

Submission by the Campaign for Press and Broadcasting Freedom to the Culture, Media and Sport Committee Inquiry into Media Pluralism

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About the CPBF

1. The CPBF was established in 1979. It is a leading independent organisation dealing with questions of freedom, diversity and accountability in the UK media. It is membership-based, drawing its support from individuals, trade unions, cultural and civil society organisations. Since it was established, it has consistently advocated policies designed to encourage a more pluralistic media, and has regularly intervened in public and political debates over the future of media across the United Kingdom.

2. Summary

- Strong cross-ownership rules and clear upper ceilings on the share across media markets are needed. Any supplier with a 15 per cent share in a designated media market should be subject to a public interest test in respect of any merger or acquisition in the same or another media market. Ownership concentration and cross-ownership above the 15% threshold may be permitted subject to organisations meeting certain public interest obligations in their practice. The maximum permitted holding in any of the following designated market should be 30% (national news; regional news on all platforms and in each of the following platforms - radio, television, newspapers, online).
- Ofcom should have concurrent powers to initiate the public interest test rather than control resting exclusively with the Secretary of State.
- Determining media pluralism should involve a combination of quantitative measurement, qualitative assessment, democratic input and oversight. Media ownership regulation needs effective and continuous public consultation built-in so that public interest issues can be addressed by all of those affected.

Plurality concerns

3. In order to protect plurality it is essential that there is adequate recognition of the breadth of plurality concerns. UK regulation should reflect the Council of Europe (CoE)'s identification of media plurality as the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through the media. The CoE understands media pluralism to encompass 'the diversity of media supply, use and distribution, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests'.¹

4. Plurality matters. A healthy media culture should mean that there is a real range and diversity of voices, of creative expression, ideas, information and opinion. Such a plurality of voices, reflected in the media

¹ *Independent Study on Indicators for Media Pluralism in the Member States - Toward a Risk-Based Approach: Final Report, Prepared for the European Commission Directorate-General Information Society and Media, Leuven, July 2009, p5.*

citizens use and consume, is necessary for democracy. But such a range of voices is also needed to foster understanding, dialogue and social action, and to address divisions based on social experience and cultural values. The widest possible range of creative expression is vital for social and cultural, as well as economic, enrichment.

5. Current media ownership rules do not adequately protect pluralism. As Ofcom highlighted in its review of the proposed News Corporation/BSkyB merger, once a merger is approved, 'there is no subsequent opportunity or mechanism to address...plurality concerns that may emerge in future'². Ofcom recommended 'that the Government consider undertaking a wider review of the statutory framework to ensure sufficient plurality in the public interest'. We agree, and welcome the opportunity to make submissions to the Committee's review, as we have to Ofcom's 2011 consultation on measuring plurality. Under the original merger proposals, News Corp/BSkyB would have increased its reach amongst regular news consumers to 51 per cent. That level of market concentration powerfully contradicts the presumption that media ownership rules can be relaxed due to naturally occurring digital diversity. Instead, a more complex environment exists with significant levels of concentration and gateway controls across public media. That is why strong *ex ante* powers are required to assess and where necessary prevent levels of concentration that would stifle innovation, domestic production, and choice and quality for viewers and users.

Measuring plurality

6. The breadth of plurality concerns has implications for the measurement and assessment of plurality. No single form of measurement is adequate to capture the range of plurality concerns that arise. The recent *Independent Study on Indicators for Media Pluralism*, prepared for the European Commission by an international expert group, shows how varied are the measures applicable and how complex is the task of finding suitable indices. It is possible to start more simply. We advocate the use of ownership and market share measures to determine thresholds. The principal measure should remain that of the number of persons controlling media in designated markets. The market share of suppliers in designated markets remains the second key measure for the purposes of identifying media concentration and cross ownership. The Council of Europe's Committee of Ministers Recommendation of 2007 requests the use of 'thresholds based on objective and realistic criteria, such as the audience share, circulation, turnover/revenue, the share capital or voting rights'.³

7. We do not believe that the 'total' media market can yet be determined with sufficient clarity and precision to form the basis for numerical thresholds. We also favour an approach that is more responsive to media plurality problems occurring within and across media markets as defined by platform, service, political and other content aspects, geographic and/or cultural markets served. This requires a variety of measures that

² Ofcom (2010) *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, London: Ofcom, p15.

