

REPORT ON THE CONCENTRATION OF MEDIA OWNERSHIP IN IRELAND

AN INDEPENDENT STUDY

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1. EXECUTIVE SUMMARY

- 1.1 Issues concerning media plurality and concentration of media ownership have in recent years come under the policy spotlight in a number of European countries, including Italy, the United Kingdom (“UK”) and Hungary; and worldwide, including in the United States of America (“USA”), Australia and India. The public, policy-makers, politicians, the courts and media organisations themselves have raised questions about the accumulation of power by particular media organisations, including across different sectors; whether there are cosy relationships between dominant media groups and governments, leading to a reduction in scrutiny and an undermining of the ability of the media to hold the powerful to account; and the ability of media moguls, such as Silvio Berlusconi or Rupert Murdoch, to dominate particular markets and have a substantial influence on news agendas and the content received by audiences.
- 1.2 This Report now focuses the policy spotlight upon Ireland, and considers its current concentration of media ownership. The Report addresses concerns which have been raised – at national, European and international level – regarding Irish media ownership and other features of the media landscape in Ireland, and it highlights additional risks to freedom of expression and the Irish media’s ability to perform its vital watchdog function.
- 1.3 Critical to our analysis are the international, European and Irish standards which protect freedom of expression and the protection of plurality and diversity of voices in the media. It is now widely recognised that plurality is not a goal in itself but a means to an end, a feature and essential component of a well-functioning democratic society. It is a cornerstone of a healthy dynamic democracy.¹ As the Council of Europe has put it, “*democracy would be threatened if any single voice within the media, with the power to propagate a single viewpoint, were to become too dominant*”.²

¹ B.H. Bagdikian, *The New Media Monopoly* (Beacon Press, 2004); Edwin C. Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press, 2007); Steven Barnett and Judith Townend, *Media Power and Plurality: From Hyperlocal to High-Level Policy* (Palgrave Macmillan, 2015), p. 3.

² Council of Europe, Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, Explanatory Memorandum (1999).

- 1.4 Ireland has one of the most concentrated media markets of any democracy. Accumulation of what has been described as “*communicative power*”³ within the news markets is at endemic levels, and this, combined with the dominance of one private individual media owner in the State, creates what the Media Reform Coalition has described as “*conditions in which wealthy individuals and organisations can amass huge political and economic power and distort the media landscape to suit their interests and personal views.*”⁴
- 1.5 The two most important controlling entities in the Irish media landscape are the national State broadcaster, RTÉ, and an individual businessman, Denis O’Brien, who has a dominant position within the Irish print media sector, given his ownership of a significant minority stake in the country’s largest newspaper publisher, Independent News and Media (“INM”), and substantial holdings in the commercial radio sector. In addition to his media ownership, Mr. O’Brien is also a prolific businessman and one of Ireland’s richest people, listed in the Forbes List of billionaires.⁵
- 1.6 The spread – or rather, the clustering – of media ownership in Ireland was heavily criticised in a March 2016 report on Ireland published by the Centre for Media Pluralism and Media Freedom (“CMPF”) in Florence. The research for that report was conducted by Dr. Roderick Flynn, Dublin City University (“DCU”). The scoring system used by CMPF in its Media Pluralism Monitor rates countries across a range of indicators, between a low and high of 0.00 and 1.00, with scores recorded above 0.66 being described as representing a ‘high risk’. The score awarded for Ireland in the ‘concentration of media ownership’ category was in excess of 0.70, placing it firmly in the highest level of concern. The CMPF report concluded that a lack of specific legal barriers to concentrated media ownership has placed Ireland at the highest risk level, in their assessment of threats to media pluralism. Particular concern was expressed about INM and its largest shareholder, Mr. O’Brien.

³ Per Baker (2007) (see above at fn 1).

⁴ Media Reform Coalition, *Who Owns the UK Media?* (October 2015), p. 3, available at <http://www.mediareform.org.uk/resources/media-ownership-reports>.

⁵ *Forbes: The World’s Billionaires*, Denis O’Brien, no. 219, <http://www.forbes.com/profile/denis-obrien/>; see also Eamon Quinn, “Denis O’Brien features on Forbes rich list despite €1bn drop,” *Irish Examiner*, 2nd March 2016, available at <http://www.irishexaminer.com/business/denis-obrien-features-on-forbes-rich-list-despite-1bn-drop-385080.html>.

1.7 We echo the concerns in the CMPF report regarding the concentration of media ownership in the Irish market, but in our view those concerns are amplified by a number of additional features, including:

1.7.1 First, Mr. O’Brien has initiated a large number of sets of proceedings since 2010, including 12 cases against media organisations in relation to their coverage of his business affairs.⁶ Analysis stretching back almost two decades, to 1998, suggests that Mr. O’Brien has regularly made threats of legal action, and instituted legal proceedings, against journalists and media organisations.⁷ Any wealthy individual bringing such a large number of claims seeking to restrict press coverage of their business dealings would raise concerns regarding freedom of expression and the potential for such litigious profligacy to have a ‘chilling effect’ on newsgathering and reporting in the public interest. However, when the wealthy individual in question is also the “*largest owner of private media in the State*,”⁸ those concerns and risks are substantially increased. It is little wonder that journalist and media commentator Roy Greenslade has reminded his readers of a “*British equivalent back in the day*” who was a “*more active employer of lawyers than [Mr. O’Brien]*. *Writs were issued in his name like confetti*”: media mogul Robert Maxwell.⁹

1.7.2 Second, media organisations and academics have, rightly, repeatedly criticised Ireland’s defamation laws, including the potential for very high jury awards which are wholly out of kilter with the rest of Europe, and lack of certainty regarding damages. For example, NewsBrands Ireland¹⁰ has criticised the defamation regime in a statement released to mark World Press Freedom Day 2016, asserting that many newspapers simply do not take the risk of publishing

⁶ Analysis by Colm Keena, “Holding court: Denis O’Brien’s long list of legal actions,” *Irish Times*, 14th May 2016, available at <http://www.irishtimes.com/news/crime-and-law/holding-court-denis-o-brien-s-long-list-of-legal-actions-1.2647302>; see also Roy Greenslade, “Are Denis O’Brien’s legal actions some kind of record?”, *Guardian*, 16th May 2016, available at <https://www.theguardian.com/media/greenslade/2016/may/16/are-denis-obriens-legal-activities-some-kind-of-record>.

⁷ Roy Greenslade, 16th May 2016 (see fn 6 above), citing Transparency International’s 2012 citation of figures gathered by the NUJ.

⁸ Per Colm Keena, *Irish Times*, 14th May 2016 (see above at fn 6).

⁹ Roy Greenslade, *Guardian*, 16th May 2016 (see above at fn 6).

¹⁰ Formerly known as National Newspapers Ireland.

potentially controversial material given the possibility of high damages awards and the unpredictability for publishers, who cannot reliably ascertain their potential liability pre-publication.¹¹

- 1.8 In our view, taken together, the combination of the highly concentrated Irish media market, Mr. O’Brien’s threats and initiation of a large number of legal proceedings against media and other critics, and serious shortcomings in the defamation framework create a perfect storm which threatens news plurality and undermines the media’s ability to perform its watchdog function.
- 1.9 The importance of media plurality is recognised in Ireland through the new regime established by the Competition and Consumer Protection Act 2014 (“**the 2014 Act**”), which introduced a new media mergers system. All mergers involving media must now be notified to the Minister for Communications, Energy and Natural Resources as well as to the EU Commission, or to the Competition and Consumer Protection Commission. The Minister reviews the effect of the media merger on media plurality in Ireland (e.g. diversity of ownership and diversity of content) and can prohibit a media merger. The 2014 Act refers to the “*undesirability of allowing any one undertaking to hold significant interests [defined as in excess of a 20% share] within a sector or across different sectors of media business in the state*” when assessing media mergers. The 2014 Act can prospectively ensure that no entity acquires through merger a share in excess of 20% of a particular sector in the media. However it contains no mechanism for adjusting the status quo in which Ireland finds itself, whereby an individual, Mr. O’Brien, already controls what the Act itself describes as an “*undesirably*” high level of media ownership.
- 1.10 Since publication of the CMPF report in March 2016, there have been many calls for reform. The National Union of Journalists (“**NUJ**”), for example, issued a call in April 2016 to urge political parties to seek all-party agreement on ways of tackling media dominance in Ireland. Media commentator Roy Greenslade in a series of

¹¹ Patsy McGarry, “Defamation laws ‘out of line with Europe’, says newspaper body,” *Irish Times*, 3rd May 2016.

thundering articles asked if the Irish government is “*too cowed to do anything about the country’s largest media tycoon*”.¹²

1.11 However, no steps have yet been taken, and in September 2016 INM agreed a deal to add seven more newspaper titles to its stable by acquiring the Celtic Media Group, extending its regional footprint to five more counties.

