

Campaign for Press and Broadcasting Freedom Submission to Department for Culture, Media and Sport Consultation on Media Plurality (October 2013)

ABOUT THE CPBF

1. The Campaign for Press and Broadcasting Freedom (CPBF) 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, and cultural and civil society organisations. The CPBF advocates policies designed to encourage a more pluralistic media, and intervenes in public debates over the future of media across the United Kingdom.

COMMENTS ON THE DCMS CONSULTATION

2. We recognise that the focus on the consultation concerns the scope of a measurement framework for media plurality. However, we wish to explain and summarise our proposals for media plurality before addressing the specific questions in the consultation.

3. A new framework governing media plurality regulation is needed not just measurement. While a system for measurement can inform the process, there needs to be a much broader consultation focused on remedies to address the range of media plurality concerns. We have now had an Ofcom report that highlighted problems with the media merger regime, the recommendations from the Leveson Enquiry for a thorough overhaul of the existing framework as well as consultations in both Houses of Parliament.

4. The consultation document suggests that the proliferation of suppliers of content means that barriers to market entry have lowered and that emerging digital markets can deliver plurality themselves. On the contrary, there are barriers and advantages that favour large providers of 'legacy' media, as well as new digital giants such as Google, Apple, Facebook and Twitter dominating new markets such as social media (McChesney 2013). The impact of digitalisation on media industries, while profound, has been uneven. The notion that 'new media' has replaced 'old media' is true in some markets and sectors but is inaccurate and misleading when applied across the media as a whole. There are considerable advantages for large firms with market dominance in high costs content creation (regular professional news) and in distribution and retail. While markets are volatile there are advantages for vertically integrated companies over competitors and for those who can benefit from factors that help to lock in consumers (purchase, sunk investment, etc.) and from cross-promotion and other economies of synergy (Arsenault and Castells 2008). Some sectors such as news are threatened. This does create opportunities for new entrants but most are undercapitalized, or cross-subsidised. The trends, evident

in the US, are likely to become more apparent in the UK. New is becoming a division within large multimedia corporations who are presiding over a disinvestment of resources in newsgathering, with profound consequences for democracy (Fenton 2009; Picard and McChesney 2011; Pew 2012).

SUMMARY: MEDIA PLURALITY AND OWNERSHIP REGULATION

5. The CPBF proposes that the ‘Public Interest’ (PI) test, established by the Communications Act 2003, should be revised and extended. We regard the test as one important means of helping to secure media pluralism across converging media, and extend PI obligations to commercial media firms that have a significant reach and influence.

6. Strong cross-ownership rules are needed with clear ceilings on the share across media markets. Any supplier with a 15 per cent share in a designated media market should be subject to a PI 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 operation. 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).

DEFINING THE SCOPE OF MEDIA PLURALITY

7. In order to protect plurality it is essential that there is adequate recognition of the breadth of plurality concerns. Ofcom (2011: 2), inviting comments on measuring plurality, asserted ‘The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda’. This is a reasonable and straightforward statement about why pluralism matters and many would agree that it states why pluralism matters *most*. It draws upon Ministerial, parliamentary and other statements about the importance of media pluralism in a democracy. However it does not serve as a comprehensive statement of media plurality concerns, nor even how such concerns have been expressed within UK media policy. It is also far removed from the policy consensus on media plurality informing international associations such as the Council of Europe.

8. 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' (European Commission 2009:5). Plurality concerns include:

1. Content variety and cultural diversity
2. Media access (social, cultural and economic access for individuals and groups in society, especially marginalized groups)
3. Independence of creators, programmers and journalists
4. Owner influence affecting media content and performance in entertainment, fiction and factual programmes as well as 'news'
5. Plurality of sources of funding for media

9. 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 citizens use and consume, is necessary for democracy. But such a range of voices is also needed to foster mutual understanding and dialogue. The widest possible range of creative expression is vital for social and cultural, as well as economic, enrichment.

