

Article

## Media Concentration Law: Gaps and Promises in the Digital Age

Theresa Josephine Seipp

Institute for Information Law, University of Amsterdam, The Netherlands; [t.j.seipp@uva.nl](mailto:t.j.seipp@uva.nl)

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### Abstract

Power concentrations are increasing in today's media landscape. Reasons for this include increasing structural and technological dependences 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 European Union regulatory framework—specifically the Digital Services Act, the Digital Markets Act, 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.

### Keywords

digital platforms; editorial independence; European regulation; media concentration; media pluralism; opinion power; structural dependency

### Issue

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### 1. Introduction

Today's media environment is characterised by shifting opinion power, changes in news production, distribution, and consumption, and increased structural and technological dependences on digital platform companies. Throughout this article, I will refer to "digital platform companies" (hereafter "platforms") as (a) the services, platforms, and infrastructures of large platform companies, and (b) the "firm's" or "company's" corporate and business strategies. This is in line with the definitions of "platform" and "platform companies" brought forward by Gorwa (2019, p. 856) and Simon (2022, p. 1833).

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 (Helberger, 2020). 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 (Pickard, 2020; Seipp et al., 2023). Such developments might endanger not only a pluralistic media landscape but democracy as a whole (Helberger, 2020, p. 845). While these developments are relevant to many democracies around the world, this article focuses on Europe and its tradition of imposing positive obligations on states to prevent media concentration and promote pluralism and freedom (Tambini, 2021). 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” (Neuberger, 2018, p. 56; see also Baker, 2007; Seipp et al., 2023).

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 (KEK, 2018; Lobigs & Neuberger, 2018; Ofcom, 2021). This is what prompted the EU to urge a review of media concentration laws and measurements in its recently proposed European Media Freedom Act (European Commission, 2022a). 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).

### 1.1. Methodology

A normative legal research method is used to investigate media concentration law and related policy responses. Because “normative choices have policy consequences” (Popiel, 2022, p. 33), understanding the underlying normative goals of legal tools (Cornils, 2020, p. 14; Ganter, 2022) is useful to assess long-term and institutional effects. Economic and competition-driven policies generally fail to effectively protect media pluralism, public values, and democracy (Baker, 2002, p. 30). 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 (2022, p. 2), discussions about the digitalisation of the news media shall focus on what AI and technology *should* (rather than *could*) do for them and democracy. To that 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 (Centre on Media Pluralism and Media Freedom [CMPF] et al., 2022), 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 (Armitage et al., 2023) and other relevant national studies (KEK, 2018; Lobigs & Neuberger, 2018; Ofcom, 2021). To identify general approaches, several national examples are highlighted to support my arguments, though they are not compared in detail. 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 (Seipp et al., 2023). 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. Normative Foundations of European Media Concentration Law

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” (Knoche, 2021, pp. 374–375). Those with journalistic power can “enforce information, opinion, legitimization, and ideology” that conforms with the interests and goals of those in power (Knoche, 2021, pp. 374–375). 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. (2017) stress, the public value(s) at stake depend on the context. 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 (Baker, 2007; Karppinen, 2013; Schulz, 1998; Seipp et al., 2023). 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 (Baker, 2002, 2007). 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 (Tambini, 2021). Individual and public freedom of expression safeguards, envisaged in Article 10 of the European Convention on Human Rights (Council of Europe, 1950) and Article 11 of the EU Charter (Charter of Fundamental Rights of the European Union, 2012), 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 (Tambini, 2021). Therefore, media freedom and pluralism are means to an end—truth, democracy, and individual autonomy—and not ends in 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 (2013, pp. 15–16), 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. 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 (Tambini, 2021). Henceforth, I resort to and refer to the following list of concentration threats in the gap analysis that has previously guided reports worldwide (CMPF et al., 2022; Mendel et al., 2017):

- 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 (2022) highlight, they are not the only way to achieve certain goals and establish norms. 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.