1.12 This Report concludes that there are very grave concerns about the situation in Ireland, and the threats to diversity, plurality and freedom of expression. We strongly recommend that these concerns be addressed as a matter of urgency, and be seen to be addressed. It is imperative that safeguards are considered to ensure journalistic and editorial autonomy, to protect and promote plurality in the Irish media market, and to address the ability of powerful media proprietors such as Mr. O’Brien to dictate news agendas and stifle newsgathering and reporting concerning their business interests.

1.13 The Report’s authors are aware of suggestions that there are legal bars to any such action being taken, but we reject any suggestion that it is not legally permissible to address the status quo and that tackling the current concentration of media ownership is impossible given the importance of property rights in the Irish Constitution and/ or the European Convention on Human Rights (“ECHR”). On the contrary, our conclusion is that there is, in principle, no such legal bar. A retrospective mechanism could indeed be permissible under the Irish Constitution, EU law, and the ECHR. Indications to the CMPF that this is a constitutional no-go area were misguided and do not reflect the true legal position.

1.14 However, whilst this matter of principle is clear, there remain complex and nuanced issues to consider. The devil is very much in the detail, and these are difficult issues. What is now needed is a careful review of the detail, and, accordingly, the Report recommends that the Government establish a cross-disciplinary Commission of Inquiry. This Commission should examine the issues closely and make concrete recommendations, within a tight timeframe.

¹² See Roy Greenslade, “Should Ireland allow Denis O’Brien’s media empire to get larger still?,” *Guardian*, 7th September 2016, available at <https://www.theguardian.com/media/greenslade/2016/sep/07/should-ireland-allow-denis-obriens-media-empire-larger>.

1.15 The authors also recommend action by the Council of Europe, proposing that there be a fresh recommendation by the Committee of Ministers on media pluralism, as the existing key standards date from 1999, almost two decades ago.

1.16 The Irish Commission of Inquiry should work with the Council of Europe's recently appointed Committee of Experts on Media Pluralism and Transparency of Media Ownership¹³, both to provide accurate information and expert analysis on the position in Ireland, and to contribute to the Council of Europe's approach to the issue of media pluralism.

¹³ See further <http://www.coe.int/en/web/freedom-expression/committee-of-experts-on-media-pluralism-and-transparency-of-media-ownership-msi-med->.

2. LEGAL STANDARDS CONCERNING MEDIA PLURALITY, CONCENTRATION OF OWNERSHIP AND CROSS-OWNERSHIP

2.1 When the UK's House of Lords' Select Committee on Communications examined the issue of media plurality in 2014, they commented with surprise upon the fact that the evidence they had received from witnesses tended to take for granted the question of whether plurality was desirable, and instead focused only upon what the particular plurality policy should be.¹⁴ The Committee adopted the approach of Ofcom (which had also been supported by Lord Justice Leveson¹⁵) to the effect that:

“Plurality is not a goal in itself, but a means to an end... a well-functioning democratic society... Plurality contributes to a well-functioning democratic society through the means of:

- (a) Informed citizens – able to access and consume a wide range of viewpoints across a variety of platforms and media owners.*
- (b) Preventing too much influence over the political process – exercised by any one media owner.”¹⁶*

2.2 We agree that this is a useful working definition, reflecting two key aspects of a plural media market – diversity of viewpoint for the audience, and the prevention of undue accumulation of power in the hands of a single media owner. The first aspect is often emphasised – see, for example, the expert group Sustainable Governance Indicators (“SGI”) which addresses the range of television and radio stations and Irish-produced and UK-produced newspapers available daily to an Irish audience,¹⁷ or the 1961 House of Commons' Pilkington Committee¹⁸ – but it is important to bear the second in mind also (particularly in the Irish context).

¹⁴ House of Lords, Select Committee on Communications, 1st Report of Session 2013-14, *Media Plurality* (4th February 2014) (HL Paper 120), at [4].

¹⁵ This working definition was also supported by the Department for Media, Culture and Sport in their consultation document, *Media Ownership and Plurality Consultation* (July 2013).

¹⁶ *Ibid.*, at [1] – [3].

¹⁷ http://www.sginetwork.org/2016/Democracy/Quality_of_Democracy/Access_to_Information/Media_Pluralism.

¹⁸ The Pilkington Committee considered concentrated ownership across different means of communication and, in particular, whether there was an implicit threat to democracy for control over newspapers and television stations to be vested in the same hands. The Committee's report specifically addressed the potential danger, at [627]: *“The threat is thought to reside in the fact that, because two of the media of mass communication are owned in some measure by the same people, there is an excessive concentration of power to influence and persuade public opinion; and that, if these same people are too few or have broadly the same political affiliations, there will be an increasingly one-sided presentation of affairs of public concern. There might, too, be a failure to present some of these affairs sufficiently or at all.”*

2.3 The Australian Green Party politician Scott Ludham has echoed these twin aims in his battle-cry concerning the importance of protecting media plurality, made when there were proposals to deregulate media ownership in Australia:

*“The greatest issue here is not market share for one media proprietor or another, but the health of our democracy. Media organisations and journalists on their payroll play a crucial role in holding powerful people and institutions to account. Should the media organisations themselves accumulate too much power, there is no-one left with substantial audience reach to watch the watchers. A vibrant, diverse media ecosystem is essential to a functioning democracy, and any threats to water down the laws that keep it that way should be vigorously opposed – no matter what your political views.”*¹⁹

2.4 Given our terms of reference, this Report focuses upon the issue of concentration of media ownership. However, it is important to bear in mind that media pluralism is a concept which also embraces other aspects, including variety in the sources of information and range of content and viewpoints available. The Commission of the European Communities noted this in a 2007 working paper, stating, *“for many analysts or observers, media pluralism has come to mean, almost exclusively, plurality of ownership... Although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism.”*²⁰ In the Irish market, for example, there is a plurality issue arising which is linked to the issues we address concerning ownership, but it is not an ownership issue specifically – the supply of news services.

2.5 According to Ipsos MRBI, Irish people spend more time listening to radio than any other media, and almost 3 million people listen to radio every weekday (83% of those aged 15+)²¹. More than half, 58%, tune into their local or regional station and 44% listen to a national station. Ireland has many independent local or regional radio stations, but we note that Communicorp-owned Newstalk, one of Ireland’s leading commercial radio talk stations, supplies the news to the entirety of this

¹⁹ Scott Ludham, “The growing threat to Australia’s media plurality,” *Guardian*, 24th March 2014.

²⁰ Commission of the European Communities, *Commission Staff Working Document: Media Pluralism in the Member States of the European Union*, 16th January 2007, SEC (2007) 32, at p. 2, available at http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf.

²¹ 2.992 million: Ipsos MRBI/JNLR 2016/2 Summary Results, July 2016, available at http://info.ipsosmrbi.com/assets/files/jnlr/user_information/15-080947-Jul'16-Press%20Release-FINAL.pdf.

network.²² A Newstalk journalist proudly announced its dominance in the supply of radio news services in October 2014:

“Newstalk has today announced a new deal to provide a National & International news, business and sports service to the UTV Group of radio stations: Limerick 95FM, LMFM, Cork 96FM, C103FM, Q102 and FM104. The Communicorp owned station will now become the largest news supplier in Ireland, with a total available audience of 1.7 million listeners daily.

