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# More De-Regulation or Re-Regulation? The Lessons for Media Policy from the Great East Japan Earthquake

Yoshiharu Ichikawa

## **Abstract**

The Great East Japan Earthquake has resulted in various implications for media regulation. The main framework for media regulation in Japan is based on partial regulation and dualism designed for maintaining media pluralism, while relying on market mechanism with mitigating barriers to entry and regulation on the concentration of ownership in accordance with digitization and a decrease in the scarcity of the radio spectrum. In an extreme and confused situation such as an earthquake, reliance on ‘one, absolute voice’ is sought, but this necessarily leads to restrictions on freedom of speech by the authorities. The earthquake challenged the resilience of media policy, which is inclined to pave the way for the normative concept of the marketplace of ideas, and requires a reassessment of its orientation. The situation of both supply side and citizen/user side will be examined with surveys observed just after the earthquake. How its intended aims and philosophy have functioned through the disaster will be clarified and the new direction of media policy in a convergent era will be induced.

## **I. Introduction**

The purpose of this article is to review how media regulation in Japan functions, particularly in light of the experience following the occurrence of the Great East Japan earthquake,<sup>1</sup> as well as to foresee future media regulation from the standpoint of this experience and its resultant implications. This extreme incident has revealed to us the various limitations and potentials of current media regulation in Japan. Among these, media pluralism will be selected for examination in this article, since this is considered to be one of the fundamental premises of a democratic society<sup>2</sup> and has recently been the target of discussion around the world, including in Japan, upon the advent of the era of convergence.<sup>3</sup> Moreover, it is possible to test media pluralism in an extreme and confused situation where

reliance on ‘one, absolute voice’ is sought, but necessarily leads to restrictions on freedom of speech by the authorities.

The structure of the discussion is therefore as follows:

Firstly, the features of the framework of media regulation in Japan will be examined and its underlining principles will be clarified. Second, the challenges to this framework by the Great East Japan Earthquake will be observed from both the supply side and citizen or user side. This will reveal various implications for considering the limitations and potential of media regulation. Next, a new orientation will be sought not by a traditional constitutional law approach but by a newly emerging competition law approach under the inclination of de-regulatory reform. Finally, the discussion will be concluded with reference to an example from the UK and a theory in Japan for future policy design.

## **II. Framework of Media Regulation in Japan**

### **1. Basic Principles**

In Japan, the features of the regulation of traditional media (television, radio and newspaper) are dualism and partial regulation.<sup>4</sup> While the duopoly of public service broadcaster (PSB) and commercial broadcasters is established mainly for terrestrial television and local radio for the reason of scarcity of radio spectrum, there is no regulation of newspapers.<sup>5</sup> In addition, as for television and radio, commercial broadcasters are mainly funded by advertisements, and the PSB, i.e. NHK (Nippon Hoso Kyokai: Japan Broadcasting Corporation), is funded by a receiving fee.<sup>6</sup> As for the newly emerged Internet, no specific TV-like regulations on contents have been introduced but general obligations on the Internet service providers (ISPs) are imposed in the context of telecommunications regulation, mainly based on privacy of communications.<sup>7</sup> This system is aimed at offering people pluralistic and quality information for a democratic society by fostering “journalistic competition.”<sup>8</sup> In Europe, the presence of the PSB and dualism itself is considered to strengthen pluralism<sup>9</sup> and this kind of thinking can also be applied to Japan.

Conceptually, media pluralism, an essential element for the right to information and freedom of expression, is mostly meant as plurality of ownership (supply side), but it also implies citizen access to a variety of information sources, opinions, voices, and so on for opinion formation (citizen or user side).<sup>10</sup>

The rationale for media regulation to maintain plurality in Japan is justified normatively by two similar pillars: variety of opinions or information and the rights to information, both leading to the maintenance of a democratic political process.<sup>11</sup> The concept of media pluralism is generally realized, and therefore analyzed, according to two normative approaches, even if the legal framework differs in each jurisdiction: One is based on competition and freedom of choice, the other emphasizes a broader defense of

‘principled pluralism.’<sup>12</sup> The former is often covered by competition policy, but how this policy can lead to a marketplace of ideas differs depending on whether the focus is on consumer welfare or freedom of choice and economic freedom. The latter is usually dealt with by the rights-based discussion of freedom of speech, which is connected to the public sphere theory supported by Habermas.<sup>13</sup> In reality, accommodation of these approaches is observed in actual regulations and, for instance, in Germany, that hybrid concept has ‘triggered a tension between two regulatory philosophies both of which aim to secure institutions in the Federal Republic: specific broadcasting regulation for cultural, social and political purposes; and economic regulation in the name of the free market.’<sup>14</sup>

## 2. Attention to Chilling Effects – Features of Japan’s Regulation

Even if the pure concept of the marketplace of ideas, where the first priority is no intervention against speech, is applied, there can still be basic requirements for the proper working of the market. Critics of the public sphere theory also admit the remaining rationale for public intervention, which is linked to externalities and ‘citizenship’ concerns.<sup>15</sup> However, the Japanese constitution has paid much more attention to chilling effects and has not positively constructed the enforcement framework for media policy, such as ‘co-regulation,’ as other European countries have, and more discussion to accommodate this will be needed. This strict stance might be appraised for freedom of expression or in terms of market-based regulation, but this brings about ambiguous situation as Sogabe rightly describes,<sup>16</sup>

*‘In Japan, there are tendencies to avoid co-regulation because it is regarded as part of the traditional control system of the government. On the other hand, self-regulation does not work because it is induced by an ambiguous independent committee guided by administrative advice or government reports.’*

## 3. Principles Maintained in the Era of Convergence

The above underlining principles in Japan also apply to the amendments for a converged situation where the boundaries between broadcasting and the Internet are obscure.

In the EU and the US, corresponding to the emergence of these situations, various measures are already being adopted.<sup>17</sup> In the EU, the definition of broadcasting or broadcasting companies was changed to adapt to the converged era and a technology-neutral definition was sought.<sup>18</sup> Under this framework, for example, in the UK, the boundaries of television regulations were adjusted to include audiovisual media services.<sup>19</sup> In the US, the definition of the “broadcast” remains the traditional one, “transmission via radio frequency,” but due to the penetration of cable and satellite systems,

the US Federal Communications Commission (FCC) has taken various measures to make a level-playing field among the medium.<sup>20</sup>

The situation in Japan differs from both of these jurisdictions. The regulatory framework of the media themselves is still fundamentally based on the medium. For instance, the concept of “main terrestrial broadcasting” is connected to the allocation of radio waves, and this feature separates the level of content regulation.<sup>21</sup> According to the 2010 amendments, the definition of the term “broadcasting” itself was changed to “telecommunications communication intended to be received directly by the general public”<sup>22</sup> from “radio communication intended to be received directly by the general public.” Originally, this amendment was intended to be an EU-like converged system, where the level of regulation depends upon the “impact on society,” but the proposed wide-ranging criterion was heavily criticized for fear of chilling effects caused by the authorities’ enforcement. As a result, the fundamental reasoning remained the allocation of radio waves despite the fact that spectrum scarcity is decreasing.