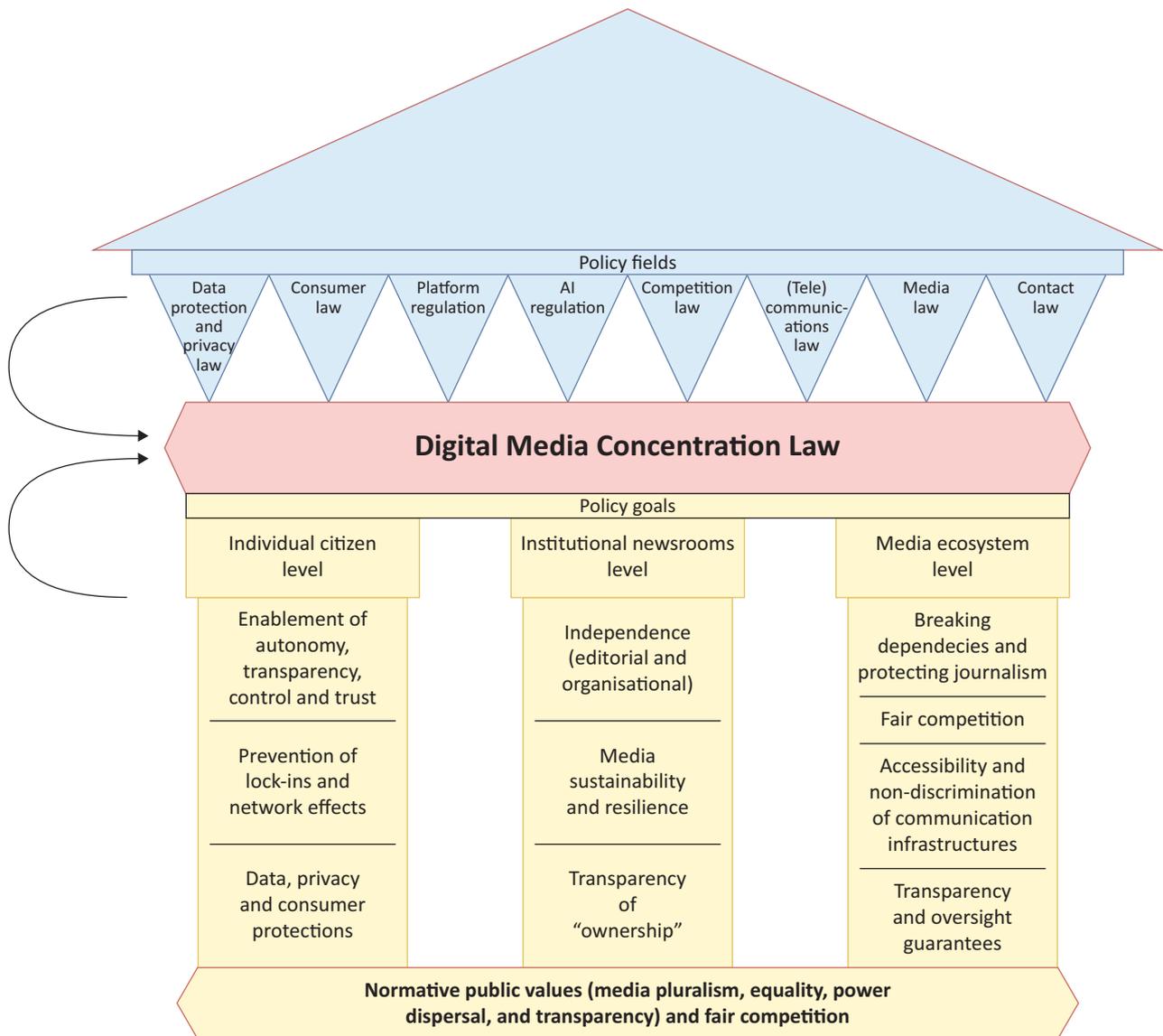
### 3. Analysis: Gaps and Promises for a Digital Media Concentration Law

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.

#### 3.1. Individual Citizen Level

##### 3.1.1. Normative Conceptual Framework: Power Over News Consumption and 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 (Diakopolous, 2019). 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 (Viljoen et al., 2021, p. 2), may affect how autonomous and free choices in news consumption and opinion formation are. 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” (Schulz, 1998, p. 180).