³ *Recommendation CM/Rec (2007)2 on Media Pluralism and Diversity of Media Content*, 31 January 2007, para 2.3

derive from the different areas of concern: economic, political and geocultural.

8. There are many ways in which current regulations fail to deal adequately with online platforms and convergent media. Online media services should certainly be included in analysis of media pluralism. However it is important that these are assessed carefully. We believe Ofcom adopted the right approach in assessing the cross-media market share for news in its report on the proposed takeover of BSkyB by News Corporation. It would be wrong to draw the conclusion that the massively increased availability of content online diminishes concern about the sources and supply of news, or the share and reach of media companies operating across various platforms. As Ofcom highlighted, 'traditional media providers account for 10 of the top 15 online providers of news (eight newspaper groups plus the BBC and Sky), with the remainder predominantly being news aggregators rather than alternative sources of news. This suggests that today online news tends to extend the reach of established news providers as opposed to favouring the use of new outlets that are not present on traditional media'.⁴

9. We believe that the assessment of media pluralism should involve analytical tools, such as market share analysis, and adopt fair and transparent legal-regulatory processes. However, assessment should not be limited to economic and market analysis but encompass the range of relevant indicators to provide a reasoned, evidence-based assessment of plurality concerns and risks. We favour an approach that combines the rigorous application of specific measures, in particular ownership and market share, with scope to apply a broader range of plurality criteria and considerations as set out in new legislation. We favour a discretionary approach that involves Ofcom selecting and justifying appropriate measures.⁵ This process should be informed by effective public consultation and democratic oversight. Deciding whether there is too much media concentration, or insufficient cultural diversity, in media serving audiences within any part of the United Kingdom should be fully open to public opinion, consultation and deliberation. Above all, we believe that determining what is in the public interest must be achieved through effective democratic participation, as proposed in our revised public interest test.

Revising the public interest test

10. There is a need to assess concentrations of media ownership and cross-media ownership to ensure that the public media on which we rely provide pluralism of voice and opinion, sufficiently diverse sources of news and information, and diversity of cultural expression. The government should clearly and transparently set out public policy objectives, independently of the general competition framework,

⁴ Ofcom (2010) *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, London: Ofcom, p13.

⁵ Ofcom has wide discretion in relation to the assessment of sufficient plurality under the current public interest test (see Ofcom (2010) *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, London: Ofcom). The Court of Appeal in BSkyB/ITV confirmed that Ofcom should provide a qualitative assessment of the position resulting, or likely to result, from the proposed merger.

concerning the degree of concentration of ownership that should be considered permissible in converging media sectors. These should go with the grain of the previous rules that applied in the Enterprise Act Public Interest Test regime and the Communications Act Schedule 14 Rules. Such important rules should be subject to open public consultation and debate.

11. We regard the public interest test as one important means of helping to secure media pluralism and extend public interest obligations to commercial media firms that have a significant reach and influence. However, we regard all such measure as being additional to the maintenance of well-funded public service media. This section includes proposals of the Co-ordinating Committee for Media Reform to which we have contributed as a founding member.

12. The existing public interest test applies different criteria for press and broadcasting in a manner that is inconsistent, unsuitable, and insufficient as media markets and services converge. We believe that the test would be strengthened by identifying broader criteria that could be considered wherever appropriate. These would recognise the special importance of plurality in news, but would also incorporate criteria relevant to all other forms of public media. Here criteria should include those currently assigned for broadcasting and cross-media mergers under the public interest test, namely the quality and range of content, and the suitability of suppliers, wherever these are relevant. The criteria should also include relevant obligations and commitments made by the UK government under international agreements. These include commitments under the UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Audiovisual Media Services Directive, recommendations made by the Council of Europe, and commitments on freedom of expression and other human rights.

Media ownership thresholds and the public interest test

13. Strong cross-ownership rules and clear upper ceilings on the share across media markets are needed. The regulator should have regard for transactions that would result in a supplier having a market share of 15% or greater in the relevant market. **Any supplier with a 15% share in a designated media market should be subject to a public interest test in respect of any merger or acquisition in the same or another media market.** A public interest test should be applied to existing market conditions as well as to any prospective change arising from merger or acquisition. This means that any provider with a 15% share in a designated market should not be permitted to own or extend properties in any other media market without the application of a public interest test. The test should assess the holding against clear criteria concerning plurality of information, diversity of cultural expression, contribution to the public good (democratic, social and cultural). **Ownership concentration and cross-ownership above the 15% threshold may be permitted subject to conditions. However, the maximum permitted holding in any of the following designated market should be 30% (national news; regional news on all platforms and in each of the following platforms - radio, television, newspapers, online).**