In addition, this amended definition is not applied to the PSB and traditional “broadcasting” by radio communication is still the main remit for “domestic basic broadcasting” in the PSB’s mission. On the contrary, in Europe, many countries have proceeded with the discussion on the extension of the remit of the PSB over the medium other than traditional broadcasting and the consequential effects that this has on the license fee.<sup>23</sup>

#### **4. Recent Developments and the Changing Landscape in Reality**

Under this framework, a number of de-regulations have occurred in the traditional television market. In the course of digital technology development in Japan, channels have increased through the emergence of broadcasting/communications satellites and scarcity has been mitigated. In that environment, “regulatory reform” was advocated by the neo-liberalist market approach and mitigating barriers to entry for a further open market and the introduction of Pay-TV were considered to be preferable in terms of utility in easing the restrictions of concentration of ownership. In addition, equivalents of traditional television like IPTV have penetrated and the regulations have been gradually changed. In this context, regulatory authorities have introduced a competition policy perspective. There has, however, been no significant application of the Antimonopoly Law in this field despite the remaining barriers to entry and the fact that there is no player to lose out.<sup>24</sup>

Moreover, with this deregulation, media consumption has changed in reality.

As recent surveys reveal, the share of traditional broadcasting in all media consumption is decreasing in Japan with the increase in time spent using the Internet.<sup>25</sup> Although time spent watching TV is stable, usage of the Internet/e-mail has been increasing dramatically since 2001. In addition, the younger generation tends to acquire information through the Internet instead of from traditional media and, in particular, one section of the

younger generation (age 16-30s, male/female) answered ‘almost none’ for television usage (ranging from 6 to 10%).<sup>26</sup> In accordance with this trend, people’s perception of the main source of information has shifted from traditional media toward the Internet and the latter has acquired a share exceeding 25%. (‘Moderately through the Internet’ (19.3%) and ‘Mainly through the Internet’ (7.2%)) This shift is similar to the diversification of media and devices observed in other countries.<sup>27</sup>

In summary, the trend towards more market-based approach and increased use of the Internet has been observed. These changes imply that a dramatic transformation will occur in the traditional media industry in the near future. Some argue, therefore, that the days of traditional television news are numbered and online news based on new formats will prevail.<sup>28</sup>

It was in this media environment that the March 2011 earthquake occurred.

### **III. Challenges to the Framework of Media Regulation: the Great East Japan Earthquake**

The Great East Japan Earthquake has challenged the resilience of media regulation, whose potentials and limits were tested by various incidents and at various levels. Topics dealt with in this article are, of course, not exhaustive but the diverse nature of the phenomena has important implications.

As already described, when it comes to discussing media pluralism, supply side (plurality of ownership) and the citizen or user side (access to a variety of information sources, opinions, voices, and so on for opinion formation) has to be recognized separately. In addition, surveys will be used to support the discussion.

#### **1. Supply Side: Plurality of Ownership**

##### **1.1 Range of Real Choices**

One of the primal reasons for media regulation is to maintain a plurality of choices for the people, and its intended functions were tested by this earthquake.

The reportage on the earthquake has revealed the power of the new media and reaffirmed that of the traditional media at the same time. Of the people polled, 43.2% saw the Internet as a source of information for the earthquake<sup>29</sup> while about 10% of the younger generation does not watch television in their daily lives, as observed above.<sup>30</sup>

On the earthquake, social media such as twitter played a certain role in disseminating detailed information and uniting the people.<sup>31</sup> Simulcasting of television and radio on the Internet received much praise, especially from people who were not able to access the television, as reported by a number of journals.<sup>32</sup> However, as a survey by one research institute shows,<sup>33</sup> credibility increased in the traditional media whereas mixed results were

found for social media such as twitter (On social media, 13.4% of respondents said credibility increased, while 9% said it decreased).

How have partial regulation and dualism preformed? Even if people are able to access various media for acquiring information, human beings have a limited ability to deal with several media services at the same time, and this also determines the media environment. Miller's famous article teaches us our limitations on choice.<sup>34 35</sup> Even if freedom of choice and multiple choices is guaranteed, the realistic range of choices is restricted and the meaning of 'pluralism' needs to take this fact into consideration. In terms of the media environment, for instance, the FCC report agrees that there is a limit on people's choices. The report mentions that, in general, people regularly watch around seven channels.<sup>36</sup>

This tendency was confirmed after the earthquake in Japan. The usage of media is influenced by people's usual use of media. A survey conducted on the first weekend after the incident reveals that usual use decides which media people accessed and, concerning the Internet, people use the medium despite the fact that they regard it as less credible than the traditional media.<sup>37</sup> When thinking about a "market" where plurality is to be maintained, it is controllability and not availability to which attention must be given.<sup>38</sup>

In addition, the recent FCC observation could also apply to Japan because these providers might be players in "the market." In reconsidering media concentration rules, the FCC observes that 67 percent of the media on the Internet are associated with "legacy media," and judges that it might be premature to consider new media players as a separate existence.<sup>39</sup>

Irrespective of the breadth of choices on the supply side, what users access to is more limited. This is rendered clear by the earthquake.

## 1.2 Where is the "Market"?

As discussed in the above, maintaining the "numbers" of players leads to defining the "market" and setting the target in that area. In the aftermath of the earthquake, the correctness of this "market" definition was challenged. When it comes to considering media pluralism from this perspective, it is important to define "the market" in which plurality is maintained. For instance, the FCC maintains the concept of a "Designated Market Area," based on data provided by the research company Nielsen, when reviewing controversial media concentration policy.<sup>40</sup>

In the Kanto region (which includes the Tokyo metropolitan area) market in Japan, people watched TV programs about the earthquake for a longer time than they usually watch TV.<sup>41</sup> This naturally led to a high viewing rate, and to define this TV program market as "the market" and using it for analysis is quite natural and not at all illegitimate. However, this data only represents people who had been able to access information through television, mainly those at home with no electric power shortage.

In the devastated areas, the situation was totally different. Based on a survey of

people in Iwate Prefecture, medium-based usage shares differed at the times of ‘just after the incident,’ ‘one week after the incident’ and ‘one month after the incident.’<sup>42</sup> Iwate Prefecture was one of the areas most severely devastated by the earthquake and tsunami. In this area, the tendency for the radio and information on the Internet to be helpful was revealed for people in the earlier stages (radio 47%, mobile/PC Internet 9%) when emergency information such as a tsunami alarm was needed. Contrary to the viewing situation in the Kanto region, the radio was heavily used by people because these devices are portable and require little electric power.<sup>43</sup>

Other than traditional broadcasting, *One-seg* (broadcasting for mobile devices; one of the features of Japan’s digital terrestrial broadcasting), simulcasting through Yahoo! Japan or other providers, or other information on the Internet were also useful for people since these can be received through mobile phones.<sup>44</sup>

Normatively speaking, partial regulation is based on the premise that “the market” can be defined according to the limits of scarcity of the radio spectrum. Therefore, as the de-regulatory reform proceeds, its fundamental rationale might be fading.<sup>45</sup> However, as already observed, “the market” has to be identified more flexibly, based on the real situation. When you regulate in good times and this regulation causes the elimination of those forms of supply that are vital in cases of emergency, then regulation will fail at these intense times.