10. Media pluralism draws on three main sets of concerns: economic, political and geo-cultural. As a recent study summarises, '[i]n mature democracies media pluralism encompasses political, cultural, geographical, structural and content related dimensions'. This *Independent Study on Indicators for Media Pluralism in the Member States*, prepared for the European Commission Directorate-General Information Society, identifies five dimensions of media pluralism: political pluralism, cultural pluralism, geographic/local pluralism, pluralism of media ownership and control, pluralism of media types and genres. Cultural pluralism refers to (European Commission 2009: 12):

the fair and diverse representation of and expression by (i.e. passive and active access) the various cultural and social groups, including ethnic, linguistic, national and religious minorities, disabled people, women and sexual minorities, in the media. It comprises a plurality of themes and voices being present in the media, socialisation through multiple forms of media access and participation, choice between different forms of interaction and the representation of diverse values, viewpoints and roles, in which citizens belonging to various cultural and social groups...can recognise themselves.

11. Media pluralism is not restricted to news but encompasses broader forms of cultural expression and communication. Rather than being a discrete set of policies concerning news media, the protection of pluralism involves a wide range of policy measures and

obligations including UK commitments under the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, adopted on 20 October 2005. Ofcom (2012), in its report on measuring plurality, narrows the scope of plurality to the point of offering a partial and misleading account of the public interest test provisions in the Communications Act 2003. Ofcom states (2012: 18), 'There are two "plurality" media public interest considerations: plurality of views in newspapers and plurality of persons with control of media enterprises'. In fact there are two others, both of which address cultural provision:

- The need for a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests
- The need for persons carrying on media enterprises to have a genuine commitment to the attainment [of broadcasting standards]

The Government's own guidance (DTI 2004) explained the purposes of these provisions as 'safeguarding the quality and range of broadcasting when mergers take place in order to ensure a diversity of programming and protect the interests of viewers and listeners'.

MEDIA PLURALITY CONCERNS IN UK MEDIA MARKETS

12. The UK media system has high levels of concentration of media ownership, bottlenecks and gateway control at key points across the press, TV, radio and online media markets. Current media ownership rules do not adequately protect pluralism. As Ofcom (2010: 15) 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'. If the News Corp/BSkyB merger had gone ahead News Corp would have increased its reach amongst regular news consumers to 51 per cent. That level of market concentration contradicts the presumption that media ownership rules can be relaxed due to naturally occurring digital diversity.

13. Diversity of news provision is more likely to come from a plurality of types of news outlets, platforms and funding models as well as a diversity of news owners. Owners can have an effect on news output through various means including, at times, direct intervention. More frequently, however, it is likely to be via indirect means: through the appointment of like minded editors, emphasising particular business approaches, cross-promoting or censoring matters of corporate interest, or by prioritising certain types of journalism. Owners can also influence the journalistic ethos of a news organisation and this can filter through to the processes of news production.

14. Despite the ownership regulations currently in place, a handful of owners in the national and regional press have a large market share allowing a disproportionate influence over the media agenda, public debate and political opinion. For instance, Richard Desmond's Northern and Shell, for instance, now owns Channel 5, four national newspapers, celebrity magazines such as OK! and Portland TV which runs 17 UK broadcast channels with carriage on Sky, Freeview, Virgin and BT Vision and includes adult channels such as Television X and Red Hot TV.

