

**MEDIA OWNERSHIP REGULATION IN MALAYSIA:  
LESSONS FROM THE UNITED KINGDOM**

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***ABSTRACT***

This paper aims at examining the extent of the Communications and Multimedia Act 1998 in addressing the issues of media consolidation in Malaysia. This study employs a qualitative research and adopts a doctrinal legal research approach. It discusses the matters arising on media ownership, which include a bigger concentration of ownership in cross-sectors and the deterioration of media plurality. The UK government addressed these concerns through the Secretary of State for Culture, Olympics, Media and Sport which has completed a series of review relating to media ownership following the NewsCorp proposal of purchasing shares in BSkyB. This report highlights the ‘necessity in the public interest’ in reviewing the law and the question of diversity of ownership in view of the digital and the Internet technology. As such the UK legal position provides an established benchmark for Malaysia in dealing with the issue of media ownership. In contrast, the Malaysian experience indicates an enforced media monopoly, which allows the formation of one gigantic conglomerate controlling the majority of the market. The paper argues that, Malaysia took little effort in dealing with the structural control and audience-reach share as compared to those of the UK legal position.

***Keywords:*** *Media Ownership, Pluralism, Convergence, Media Concentration, Public Interest.*

## **Introduction**

The decade of 2000s witnessed the regulatory transformation of media ownership landscape in the United Kingdom (hereinafter ‘the UK’). The UK has comprehensively reviewing its media legislation and relaxed certain regulation dealing with the local and national media industry. Nonetheless, there are few ownership rules, which are still intact. In December 2010, the proposed British Sky Broadcasting Group Plc (hereinafter ‘the BSKyB’)/NewsCorporation merger heightened the difficulty to regulate media concentration (Smith, Tambini and Morisi, 2012). In addition, the illegal activities, notably the phone hacking incident by the journalists deepens the existing regulatory challenge. The conflict arises between fostering economic development and nurturing public interest. In the advent of the Internet and the digital technology that multiplies the proliferation of diverse information across all borders, there is an increasing debate proposing various approaches to the issue at hand ranging from an active approach to a passive scheme (Rice, 2008). In Malaysia, the existence of a Malaysian public listed company, Media Prima, owning all the free-to-air commercial television stations nationwide raises similar concern. In order to minimise the effect of such a media consolidation, the government formulates the usage of a legal mechanism in controlling media ownership. However, it is yet to be seen how this legislative effort could be to a certain extent, be successful in limiting the economic deluge in media ownership by such a large media corporation.

This paper aims at examining the control of media consolidation in Malaysia and compares them with that of the UK as the latter provides the benchmark of an established statutory regime in regulating media ownership. This paper commences with a brief literature review relating to the media ownership and control. Subsequently, it illustrates the methodology of the research in which employs a qualitative research and the traditional approach of doctrinal analysis. The following part presents the central discussions on the research findings. The last part that concludes this paper suggests that as opposed to the UK legislative approach, the Malaysian legislative model in dealing with media ownership is rather inert, which would inevitably fail in providing any specific or generic modalities in preventing the current concentrated ownership.

## **Literature Review**

### *Ownership and Control*

In Malaysia, there are two mega corporations that headed the industry, namely, Media Prima and, Astro All Asia Networks (ASTRO) Berhad. The former is the largest integrated media investment group in Malaysia having 100 per cent shares in all free-to-air commercial television stations’ corporations. It also has a 98.2 per cent equity interest in the New Straits Time Press (NSTP), one of the Malaysia’s largest publishing groups that publish a leading newspaper (Media Prima, 2011).

Media Prima also controls two popular radio networks in the country, namely the Fly FM and Hot FM. The latter is Malaysia's leading cross-media group with an important existence in Direct-To-Home (DTH) TV services and commercial radio. Currently, ASTRO broadcast 100 pay-TV channels across Malaysia and Brunei and its branded subscription pay-TV service is also available in Indonesia. Unlike the Malaysian experience, the UK broadcasting sector is dominated by the BBC, ITN, NewsCorp and Sky. Whilst BBC has the largest share, representing 37% of the audience, the second group of providers, ITN, NewsCorp and Sky, each of these has a share of around 10% (Ofcom, 2012).