Newstalk, the multiple PPI award winning station, already provides broadcast services to 25 independent local and regional radio stations across the country, with the new addition of the UTV group it will bring the total number to 31, which is the entire independent radio network.”²³

2.6 A number of academics have analysed the value of media plurality, and in particular, diversity and non-concentration of ownership. For example, Professor Steven Barnett has posed the question: why is concentration of media ownership so routinely condemned? He goes on to summarise the usual rationale for criticising such concentration:

“It has been axiomatic since the emergence of a press that is not irredeemably allied to the interests of the State or to party political factions that plurality of media ownership is an essential element of a healthy democracy. The fewer owners or gatekeepers, goes the argument, the fewer the number of voices and the more damaging the consequences for diversity of expression. Not only will fewer interests be represented but there will be fewer opportunities for elites to be held properly to account: less opportunity to ‘tell truth to power’.”²⁴

2.7 Professor Edwin C. Baker was one of the leading authorities on mass media policy and freedom of expression in the USA. He advanced three main reasons for opposing ownership concentration:

2.7.1 First, because opposing such concentration is necessary for a more democratic distribution of what he termed “*communicative power*.” He emphasised that

²² See further Laura Slattery, “Newstalk renews local news contract,” *Irish Times*, 25th April 2013, available at <http://www.irishtimes.com/business/media-and-marketing/newstalk-renews-local-news-contract-1.1371265>, and Sue Murphy, “Newstalk announces deal to supply news services to UTV radio stations,” *Newstalk*, 23rd October 2014, available at <http://www.newstalk.com/Newstalk-announces-deal-to-supply-news-services-to-UTV-radio-stations>.

²³ Sue Murphy, *ibid*.

²⁴ Steven Barnett, *Media @ LSE Electronic Working Papers*, No. 18, ‘What’s wrong with media monopolies? A lesson from history and a new approach to media ownership policy,’ available at <http://www.lse.ac.uk/media@lse/research/mediaWorkingPapers/pdf/EWP18.pdf>.

this does not rest solely on empirical verification because, “*whether ownership dispersal actually leads to such content or viewpoint diversity turns out to be a complex and contextual matter.*”²⁵ He cited a US Court of Appeals decision from 1975, concerning an application for combined ownership of a local newspaper and a TV station,

“... *diversity and its effects are...elusive concepts, not easily defined let alone measured without making qualitative judgements objectionable on both policy and first Amendment grounds.*”²⁶

2.7.2 Second, Professor Baker refers to “*democratic safeguards*”, including protection against a single individual or ideology wielding unchallenged, autocratic power; the number of decision makers in a position to commit resources to ‘watchdog’ journalism; and a reduction in the risk of co-optation of media operations by powerful political or economic interests.

2.7.3 Third, he focused upon the obsession with profitability, stating that the drive for higher profit margins places downward emphasis on operating costs which, in turn, drives down investment in journalism. These structural pressures are an inevitable consequence of large, centralised corporations.

2.8 More recently, a number of writers²⁷ and campaigners²⁸ have considered whether these principles have been altered the impact of new ‘democratising’ technologies and non-traditional news outlets. Whilst recognising that these changes apparently present new opportunities for plurality, they argue that there are countervailing factors which mean that taking steps to secure diversity and plurality remains a priority.

2.9 These principles concerning the importance of media plurality and the threats posed to freedom of expression and democratic values by excessive media concentration are reflected in international and European legal standards. ‘Media freedom’, which is recognised as an essential constituent element of the rights protected by

²⁵ Edwin C. Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press, 2007), p. 15.

²⁶ *Sinclair Broadcast Group v. FCC*, 284 F. 3d 148, US Court of Appeal (2002).

²⁷ See e.g. Steven Barnett and Judith Townend, fn 1, at p. 1.

²⁸ See e.g. the European Initiative for Media Pluralism (“EIMP”).

international and European instruments which protect expression rights generally, incorporates both freedom from government intervention in media and the protection of media pluralism. Media freedom fulfils three major functions, each fundamental to a properly functioning democracy, and media pluralism is necessary to each function. Those are: (1) to provide a platform for self-expression; (2) to inform citizens; and (3) to engender public debate.²⁹

International Instruments

2.10 Article 19 of the Universal Declaration of Human Rights (“UDHR”) (1948) provides:

“Everyone has the right to freedom of expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.”

2.11 Whilst media pluralism is not expressly mentioned in Article 19, nevertheless it has been specifically recognised by the United Nations Committee on Human Rights as an important aspect of the right protected by Article 19:

“The State should not have monopoly control over the media and should promote plurality of the media. Consequently, State parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”³⁰

Council of Europe

2.12 Article 10, ECHR (1953) provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public

²⁹ From Chapter 1 (Calderaro and Dobreva, ‘Framing and Measuring Media Pluralism and Media Freedom across Social and Political Contexts’) of Parcu (ed.), ‘European Union Competencies in Respect of Media Pluralism and Media Freedom’ (CMPF, 2013), available at <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>.

³⁰ Comment General No. 34 on Article 19 adopted by the Committee during the 102nd session, July 2011.

safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

2.13 Article 10 does not expressly refer to media plurality or diversity. However, in its case law the European Court of Human Rights (“**ECtHR**”) has regularly referred to core principles which echo the descriptions of the importance of plurality which we have set out above – highlighting the media’s watchdog role, and the duty of the press to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest.³¹

2.14 The ECtHR has also made clear that compliance with Article 10 may involve States having to take positive steps to ensure its protection:

“in view of the crucial importance of freedom of expression as one of the preconditions for a functioning democracy, “exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.”³²

2.15 The third sentence of Article 10(1) provides that, *“This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”* In interpreting this aspect of Article 10, the ECtHR has on a number of occasions directly connected the protection of free speech with media pluralism.

2.16 For example, in 1993 the ECtHR examined for the first time a public monopoly on broadcasting, and found a violation of Article 10.³³ It first pointed out the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it imparted information and ideas of general interest, which the public, moreover, was entitled to receive. Secondly, the ECtHR held that pluralism, of which the State was the ultimate guarantor, was an especially important principle in relation to audiovisual media, whose programmes were often

³¹ See e.g. *Bladet Tromsø and Stensaas v. Norway*, No. 21980/93, judgment of 20th May 1999, Reports 1999-III (Grand Chamber).

³² *Özgür Gündem v. Turkey*, No. 23144/93, judgment of 16 March 2000, Reports 2000-III, §43.

³³ *Informationsverein Lentia and others v. Austria*, judgment of 24th November 1993, Series A No. 276, (1993) 17 EHRR 93.

broadcast very widely; and thus the far-reaching character of the restrictions which a public monopoly imposed on freedom of expression meant that they could only be justified if they met a *pressing* need, which they did not in this instance. The ECtHR rejected as groundless fears that the Austrian market was too small to sustain a sufficient number of private stations for concentrations and ‘private monopolies’ to be avoided, being contradicted by the experience of several European countries, comparable in size to Austria, where public and private stations coexisted under national rules backed up by measures preventing the development of private monopolies.

2.17 Article 10 ECHR has also been directly connected to media pluralism by the European Court of Justice (“ECJ”). In *Kabel Deutschland*³⁴, a case concerning a national law requiring analogue cable network operators to provide access to their cable networks to all television programmes allowed to be broadcast terrestrially, the ECJ affirmed that:

“the maintenance of the pluralism which the legislation in question seeks to guarantee is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which freedom is one of the fundamental rights guaranteed by the Community legal order.”

2.18 The importance which the Council of Europe has long attached to media plurality is also clear from its 1999 Recommendation³⁵, which recommended, *inter alia*:

- “... that the governments of the member States:*
- i. examine the measures contained in the appendix to this recommendation and consider the inclusion of these in their domestic law or practice where appropriate, with a view to promoting media pluralism;*
 - ii. evaluate on a regular basis the effectiveness of their existing measures to promote pluralism and/or anti-concentration mechanisms and examine the possible need to revise them in the light of economic and technological developments in the media field.*

³⁴ *Kabel Deutschland Vertrieb und Service GmbH & Co. v. Niedersächsische Landesmedienanstalt für privaten Rundfunk* (Case C-336/07).

³⁵ The importance of guaranteeing media pluralism had also been emphasised in earlier instruments: see the declarations and resolutions adopted at the 3rd, 4th and 5th Ministerial Conferences on Mass Media Policy (Cyprus, October 1991, Prague, December 1994, and Thessaloniki, December 1997) and Recommendation No. R (94) 13 of the Committee of Ministers on measures to promote media transparency.

....

Measures to promote media pluralism

I. Regulation of ownership: broadcasting and the press

Member States should consider the introduction of legislation designed to prevent or counteract concentrations that might endanger media pluralism at the national, regional or local levels.

Member States should examine the possibility of defining thresholds — in their law or authorisation, licensing or similar procedures — to limit the influence which a single commercial company or group may have in one or more media sectors. Such thresholds may for example take the form of a maximum audience share or be based on the revenue/turnover of commercial media companies. Capital share limits in commercial media enterprises may also be considered. If thresholds are introduced, member States should take into consideration the size of the media market and the level of resources available in it. Companies which have reached the permissible thresholds in a relevant market should not be awarded additional broadcasting licences for that market.