In summary, from supply side perspectives, plurality has been steadily increasing with the penetration of the Internet and de-regulation in the media market while the rationale for intervention is decreasing. The earthquake, however, revealed that, to a large extent, the traditional media hierarchy has been sustained because of human beings’ habitual limitation of choices and amplified choices are to be preserved to satisfy various needs.

The lessons here is that one should not believe that the penetration of the Internet changes the game of pluralism/media regulation totally and the earthquake is just a really important event proving this point.

## 2. Citizen or User Side: Rights to Information and Freedom of Speech

Next, citizen or user side perspectives will be analyzed. With the advent of the Internet, the information flow bottleneck is fading and the ‘new marketplace of ideas’ is advocated as an ideal space for freedom of speech.<sup>46</sup>

### 2.1 Let Truth and Falsehood Grapple?

*‘Let [Truth] and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?’ - John Milton, Areopagitica*<sup>47</sup>



In the purely founded marketplaces of ideas, there will be no distinction between supply side and citizen or user side and the truth will prevail. But again, the Earthquake showed another example of the limitation of this.

Just after the earthquake, many unfounded rumors appeared on the Internet, especially on twitter or on blogsites. A few examples of these are; “This earthquake is an attack by another country,” “There have been many people kidnapped in the devastated areas,” “Contaminated rain will fall,” and so on.<sup>48</sup> In order to cope with this situation, the police authorities asked the administrators of ISPs to delete unfounded rumors from March 15<sup>th</sup> to April 20<sup>th</sup>.<sup>49</sup> As a response by the whole government, a working team on safety and security in the devastated areas was set up, and integrated measures for public order and morality were submitted under the authority of the Cabinet Office, National Police Agency, Ministry of Internal Affairs and Communications (MIC) and Ministry of Economy, Trade and Industry. Under this framework, the authorities requested ISPs and operators to follow established self-regulatory guidelines already in place for illegal contents,<sup>50</sup> that is, to take voluntary action against contents that appear to be offensive to public order and morals.<sup>51</sup>

In these emergency situations, “one, absolute voice” might be convenient for restraining panic and confusion, but arbitrary decision-making by the authorities has to be avoided in terms of freedom of speech because there are no specific boundaries between true rumors and false rumors. In fact, regarding the earthquake, the police authorities gradually indicated the specific information for which they requested deletion, but no specific criteria were given to distinguish between true information and unfounded rumors at the time of the request. Given this situation, NHK and some major newspapers launched interactive reports via twitter. For instance, NHK dealt with each of the unfounded rumors, posting various kinds of information related to the rumors, including citations from official specialist publications to help people form their own judgments. This appears to be a new service provided through a new tool, but is in fact only performing the traditional function of the media, by which a marketplace of ideas will be realized. In addition, NHK’s missing persons service in cooperation with Google’s Person Finder instead of a traditional information program, or the distribution of informational programs on the Internet were strong pieces of evidence of this revealed by the earthquake. These are beyond the scope of the traditional legal framework, but have to be taken into consideration when designing regulations on a function basis.

In this extreme, urgent and confused situation, maintaining “more speech” was extremely significant for the people.<sup>52</sup> As Brandeis says,<sup>53</sup>

*‘If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.’*

When it comes to enforcement, however, reactions in each jurisdiction tend to differ.

In the US, as there is a historic tendency toward suspicion of government,<sup>54</sup> the middle ground between censorship and unrestricted freedom of speech is discussed while political speech is securely protected as a premise.<sup>55</sup> On the other hand, freedom of speech is recognized among the positive fundamental rights in Europe<sup>56</sup> and the government takes measures to sustain this value through various legal policies.<sup>57</sup> In Japan, the lower court confirmed the principle of “more speech” in a private damages case.<sup>58</sup> The *Niftyserve* case admitted the exemption of the administrator’s responsibility in operating a web forum because participants on that forum are given free opportunities to counter each other’s arguments.

These cases have been regarded as thematic on the Internet, but as web-based contents services have gradually penetrated, it has become one more regulatory issue in the media sector. This “more speech” principle has to be recognized through the lens of media regulation on pluralism even if it is realized on the Internet.<sup>59</sup> As for the people’s reaction in Japan, the result is mixed. In a newspaper survey,<sup>60</sup> 35% of the respondents agreed with the idea that ISPs should check the contents of their sites and 28% responded that the recipient should judge the truth by him or herself. On the other hand, 20% support the imposition of legal obligations on the sender.

## 2.2 Credibility and Fairness

Credibility is regarded as one of the essential factors sought by mass media.<sup>61</sup> Even if plenty of information is received, without credibility, these do not contribute to the development of democracy. In particular, credibility of the press is the fundamental value that partial regulation seeks<sup>62</sup> and this would be confirmed by actual perception.

An independent research institute’s survey just after the earthquake shows that 80% of the people regarded NHK television as an important source of information on the earthquake, followed by commercial broadcasters (56.9%), with information on portal sites (43.2%) coming third, and newspapers (36.3%) fourth. In addition, 28% of the people responded that the credibility of information supplied by NHK had increased, followed by portal sites (increased by 17.5%).<sup>63</sup>

The surveys show that NHK responded well to the people’s expectations on the coverage of the earthquake and NHK reportage itself, their stance on the incident and preparedness for the disaster has received widespread praise.<sup>64</sup>

Conventional communications theories tell us that credibility is created from trustworthiness and expertise through examining factors such as bias, trust, fairness, and accuracy.<sup>65</sup> While professional journalism as practiced by traditional media should be praised, the result is not simply explained by their passion and sense of mission.

In the case of NHK, one of its expected roles within dualism is to maintain impartiality by refraining from bias which might be caused by advertisement sponsors, and to make long-term investments for investigative or emergency reporting. Both are to be

realized by the receiving fee, collected directly by NHK itself.<sup>66</sup>

In particular, the earthquake resulted in the nuclear accident, which is closely related to government policy and the electric power companies. The neutrality of reporting by commercial media has been strongly doubted because the power companies are huge advertisement sponsors.<sup>67</sup> Accordingly, this incident accidentally confirms the functions of the PSB, distance from commercial company sponsors, and sheds some light on the relationship with the regulatory authorities, as these have partial control over the PSB. In the end, however, the result of the survey on credibility shows that NHK has played the role expected by the system.