The dichotomy between the marketplace model and the public sphere approach is well documented in the literature. Writers such as Rice, Croteau and Hoynes point out that the marketplace perspective contours the primary discussions about media ownership based on the market and economic values (Croteau and Hoynes, 2001, and Rice, 2008). Rice highlights the essential elements of this model as the application of the market place formula, which includes maximising revenues and resources, protecting against competition, minimising costs and risks as well as seeking new markets and audiences (Rice, 2008). The above mentioned marketplace model seems to have its downside, in which the market do not correspond to some essential non-economic values including the philosophy of democracy and the social consequences. In addition, the economic aspects of the small consumer groups' demand are been overlooked, and the extrinsic market has the tendencies to lead to oligopoly and monopoly (Rice, 2008, and Smith, Tambini and Morisi, 2012).

In contrast, the public sphere perspective embraces the fundamental arguments relating to media ownership on democracy and social values. Croteau and Hoynes regard this model as a social discourse that allows exchange of ideas and knowledge, thereby nurturing active citizenship (Croteau and Hoynes, 2001). In a similar vein, Rice highlights that this perspective places the media in the public sphere 'principles of diversity, access to information for an informed citizenry necessary for democracy, free speech and freedom of press and the scarcity of the broadcast spectrum' (Rice, 2008).

### **Research Methodology**

The study employs a qualitative research, with a doctrinal legal research approach. In addition, the researcher examines media ownership laws in the UK for the purpose of establishing the legal benchmark of the study. In this respect, the UK jurisdiction is justifiably selected in light of its adoption of a legal model known as the heavy approach in its media ownership literature. This jurisdiction is also chosen based on the UK incredible influence and reputable impact in promoting plurality of ownership via the media ownership law in the era of convergence (Media Plurality Report 2012). The analysis of the doctrinal approach is based on secondary data from both primary and secondary sources (Chatterjee, 1997). Adopting the comparative analysis and content analysis approach to interpret such sources, the researcher, therefore, on one hand, scrutinises primary sources

including the Malaysian Communications and Multimedia Act 1998 (hereinafter ‘the 1998 Act’) and the UK Communication Act 2003 (hereinafter ‘the 2003 Act’). On the other hand, this research examines the secondary sources of data such as online databases, journal articles, books and other written commentaries on the case law and legislation.

### **Research Findings**

There are three main areas of discussion in this part to explain the comparative analysis and content analysis of the UK approach as compared to the Malaysian legal position. They are legislative approach, regulatory regime, and regime transformation.

#### *Legislative Approach*

With the above mentioned media backdrop, the development of media ownership law in these two jurisdictions follows opposite paths in which the UK government adopts a heavy approach that is contrary to Malaysian passive model. The UK government heavily regulates the media sector and depends on ownership legislation. The UK provides a compelling legislative debate on the media ownership regulation with the Media Plurality Report 2012 prepared by the Office of Communications (hereinafter ‘the Ofcom’) advising the Secretary of State for Culture, Olympics, Media and Sport following the proposed acquisition of the remaining shares in BSkyB by NewsCorp (Media Plurality Report 2012). Furthermore, social values and public interest policy of media diversity have become the essential basis of the regulation, which is in line with the principles of the public sphere model. The general duty of Ofcom recognises the need for media plurality (Section 3, 2003 Act) and the BBC Licence Agreement (BBC Licence Agreement 2006, clauses 9 and 10). In addition, the Council of Europe and European Union also emphasise it as an important feature of media system in democratic societies (Article 11 of the Charter of Human Rights of European Union, 2000).

The rule limiting the consolidation between similar media stations or outlets in the newspaper, radio or television industry, takes in the form of restricting ownership or economic participation. The UK has allowed sectoral plurality to be considered together with the general competition laws in reviewing few media mergers (Smith, Tambini and Morisi, 2012). As a consequence, this would indirectly lead to a less concentrated ownership and better control of media outlets, which will increase the diversity of sources of information and opinion.