14. The public interest test process would determine whether a merger or market share position was permissible or not. But it could also extend the power to impose remedies other than simple approval/disapproval that refer to 'behavioural' conditions placed on the conduct, performance, and governance of organisations. The nature of behavioural controls that could be included in the case of media mergers include:

Protection of the editorial independence of media workers: The power to appoint or dismiss editors could be safeguarded against decisions made by those with a controlling interest. Media owners and others with a controlling interest could be required to adhere to publishers' and journalists' codes of conduct, as well as to undertakings drawn up for specific practices.

Investment in Newsgathering: Evidence of a consistent approach to and commitment to newsgathering and in particular to investigative journalism.

Forms of ownership and control: The existing enforcement powers include alteration of the constitution of a body corporate. Another important way in which the merger regime could be enhanced would be to grant powers to the relevant competition authorities to require that entities subject to merger approval adopt designated forms of corporate status, ownership and governance as a condition of approval. For instance a firm that was dominant in a market and sought to expand into other media in the same market could be required to establish the new entity as a public trust, co-operative venture, non-profit distributing company, or other form.

15. Under such alternative ownership structures, or as conditions imposed on privately owned companies, there could also be requirements to provide or share resources, under favourable terms, to other users in order to serve public interest objectives. This could take the form of sharing, or allowing access to, facilities and resources at favourable rates. This might include links with public bodies, charities, community organisations and non-profit companies as well as commercial competitors under certain conditions to sustain plurality of supply and voice. The proposed sharing of local news resources by the BBC shows the importance of such initiatives to help sustain media services and pluralism in creative production.

16. Establishing a Stronger Legal Framework for the Public Interest:

What is required is an expanded listing in statute of public interest considerations that may be addressed. The process of public consultation should allow any and all relevant criteria to be addressed by respondents, and Ofcom should be required to summarise and respond to all criteria. This approach to the examination of public interest issues, and application and enforcement of remedies, would not meet strict criteria of predictability. However the inherent unpredictability of a quasi-legal public interest test can be mitigated in various ways. First, setting out criteria in the legislation for public interest considerations and for the types of conditions and remedies that may be imposed will provide clarity about the scope of the public interest test. Second, advice and information should be published to explain the considerations to those likely to be affected by them. Such provisions were included in the Communications Act 2003, resulting in the DTI guidance issued in 2004. Third, the procedures and rulings of the regulatory bodies, and higher

courts in cases of appeal, will establish a substantive body of regulatory decision-making and case law. This will be a quasi-legal process only, since it will involve public consultation and deliberation. Yet, there should be suitable predictability so that firms know when their current or future activities may become subject to a public interest test.

17. Process and democracy: A greater role for public involvement and oversight is required. This necessitates that the process should be quasi-legal only. The merger process should remain subject to judicial review and appeal to the Competition Appeals Tribunal. However the courts should have regard to Ofcom's powers to determine the public interest considerations and its authority on matters that are not strictly matters of competition law. The courts have traditionally deferred to the special expertise of regulatory bodies except in areas where the court has competence, such as process, reasonableness and application of law. Clarifying the grounds for challenging decisions on public interest criteria will help to reduce litigation. It will also assert the democratic and cultural criteria informing those decisions which competition law cannot adequately address.

18. Under our proposals:

- Ofcom would have concurrent powers with the Secretary of State (Culture, Media and Sport) to initiate a public interest test
- The public interest test would apply whenever market share thresholds were first reached, not only when there was merger or acquisition activity (although there should be safeguards including a stability period for firms following a test).
- Ownership thresholds would not preclude the public interest test being initiated on other public interest grounds in accordance with criteria and process set out in legislation. For instance, there may be circumstances where it is appropriate to initiate the public interest test in regard to criteria such as the fit and proper person test, in the absence of either a merger or market share situation.

The BBC and public service media

19. Public service media (PSM) require special consideration. The combination of requirements on public service media and systems of governance and oversight are not replicated across commercial media. Public service media are required to meet standards of internal pluralism across editorial content, including impartiality in news and opinion. In addition, the periodic authorization and review of PSM provides a mechanism to assess and sustain internal pluralism, both within individual suppliers and across the public service system as a whole.