Market share of UK national daily newspapers (%) (1997-2009)

Title/ Company	1997	2001	2002	2008	2009
News International	34.4	31.8	32.2	34.8	33.8
Trinity Mirror	23.9	21.0	20.2	15.6	16.2
Northern & Shell (formerly United Newspapers)	14.3	12.5	13.8	14.9	13.5
Daily Mail & General Trust	13.6	18.7	18.5	21.2	19.9
Telegraph Group	7.7	7.7	7.3	7.4	7.3
Pearson	1.3	3.8	3.5	4.0	4.1
Guardian Media Group	2.7	3.1	3.0	3.0	3.3
Independent Print Ltd	2.1	1.5	1.4	1.8	1.9

Source: Audit Bureau of Circulations

15. There has been a marked consolidation of newspaper ownership. Today, just four companies control over 72 per cent of the market. In commercial radio just four companies have an almost 80 per cent share of the market. The case advanced for such consolidation was that it would offer the prospect of substantial economies of scale and cost-efficient operation. Instead, according to the National Union of Journalists, the impact of consolidation on local newspapers and local radio has been a narrowing of the range and diversity of editorial voices and massive job cuts, sometimes driven by creating regional hubs/newsrooms or subbing pools covering a number of titles. Local newspapers should underpin local democracy, informing their readerships about local events but also providing a vital watchdog role over local government, the police and health provision. But the pursuit of profits by regional newspaper monopolies like Trinity Mirror, Johnston Press, Newsquest and Northcliffe has debased the value of the newspapers they own.

Mergers and takeovers have meant that in many places news operations are often centralised miles away from the communities journalists are reporting on. Also, the management response, as advertising collapsed in the wake of the recession and the growth of the internet, was to cut costs, shed staff and further reduce the quality of their papers.

16. Some argue that while 'legacy' publications remain under concentrated ownership, the growth of online publication means that plurality concerns, and the case for intervention, has diminished. Yet, 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 (2010: 13) has 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'.

17. Britain's media ownership laws have been unfit for purpose for several decades. As Will Hutton (2010) explained in his seminal Observer article in September 2010, despite our long history of democracy, Britain is lagging behind. 'We impose no nationality requirement. We do not tightly police the share of a media market held by one proprietor, nor make demands about limiting owners' power to take ownership chunks across the media domains; we do not even care much about preventing market dominance. The assumption has been that lightly applied competition law, along with self-regulation, is all that is required, with little thought for any political and cultural consequences'.

CURRENT MEDIA PLURALITY REGULATION IS INADEQUATE

18. Since a wave of deregulatory legislation swept over the UK media, beginning with the 1990 Broadcasting Act, through the 1996 Broadcasting Act, to the 2003 Communications Act, attempts to protect media pluralism and limit media power have been dismissed. Instead the imperatives have been on opening up media markets, promoting light touch regulation and stimulating growth and competition. Public interest concerns were marginalised.

19. Following the Leveson Inquiry report, and with a new Communications Act pending, this is a critical moment and historic opportunity to address the totality of communications regulation. The handling of the BSkyB merger exposed major flaws in the

current system to protect media pluralism, with the power vested with the Secretary of State rather than through a more open democratic process. The Government also exploited the restrictive legal framing of the test to bracket out not only consideration of ‘fit and proper’ governance but also a host of other concerns about the power and behavior of Murdoch’s media empire. The process proved inadequate to do what was originally intended – to address public interest considerations, like how corporate media power was exercised and might increase if News Corp was granted an even stronger grip across UK media markets.

20. The Leveson Inquiry has called for a new system for measuring and addressing concentration of media ownership. 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. We propose an approach that is democratic, flexible and responsive to media plurality problems in the way media content services are organised and supplied across the UK.

REVISING THE PUBLIC INTEREST TEST

21. The CPBF proposes that the “Public Interest” (PI) test established by the Communications Act 2003, should be revised and expanded. We regard the test as one important means of helping to secure media pluralism and extend PI obligations to commercial media firms that have a significant reach and influence. Our proposals build on the existing apparatus but develop it in various ways. We propose that broader democratic and cultural criteria are set out in the next Communications Act, and that Ofcom, operating under suitably revised terms, should have lead responsibility for investigations, and concurrent powers to initiate public interest tests.

