vulnerable to concentration threats and platform dependencies, though. Chapter 7 concludes by offering some thoughts for ensuring

a better protection of media pluralism and editorial independence as well as to tackle horizontal and vertical concentrations.

The dissertation concludes with Chapter 7, summarising its key findings and revisiting the central research question: How could and should platform opinion power and digital media concentration be regulated in Europe? The analysis reveals that opinion power is indeed shifting towards platforms, resulting in new forms of media concentration due to changing sources of opinion and political power. The research identifies the following new power dynamics facilitating these shifts: (1) expanding algorithmic control over access to information; (2) access to user data and communication contents; (3) control over communication and digital infrastructures; and (4) the resources to drive innovation in technology and AI.

Finally, Chapter 8 emphasises the need for future interdisciplinary research, particularly to develop regulatory measures to address the concentrated infrastructural power of platforms. Additionally, protecting local and regional journalism and promoting media pluralism and journalism as a public good require a stronger (political) commitment. The disadvantaged position of local and regional journalism amid growing platform power, digital media concentration, and increasing AI concentration needs urgent attention. The gap between local and regional versus large media organisations and platforms is widening, leaving them in a precarious situation. Based on that, Chapter 8 provides a brief outlook on the potential implications of growing AI concentration for the media ecosystem and concludes with some final thoughts.

SAMENVATTING

Dit proefschrift onderzoekt de verschuiving van opiniemacht van legacy media naar platforms en de daaruit voortvloeiende trends die leiden tot een grotere concentratie van digitale media. Deze verschuiving wordt gedreven door belangrijke digitale transformaties en ontwikkelingen die van invloed zijn op hoe individuen nieuws consumeren, hoe het publiek meningen vormt en hoe de media en de journalistieke sector opereert, en in het bijzonder hoe het de productie en distributie van nieuws en de journalistieke activiteiten beïnvloedt. Deze veranderingen introduceren nieuwe machtsbronnen, met name op het gebied van data, technologie en infrastructuur, die voornamelijk worden gecontroleerd door platforms, waardoor structurele afhankelijkheden ontstaan binnen het ecosysteem van digitale media. Bijgevolg worden platformen politieke actoren met aanzienlijke macht over opinievorming doordat zij controle uitoefenen over de ruimtes en infrastructuren, alsook de relaties tussen de verschillende betrokken actoren, wat uiteindelijk resulteert in een verhoogde mediaconcentratie in het digitale domein. Daarom heeft dit onderzoek tot doel te onderzoeken hoe dergelijke opiniemacht van platforms, alsook de groeiende concentratie van digitale media in Europa, zou kunnen en moeten worden gereguleerd.

Hoofdstuk 1 van dit proefschrift begint met een 'waarschuwend verhaal' om de democratische en maatschappelijke risico's van geconcentreerde opiniemacht te benadrukken en geeft een korte inleiding over de motivatie en intentie achter dit onderzoek. Hoofdstuk 2 gaat vervolgens in op de begrippen "macht", "opiniemacht" en "mediaconcentratie". De definitie van macht in dit onderzoek is sterk gebaseerd op het werk van Steve Lukes en Byung-Chul Han, die macht als zowel structureel als relationeel beschouwen. Opiniemacht wordt gedefinieerd vanuit zowel communicatiewetenschappelijk als juridisch perspectief. Het wordt begrepen als het vermogen van de media om de individuele en publieke opinievorming te sturen, waarbij het zich onderscheidt van bredere communicatiemacht door de specifieke focus op politieke macht. Opiniemacht is dus geworteld in: (a) het beïnvloeden en sturen van informatie- en nieuwsconsumptie, (b) het controleren en bepalen van de selectie van inhoud en agenda's voor debatten, en (c) het bieden van een forum voor publieke discussies en politieke debatten.

Een duidelijke definitie van opiniemacht is cruciaal voor het begrijpen van de normatieve grondslagen van mediaconcentratiewetgeving, die van oudsher zowel economische macht als opiniemacht aanpakt en tegelijkertijd publieke waarden bevordert, in het bijzonder mediapluralisme. Daarom zijn de doelen van de mediaconcentratiewetgeving tweeledig: het behouden van diverse en pluralistische mediamarkten en het beschermen van vrije en open individuele en

publieke meningsvorming. Deze doelstellingen zijn essentieel voor het behoud van mediapluralisme en publieke waarden. In tegenstelling tot het mededingingsrecht, is het onderscheidende kenmerk van het mediaconcentratierecht de extra focus op het bevorderen en behouden van pluralisme. In Hoofdstuk 2, waarin de normatieve en conceptuele grondslagen van dit onderzoek worden gelegd, wordt benadrukt dat naarmate de macht verschuift naar platforms en er nieuwe concentratietrends ontstaan, er vragen rijzen over welke regulerende maatregelen deze macht effectief kunnen beperken. Het hoofdstuk sluit af met een korte schets van de onderzoeksvragen die in de volgende hoofdstukken aan bod komen en introduceert de gebruikte methodologieën.