**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.

### 3.1.2. 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 (CMPF et al., 2022, p. 206), while others limit capital rights shares and voting rights shares to confine the power of individual actors within a media company. Media reach limitations, however, neglect the influence of online media, new services, and platforms on opinion formation (CMPF et al., 2022, pp. 204–207). Similarly, audience share measures mostly target traditional media. Only six EU member states (e.g., Croatia, Italy, and Germany) address online media (CMPF et al.,

2022, p. 208). 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, Snapchat, and Instagram, amongst younger audiences keeps growing (Newman et al., 2022). 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” (Lobigs & Neuberger, 2018, p. 70, translation by the author; van der Vlist & Helmond, 2021). 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 (Napoli, 1999). 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 (2021, p. 154) highlighted, “the key metric is not audience share on [the] national level, but data consolidation.” 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 and 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 (European Commission, 2021) and the German “Medienstaatsvertrag” (Die Medienanstalten, §83, §93) both 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 (Deuze & Beckett, 2022). Research shows that obligations to make transparent information about automated decision-making, like the Regulation of the European Parliament and of the Council of 27 April (2016; General Data Protection Regulation [GDPR]) requires or about the main parameters of platforms recommender systems (European Commission, 2022b, Article 27) are only a small (and slightly less relevant) portion of the information that is important to individuals’ trust (van Drunen et al., 2022, p. 36). From a normative viewpoint, to pro-

tect 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 (van Drunen et al., 2019, 2022).

Connectedly, the European Media Freedom Act proposes a “right of customisation” (of audio-visual media offer; European Commission, 2022a, Article 19) and the Digital Services Act requires platforms that use recommenders to allow user choice, including enabling at least one option for recipients of the service to modify or influence those main parameters (European Commission, 2022b, 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 (Harambam et al., 2019). 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 (van Drunen et al., 2022). 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 (Helberger, van Drunen, et al., 2021).

So far, media concentration rules do not fully encompass elements of transparency, 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’ (2019, p. 183) 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

(Napoli, 2015). Accordingly, measures to avoid lock-ins and prevent network effects seem indispensable to fulfil the normative goals and to truly enable competition. The Digital Markets Act 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 dependence of both business users and end users, lock-in effects” (European Commission, 2022c, 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 dependences.

### 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” (Kerber & Specht-Riemenschneider, 2021, p. 4). Protective measures matter for media pluralism and freedom, as privacy concerns may have a chilling effect on free speech (Cohen, 2013). 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 European Convention on Human Rights (Council of Europe, 1950) and Articles 7 and 8 of the EU Charter (Charter of Fundamental Rights of the European Union, 2012), 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 (Helberger, Micklitz, et al., 2021, p. 145). 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 (Helberger, Micklitz, et al., 2021, p. 6).

The Digital Markets Act (European Commission, 2022c, 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. 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 (Graef, 2021) nor to protect consumers, as architectures could exploit user vulnerabilities and nudge towards consenting (Helberger, Micklitz, et al., 2021). Furthermore, Helberger et al. (2017) argue that realising public values in platform-based public activities requires “cooperative responsibility.” 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 (Helberger et al., 2017, p. 2).

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 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 and 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 (Seipp et al., 2023; van Drunen & Fechner, 2022). 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 (Jarren, 2018). As control over audience connection shifts from news media to platforms (Nielsen & Ganter, 2022; Simon, 2022), opinion power and control inside newsrooms also shift. 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” (Karpinen, 2013, p. 80).

### 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” (Just, 2022, p. 188).

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 (2002, p. 57) observed decades ago that “the fundamental issue is control, for which ownership is a loose but poor proxy.” The growing importance of control over data, skills, and knowledge is eroding traditional understandings of what it means to “own” 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 (2018, p. 448), 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. Journalists’ and editors’ reliance on audience metrics, often defined and controlled by external platforms, is another example of power shifting within newsrooms (Dodds et al., 2023). 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 (Ferrer-Conill & Tandoc, 2018, p. 448). 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 (Murgia, 2023), with potentially severe long-term institutional consequences. 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 dependence.