Over and above these measures, national bodies responsible for awarding licences to private broadcasters should pay particular attention to the promotion of media pluralism in the discharge of their mission.

Member States may consider the possibility of creating specific media authorities invested with powers to act against mergers or other concentration operations that threaten media pluralism or investing existing regulatory bodies for the broadcasting sector with such powers. In the event member States would not consider this appropriate, the general competition authorities should pay particular attention to media pluralism when reviewing mergers or other concentration operations in the media sector.

Member States should consider the adoption of specific measures where vertical integration — that is, the control of key elements of production, broadcasting, distribution and related activities by a single company or group — may be detrimental to pluralism.”

2.19 The Recommendation and Appendix expressly recognise the important role played by public service broadcasting (“PSB”), and the importance of maintaining and sustaining PSB in the interests of media pluralism.

2.20 In the Explanatory Memorandum to the Recommendation, the Council of Europe linked pluralism to the promotion of democratic values, stating that, “*democracy would be threatened if any single voice within the media, with the power to propagate a single viewpoint, were to become too dominant*”.³⁶

³⁶ Council of Europe, Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, Explanatory Memorandum (1999).

European Union

2.21 The European Union (“EU”) has no explicit competence in relation to media pluralism, however – expressly through Article 11 of the Charter of Fundamental Rights of the European Union (2000) (“**the Charter**”), and impliedly through Article 10 ECHR – regard must be had to protection of media pluralism in the implementation of EU law and in the interpretation of the EU’s constitutional principles.

2.22 The EU has competence in the field of competition, which has direct application to issues of media pluralism, but has abrogated those issues to Member States. There is no bar in principle to domestic competition law (including any domestic mechanism for referring EU competition issues to the Commission) that protects media pluralism and has retroactive effect. However any such retroactive legislative measure would have to meet a stringent test of necessity and proportionality.

2.23 As noted above ‘media freedom’ incorporates both freedom from government intervention in media and the protection of media pluralism, and as such is recognised as an essential constituent element of the rights protected by the International articles protecting expression rights generally.

2.24 Article 11 of the Charter provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.”

2.25 The precise legal effect of the second paragraph of Article 11 is a matter of debate. The phrase, ‘shall be respected’, whilst superficially mandatory, does not give rise to any stand-alone, substantive legal obligation. Article 52(3) of the Charter provides that Charter rights which correspond to ECHR rights are to be read in meaning and scope as the same as the corresponding ECHR rights. Moreover Article 6 of the Treaty of the European Union stipulates that Charter rights are not to be taken to extend the EU competences as set out in the Treaties.

2.26 Nevertheless the Charter “represents a key fundamental legal instrument that introduces “constitutional” principles in a source of primary law and can and must be used in the multilevel European environment to interpret existing legislation and shape ... the EU and national legislative orders.”³⁷ So, although Article 11 of the Charter cannot enlarge EU competence, it must be taken into account in all matters pertaining to EU law including national implementation of EU directives and measures taken at EU and local level where there is existing EU competence.

2.27 Article 11’s second paragraph is therefore capable of assuming significance in legislative and judicial/regulatory functions pertaining, for example, to competition law. It is strongly arguable that any notifiable media merger must be considered in the light of its effect on media pluralism, and that media pluralism is to be afforded due ‘respect’ in the exercise.

2.28 The European Charter on Freedom of the Press (2009) was adopted and signed by 48 editors-in-chief and leading journalists from 19 states on 25th May 2009. The stated goal of the signatories is, “to assert the charter’s validity across Europe and to make its adoption a condition in EU accession negotiations.”³⁸ Whilst this charter has received warm support from many quarters,³⁹ it has not yet acquired any legal status. This charter is largely concerned with protection of journalists against state control, but Article 1 is more general and supports media pluralism as follows:

“Freedom of the press is essential to a democratic society. To uphold and protect it, and to respect its diversity and its political, social and cultural missions, is the mandate of all governments.”

2.27 In 2013, the Report of the High Level Group on Media Freedom and Pluralism concluded that a free and pluralistic media is fundamental to European democracy. It is a fundamental principle of democratic systems that participation in decision-

³⁷ From Chapter 4 (Brogi and Gori, ‘European Commission Soft and Hard Law Instruments for Media Pluralism and Media Freedom’) of Parcu (ed.), *European Union Competencies in Respect of Media Pluralism and Media Freedom* (CMPF, 2013).

³⁸ See <http://www.pressfreedom.eu/en/index.php>.

³⁹ See for example the speech of the then President of the European Commission, José Manuel Barroso, on the occasion of the celebrations to mark the 175th anniversary of Bertelsmann on 16th September 2010: “*In the EU these freedoms [of the media] have been won at a high price. Although they are engraved in our political and legal heritage they will have to be defended permanently. We have the Charter of Fundamental Rights and the European Convention on Human Rights. I also strongly welcome the European Charter on Freedom of the Press.*”

making is freely informed. Excessive control over the media – whether by the State or any person (corporate or individual) – diminishes the freedom of such information and erodes the quality of the decision-making.

Competition law as a mechanism for protecting media pluralism

2.29 The Merger Regulation (Council Regulation (EC) No 139/2004 of January 2004) applies to any ‘concentration’ that has or is deemed to have an EU dimension (according to certain defined thresholds based on turnover across more than one State of the EU). Domestic competition law may be enforced by Member States unless in conflict with EU law as laid down in the Regulation.⁴⁰

2.30 Recital 36 of the Regulation refers directly to the Charter:

“The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.”

2.31 Whilst the Commission (subject to review by the ECJ) has sole and exclusive jurisdiction over matters covered by the Regulation, by paragraph 4 of Article 21 Member States may nevertheless:

“take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.”

2.32 In this way, the Merger Regulation expressly devolves issues of media plurality to State-level competition regulation. Media companies and media products are economic entities. However media products are peculiar for their capacity to facilitate, frame and shape public debate and influence public opinion. Trade in media products cannot therefore be analysed on the same plane as trade in other goods, which may have little or no impact upon the democratic processes in the EU. Media mergers therefore involve non-economic cultural considerations. The Commission has expressly abrogated such considerations to State-level competition regulators whose jurisdiction over the same must therefore be protected.

⁴⁰ *Factortame II*, C-221/89.

2.33 Two commentators, Brogi and Gori, argue that competition law has contributed little or nothing to the advancement of media pluralism.⁴¹ They point out that despite the serious pluralism concerns raised by the Newscorp/ BSKyB merger, the Commission did not deal at all with such issues in its decision, focusing exclusively instead on the competitive impact of the notified merger on the markets⁴².

2.34 The UK's House of Lords' Select Committee report on media pluralism also emphasises and explains the differences between media pluralism and competition policy. It states:

“Would it matter if there were no policy on media plurality such that decisions on media ownership were made strictly on competition grounds? To this, our emphatic answer is: yes. There is a fundamental difference between the interests of competitions and the consumer on the one hand, and the interests of the citizen and media plurality on the other; in matters of media ownership, both need to be considered... Competition and plurality policy are clearly separate but parallel policies...”

2.35 It is thus appropriate for Irish competition legislation to comprehend – as it has done prospectively in the 2014 Act – issues of media pluralism. Subject to considerations of protection of property rights (considered below), compliance with the requirements of Article 10 ECHR and Article 11 of the Charter, and provided no conflict is created with the provisions of the Merger Regulation, it is also appropriate under the right conditions for Irish competition legislation to seek to protect medial pluralism through retroactive measures.

Freedom of Expression in Irish Constitutional Law

2.36 Article 40.6.1^o of the Constitution of Ireland (1937) provides:

“6 1^o The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

⁴¹ Brogi and Gori, *op cit*.

⁴² *News Corp/ BSKyB* (C(2010) 9684) at Case No. COMP/M.5932, *News Corp/ BSKyB*, SG-Greffe(2010) D/C(2010) 9684, (21st December 2010, [307], available at http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf: “The purpose and legal frameworks for competition assessments and media plurality assessments are very different. The focus in merger control is whether there is a “significant impediment to effective competition”, including the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger. By contrast, a media plurality review reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient.”

i The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.”