Hoofdstuk 3 gaat in op de analyse van de verschuivende opiniemacht binnen het digitale media-ecosysteem en bespreekt de relevantie van een herziening van de mediaconcentratiewetgeving, met name de normatieve grondslagen ervan, om deze nieuwe machtsdynamiek aan te pakken. Deze verschuivingen worden voornamelijk gedreven door de digitalisering en platformisering van de nieuwsomgeving, die een impact heeft op het publiek, de traditionele rol van nieuwsmedia uitdaagt en het media-ecosysteem transformeert. Het hoofdstuk bevestigt het normatieve en grondwettelijke belang van opiniemacht en benadrukt het belang ervan voor de macht van de media in een democratie en de noodzaak van een eerlijke verdeling van de macht. Het hoofdstuk concludeert dat opiniemacht inderdaad aan het verschuiven is van legacy media naar platforms, zoals beschreven op drie niveaus: (1) de individuele burger, (2) de institutionele redactiekamer en (3) het media-ecosysteem. Deze drie niveaus vormen de basis voor analyses in de volgende hoofdstukken en introduceren een kader voor het ontwikkelen van toekomstige (niet-)regulerende reacties. Deze antwoorden moeten gericht zijn op (1) de verschuivende invloed op de individuele nieuwsconsumptie en -blootstelling, (2) de veranderende machtsdynamiek binnen geautomatiseerde, datagestuurde en platformafhankelijke nieuwsredacties en (3) de systemische macht van platforms en de daaruit voortvloeiende structurele afhankelijkheden binnen het media-ecosysteem.

Hierop voortbouwend onderzoekt Hoofdstuk 4 traditionele mediaconcentratiewetten in Europa en hun normatieve grondslagen. Het hoofdstuk heeft als doel de bestaande wetten kritisch te herzien en te analyseren, en biedt tegelijkertijd een verenigend theoretisch kader voor een digitale mediaconcentratiewet, inclusief kernconcepten en leidende beginselen. De analyse is gestructureerd rond de drie niveaus uiteengezet in Hoofdstuk 4 (individuele, institutionele, en media-ecosysteem), en behandelt het relevante normatieve kader, identificeert hiaten en stelt mogelijke oplossingen voor op elk niveau. Uit de analyse blijkt dat, hoewel de meeste Europese

landen specifieke wetten voor mediaconcentratie hebben die bedoeld zijn om de opinie en economische macht binnen de mediasector te decentraliseren, deze wetten platforms over het algemeen uitsluiten van hun toepassingsgebied en de nieuwe bronnen van macht in het digitale media-ecosysteem niet effectief aanpakken. Hoewel traditionele regels relevant blijven, verstoren de nieuwe dynamiek en machtsdimensies het media-ecosysteem, waardoor traditionele regels niet effectief blijken om de opiniemacht van platforms aan te pakken. Daarom concludeert het hoofdstuk dat een regelgevende benadering van platformopiniemacht en digitale mediaconcentratie verder moet gaan dan het traditionele toepassingsgebied en ook andere rechtsgebieden moet omvatten, met name gegevensbescherming en privacywetgeving, platformregulering en AI-regulering, om de normatieve waarden die op het spel staan te beschermen.