Apart from the praise for NHK, there emerges the presence of the Internet from the perspective of credibility. But have the functions of traditional media system become obsolete due to the advent of the Internet? Responses by people whose main source of information is the Internet appear to be negative regarding this question. They strongly support the functions of “agenda-setting” (‘Yes’ (18.2%), and ‘A reserved yes’ (60.4%)) and the “perception of public opinion” (‘Yes’ (15.6%) and ‘A reserved yes’ (56.2%)) on services on the Internet.<sup>68</sup> These have usually been understood as functions of the traditional media. The important matter is the function, which is derived from partial regulation and dualism in the past.

### 2.3 Universal Design: Another Aspect of Fundamental Rights

The concept of the marketplace of ideas is closely connected to fundamental rights and applies to all people.<sup>69</sup> The earthquake has revealed the importance of rights-based thinking for freedom of speech.

In Miyagi Prefecture, the worst hit region, the local government and NGOs conducted a survey on the situation of the hard of hearing.<sup>70</sup> Concerning the problems that were troubling them, about half of the respondents said it was difficult to hear information on daily life and, secondly, they felt “guilty” about having other people help them in the middle of the disaster situation. Concerning what they expected from others, about 30% of them said peer support, literal interpretation of the disaster, information on daily life and television programs broadcast with subtitles.

For the information market, there have to be opportunities to take part in a democratic society, and the fact that this was not guaranteed in the situation of the earthquake may have been a cause of the feelings of self-accusation on the part of the hard of hearing. In addition, the function of the media is often considered to be to unite people and to increase social capital.<sup>71</sup> This should have been applied to all people.

Indeed, freedom of speech is generally regarded as a liberty *vis-à-vis* the state, and therefore a marketplace of ideas will be sought, but to realize that ideal, an essential subject for discussion is how to decide the scope of the premise of “the market.” For a healthy society, and a healthy “market” to work, certain basic requirements need to be guaranteed

for all people.<sup>72</sup> In Europe, the Council of Europe endorses the positive obligation of states to protect individual rights to information and the PSB has public service obligations that extend to the disabled people.<sup>73</sup>

In summary, from the viewpoint of the citizen or user side, the Internet reveals the potential of realizing the marketplace of ideas in reality, but the earthquake has shown that adjustments by public intervention are needed to acquire its ideal and intended results. For tackling the limits of deregulation, there are certain needs that can only be met through sophisticated regulation including the establishment of the PSB.

#### **IV. What Protects Media Pluralism? From the Constitutional Law Approach to the Competition Law Approach**

Generally speaking, the rights to liberty such as freedom of speech are protected against governmental intervention from constitutional law perspectives. In countries like Germany, more positive regulations are imposed on governments to protect the rights from third parties.<sup>74</sup>

With the penetration of the Internet and de-regulation in the media market, the rationale for intervention based on scarcity of the radio spectrum is decreasing. In accordance with this, the power of intervention based on constitutional law fades and the role of competition law necessarily becomes important as a gatekeeper for the rights to liberty. This is caused by the structure of information society, which is not directly ruled by the government, but is regulated by the firms as “administrator” through the various architectures.<sup>75</sup>

As Komamura describes,<sup>76</sup> the Internet has appeared as an extreme form of democratization of speech, but the earthquake reveals its limitation in the “marketplace of ideas” in an extreme situation.

Therefore, how competition law should be reevaluated in the context of constitutional law perspective will be important. This might lead to a positive obligation on dominant players in the information market as well as the government to maintain pluralism. This means that accommodation is needed between the normative marketplace of ideas and the real market mechanism.

Accordingly, in this section, fundamental issues of media pluralism sustained by a competition law perspective will be referred to first as the premise of the main discussion with the accompanying latest issue, net neutrality. Following that, two examples for the actual realization of media pluralism will be discussed.

##### **1. Media Pluralism and Goals of Competition Law**

Historically speaking, the relationship between media pluralism and competition law has long been discussed.<sup>77</sup> Some insist that competition law has the potential to protect this

value through an “extended” or strategic use of the law.<sup>78</sup> In that context, competition law is applied to maintain pluralism by paying much attention to the features of the media industry. Others emphasize that ad-hoc regulatory interventions would have an adverse effect on the market and that there is therefore no need to make special rules.<sup>79</sup>

Therefore, when it comes to utilizing this perspective, to focus on freedom of choice and economic freedom instead of consumer welfare would bring about consistency and coherence, as already discussed in the previous section. In Japan, the interpretation of the Antimonopoly Act traditionally refers to the consumer welfare approach and this might be difficult to overcome. The guidelines say, ‘...where the supply of tied products is deemed to be increased, resulting in supplying the products to users at a lower price, and improving users’ welfare according to promoting competition in the market, the JFTC will consider such circumstances in order to assess whether or not competition is substantially restrained.’<sup>80</sup>

Recently, however, the opinion has emerged that the process of competition should be reevaluated.<sup>81</sup> Furthermore, the idea is also advocated that ‘impediment to unfair competition’ (Article 19: No entrepreneur shall employ unfair trade practices) is fundamentally connected to economic freedom and interprets the “interests of general consumers” (Article 1: Purpose of the Antimonopoly Act) as the right to choose/right to be informed.<sup>82</sup> This is analogous to the normative debate on EU competition law in Europe, especially in Germany, where many discussions are taking place on the principles of consumer welfare and economic freedom as normative objectives of competition law.<sup>83</sup>

In addition to these normative analyses, the PSB is another factor in the consideration of media pluralism from the competition law perspective in reality. In the UK, how the presence of the PSB should be included in the media market has become one of the topics for measuring media plurality.<sup>84</sup> In Japan, one of the leading competition law professors similarly indicates that NHK will be included in the same “market” with other commercial broadcasters when considering competition issues in the media sector.<sup>85</sup> Market definition itself has also recently become a contentious topic in competition law.<sup>86</sup> Through the debate on the limits and potentials of defining the market, its function has once again been reviewed and evaluated. This will necessarily influence the debate on media regulation, since the influential US horizontal merger guidelines partly introduce a skeptical attitude toward the conventional market definition.<sup>87</sup>

Generally speaking, consumer welfare-based analysis from the perspective of competition policy tends to focus on the consequences and not on the process of rivalry, and the scope of competition law omits information market competitors since these firms are not necessarily product-market competitors.<sup>88</sup> In addition, even if freedom of choice and economic freedom are preferred in the interpretation of competition policy, maintaining the number of companies in the market does not fulfill the functions of media pluralism.<sup>89</sup> Regulatory measures are therefore needed to resolve these issues.<sup>90</sup>

## 2. Net Neutrality: An Emerging Issue

Although there are limitations of application of competition law for media pluralism, intervention in the rapid changing media environment necessarily increases reliance on its general power. Dealing with the issue of net neutrality is one proof of this.