2.37 Although a qualified one, this is a constitutional guarantee of freedom of expression, and it guarantees freedom of the press: *Irish Times Ltd. v. Ireland* [1998] 1 IR 359.⁴³

2.38 In addition, the European Convention on Human Rights Act 2003 (“**the ECHR Act**”) allows the provisions of the ECHR to be considered directly before the Irish courts.⁴⁴ The ECHR Act requires that each organ of the State, including Government Departments and Ministers, “*perform[s] its functions in a manner compatible with the State’s obligations under the Convention*” (s. 3). It also contains an interpretative obligation, requiring the courts, subject to the existing rules of statutory interpretation, to apply both the common law and statutory provisions in line with the ECHR insofar as it is possible to do so (s. 2).

⁴³ Per O’Flaherty J at p. 395; Denham J at p. 399; Barrington J at p. 405.

⁴⁴ The Constitution has primacy in the event of a conflict.

3. MEDIA OWNERSHIP IN IRELAND

Centre for Media Pluralism and Media Freedom

- 3.1 In 2011, the CMPF⁴⁵ was established in Florence, in order to study and report on issues of media freedom and pluralism in the EU. One of CMPF's major projects is the Media Pluralism Monitor ("MPM"), which seeks to systematically analyse and report upon the strengths and weaknesses of Member States in the domain of media pluralism.
- 3.2 The CMPF has now released pilot reports on all Member States based on research conducted between 2013 and 2015 as part of the MPM project. The research into Ireland was conducted by Dr Roderick Flynn⁴⁶, DCU, and the report was issued on 30 March 2016⁴⁷.
- 3.3 The scoring system used by CMPF in its MPM rates countries across a range of indicators, between a low and high of 0.00 and 1.00, with scores recorded above 0.66 being described as representing a 'high risk'.

Concentration of Media Ownership in Ireland

- 3.4 Ireland has one of the most concentrated media markets of any democracy. Accumulation of what Professor Baker described as "*communicative power*" within the news markets is at endemic levels, and this, combined with the dominance of one private individual media owner in the State, creates what the Media Reform Coalition has described as "*conditions in which wealthy individuals and organisations can amass huge political and economic power and distort the media landscape to suit their interests and personal views.*"⁴⁸

⁴⁵ Centre for Media Pluralism and Media Freedom: <http://cmpf.eui.eu/Home.aspx>.

⁴⁶ Dr. Roderick Flynn is a lecturer in the School of Communications where he has been Chair of the MA in Film Television Studies degree since 1999. His teaching is focused around political economy approaches to understanding the media, which includes modules on Media, Technology and Society, Innovation in Media Markets and Film and Television Finance. He currently teaches upon the Communications, Journalism and Multimedia undergraduate programmes and the Masters programmes in Film and Television Studies and Multimedia. He has a wide variety of research interests relating to Irish film, broadcasting and telecommunications policy. See further:

http://www4.dcu.ie/communications/biographies/roddy_flynn.shtml.

⁴⁷ DCU - Dublin City University, Ireland: <http://www.dcu.ie/>.

⁴⁸ Media Reform Coalition, *Who Owns the UK Media?* (October 2015), p. 3, available at <http://www.mediareform.org.uk/resources/media-ownership-reports>.

3.5 The two most important controlling entities in the Irish media landscape are the national State broadcaster, RTÉ, and an individual businessman, Denis O’Brien, who has a dominant position within the Irish print media sector, given his ownership of a significant minority stake in the dominant Independent News and Media, and substantial holdings in the commercial radio sector. In addition to his media ownership, Mr. O’Brien is also a prolific businessman and one of Ireland’s richest people, listed in the Forbes List of billionaires.⁴⁹

3.6 The spread – or rather, the clustering – of media ownership in Ireland was heavily criticised in the March 2016 CMPF report. The score awarded for Ireland in the ‘concentration of media ownership’ category was in excess of 0.70, placing it firmly in the highest level of concern. The Report concludes that a lack of specific legal barriers to concentrated media ownership has placed Ireland at the highest risk level, in their assessment of threats to media pluralism. Dr. Flynn stated that Irish media and competition law imposed no maximum media thresholds and, remarkably, there was “*nothing in Irish law to stop an individual or institution enjoying 100 per cent ownership of newspapers, radio or TV stations*”.

3.7 The MPM assesses four key areas of media pluralism:

3.7.1 Basic Protections: Dr. Flynn assessed Ireland as at 29% risk under this head.⁵⁰

This area deals with regulatory safeguards for freedom of expression and the right to information, the status of journalists, and the independence and effectiveness of the national regulatory bodies. The risks detected in this area are limited. Given that this area represents the regulatory backbone of the

⁴⁹ *Forbes: The World’s Billionaires*, Denis O’Brien no. 219, <http://www.forbes.com/profile/denis-obrien/>; see also Eamon Quinn, “Denis O’Brien features on Forbes rich list despite €1bn drop,” *Irish Examiner*, 2nd March 2016, available at <http://www.irishexaminer.com/business/denis-obrien-features-on-forbes-rich-list-despite-1bn-drop-385080.html>.

⁵⁰ He said that this risk comes mainly from the provisions of the Defamation Act 2009, which permits bodies corporate to take libel actions and includes blasphemy as an offence. On the Defamation Act 2009, see further Dr. Eoin O’Dell’s summary, “Defamation Act a welcome but imperfect reform for libel cases,” *Irish Times*, 18th January 2010, available at <http://www.irishtimes.com/news/crime-and-law/defamation-act-a-welcome-but-imperfect-reform-for-libel-cases-1.1269685>. Dr. Flynn in his report also said that crime journalists, in particular, report serious threats to their physical safety, and that there is “*some evidence that the State may have used*” the Communications (Retention of Data) Act 2011 “*for the surveillance of journalists*”.

media sector in every contemporary democracy, even an average risk of 23% represents a threat to media pluralism.

3.7.2 Market Plurality: Dr. Flynn assessed Ireland as at 54% risk under this head,⁵¹ noting that most countries are at medium risk. This area deals mainly with media ownership, an economic component that is widely considered essential in the assessment of a level of media pluralism in any given context.

3.7.3 Social Inclusiveness: Dr. Flynn assessed Ireland as at 41% risk under this head. This area evaluates access to airtime and media platforms for different cultural and social groups, for local/regional communities, and for people with disabilities, and examines the level of media literacy for the population as a whole.

3.7.4 Political Independence: Dr. Flynn assessed Ireland as at 40% risk under this head. He evaluates the politicisation of the media considering public service media, commercial media outlets, media distribution networks, and news agencies.

3.8 According to Dr. Flynn, Mr. O'Brien "*enjoys a dominant position within the Irish print sector, due to his ownership of a significant minority stake in Independent News and Media*".⁵² Independent News and Media publishes Ireland's two largest-selling titles, the *Irish Independent* and *Sunday Independent*. It also publishes the *Sunday World* and the *Dublin Herald*, and it has a 50% stake in the *Irish Daily Star*.

3.9 Mr. O'Brien also has significant holdings in the commercial radio sector, as chairperson and principal shareholder of Communicorp.⁵³ Communicorp owns Ireland's two leading commercial radio talk stations, Newstalk and Today FM, and

⁵¹ The highest risk under this head, according to Flynn, relates to the concentration of media ownership. Irish law imposes no maximum media ownership thresholds or cross-ownership thresholds, and there is a lack of reliable data as to market share by revenue in Ireland.

⁵² <http://monitor.cmpf.eu/mpi2015/results/ireland/>

⁵³ Communicorp Group Ltd. Communicorp owns and operates a portfolio of media channels with a strong focus on commercial radio and emerging digital media. The company maintains some of the largest independent radio networks in Ireland, Bulgaria, and the UK with 21 radio stations in 3 countries. In February of 2014, 8 regional UK radio stations joined the Communicorp stable. Communicorp UK is now the newest and fourth largest radio group in the United Kingdom. <http://www.communicorp.ie/>

also Dublin's 98FM, SPIN 1038, TFXM and SPIN South West.⁵⁴ (On 24th April 2016, Communicorp challenged the conclusion of the report in relation to the 20% share of the market. O'Brien's company wrote to Dr Flynn insisting that the correct figure is 16%. Communicorp asked for the finding to be changed.⁵⁵) Further, as we have noted above, radio news in Ireland is supplied only by RTÉ or Communicorp-owned Newstalk, as Newstalk supplies the news service for all local radio services.⁵⁶

3.10 RTÉ is described by Dr. Flynn as "*playing a "dominant" role in the broadcasting sector*".⁵⁷ There are some other notable examples of cross media ownership, such as Landmark Media (formerly Crosbie Holdings) and UTV PLC.