Within the Malaysian context, none of the ownership or audience reaches rule exists. The 1998 Act is part of the broader development agenda to promote Malaysia as a country for high-tech investment (Kenyon and Marjoribanks, 2007). The 1998 Act replaces the Broadcasting Act 1988 and the Telecommunications Act 1950. The 1998 Act combines three discrete sectors into one roof – broadcasting, telecommunication and the Internet. The main objectives are listed under section 3 (1) of

the 1998 Act that include the promotion of national policy objectives and the establishment of a licensing and regulatory framework in support of such objectives for the communications and multimedia industry.

Malaysia has no safeguard in the form of structural statutory regulation. This regulation evaluates the impact of consolidation and the possibility of substantially lessen competition. However, there are two guidelines that address the issue of ‘dominant position’ (Guideline on Dominant Position) and ‘substantial lessening of competition’ (Guideline on Substantial Lessening Competition) under the jurisdiction of a regulatory authority - the Malaysian Communications and Multimedia Commission (hereinafter “MCMC”). They are Guideline on Dominant Position in a Communications Market and Guideline on Substantial Lessening of Competition. The MCMC has the authority to seek interim or interlocutory injunction (section 142 of the 1998 Act), to direct the licensee to cease such conduct section 51 of the 1998 Act), to seek imposition of fines section 143 of the 1998 Act) or to implement appropriate remedies section 139 of the 1998 Act) under the 1998 Act. The MCMC has the option of introducing a structural reform, but this decision is not specifically provided in light of the 1998 Act. In addition, the Communications and Multimedia (Licensing) Regulations 2000 requires the licensees to register with the MCMC and complies with any access undertaking (section 155 of the 1998 Act). The licensee shall notify in writing, of any restructuring or rationalisation of the individual licensee’s corporate structure.

This approach would encourage concentrated ownership. The establishment of Media Prima evidenced the expected result of an enforced media monopoly. Malaysia is silent on the aspect of plurality. In addition, at present, there is no cross-media ownership rule limiting any consolidation. The limited control is provided under Foreign Investment Committee Guideline. The guideline applies if there is a proposal of acquisition of interest in a local company in Malaysia, which is RM10million and above in value. For the past ten years, the regulators such as the MCMC and Foreign Investment Committee show little inclination to block media mergers. A Malaysian conglomerate, Media Prima acquired four commercial televisions stations and 98.2 per cent equity stake in NSTP, the largest combined circulation of newspapers in Malaysia. Media Prima also own Grand Brilliance Sdn Bhd, which is one of the largest drama and movie content producer in Malaysia. Additionally, MEASAT Broadcast Network Systems, a subsidiary of ASTRO All Asia Networks Plc, which is the main subscription television provider operates eight FM terrestrial radio stations in Malaysia. MEASAT also ventures into telecommunication business by having a substantial interest in Maxis Communications Berhad.

### *Regulatory Regime*

The UK Ownership Rule shows a detailed regime adopted by the UK Government in order to promote media diversity via the media ownership rule. The 2003 Act imposes certain provisions limiting control of a company with interests in the national newspaper and the television stations. This rule is strengthened by the Enterprise Act 2002, which subject any mergers or acquisitions that would result in a substantial lessening the competition, especially involving cross-sector mergers (Section 58 of the Enterprise Act 2002). The ownership rules promoting media diversity are summarised in the followings:

#### Ownership Rules

##### *a. National media ownership rules*

This rule is a cross-sector ownership rule and also known as ‘20/20 rule’. The rule prohibits the owner of one or more national newspapers with an aggregate market share of 20 per cent to acquire a Channel 3 licence (Section 350(1) of the 2003 Act). Similarly, the holder of a Channel 3 licence is not allowed to acquire an interest of 20 per cent or more in a body corporate operating one or more newspapers with an aggregate market share of 20 per cent or more (Section 350(2) of the 2003 Act). Ofcom justified the limit for these entities is that Channel 3 and national newspapers have a significant influence to the viewers and readers.

##### *b. Specific prohibitions on licence holding*

The UK restraints certain individuals or organisations including religious institutions, politicians, political bodies and advertising agencies, from holding certain broadcasting licences because of the possibility of conflicts of interest. In addition, the broadcasting law limit the holder of the broadcasting licence to the ‘fit and proper’ persons (section 3(3) of the Broadcasting Act 1990 and 1996). In the report on the phone hacking incident involving BSkyB, the Ofcom assessed the criteria of fitness and propriety based on conduct and character of any person (a director or a shareholder with a significant holding) with the ability to influence the entities (Ofcom, 2012).