As Erzingher explained with reference to the US situation,

*‘For example, an ISP that, in addition to providing Internet, provides television services. This provider chooses to offer to its consumers a web-based service such as Hulu through its television service. Here, two legal standards would exist because of a mere difference in platform even though the content, arguably, remains unchanged.’<sup>91</sup>*

Net neutrality was originally defined as the notion that the Internet should be “an Internet that does not favour one application (say, the World Wide Web) over others (say, e-mail).”<sup>92</sup> This was considered to be related to the Internet only, but as contents services have gradually penetrated the Internet, it has become an important regulatory issue. However, even when the definition of “broadcasting” is properly adjusted by regulatory measures, its delivery might be distorted by asymmetrical regulations, and media pluralism will not be achieved as designed. To tackle this problem, various enforcement measures from the perspectives of competition law have been taken against “conduit” in each jurisdiction. In the US, the FCC has attempted to establish an open Internet order despite the complicated jurisdiction problems. This is basically discussed in telecommunications regulation<sup>93</sup> and an analogy of “non-discrimination” could be applied. From the viewpoint of antitrust, similar enforcement approaches are being introduced, and in the *NBCU/Comcast* case remedies are structured to include the provision of non-discriminatory offers of contents to online distributors.<sup>94</sup> In the EU, this problem is dealt with by the competition law-based market power control mechanism.<sup>95</sup>

Media regulations including dealing with net neutrality are closely connected to how the place of the Internet is considered from the viewpoint of competition policy and freedom of speech at the same time. As an “ideal level playing field” will be realized by different measures from jurisdiction to jurisdiction, the place or “the market” has to be grasped functionally from the viewpoint of ordinary people. If the industry is perceived in a vertical or horizontal way, the market where the function has been brought about has to be observed in that way. This requires high flexibility and appears to fit very well with a competition law-based approach rather than regulatory measures.

Next, two examples will be tabled for a future discussion based on the above analysis. One is the case of the UK. The UK has introduced a system which combines the viewpoints of consumers and citizens, leading to a mixture of competition law and constitutional law

perspectives. The second case concerns one of the primary theories advocated by a leading Japanese constitutional law scholar. This theory reevaluates the significance of the PSB in the context of partial regulation.

### 3. Perspectives of Consumer and Citizen: The UK

One of the strong reasons for maintaining freedom of speech is to guarantee citizen participation in a democracy.<sup>96</sup> As is discussed in Europe, media regulation is designed such that '[a] regulatory structure that attempts to balance a range of interests, commercial wants and technological change with viewers' desires must not only accommodate consumer interest to achieve a particular content reach but also ensure citizens have *rights*'<sup>97</sup> (italics by author) In the UK, communications policy is structured under the separated concepts of consumer and citizen.<sup>98</sup> This enables the policy to reach not only the competition side of media regulation, but also the rights-based sphere, such as guaranteeing freedom of speech as a government duty. The latter is basically close to Habermas' public sphere theory,<sup>99</sup> which ensures that specific rules on media ownership and control reflect a perception of the public as citizens.<sup>100</sup>

### 4. Further Role of Public Service Broadcasting: Japan

Another way to maintain the balance between constitutional needs and market mechanism is to facilitate the role of the PSB. Nishido insists that the reasoning for partial regulation will be crystallized into the function of the PSB in a convergent era where scarcity of the radio spectrum is diminished and the tendency of "Balkanization" or group polarization in a diversified society is observed.<sup>101</sup>

In response to the earthquake, NHK has played the role of a future-style PSB, advancing beyond the traditional services. When considering future media regulation, the functions of the PSB have to be reviewed and designed.

As discussed above, NHK's Internet-related services at the earthquake are beyond the scope of the traditional legal framework, but have to be taken into consideration when designing regulations on a function basis.

From another angle, there appear once again to be expectations on the functions of the PSB. A recent Japanese government survey notes the change that has occurred in people's focus points in daily life after the earthquake.<sup>102</sup> This shows that their focus is now on social cohesion, such as valuing the connections with family or regional society next to lifeline-related issues.

These are the traditional functions of the PSB expected by the people, based on trustworthiness and fairness.<sup>103</sup> Maintaining the PSB is possibly one of the measures that can correct the "market failure" of the pure marketplace of ideas and bring about its ideal, intended functions in society.



Although there is little discussion from this perspective, the situation in the UK will be a useful reference for Japan. In the UK, to inform, to educate and to entertain are the traditional purposes of the PSB, supported by three core values: citizenship, universality and quality.<sup>104</sup> For the convergent environment, the BBC is already under a regulatory system which is free from technical discriminations and its obligation of universality is imposed not only as the ‘must carry’ of other media but also as the ‘must offer’ of major media to exert the function of the PSB. Therefore, the BBC has recently championed the importance of the open Internet for exercising their function in a convergent era.<sup>105</sup> The regulatory authority, Ofcom, also holds the same interest in this situation.<sup>106</sup> This means that the functions of the PSB are to be embedded in the context of market mechanism. Even if the legal framework is dissimilar, these issues will be topics of media regulation soon in Japan.<sup>107</sup>

In summary, this section deals with the emerging presence of the competition law approach and its relationship with media pluralism. Its potentials and limitations as media regulation are revealed and two examples to address these are examined for future design.

## V. Conclusion

This article sheds light on media regulation in Japan, which seeks media pluralism, from the perspectives of supply side and citizen or user side with the important experience of the Great East Japan Earthquake. In this process, the penetration of marketplace of ideas has been observed through the de-regulatory orientation, which works to diminish the rationale of public intervention. Although this might be a route to an ideal situation for freedom of speech with no intervention, the earthquake also reveals the limitations of the competition law approach. To maintain media pluralism properly, measures to correct the real market mechanism for an ideal, normative marketplace of ideas are needed, and some examples and theory have been analyzed.<sup>108</sup> In reality, the earthquake has revealed that the PSB remains valuable and a competition law approach to media regulation is not always preferable and more sophisticated regulation is needed in the era of convergence.

How to design the future regulation is another thing to discuss. This needs forward-looking perspectives and requires consideration of both the resultant effects and the decision-process itself for its legitimacy.

The earthquake disaster may have been an extreme case, but it has brought us numerous insights along with its terrible sacrifice. Ensuring that we learn the lessons of our experience in Japan is considered to be the important mission of Japanese academia.

## Acknowledgement

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## Notes

<sup>1</sup> For general information, see Cabinet Office, Information on the Great East Japan Earthquake, <http://www.cao.go.jp/index-e.html>; <http://www.cao.go.jp/shinsai/index.html>

<sup>2</sup> E. Barendt, *Freedom of Speech* (2nd ed.) (Oxford: Oxford University Press, 2005), 430.

<sup>3</sup> For example, the European Commission co-financed the project "Centre for Media Pluralism and Media Freedom" for improving the protection of media pluralism and media freedom in Europe and establishing what actions need to be taken at European or national levels to foster these objectives: <http://cmpf.eui.eu/Home.aspx>; the Columbia Institute for Tele-Information hosts a project called International Media Concentration:

<http://internationalmedia.pbworks.com/w/page/20075656/FrontPage>

<sup>4</sup> Yasuo Hasebe, "Utilitarianism and Freedom of Speech – Why and how broadcasting should be regulated," *University of Tokyo Law School Law Review*, vol.3 (2008), 238. Concerning partial regulation, see Lee C. Bollinger, "Freedom and the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media," *Michigan Law Review* 75 (1976), 1.