3.11 Dr. Flynn concluded:

"the existing levels of media concentration, especially with regard to print and broadcast media, already exceed the recommended maximum levels (20% market share) as described in the 2014 Competition and Consumer Protection Act. The obvious means to address this is to adjust the legislation so that it applies retrospectively. To date, Irish politicians have been reluctant to seriously consider this, however, citing the strong defence of property rights that characterises the Irish Constitution. However, given that freedom of expression is also explicitly defended in the constitution, there is clearly a case to be made for retrospection."

3.12 On publication of the CMPF report, Colum Kenny of the *Irish Times* wrote:

"Irish people depend heavily on three big media groups. One is RTÉ, another is controlled by Denis O'Brien (Communicorp radio stations and Independent newspapers), and the third is associated with Rupert Murdoch (Sky and the Irish editions of the Sun and Sunday Times).....growing swathes of the media (including web services and other crucial online information platforms not always deemed "media") are entirely outside the control of national regulators and governments, being owned by massive corporations whose principal objectives do not necessarily include telling the truth as objectively as possible.

The international media use sophisticated methods of marketing and manipulation, facilitated by algorithms and other techniques that displace

⁵⁴ Roy Greenslade, "Should Ireland allow Denis O'Brien's media empire to get larger still?," *Guardian*, 7th September 2016, available at <https://www.theguardian.com/media/greenslade/2016/sep/07/should-ireland-allow-denis-obriens-media-empire-larger>.

⁵⁵ "Communicorp denies control over 20% of radio," *Sunday Times*, 24th April 2016 <http://www.thesundaytimes.co.uk/sto/news/ireland/article1689511.ece> last accessed 16th September 2016.

⁵⁶ See above at paragraphs 2.4 and 2.5.

⁵⁷ The Competition and Consumer Protection Act 2014: <http://www.irishstatutebook.ie/eli/2014/act/29/enacted/en/html>

more cogent discourse about the world we inhabit. RTÉ has sustained a balancing act between its commercial activities and public service remit. The station's recent appointment of a new director general from the world of global television seems calculated to prop up its commercial profile rather than to generate radical thinking on news and current affairs. This new report has sounded an alarm bell about what it sees as considerable difficulties of access to the media by different social and cultural groups in Ireland.

The problem is not simply that of RTÉ or other stations dipping into a pool of predictability when it comes to presenters and guests. More significantly, it reflects the gap between the wealthy and other classes, between the powerful and weak that is widening in society. The ultimate test of media plurality is not who owns what, although that certainly matters. It is whether vital stories that could be told are being told. For every journalist who can spill the beans about offshore accounts or inshore scams, there are many who have neither the time, training, nor resources to do so. Some are afraid that if they insist on filing such stories their precarious contracts of employment may not be renewed by media managers who question their idea of what makes a story relevant to readers or audiences”.⁵⁸

3.13 We echo the concerns in the CMPF report regarding the concentration of media ownership in the Irish market, but in our view those concerns are amplified by a number of additional features. Considered together, we consider there to be a perfect storm which poses grave risks to freedom of expression and media pluralism in the Irish market.

3.14 The first additional feature which we note is that Mr. O'Brien has initiated a 21 sets of proceedings in the High Court since 2010. The figures were compiled by *Irish Times* journalist Colm Keena, based on analysis of the High Court website.⁵⁹ Many of these cases appear to concern reputation management by Mr. O'Brien, acting against organisations or individuals who are critical of him. Mr. Keena has reported that 12 of these 21 cases were against media organisations relating to their coverage of Mr. O'Brien's affairs; one was against a lobbying firm alleging a conspiracy to damage him; two were against the Moriarty Tribunal; one was against the Dáil; and

⁵⁸ Colum Kenny, "Paddy not getting full story due to media constraints," *Irish Times*, 6th April 2016, available at <http://www.irishtimes.com/opinion/colum-kenny-paddy-not-getting-full-story-due-to-media-constraints-1.2599384> last accessed on 8th September 2016.

⁵⁹ Analysis by Colm Keena, "Holding court: Denis O'Brien's long list of legal actions," *Irish Times*, 14th May 2016, available at <http://www.irishtimes.com/news/crime-and-law/holding-court-denis-o-brien-s-long-list-of-legal-actions-1.2647302>; see also Roy Greenslade, "Are Denis O'Brien's legal actions some kind of record?" *Guardian*, 16th May 2016, available at <https://www.theguardian.com/media/greenslade/2016/may/16/are-denis-obriens-legal-activities-some-kind-of-record>.

one was against former TD, Colm Keaveney. There were also four cases lodged against the Revenue Commissioners, concerning his tax affairs.

3.15 Amongst these 21 sets of proceedings was a 2015 matter which caused substantial controversy, when Mr. Justice Donald Binchy granted an injunction preventing RTÉ broadcasting certain information about Mr. O’Brien and his dealings with the Irish Bank Resolution Corporation. When Catherine Murphy TD subsequently spoke in the Dáil about the matter, it was alleged that the injunction covered reporting her remarks, a situation which was described by commentators at the time as a constitutional crisis. The *Irish Times* and RTÉ sought clarification from the court, and Binchy J stated that it was never his intention that the injunction would apply to Dáil reporting.

3.16 Mr. Keena’s statistics relate only to proceedings which were lodged. They do not include any additional situations in which legal action was threatened by Mr. O’Brien. For example, in 2015 the satirical website *Waterford Whispers* is understood to have received a threat of legal action from him, which resulted in it removing an article.

3.17 Roy Greenslade has queried whether Mr. O’Brien has set “*some kind of record*” with his legal actions, and he has also drawn a comparison with Robert Maxwell, who was, “*acutely sensitive about press coverage of his affairs, spent thousands on legal actions. It achieved the result he desired, a gradual unwillingness by rival media to report on him.*”⁶⁰

3.18 Mr. Greenslade also draws attention to analysis stretching back almost two decades, to 1998, which suggests that Mr. O’Brien has regularly made threats of legal action, and instituted legal proceedings, against journalists and media organisations.⁶¹

3.19 Any wealthy individual bringing such a large number of claims seeking to restrict press coverage of their business dealings would raise concerns regarding freedom of expression and the potential for such litigious profligacy to have a ‘chilling effect’

⁶⁰ 16th May 2016 (above, fn 6).

⁶¹ Roy Greenslade, 16th May 2016 (see fn 6 above), citing Transparency International’s 2012 citation of figures gathered by the NUJ.

on newsgathering and reporting in the public interest. However, when the wealthy individual in question is also the “*largest owner of private media in the State*”,⁶² those concerns and risks are substantially increased.

3.20 Second, media organisations and academics have, rightly, repeatedly criticised Ireland’s defamation laws, including the potential for very high jury awards which are wholly out of kilter with the rest of Europe and the lack of certainty regarding damages. For example, NewsBrands Ireland⁶³ has criticised the defamation regime in a statement released to mark World Press Freedom Day 2016, asserting that many newspapers simply will not take the risk of publishing given the possibility of high damages awards and the unpredictability for publishers, who cannot reliably ascertain their potential liability pre-publication.⁶⁴

3.21 In our view, taken together, the combination of the highly concentrated Irish media market, Mr. O’Brien’s threatening and initiation of a large number of legal proceedings against media and other critics, and serious shortcomings in the defamation framework create a perfect storm which threatens news plurality and undermines the media’s ability to perform its watchdog function.

⁶² Per Colm Keena, *Irish Times*, 14th May 2016 (see above at fn 6).

⁶³ Formerly known as National Newspapers Ireland.

⁶⁴ Patsy McGarry, “Defamation laws ‘out of line with Europe’, says newspaper body,” *Irish Times*, 3rd May 2016.

4. THE COMPETITION AND CONSUMER PROTECTION ACT 2014

- 4.1 In 2014 the Dáil passed the Competition and Consumer Protection Act 2014⁶⁵.
- 4.2 The 2014 Act established a combined consumer and competition body known as the Competition and Consumer Protection Commission (“**the CCPC**”). The CCPC replaced the Competition Authority and the National Consumer Agency as the body responsible for consumer protection and competition enforcement in Ireland. The Minister for Jobs, Enterprise and Innovation described the new regulator created by the legislation as a “*powerful watchdog with real teeth acting to protect and vindicate consumers*”.⁶⁶
- 4.3 The importance of media plurality is now recognised in Ireland, to an extent, through the new regime established by the 2014 Act. It introduced a new media mergers system. All mergers involving media must now be notified to the Minister for Communications, Energy and Natural Resources as well as to the EU Commission, and are subject to a media plurality review (in addition to a competition law review by the CCPC).
- 4.4 The Minister reviews the effect of the media merger on media plurality in Ireland. This incorporates both diversity of ownership and diversity of content. The Minister can prohibit a media merger. This is a permissive clause – the Minister may take this action, but it is not mandatory in any circumstances.
- 4.5 The 2014 Act refers to the “*undesirability of allowing any one undertaking to hold significant interests [defined as in excess of a 20% share] within a sector or across different sectors of media business in the state*” when assessing media mergers. This is not the only basis for a potential prohibition, as concern regarding diversity of content rather than only the mathematical question of ownership may be relevant.