Hoofdstuk 5 richt zich op het niveau van de institutionele redactiekamers en conceptualiseert “tegenmacht” [“counterpower”] vanuit zowel theoretisch als praktisch perspectief. De praktische inzichten zijn afkomstig uit 12 semigestructureerde interviews met nieuwsorganisaties van verschillende grootte in het Verenigd Koninkrijk en Nederland. Het concept van “tegenmacht” is van belang bij de aanpak van digitale mediaconcentratie om tegenkrachten te versterken en zo asymmetrieën terug in evenwicht te brengen. Op basis van een theoretische analyse definieert dit hoofdstuk “tegenmacht” als “doelbewuste en gecoördineerde inspanningen om [macht] (1) controle te krijgen over relaties en (2) invloed terug te winnen over ruimten, waardoor afhankelijkheden worden verminderd”. Deze definitie bouwt voort op de concepten van macht en opiniemacht die in eerdere hoofdstukken zijn besproken. Uit de interviews kwamen weinig concrete strategieën van nieuwsorganisaties naar voren om een tegenmacht te vormen, wat de behoefte aan extra (wettelijke) ondersteuning onderstreept, met name voor lokale en regionale nieuwsorganisaties die autonomie nastreven om afhankelijkheden te verminderen. De geïdentificeerde strategieën hebben betrekking op het opbouwen van directe en betrokken journalistiek om de relatie tussen publiek en media te verbeteren en het diversifiëren van afhankelijkheden, waarvoor een eerlijk en concurrerend digitaal media-ecosysteem nodig is. Het hoofdstuk sluit af met een onderzoek naar de wettelijke voorwaarden waaraan nieuwsorganisaties moeten voldoen om een “tegenmacht” te kunnen vormen die een relevante rol kan spelen bij het aanpakken van mediaconcentratie en platformafhankelijkheid. Dit houdt in dat naast strengere concentratieregels en het zich ontwikkelende EU-kader, waaronder de DSA, DMA, EMFA en, tot op zekere hoogte, de AI-wet, niet-regulerende maatregelen moeten worden geïmplementeerd.

Dienovereenkomstig worden in Hoofdstuk 6 de regelgevingsinspanningen van de

EU geanalyseerd om mediaconcentratie en platformafhankelijkheid aan te pakken. Belangrijke ontwikkelingen op het gebied van regelgeving op EU-niveau zijn erop gericht de macht van platforms te beperken, eerlijkere en meer concurrerende digitale markten te bevorderen en de eerste AI-wet in te voeren om relevante risico's te verminderen. De EMFA is een andere belangrijke ontwikkeling in deze context, bedoeld om toezicht te houden op mediaconcentratie in "de online omgeving". In dit hoofdstuk wordt de doeltreffendheid van de EMFA onderzocht en worden verschillende blinde vlekken belicht. Een cruciale tekortkoming in de EMFA die meer aandacht verdient, is de technologische en infrastructurele macht van platformen, naast hun economische macht. Deze technologische macht vormt in toenemende mate een nieuwe dimensie van de politieke macht van platforms met hun mogelijkheden om afhankelijkheden te creëren en in stand te houden en democratische ruimten te controleren. Daarom moeten platforms worden gezien als meer dan "slechts" poortwachters, maar ook als leveranciers van infrastructuur, technologie en AI, die centraal staan bij het controleren van de digitale publieke sfeer. Bovendien, hoewel de EMFA tot doel heeft mediapluralisme te bevorderen, worden kleine, lokale en regionale nieuwsentiteiten, die bijzonder kwetsbaar zijn voor concentratiedreigingen en platformafhankelijkheid, niet voldoende genoemd en beschermd. Hoofdstuk 7 sluit af met enkele suggesties om mediapluralisme en redactionele onafhankelijkheid beter te beschermen en horizontale en verticale concentraties aan te pakken.

Het proefschrift wordt afgesloten met Hoofdstuk 7, waarin de belangrijkste bevindingen worden samengevat en de centrale onderzoeksvraag opnieuw wordt bekeken: Hoe kan en moet platformopiniemacht en digitale mediaconcentratie worden gereguleerd in Europa? Uit de analyse blijkt dat de opiniemacht inderdaad verschuift naar platforms, wat leidt tot nieuwe vormen van mediaconcentratie als gevolg van veranderende bronnen van opinie en politieke macht. Het onderzoek identificeert de volgende nieuwe machtsdynamieken die deze verschuivingen mogelijk maken: (1) toenemende algoritmische controle over de toegang tot informatie; (2) toegang tot gebruikersgegevens en communicatie-inhoud; (3) controle over communicatie en digitale infrastructuren; en (4) de middelen om innovatie in technologie en AI te stimuleren.

Tot slot benadrukt Hoofdstuk 8 de noodzaak van toekomstig interdisciplinair onderzoek, met name om regulerende maatregelen te ontwikkelen om de geconcentreerde infrastructurele macht van platforms aan te pakken. Daarnaast vereisen de bescherming van lokale en regionale journalistiek en de bevordering van mediapluralisme en journalistiek als een publiek goed een sterker (politiek)

engagement. De achtergestelde positie van lokale en regionale journalistiek te midden van groeiende platformmacht, digitale mediaconcentratie en toenemende AI-concentratie behoeft dringend aandacht. De kloof tussen lokale en regionale versus grote mediaorganisaties en platforms wordt groter, waardoor ze in een precare situatie terechtkomen. Op basis daarvan geeft Hoofdstuk 8 een korte vooruitblik op de mogelijke implicaties van toenemende AI-concentratie voor het media-ecosysteem en sluit af met enkele slotgedachten.