<sup>5</sup> Souichirou Kozuka, "Plurality in the Broadcasting Sector: An Agency Cost Analysis of the Regulation in Japan," *Asian Journal of Comparative Law* 5(1) 1 (2010), 1241.

<sup>6</sup> In Japan, the funding of the PSB is not based on a license fee, but a receiving fee. It is not required as a license to receive, but it obligates owners of TV set to make a contract with NHK.

<sup>7</sup> Certain regulations are imposed in some areas of "telecommunications with some openness" based on their nature of editorial control and accompanying obligations. See, the Law on Restrictions on the Liability for Damages of Specified Telecommunications Service Providers and Right to Disclosure of Identity Information of the Sender (2001), Article 2(1).

<sup>8</sup> This was confirmed by the statement of the head of the Radio Control Council in the telecommunications committee of the House of the Representatives, January 24, 1950.

<sup>9</sup> European Commission, "Media pluralism in the Member States of the European Union," SEC(2007) 32, Brussels, 16 January 2007.

<sup>10</sup> European Commission, 5.

<sup>11</sup> Juinichi Hamada, "Pay Television and 'Open Broadcasting Order'," *Forecast of Pay TV Market* (Nippon Hyoron Sya, 1997), 59.

<sup>12</sup> European Commission, "Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach," July 2009, 5.

<sup>13</sup> Bruce M. Owen, "Confusing Success with Access: 'Correctly' Measuring Concentration of Ownership and Control in Mass Media and Online Services," *Progress in Point*, July 2005. Ewa, Komorek, "Is Media Pluralism a Human Right? The European Court of Human Rights, the Council of Europe and the Issue of Media Pluralism," *European Human Rights Law Review* 3 (2009), 395. In this article, freedom of speech includes the rights to impart and receive information as well as ideas. (Barendt, 11)

<sup>14</sup> Vincent Porter and Suzanne Hasselbach, *Pluralism, Politics and the Marketplace: The Regulation of German Broadcasting* (Routledge, 1991), 24. What is more, they indicate that "the broadcasting debate mirrors the contradictions inherent in the German concept of the 'social market economy'."

<sup>15</sup> Mark Armstrong and Helen Weeds, "Public service broadcasting in the digital world," *The Economic Regulation of Broadcasting Markets – Evolving Technology and Challenges for Policy* (Cambridge University Press, 2007), 81.

<sup>16</sup> Masahiro Sogabe, "Co-regulation in Media Law," *Differences and connections between constitutions of different countries* (Seibundo, 2010), 658. (in Japanese)

<sup>17</sup> For general information, see Thomas Gibbons and Peter Humphreys, *Audiovisual Regulation under Pressure – Comparative cases from North America and Europe* (Routledge, 2012).

<sup>18</sup> See Audiovisual Media Service Directive (Directive 2007/65/EC, OJ[2007] L332/27), Loma Woods, "Jurisdiction in the Television without Frontiers Directive," *The European Union and the Culture Industries – Regulation and the Public Interest* (Ashgate, 2008), 145.

<sup>19</sup> Tony Ballard, "Broadcasting," *Media Law and Practice*, (Oxford University Press, 2009), 315.

<sup>20</sup> For instance, the FCC has prepared the maintenance of a level playing field between cable television and IPTV by telecom companies. Thomas Hildebrandt, "Unplugging the Cable Franchise: A Regulatory Framework to Promote the IPTV Cable Alternative," *Georgia Law Review*, 42(1) (2008), 227.

<sup>21</sup> Broadcast Law (Law No.132 of May 2, 1950), Article 2(1).

<sup>22</sup> This was transferred from the definition in the Telecommunications Business Law (Law No.86 of December 25, 1984). "Telecommunications" means transmitting, relaying or receiving codes, sounds or images by wire, radio or any other electromagnetic method.

<sup>23</sup> Wolfgang Schulz, *In Search of the Appropriate Licence Fee Base in Times of Media Convergence*, International Conference: The Future of the Broadcasting Licence Fee in Times of Media Convergence, May 6 and 7, 2010.

<sup>24</sup> See, Yoshiharu Ichikawa, Competition Policy and Media Industry in Japan From the Perspective of Economic Freedom in the Digital Age, *forthcoming*.

<sup>25</sup> Dentsu Research, *White Paper on Information Media 2010*; Expert Committee on the Receiving Fee System in Japan, 2011 (*hereinafter* Expert Committee), *Report by the Expert Committee on the Receiving Fee System in Japan*, submitted to NHK, July 2011. (in Japanese), 5.

<sup>26</sup> Expert Committee, 5.

<sup>27</sup> For instance, see Ofcom, *International Communications Market Report 2011*, 2011.

<sup>28</sup> Francesca Unsworth, *Introductory speech*, News Xchange, November 3<sup>rd</sup>, 2011.

<sup>29</sup> Nomura Research Institute, 2011. This survey is based on multiple answers. (80.5% for NHK TV information, 56.9% for commercial broadcasters' TV information)

<sup>30</sup> Expert Committee (2011), p.5.

<sup>31</sup> Ayako Shigyo, "How did the people hit by the Great East Japan Earthquake use the media?" *NHK Monthly Report on Broadcast Research*, September, 2011, 18. (in Japanese)

<sup>32</sup> "Real SNS usage at the time of the Earthquake," *Nikkei Trendy*, May 5, 2011.

[http://trendy.nikkeibp.co.jp/article/pickup/20110506/1035544/?top\\_rtx2](http://trendy.nikkeibp.co.jp/article/pickup/20110506/1035544/?top_rtx2)

<sup>33</sup> Nomura Research Institute, 2011.

<sup>34</sup> G. Miller, "The magical number seven, plus or minus two: Some limits on our capacity for processing information," *The Psychological Review* 63(2), 1956, 81.

<sup>35</sup> Sheena Iyenger, *The Art of Choosing* (Twelve, 2010).

<sup>36</sup> Mara Einstein, *Media Diversity: Economics, Ownership, and the FCC* (Erlbaum Associates, 2004), 35.

<sup>37</sup> Expert committee, 15.

<sup>38</sup> This way of thinking is analogous with the discussion on unilateral effects in differentiated product markets. In the competition law field, cases such as *Heinz (FTC v HJ Heinz Co 246 F 3d 708 (US Court of Appeals (District of Colombia Cir.), 2001)*. For a detailed explanation, see Gunnar Neils, et.al, *Economics for Competition Lawyers*, (Oxford University Press, 2011), 349) show that observing the closeness of competition is required for judging the likely effects of a merger. If due attention is not given to the close competition between the number two and three companies, which makes the market competitive, a merger would be admitted and 'plurality' would be impaired.

<sup>39</sup> FCC, para.97. Enforcement of antitrust law itself is adapted to the age of the Internet. See, Darren S. Tucker and Alexander P. Okuliar, "Internet Ready: Agency Enforcement of Online

Mergers,” *Antitrust* 26(1) (2012), 80.