20. It is right that the BBC is included in the calculation and analysis of market share since the presence of BBC services has a market impact that must be included wherever relevant. But it does not follow that the BBC's market share should be included in assessing the degree of market concentration within non-public service media. The latter should be assessed alone as the basis for regulatory action to sustain plurality. This is necessary because the pluralism obtained by public service media should not be allowed to serve as grounds to diminish plurality across other media serving audiences in the same markets. The public interest test cannot directly remedy the risk of public service provision itself curtailing market competition and provision. However to the extent either

problem arises it can be addressed through other mechanisms of public service governance. The purpose of the public interest test, by contrast, is to provide an available and effective mechanism to secure public interest outcomes by providers other than those designated public service media.

21. The market share analysis used to calculate ownership limits should not include publicly funded or publicly owned media. The BBC is publicly funded and has to meet requirements for pluralism and diversity. Channel Four is governed by a public trust and has explicit obligations for cultural diversity, pluralism and impartiality. The commercial PSBs, ITV and Channel Five have weaker public service obligations, and as commercially-funded organisations should be included in the calculation of market share thresholds for the public interest test, but should also be granted special consideration as public service media.

22. Monitoring plurality.

Ofcom should have sufficient powers and resources to continue to conduct periodic reviews of media ownership, and pluralism and diversity in media markets. Since Ofcom, under our proposals, would be the lead body responsible for investigating and proposing enforcement action, it is important that there is sufficient independent, and democratic, oversight. We believe that the Culture, Media and Sport Committee has an important role here both in overseeing Ofcom and in initiating consultations and reports on media pluralism. We believe that Ofcom should be required to have regard for independent monitoring of media plurality and should establish an expert working group on media plurality, drawing on the successful model of the Council for Europe, that would undertake research and meet periodically with the wider community of academics, civil society organisations, as well as business and commercial policy-analysts.

23. **Safeguards for editorial independence**

We have highlighted the failings of the Press Complaints Commission over many years and there is now a welcome consensus that existing self-regulation has demonstrably failed. We have set out our proposals in more detail elsewhere.⁶ We believe that what is required is an updated version of proposals in the Press Freedom and Responsibility Bill, put forward by Clive Soley MP in 1992. That bill proposed a statutory body that would operate a code of conduct in conjunction with the industry.

24. The CPBF also supports the call by the National Union of Journalists for a conscience clause, such as that in the NUJ Code, to be made binding in contracts of employment. This proposal was discussed by the NUJ when giving evidence to the Culture, Media and Sport Committee's inquiry into privacy and media intrusion in 2003, and reiterated in the union's evidence to the Leveson Inquiry. Under the NUJ Code a journalist 'has the right to refuse assignments or be identified as the creator of editorial which would break the letter of the spirit of the Code. No journalist should be disciplined or suffer detriment to their career for asserting his/her rights to act according to the Code'.

24. Regulations have not kept pace with the pressures towards corporate cross-media promotion and to the integration of advertising and media (commercial communications and media content in which users have expectations of editorial independence and integrity). We have addressed these important issues in other submissions and believe that, where relevant, they should be included in criteria for the 'behavioural' controls and conditions established under the public interest test.

25. **Impartiality** rules do not inhibit diversity in media, instead they provide safeguards that those who own and control powerful, public communication resources, must adhere to standards to safeguard the quality of information and the range of opinions necessary for political opinion formation in a democracy. Impartiality rules are vital, but they are not sufficient safeguards on their own for editorial independence and standards, and they do not, as some argue, provide sufficient safeguards to justify liberalisation of media ownership rules.

26. As newspapers, that are not subject to impartiality requirements, become 'broadcasters', with online audiovisual content, there are renewed threats to impartiality rules. If there is a free-for-all in the area of online newspaper content, established broadcasters like the BBC will risk having their own standards driven ever lower in order to compete with the online versions of newspapers like the *Sun* and *Express*. The standards of public service broadcasting, and in particular the all-important requirements for impartiality and balance, could be seriously jeopardised by the effects of politically partisan broadcasting creeping in through the back door. In our view, online versions of newspapers should therefore come within the regulatory scope of Ofcom, but with a lighter regime than for conventional broadcasters.

Campaign for Press and Broadcasting Freedom

⁶ CPBF (2011) *A Chance for Change*, London: CPBF. Available at www.cpbef.org.uk.

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