ACKNOWLEDGEMENTS

There are countless people to thank for making this dissertation possible. First and foremost, I want to thank my doctoral committee for the time and effort they dedicated to reviewing my dissertation, and, of course, my supervisors.

I am deeply indebted to Natali Helberger for her relentless support. Natali, writing my PhD under your supervision, with the freedom to explore my own ideas while benefitting from your clear guidance and brilliance has really been a privilege. Your feedback has always been thought-provoking, challenging, and inspiring at the same time. Also, thank you for encouraging me to have greater confidence in myself and my research – something I struggled with especially in the early stages. Many thanks to Claes de Vreese, for introducing me to the fascinating world of communication science! A highlight of my PhD experience has been its interdisciplinarity, allowing me to delve into (empirical) communications research, which was greatly supported by you, Claes. Finally, I have had the privilege of having not just two brilliant supervisors, but three with Jef Ausloos! Thank you, Jef, for always taking the time to meet (often also very spontaneously), provide such thoughtful feedback, and push me just a little bit further each time. I couldn't have asked for a better trio - your approach to supervision, reminiscent of Goethe's wisdom to provide both "roots and wings", has helped me to think independently while knowing of a solid foundation of support.

My heartfelt thanks to all my colleagues at IViR and the AI, Media & Democracy Lab, especially the youngAIMD and youngIViR crowds: Charis Papaevangelou, Kimon Kieslich, Laurens Nauds, Sophie Morosoli, Ronan Fahy, Paddy Leerssen, Marijn Sax, Hannes Cools, Anna Schøtt Hansen, Plixavra Vogiatzoglou, Doris Buijs, Arlette Meiring and many others. Thanks for the many lunchtime-chats and laughs! Tomás Dodds and Valeria Resendez – my wonderful paranymphs – this entire PhD journey would not have been the same without you, and I believe, it would have been much harder and, frankly, more boring. Thank you for your friendship and endless support! From our beginnings almost four years ago, we've all grown so much, moving from the hopeful "we will be fine" to the reality of "being fine" – who would have known? I'm also especially grateful to Max van Drunen! Thanks, Max, for your critical feedback on this dissertation and for always offering a listening ear and cool-headedness. Jill Toh and Naomi Appelman – thank you both for welcoming me so warmly when I arrived at IViR (it can be a bit overwhelming at first). *Dankeschön* to Ljubiša Metikoš and Gionata Bouchè for the laughter and banter you bring into our shared office! Sanne Vrijenhoek – you deserve a big thank you! Thanks for the uplifting occasional bierstjes, the chats, and for listening, especially during the very final weeks of writing this dissertation. Finally, thank you so much – Sara Spaargaren, Nathalie van Doorn, and Linda Alonso! We would all be pretty lost without you.

There are countless more people who come to mind that I'd like to thank; mostly because, beyond Amsterdam, I have been fortunate enough to not only to travel to conferences to present my research, meet colleagues, and make new friends, but also to spend a few months at the LSE's Polis think tank in London—many thanks to Charlie Beckett for hosting me! Felix Simon, thank you for being a great Oxford guide, a real academic inspiration, and – above all – a friend. The input I received from so many other brilliant researchers over the years has truly shaped this dissertation as well as me as a researcher. Thank you for that – Judith Möller, Damian Tambini, James Meese, Victor Pickard, João Pedro Quintais, Thomas Poell, Manuel Puppis, Tarlach McGonagle, Dwayne Winseck, Maria Donde, Eleonora Mazzoli, Helle Sjøvaag, Jannie Møller Hartley, Kristina Irion, Tarlach McGonagle, Elda Brogi, Sofia Verza, Nick Diakopolous, Colin Porlezza, Sally Broughton Micova, Adelaida Afilipoaie, Mathias-Felipe de-Lima-Santos, Joanne Kuai, Tim Groot Kormelink, and so many others!

Finally, reflecting on the entirety of this journey, the unconditional support of my friends and family— especially my parents and my sister Luisa—has been my true cornerstone. Your constant belief in me gave me the confidence I needed to get to where I am at now.

Because words can never truly capture the depth of gratitude, I'll end by simply saying: *Thank you, Dankjewel & Danke.*