⁶⁵ The Act was signed into law by the President of Ireland on 28th July 2014.

⁶⁶ Oireachtas Debates, 16th April

2014:<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014041600012?opendocument#K00500>, last accessed 8th September 2016.

- 4.6 The media plurality review process consists of an initial review by the Minister, with the possibility of a further more detailed review where media plurality concerns exist. The detailed review will involve an examination and report by the Broadcasting Authority of Ireland (“BAI”).
- 4.7 The Minister shall, within a 30 day period (s. 28D), extendable to 45 days in some circumstances, notify the undertakings of the determination which has been made. This may be a determination that, in the Minister’s opinion, the result of the media merger will not be contrary to the public interest in protecting plurality of the media in the State, in which case the media merger may be put into effect; that, subject to *“proposed commitments offered by the undertakings”* the merger can proceed; or alternatively, *“that he or she is concerned that the media merger may be contrary to the public interest in protecting plurality of the media in the State, and accordingly that he or she intends to request the Broadcasting Authority of Ireland to carry out an examination under section 28E.”*
- 4.8 The 2014 Act provides a mechanism which can be used to prospectively ensure that no entity acquires through merger a share in excess of 20% of a particular sector in the media. However it contains no mechanism for adjusting the status quo in which Ireland finds itself, whereby an individual, Mr. O’Brien, already controls what the Act itself describes as an *“undesirably”* high level of media ownership. Similarly, the 2014 Act provides for prospective steps to be taken to ensure diversity of content – either blocking a proposed merger, or requiring that certain commitments be given in order for the merger to proceed, but again, there is no retroactive mechanism.
- 4.9 The absence of any mechanism in the 2014 Act for addressing issues within the existing market carries the potential risk that it will in fact have an anti-competitive effect, and cement the status quo. The position of INM and Mr. O’Brien remains unchallenged, but new entrants to the market or other players in the market who seek to challenge INM’s or Mr. O’Brien’s status will have additional hurdles to overcome. The 2014 Act could thus arguably be said to strengthen INM’s and Mr. O’Brien’s position.

March 2016 to Date

- 4.10 Since publication of the CMPF report in March 2016, there have been many calls for reform. In particular, the National Union of Journalists issued a call in April 2016 to urge political parties to seek all-party agreement on ways of tackling media dominance in Ireland. Media commentator Roy Greenslade in a series of thundering articles asked if the Irish government is “*too cowed to do anything about the country’s largest media tycoon*”.⁶⁷
- 4.11 However, no steps have yet been taken, and in September 2016 INM agreed a deal to add seven more newspaper titles to its stable by acquiring the Celtic Media Group, which includes the *Anglo-Celt* in Cavan, the *Meath Chronicle* and the *Connaught Telegraph* in Mayo. Acquisition of the Celtic Media Group extends INM’s footprint to five more counties.
- 4.12 Another important recent development dates from June 2016, when further research by Dr. Flynn was published. Dr. Flynn’s study, based on research into newspapers, found that Mr. O’Brien received less critical coverage in his own titles when he was embroiled in controversies.⁶⁸ For example, his review of 140 articles published about the Moriarty Tribunal in INM titles and 227 in non-INM titles between March 23rd and April 2nd 2011 showed that INM titles were generally more likely to put the focus on Michael Lowry than on Denis O’Brien.
- 4.13 Dr. Flynn’s study, however, found overall that media ownership – State or private – did not have a major influence on the content and tone of articles and broadcasts.
- 4.14 Finally, on 1st July 2016 details of a consultant’s report concerning Mr. O’Brien’s increase in his stake in INM were published. The report, commissioned by the Broadcasting Authority of Ireland, concluded that there was no “*material reduction in plurality*” when he increased his stake from 22 per cent to 29.9 per cent, as “*such*

⁶⁷ See Roy Greenslade, ‘Should Ireland allow Denis O’Brien’s media empire to get larger still?’, *Guardian*, 7th September 2016, available at <https://www.theguardian.com/media/greenslade/2016/sep/07/should-ireland-allow-denis-obriens-media-empire-larger>.

⁶⁸ Caroline O’Doherty, ‘Research finds Denis O’Brien less criticised in media titles he owns’, *Irish Examiner*, 5th June 2016, available at <http://www.irishexaminer.com/ireland/research-finds-denis-obrien-less-criticised-in-media-titles-he-owns-403174.html>.

*an interest likely existed already.*⁶⁹ We do not find the reasoning particularly persuasive, but in any event the pre-existing 22 per cent stake was already problematic.

⁶⁹ Harry McGee, “INM Changes did not reduce media ‘plurality’ – report,” *Irish Times*, 1st July 2016.

5. LEGAL BARRIERS TO ADDRESSING CURRENT MEDIA CONCENTRATION OR OWNERSHIP

5.1 It is understood, both from Dr. Flynn's report for the CMPF of March 2016 and from quotations given to multiple media outlets, that there is a school of thought amongst a number of unknown Irish politicians which suggests that no retroactive step could be taken which would alter current media ownership concentration due to the protection of property rights. If the protection of property rights is being suggested to be a legal barrier, we are firmly of the view that this is based upon flawed legal analysis.

5.2 In principle, there is no such bar under Irish Constitutional law, the ECHR or EU law.

Irish Constitutional Law

5.3 The Constitution refers to property rights in two places, in Article 40.3.2° (where the State pledges itself as best it may to protect property rights from unjust attack and, if injustice is done, to vindicate those rights) and in Article 43.⁷⁰ Article 43 states that,

“1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.”

5.4 Again, as with the Constitutional protection for freedom of expression, this is a qualified right. It is clear that the State may restrict the exercise of property rights with a view to reconciling this with the exigencies of the common good; and that the

⁷⁰ There remains some doubt regarding the correct relationship between the two provisions, but it is not relevant for present purposes.

courts have jurisdiction to inquire into whether any restriction or deprivation of property rights is in accordance with the principles of social justice and whether the measure is necessary given the demands of the common good. The concepts of “*the principles of social justice*” and the “*common good*” plainly may encompass both the protection of other qualified Constitutional rights (such as freedom of expression, in this instance) or international norms (such as protection of the plurality of the media, particularly under Articles 11 of the Charter and 10 of the ECHR).

- 5.5 Early cases established that compulsory purchase provisions concerning land, provided there is compensation paid, do not offend these Constitutional property rights: see e.g. *Fisher v. Irish Land Commission* [1948] IR 3. There is nothing in either Article 40.3.2° or Article 43 which prevents action being taken in relation to the concentration of media ownership. This is a jurisprudential red herring.

ECHR

- 5.6 Similarly, the right to property is heavily caveated under the ECHR. The right is protected through Article 1, Protocol 1 (“**A1P1**”). A1P1 protects property from unlawful interference by the State:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure secure the payment of taxes or other contributions or penalties.”

- 5.7 An interference with property can be justified if it is the public, or general, interest. There must be a legitimate public interest objective. There must also be a reasonable relationship of proportionality between the means employed and the aim pursued.⁷¹ The Grand Chamber has recently stated the applicable principles to be as follows:

“167. Not only must an interference with the right of property pursue, on the facts as well as in principle, a ‘legitimate aim’ in the ‘general interest’, but there must also be a reasonable relation of proportionality between the

⁷¹ *James v. UK* (1986) 8 EHRR 123, at [50].

means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of article 1 of Protocol No 1 as a whole. In each case involving an alleged violation of that article the court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden.