In addition to being gateways to news and providing technologies and data, platforms remain relevant for funding skills, expertise, and research projects (Diakopolous, 2019, p. 179; Simon, 2022, p. 4). Although previous research has not shown any *direct* interferences with journalists’ editorial independence through funding (Fanta & Dachwitz, 2020), limitations on foreign ownership do not capture the money flowing from foreign private companies into (European) news organisations, which might pose potential for *indirect* influ-

ence. 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% (CMPF et al., 2022, p. 219). 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 (Helberger, 2020). Therefore, transparency obligations regarding the amounts and beneficiaries of funding (especially from Google and Meta) may need to be included in the current toolbox (CMPF et al., 2022, pp. 401–402; Papaevangelou, 2023). 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 and Potential Remedies

The media serve a public and democratic purpose by upholding professional and journalistic ideals such as independence and autonomy (McCombs & Shaw, 1972). 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, business departments, and third-party technology companies that often either fund and support R&D or externally develop and build technology is the norm (van Drunen & Fechner, 2022, p. 6). In addition to regulatory measures, van Drunen and Fechner (2022, p. 22) argue that “internal organisational matters have increasing relevance in ensuring editorial independence in the context of automation,” also to prevent external influences. 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 (Simon, 2022). 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 (Helberger, 2020). 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 (2021, p. 48) 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.” Accordingly, Pickard (2020) and others have called for public funds and digital or “public media” taxes on platforms’ earnings to fund public interest journalism (CMPF et al., 2022, p. 400). This requires a delicate balance to be struck between regulatory action and public support while avoiding public interference with journalistic freedom.

### 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; Sjøvaag & Ohlsson, 2019). The European Media Freedom Act proposes to mitigate “the risk of undue public and private interference in editorial freedom” (European Commission, 2022a) 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 (Helberger, 2020, p. 846). Platforms have the (economic) monopolistic and political power to influence policymaking (Helberger, 2020; Seipp et al., 2023), 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 (Knoche, 2021), 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” (CMPF et al., 2022, p. 210). Rules at the media ecosystem level focus specifically on limiting concentrations of power and anti-competitive behaviour, 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 (Just, 2022). 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 (CMPF et al., 2022, p. 214; Just, 2022). Most ownership limitations constitute purely competition-focused rules and are evaluated by national competition authorities (NCAs; e.g., Slovakia, Estonia, and Luxemburg; CMPF et al., 2022, pp. 209, 246). 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 (CMPF et al., 2022, pp. 214–218). NCAs can evaluate mergers’ economic effects but not political power, which derives from opinion power (CMPF et al., 2022, p. 39). 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 (CMPF et al., 2022). 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 and 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 (Pickard, 2020). Empowering local media has two main purposes: to reduce the dependence 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 (Nielsen & Ganter, 2022), sparking increased concentration trends. 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 (Bossio et al., 2022). 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 (Minderoo Foundation, 2022). 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 col-

lectively and share information about the progress of negotiations (Bossio et al., 2022, p. 8).

Other remedies could concentrate on defining a balanced contractual relationship between platforms and news media while respecting contractual freedoms (Helberger, 2020). Not only users but also the news media find themselves in situations where platforms have contractual control over their infrastructure and services (Simon, 2022, p. 12). 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 (Council of Europe, n.d.).

#### 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; CMPF et al., 2022, p. 38). 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 (CMPF et al., 2022, p. 39). 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 Digital Markets Act 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 (European Commission, 2022c; European Commission, 2022d). 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 (European Commission, 2020), the EU (European Commission, 2022e) 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. 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 physical or digital resources and service” of a business (Nechushtai, 2017, p. 1043). 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; Busch, 2021). For digital news media markets, such dependence 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 (Nechushtai, 2017).

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 (2021, p. 5) suggests a “platform infrastructure law” to address platforms as societal infrastructures and key actors in the sphere of services of general interest. 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 (CMPF et al., 2022, p. 390). Collaborations could improve the exchange of data among authorities and create joint com-

mittees 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 of two authorities” (CMPF et al., 2022, p. 390).

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 (CMPF et al., 2022, p. 244), despite some previous proposals (e.g., KEK, 2018). 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 (CMPF et al., 2022, p. 376).

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 (Roth, 2022). 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 (Goujard, 2022). 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 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.

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The author declares no conflict of interests.

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#### About the Author



**Theresa Josephine Seipp** is a PhD candidate at the Institute for Information Law at the University of Amsterdam and is part of the AI, Media, and Democracy Lab. Her research focuses on governing AI in the media, opinion power, and media (concentration) law. Theresa holds degrees from the University of Groningen (LLB, LLM cum laude) and Ghent University (LLM), and previously researched at the Hans Bredow Institute (Leibniz Institute for Media Research) on topics related to EU media law and policy.