##### *c. Media public interest test*

The UK introduces the media public interest (hereinafter ‘the MPI’) test in order to enhance content diversity and sectoral plurality (section 58 of the Enterprise Act 2002). The Secretary of State has the power to decide and to review a merger using the MPI test. The MPI test applications vary from broadcasting to newspaper. However, the main concern is the promotion of media diversity and the prevention of undue media power (Smith, Tambini and Morisi, 2012). For newspaper mergers, the MPI considerations are provided in the two limbs of section 58. The first limb highlights the need for an accurate presentation of news and free expression of opinion (Section 58 (2A), whilst the second

limb explains the need for a sufficient plurality of views in newspapers in each market for the newspapers industry in the UK (to the extent that it is reasonable and practicable) (Section 58 (2B)).

For the broadcasting and newspaper/broadcast mergers, the MPI considerations are divided into three limbs under section 58 (2C). The first limb underlines the requirement for an adequate plurality of individuals with control of the media entities reaching every diverse audiences in every areas and localities in the UK. The second limb emphasises the necessity throughout the UK for a wide variety of broadcasting, which is both of high quality and considered to attract a wide range of tastes and interests. The third limb states the need for the media players and practitioners to have authentic commitment to the attainment in relation to the broadcasting standards objectives provided under section 319 of the 2003 Act.

The UK statutory provisions do not provide the procedure in assessing and applying the MPI considerations. The legislation awards the politicians with wide discretionary power to decide. The employment of this test recently creates a heated argument on the meaning of a 'sufficient plurality of persons' with control over media entities (Smith, Tambini and Morisi, 2012). The conflict arises involving newspaper industry with political influence that may jeopardise legitimacy of the considerations.

The employment of 'thresholds and undertakings' provides media corporations the possibility of influencing regulators that, whilst an alteration in media ownership seems prima facie a risk to media pluralism, it will not jeopardise the public interest or that any damaging results will be balanced by other advantages (Smith, Tambini and Morisi, 2012). The purpose of this exercise is to illustrate that the process of taking over is essential to avoid the failure of the company and to permit merger allows the process to maintain plurality. This was a consideration when News Corporation was granted consent to acquire the Sunday Times and Times (Smith, Tambini and Morisi, 2012).

### *Regime Transformation*

The pressure to review the ownership regulatory regime is mainly dominated by the arguments for change in the digital and convergence era. The UK has followed this path with the introduction of the 2003 Act, Digital Britain Final Report (2009), Media Ownership (Radio and Cross Media) Order 2011 and the Media Plurality Report 2012. The legislation is intended to remove any unnecessary regulation and to guarantee some safeguards to secure a plurality of voice and diversity of service in the media sector.

The research found that the UK government through the Secretary of State for Culture, Olympics, Media and Sport has completed a series of comprehensive reviews relating to media ownership following the NewsCorp proposal to purchase the shares in BSkyB (Media Plurality Report 2012). Ofcom was requested to submit a report on media plurality. The report highlighted the

importance aspect of media plurality. Firstly, plurality essentially contributes to a well-functioning democratic society through informed citizen and prevents too much influence over the political process.

Secondly, the meaning of plurality is ensuring there is diversity of viewpoints available and consumed across and within media enterprises. Plurality also refers to the act of preventing any other media owner or voice having too much influence over public opinion and the political agenda. Thirdly, plurality needs to be considered both within organizations (i.e. internal plurality) and between organizations (i.e. external plurality). Fourthly, the scope of plurality should be limited to news and current affairs but these genres should be considered across television, radio, the press and online.

The primary aims of this report, which deals with the issue of media ownership and control rules is to encourage a various range of owners at a local and national level. The Media Plurality Report 2012 suggests that a successful framework for measuring media plurality is practically to be based on quantitative approach and analysis. However, there are also matters where a significant judgement is needed. The suitable approach to carrying out such judgement is eventually for Parliament to debate and decide. This Report also highlights that a public interest test focused on media ownership would analyse wider issues than the economic market analysis required under the 2003 Act. Such changes would be in line with the public sphere model principles.