168. In assessing compliance with article 1 of Protocol No 1, the court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are 'practical and effective'. It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the State's interference with freedom of contract and contractual relations in the lease market but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner.”⁷²

5.8 In order to be justified an interference must achieve a fair balance between on the one hand the general interests of the community and on the other the protection of the individual's fundamental rights.⁷³ From the earliest cases, the ECtHR has adopted a relatively deferential approach when considering interference with AIP1 rights, allowing a wide margin of appreciation to the State. For example, in *James v. UK* (1986) 8 EHRR 123 the Court held that the compulsory transfer of property from one individual to another may constitute a legitimate aim in the public interest, and stated that the margin of appreciation available to the State should be a wide one in this sphere, and the ECtHR would respect the legislature's judgment unless that judgment is “*manifestly without reasonable foundation.*”⁷⁴ A particularly non-interventionist approach has been adopted in cases concerning affirmative action to correct historical injustice, or so-called ‘positive discrimination’, as the ECtHR recognises that the interference with property rights pursues a wider social corrective aim. By analogy, such a non-interventionist approach would be likely to

⁷² *Hutten-Czapska v. Poland* (2006) 45 EHRR 52 at [167]-[168].

⁷³ *Sporrong v. Sweden* (1982) 5 EHRR 35 at [69].

⁷⁴ At [46].

apply to any measure taken to address concentration of media ownership which is at odds with international standards regarding media pluralism and the protection of democratic principles. It is notable that Article 10 does in certain circumstances require positive steps to be taken by the State in order to protect freedom of expression.

- 5.9 It is clear that retroactive legislation is not necessarily incompatible with A1P1⁷⁵. Indeed, many of the cases concern retrospective measures – compulsory acquisition of land or other property. National legislatures have a broad area of discretion in the exercise of their judgment as to social and economic policy⁷⁶. The question is whether, in a particular case, what is demanded by the general interest is sufficiently compelling so as to justify the extent of the prejudice to which the measure gives rise.⁷⁷

EU Competition Law

- 5.10 As we have explained above, there is no bar in principle to domestic competition law (including any domestic mechanism for referring EU competition issues to the Commission) that protects media pluralism and has retroactive effect, provided any such retroactive legislative measure is necessary and proportionate.
- 5.11 There is no insurmountable legal hurdle placed in the way of the CMPF recommendation that the 2014 Act's provisions apply retrospectively. Nor is there an insurmountable hurdle placed in the way of other ways of tackling the high existing level of media ownership concentration in the Irish market, and the particular concerns regarding the dominance of one individual media owner. There is, in principle, no reason why steps could not be taken which respect both EU competition law and property rights protected under the Constitution and the ECHR.

⁷⁵ *MA v. Finland* (2003) 37 EHRR CD 210 at [217]. Cf Article 7 ECHR, in the criminal sphere.

⁷⁶ *Hutten-Czapska v. Poland*, above, at [164]-[166]

⁷⁷ *Salvesen v. Riddell and Another* [2013] HRLR 23 at [40], per Lord Hope.

6. CONCLUSION AND RECOMMENDATIONS

Ireland

- 6.1 We conclude that there are extremely grave concerns about the high concentration of media ownership in the Irish market, and in particular regarding the position of INM and Mr. Denis O'Brien. Accumulation of communicative power within the news markets is at endemic levels and so Ireland has one of the most concentrated media markets of any democracy. This feature – alarming in itself – must be viewed alongside the other gravely concerning aspects of the Irish media landscape which we have highlighted: sustained and regular threats of legal action by Mr. O'Brien to media organisations and journalists who are engaged in newsgathering or reporting about his activities, and the 'chilling effect' of the current defamation laws. This is a toxic combination for freedom of expression and media plurality.
- 6.2 It is now imperative that urgent action is taken, and seen to be taken, to reassure journalists, media organisations and the wider public, and to comply with the terms of Article 11 of the Charter and Article 10 ECHR.
- 6.3 Suggestions that this is a Constitutional no-go area, or an ECHR no-go area, are flawed. There is, in principle, no reason why action cannot be taken which is compliant with Irish law, the ECHR and EU competition law.
- 6.4 However, we recognise that this is an extremely difficult area and any retrospective steps would be affecting property rights, impacting upon an existing market, and potentially raising procedural fairness questions. There would also be freedom of expression considerations, other than plurality, to take into account in the balance against taking any action.
- 6.5 Given the urgency, coupled with the complexity of the issues, our firm view is that there must be detailed multi-disciplinary analysis and careful consideration before any steps are taken. Although the question of principle is clear, there remain complex and nuanced issues to consider, including how precisely to measure

plurality⁷⁸; the desirability of any retrospective mechanism concerning media ownership; the specific position of RTÉ, as a public service broadcaster⁷⁹; whether to adopt the approach of the 2014 Act or an alternative mechanism; the relative merits of adopting simple percentage limits on shareholdings in a particular news sector, percentage limits which are cross-sector, and / or other safeguards concerning interference by media owners in journalistic independence and editorial control. The devil is very much in the detail, and these are difficult issues. What is now needed is a careful review of that detail.

6.6 Accordingly, we recommend that the Government establish a cross-disciplinary Commission of Inquiry. This Commission should examine the issues closely and make concrete recommendations, within a tight timeframe. We anticipate that the Commission will at the outset need to grapple with the question of what definition of media pluralism to adopt, and to consider and systematically identify which concrete indicators it considers necessary in order to measure media pluralism in Ireland.

6.7 We recommend that the Commission be instituted speedily, given the delay since the CMPF Report was published seven months ago.

Council of Europe

6.8 Almost two decades have passed since the Council of Europe's 1999 Recommendation on promoting media pluralism came into being, along with the Explanatory Memorandum which described how, "*democracy would be threatened if any single voice within the media, with the power to propagate a single viewpoint, were to become too dominant*".⁸⁰ The Council of Europe at that point called on Member States to, "*consider the introduction of legislation designed to prevent or*

⁷⁸ This would include questions, for example, regarding the genre to be measured (news and current affairs only, or wider content provision?); the relevance of non-Irish based media from which Irish citizens resident in Ireland receive news and current affairs content, including UK broadcasters and international internet sites; and which parts of the supply chain of news to examine (e.g. content may originate with a newswire company such as Reuters or the Press Association, and then be disseminated to a range of broadcasters and newspapers, giving the impression of a wide range of reports although all originate from the same core source).

⁷⁹ For an excellent summary of the issues concerning plurality and public service broadcasting see Steven Barnett, 'Plurality and Public Service Broadcasting: Why and How PSBs Deserve Protection,' in Steven Barnett and Judith Townend (eds.), *Media Power and Plurality* (Palgrave Macmillan, 2015), pp. 45 – 62.

⁸⁰ Council of Europe, Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, Explanatory Memorandum (1999).

counteract concentrations that might endanger media pluralism at the national, regional or local levels.”

- 6.9 The Irish situation, as summarised above, prompts a question as to whether the 1999 Recommendation is effective, and we also note that its phrasing could be said to suffer from a lack of specificity. We suggest that a fresh recommendation by the Committee of Ministers on media pluralism would now be timely and welcome.
- 6.10 The Committee of Ministers has recently set up a Committee of Experts on Media Pluralism and Transparency of Media Ownership (“**MSI-MED**”), under Article 17 of the Statute of the Council of Europe.⁸¹ Its terms of reference are valid from 1st January 2016 until 31st December 2017. MSI-MED is tasked with analysing, “*best practices in Council of Europe member States with regard to policies and other measures ensuring a pluralist media landscape, transparency of media ownership, diversity of media content, inclusiveness in public service media, gender equality in media coverage of election campaigns.*” It has been given two specific tasks, one of which is to prepare a draft recommendation on media pluralism and transparency of media ownership.⁸²
- 6.11 MSI-MED is comprised of seven Member States representatives, and six independent experts. There is no Irish representative,⁸³ and none of the independent experts are based in Ireland.⁸⁴
- 6.12 We are of the view that it would be sensible for the recommended Irish cross-disciplinary Commission of Inquiry to feed into the MSI-MED process. This is both because such dialogue would ensure that MSI-MED is fully informed regarding the position in Ireland when analysing the position across all Member States of the Council of Europe, and also because we anticipate that the work undertaken by the

⁸¹ The Committee of Experts has been set up in accordance with Resolution CM/Res (2011) 24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

⁸² See further

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805930a8>. The Committee of Experts is also asked to address a number of matters related to election coverage.

⁸³ The seven representatives are from Bosnia and Herzegovina, the Netherlands, the United Kingdom, the Republic of Serbia, Greece, Austria and Norway.

⁸⁴ The full list of experts, along with their institutions, is available here: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a08c6>.

Irish Commission of Inquiry may be of assistance to MSI-MED when considering how best to draft a recommendation for the Committee of Ministers. Irish voices should be heard on these important matters.

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