<sup>40</sup> FCC, Notice of Proposed Rulemaking on Media Ownership Rules, December 22, 2011, para.8.

<sup>41</sup> Kazunari Uri, “How did people watch the report on March 11?” *NHK Monthly Report on Broadcast Research*, July 2011, 2 (in Japanese). 36% of the respondents say they watched TV for more than eight hours.

<sup>42</sup> Arranged from data in Expert Committee.

<sup>43</sup> This success is also interpreted as an evaluation of community media. In Iwate Prefecture, community-specific radio services had been accepted before the earthquake, and the support of residents appears to be continuing. Concerning European cases, see Nuria Reguero Jimenez and Sakvatore Scifo, “Community media in the context of European media policies,” *Telematics and Infomatics* 27(2) (2010), 131.

<sup>44</sup> Ministry of Internal Affairs and Communications, Information Communications at the Time of Disaster, March 7th, 2012.

<sup>45</sup> Shoichiro Nishido, “Partial Regulation,” *Freedom of Expression* (Shogakusha, 2011), 284. (in Japanese)

<sup>46</sup> *Reno v. A.C.L.U.*, 521 U.S. 844, 885 (1997).

<sup>47</sup> John Milton, *Areopagitica* (Oxford University Press, 1644 [1961]).

<sup>48</sup> “Delete the false rumors on the net – Media and Human Rights and Law,” *Nikkei Shimbun*, April 25, 2011.

<sup>49</sup> National Police Agency, *Measures against false rumors on the Internet by the Police*, June 21, 2011.

<sup>50</sup> Telecommunications Carriers Association, et al., Guidelines on taking measures against illegal information on the Internet (revised, 2010). This is based on the Law on Restrictions on the Liability for Damages of Specified Telecommunications Service Providers and Right to Disclosure of Identity Information of the Sender (2001), which exempts the carrier’s obligations under some conditions when it restricts the transmission by operators. Moreover, the obligation of filtering on ISPs for harmful information is an issue that would introduce another sphere into this discussion. In the EU, there is a case in dispute (Case C-70/10 *Scarlet*; examining the compatibility of a filtering injunction with fundamental rights). In Japan, the Act on Development of an Environment that Provides Safe and Secure Internet Use for Young People (<http://www8.cao.go.jp/youth/youth-harm/pdf/neteng.pdf>) was newly enacted in 2009 and various self-regulatory guidelines were provided under the Act.

<sup>51</sup> For instance, see MIC, *Request to take proper measures against false rumors concerning the Great East Japan Earthquake*, April 6, 2011.

<sup>52</sup> Expert Committee, 18.

<sup>53</sup> *Whitney v. California*, 274 U.S. 357 (1927).

<sup>54</sup> F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982), 86.

<sup>55</sup> Patrick M. Garry, “Re-Evaluating Media Regulation in a Media Environment of Nearly Unlimited Entertainment Programming and Ample Alternative Channels of Communication,” *Regent University Law Review*, 22, no 347, 2009-2010.

<sup>56</sup> See D. P. Currie, “Positive and negative constitutional rights,” *University of Chicago Law Review*, 53 (1986), 864.

<sup>57</sup> In Europe, measures against “harmful contents” or “extremism” are sometimes clearly stipulated. Akdeniz reports on the basic issues such as Internet content regulation, blocking, filtering, licensing and so on in OSCE participating states. Yaman, Akdeniz, *Freedom of Expression on the Internet: Study of Legal Provisions and Practices Related to Freedom of Expression*, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States (July 8, 2011).

<sup>58</sup> *Niftyserve case*, Tokyo District Court, April 28, 2001.

<sup>59</sup> Twitter's adjustment on content regulations in each jurisdiction is one of the pieces of evidence that points to real convergence. Twitter, "Tweets still must flow," January 26, 2012.

<sup>60</sup> *Nikkei Shimbun*, January 23, 2012.

<sup>61</sup> Therefore, the decline of traditional news media became the subject of debate because it causes an erosion in the quality of news as a premise of the media despite the advent of new media forms enabling more players to participate in the media market. Natalie Fenton, "Deregulation or democracy? New media, news, neoliberalism and the public interest," *Continuum: Journal of Media & Cultural Studies* 25(1) (2011), 63.

<sup>62</sup> Nishido, 279.

<sup>63</sup> Nomura Research Institute, *Media usage upon the Earthquake*, March 29, 2011.

<sup>64</sup> For example, "In Japan, disaster coverage is measured, not breathless," *Washington Post*, March 28, 2011 (Ellis Krauss, a professor at the University of California at San Diego says, "If you rolled ABC, NBC and CBS News together you'd have something equivalent to the place of NHK in Japanese media." Long before this M9.0 earthquake hit Japan, NHK had spent much time planning how to cover a crisis.)

<sup>65</sup> A. Flanagan, et al. "Credibility in the 21st century: Integrating perspectives on source, message, and media credibility in the contemporary media environment," *Communication Yearbook*, 2003, 293; Charmy G Sabigan, "Credibility perceptions of television and online," *Theses and Dissertations*, University of South Florida, Paper 2347, 2007; Natalie J. Stroud and Stephen, D Reese, "Objectivity & Balance: How Do Readers and Viewers of News and Information Reach Conclusions Regarding Objectivity and Balance?" *CPB White Paper*, 2008.

<sup>66</sup> Yasuo Hasebe, *Broadcasting Law* (Kobundo, 1992), 150. Of course, its impartiality is often criticized due to its relationships with the political system. See, Ellis S. Krauss, *Broadcasting Politics in Japan: NHK and Television News* (Cornell University Press, 2000).

<sup>67</sup> "Hope of Fukushima," *Asahi Shimbun*, September 13, 2011. Ministry of Internal Affairs and Communications, Report by the Forum on Guaranteeing the Fundamental Rights in the Field of ICT, December 22, 2010, 35 (The closed nature of the press club system in Japan was criticized for its exclusivity).

<sup>68</sup> Expert Committee, 9.

<sup>69</sup> As an important work, see Laurent Pech, "Freedom of Expression and Disability," NUI, Galway Faculty of Law, 3 Law CPS, 2004.

<sup>70</sup> Miyagi Emergency Center, Survey on the situation and needs of the hard of hearing brought about by the Great East Japan Earthquake, April 27, 2011.

<sup>71</sup> L. Bruni and L. Stanca, "Watching alone: Relational Goods, Television and Happiness," *Journal of Economic Behavior & Organization* 65(3-4) (2008), 506.

<sup>72</sup> In other context, the Council of Europe and the European Court of Human Rights shows the need for a regulatory model related to freedom of speech;

'The amplified effect of the Internet has led the Court to establish a specific balance between the protection of freedom of expression and respect for other rights or requirements. The rights of minors or youngsters must be protected in all circumstances, in view of their physical and mental vulnerability, and especially as it is easy for them to access information that is freely available on the Internet or to become the target of sexual abuse by paedophiles on the Internet.' (Council of Europe/European Court of Human Rights, *Internet: Case-law of the European Court of Human Rights*, 2011, 14.)