## **Conclusion**

It is evident that the UK has established both specific and generic controls on concentrated ownership. The UK also has long depended on its competition regime dealing with large conglomerates. On the contrary, Malaysia seems to have the least regulatory commitment in establishing any media ownership regulations. The UK has established both specific and generic controls to concentrated ownership. Recently, there is a heavy inclination to relax the specific rules and relied on the generic scheme. This is materialised with the removal of the UK local television ownership scheme. Nonetheless, the UK safeguarded this approach by maintaining primary restrictions on cross-media ownership and by imposing additional conditions. The UK responded to the technological changes in formulating the media ownership rules. On the other hand, Malaysia is silent on the issues of media concentration and public interest as the Malaysian agenda focuses more on national interest. The Malaysian situation is a 'reluctance to execute media concentration regulation' based on political grounds (Trappel and Meier, 1998). In addition, media policies especially involving media concentration is a politically highly sensitive issue. The situation is made worst when the 1998 Act has not adequately dealt with this lack of media ownership issue in a closed economy environment.

The current absence of media ownership rules may have a broader implication for the creation of the competition law. The Malaysian Ministry of Domestic Trade and Industry has prepared a draft of the general competition legislation since 1993, but it was only in 2010 that the Malaysian Competition Act 2010 was finally promulgated and will only be enforced in January 2012 (Long, 2010). However, since all commercial activities governed under the 1998 Act is excluded from the jurisdiction of the Competition Act 2010 the status quo, would inevitably remain the same for some time. In this regard, unfortunately, Malaysia may miss the legislative opportunity to create and establish a specific and generic control on concentrated media ownership as that in the UK.

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- (a) the relevant economic market;
- (b) global technology and commercial trends affecting market power;
- (c) the market share of the licensee;
- (d) the licensee's power to make independent rate setting decisions;
- (e) the degree of product or service differentiation and sales promotion in the market; and
- (f) other relevant matters, which the Commission considered.

Guideline on Substantial Lessening of Competition RG/SLC/1/00(1). This guideline is published by virtue of section 134 of the 1998 Act which states the following matters:(1) The Commission may publish guidelines which clarify the meaning of "a substantial lessening of competition".(2) The guidelines may include reference to

- (a) the relevant economic market;
- (b) global trends in the relevant market;
- (c) the impact of conduct on the number of competitors in a market and their market shares;
- (d) the impact of conduct on barriers to entry into the market;
- (e) the impact of conduct on the range of services in the market;

- (f) the impact of conduct on the cost and profit structures in the market; and
- (g) any other matters which is relevant according to the Commission consideration.

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Section 3(3)(a) of the UK Broadcasting Act 1990 and 1996.

Section 350(1) and (2) of the UK Communications Act 2003.

Section 58 of the UK Enterprise Act 2002.

Section 51 of the 1998 Act is a provision that describe the MCMC powers to issue directions in writing to any person regarding the compliance or non-compliance of any licence conditions, and including but not limited to the remedy of a breach of a licence condition, and the provisions of this Act or its subsidiary legislation.

Section 139 of the 1998 Act provides the followings:(1) The Commission may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market, and to implement appropriate remedies. (2) The Commission may only issue a direction under subsection (1) if the Commission is satisfied that the direction is consistent with (a) the objects of this Act; and (b) any relevant instrument under this Act.

Section 142 of the 1998 Act explains about the remedies for non-compliance: (1) The Commission or a person may seek an interim or interlocutory injunction against any conduct prohibited in this Chapter. (2) A person shall obtain a certificate from the Commission for leave to proceed to the court for enforcement of the provisions of this Chapter except in the case of an injunction.

Section 143 of the 1998 Act explains about the penalty of an offence and shall, on conviction, a person be liable to a fine five hundred thousand ringgit or to imprisonment for a term of five years or to both and shall also be liable to a further fine of one thousand ringgit for everyday or part of a day during which the offence is continued after conviction.

Section 155 of the 1998 Act provides for industry access undertakings and a licensee may specify more than one set of terms and conditions for access to a particular network facility or network service listed in the access list.

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