<sup>73</sup> Council of Europe, Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society.

<sup>74</sup> Positive obligation on the nation is observed by the judgments in the European Court of Human Rights. See, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (application no. 3843/09).

(“There can be no democracy without pluralism. Democracy thrives on freedom of expression.” [para. 129]; “State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee pluralism” [para. 134]) For general information and comparison with Japan, George Shishido, “Design Concept of Space of Speech in Germany: Liberty to Contribution for Forming Public Opinion and Democratic Communalities,” *Freedom of Expression* (Shogakusha, 2011), 101.

<sup>75</sup> Masahiro Sogabe, “Right to Liberty – Transformation in Information Society,” *Legal Seminar* (688) (2012), 12 (in Japanese). Jack Goldsmith and Tim Wu. *Who Controls the Internet?* (Oxford University Press, 2006), 68.

<sup>76</sup> Keigo Komamura, “Reproduction of Plurality and Frame of Reference,” *Freedom of Expression* (Shogakusha, 2011), 6. (in Japanese)

<sup>77</sup> Barendt, 429; Lesley Hitchens, *Broadcasting Pluralism and Diversity* (Hart Publishing, 2006), 207.

<sup>78</sup> In the US, several “extended” cases are observed such as *Turner Broadcasting System v. FCC* 512 U.S. 622 (1994) (*Turner I*). See Maurice E. Stucke and Allen P. Grunes, “Antitrust and the Marketplace of Ideas,” *Antitrust Law Journal* (69) (2001), 249. In the EU, Monti found that the strategic use of competition law matters for media. G. Monti, *EC Competition Law* (Cambridge University Press, 2007), 141.

<sup>79</sup> See Mark S. Fowler and Daniel L. Brenner, “A Marketplace Approach to Broadcast Regulation,” *Texas Law Review* 60(2) (1982), 207; Herbert Ungerer “Application of EU Competition Rules to Broadcasting – The Transition from Analogue to Digital,” Speech at Università di Napoli, Naples, 2004.

<sup>80</sup> Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act (2009); ‘users’ welfare’ is referred to in various JFTC guidelines.

<sup>81</sup> Noboru Kawahama, “Antimonopoly Act as a Market Order Law,” *Journal of Civil and Commercial Law* 139(3) (2008), 265. (in Japanese)

<sup>82</sup> Masayuki Funada, *Unfair Trade Practices* (Yuhikaku, 2009). (in Japanese)

<sup>83</sup> Bkart A., “A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A ‘Dialectic’ on Competing Approaches,” *European Competition Journal* 2 (2006) (Special issue), 212. Oles Andriychuk, “Thinking inside the box: why competition as a process is a sui generis right – a methodological observation,” *The Goals of Competition Law* (Edward Elgar, 2012), 103.

<sup>84</sup> Ofcom, *Ofcom invites comments on measuring media plurality*, October 21, 2011.

<sup>85</sup> Masayuki Funada, *The Broadcast Act and the Competition Law* (Yuhikaku, 2011). (in Japanese)

<sup>86</sup> Malcolm B. Coate and Joseph J. Simons, *In Defense of Market Definition*, SSRN, December 1, 2011. Louis Kaplow, *Market Definition and the merger guidelines*, Harvard John M. Olin Discussion Paper No.695, 2011.

<sup>87</sup> DOJ and FTC, Horizontal Merger Guidelines, 2011, 7

<sup>88</sup> M. Gentzkow and J. M. Shapiro, “Competition and Truth in the Market for News,” *Journal of Economic Perspectives* 22(2) (2008), 149.

<sup>89</sup> Gentzkow and Shapiro, 133.

<sup>90</sup> In the UK, the Communications Act 2003 was designed on the premise that plurality principles are different from competition principles. Craig Arnott, “Media Mergers and the Meaning of Sufficient Plurality: A Tale of Two Acts,” *Journal of Media Law* 2(2) (2010), 258.

<sup>91</sup> Michael V. Erzinger, “‘Net Neutrality’ in the United States of America – Who can stop the FCC, and should they?” *IRIS Plus*, 5 (2011), 33.

<sup>92</sup> Tim Wu, “Network Neutrality, Broadband Discrimination,” *Journal on Telecommunications and High Technology Law* 2 (2003), 141.



<sup>93</sup> For a discussion based on economic rights and free speech rights, see Barbara A. Cherry, “How Elevation of Corporate Free Speech Rights Affects Legality of Network Neutrality,” *Federal Communications Law Journal* (63) (2011), 591; She rightly indicates that “With technological convergence and the elimination of legal entry barriers, the interrelationship of common carriage and free speech principles is becoming more complex.” (p.593)

<sup>94</sup> *United States v. Comcast Corp.*, Case 1:11-cv-00106 (D.D.C. Jan.18, 2011).

<sup>95</sup> Article 8 of Directive 2002/21/EC (Framework Directive).

<sup>96</sup> Barendt, 18

<sup>97</sup> Jackie Harrison and Lorna Woods, “The value and functions of the broadcast media: Protecting the citizen viewer,” *European Broadcasting Law and Policy*, 2007, 29.

<sup>98</sup> Communications Act 2003 gives Ofcom duties on both sides.

<sup>99</sup> J. Habermas, *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society* (The MIT Press, 1995), Cass Sunstein, *Republic.com* (Princeton University Press, 2001).

<sup>100</sup> Hitchens, Chapter 5, 6.

<sup>101</sup> Nishido, 274

<sup>102</sup> Cabinet Office, *Survey on people's life*, October, 2011.

<sup>103</sup> This can also be explained by way of stressing internal pluralism. See, Petros Iosifidis, “Pluralism and Funding of Public Service Broadcasting across Europe,” *Reinventing Public Service Communication* (Palgrave Macmillan, 2010), 23.

<sup>104</sup> G. Born, and T. Prosser, “Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations,” *Modern Law Review*, 64(5) (2003), 657.

<sup>105</sup> D. Coyle, *Public Value in Practice: Restoring the ethos of public service*, BBC Trust, 2010.

<sup>106</sup> Ed Richards, *Speech to the Oxford Media Convention*, January 25, 2012. (He insists that ‘we will need a more coherent overall approach to digital media, covering linear broadcast at one end and internet publishing at the other.’)

<sup>107</sup> In Europe, these matters are discussed in various ways. Barbara Thomas, *PSB and the European Public Sphere, Reinventing Public Service Communication* (Palgrave Macmillan, 2010), 63.

<sup>108</sup> A similar implication is pointed out by Valcke from the viewpoint of users. Peggy Valcke, “Looking for the User in Media Pluralism Regulation: Unraveling the Traditional Diversity Chain and Recent Trends of User Employment in European Media Regulation” *Journal of Information Policy* (1) (2011), 287.