22. We propose that share of supply should be the main trigger for initiating a public interest test, not just merger situations. In key markets, such as national news on each platform, and television-based services, there should be a public interest test when firms reach 15 per cent of the market. Above 15 per cent Ofcom would have powers to require divestment –an ownership cap - but we have suggested there could be greater use of public interest obligations and undertakings. Public interest obligations (PIOs) would be applied

- to place specific structural or behavioural requirements on the activities of firms with a market share above 15%
- as a means of monitoring and enforcing adherence to broader standards of conduct, including codes of conduct
- as a broader agreed set of standards and requirements for media service providers in particular markets. For instance in news there might be obligations concerning investment in

investigative journalism; in television services there might be obligations concerning investment in original programming.

23. At the lighter end these PIOs would include behavioural controls, for instance to prevent editors from being sacked at the whim of owners, and protect editorial standards. A news organisation might have public duties to *sustain investment in newsgathering* or meet undertakings to pool and share resources with other media providers where this benefits media pluralism. At the stronger end they might include requirements to establish new forms of public governance. In particular we think that the maximum market share for privately owned media in key markets should be 30 per cent. Above that, the company would either need to divest or reorganise the service to comply with public interest requirements – for instance by establishing a public trust or community enterprise. The proposals are guided by a key principle: for media that serve public audiences, with size and reach come responsibilities. We regard the test as one important means of helping to secure media pluralism and extend PI obligations to commercial media firms that have a significant reach and influence. So far these policies have been put forward by the Campaign for Press and Broadcasting Freedom, and adopted by the Trades Union Congress Executive.

24. Strong cross-ownership rules are needed with clear ceilings on the share across media markets. Any supplier with a 15 per cent share in a designated media market should be subject to a PI 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).

25. Ofcom should have concurrent powers to initiate the PI test rather than control resting exclusively with the Secretary of State. The test should be applied in accordance with any of the following conditions:

- The passing of market share thresholds.
- In response to evidence of ‘significant public concern’
- Initiated by Ofcom or the Secretary of State when public interest considerations arise.

Following the revelations of the Leveson Inquiry and other investigations into the conduct of the Ministers, special advisors, Ofcom and others in the planned News Corp- BSkyB merger, there is very little public confidence in the existing public interest test mechanism. It is legitimate that the Secretary of State can initiate PI tests but the powers should not rest with the Government alone.

Evidence of the collusive relationship between Government Ministers and News Corporation highlighted the very real dangers of such a concentration of decision-making power. Our proposals provide multiple sources of legitimacy to initiate PI tests: Ministers, regulators, legal-economic market analysis and evidence of significant public concern. There are problems, limitations and legitimate concerns associated with each source of power. Government Ministers are likely to be influenced by considerations for their parties of decisions concerning powerful media groups who shape and influence voters' opinions. Regulators may privilege market players' interests above citizens and even consumers interests and may be subject to regulatory capture. Economic market analysis is a necessary source of legal-regulatory legitimacy but is limited in its ability to identify and address media plurality concerns including qualitative, social and cultural aspects of media provision. Democratic public involvement has been the vital missing component in communications regulation. Public concern has been neglected and needs to be placed at the heart of democratic media policy-making. Yet the mechanisms to do so need to be developed carefully to assist public participation and to command public confidence and support.

26. Determining media pluralism should involve a combination of quantitative measurement, qualitative assessment, democratic input and oversight. The PI test should be initiated principally on the basis of market share. However, we recommend a discretionary dimension that would allow the Secretary of State or Ofcom to initiate a PI test in accordance with criteria and processes established in law. Ofcom should be required to have regard for evidence of significant public concern and to initiate the test in response to such concern. Ofcom should conduct periodic reviews of media plurality. Ofcom should also be subject to periodic review by the Culture Select Committee on the operation of the test as part of a review of media plurality and regulation. We have set out our proposals in submissions to Ofcom 'Measuring Plurality across Media (November 2011); the House of Commons Culture, Media and Sport Committee Inquiry into Media Pluralism (January 2012); submission to Leveson Inquiry, module 4.

Scope of public interest interventions

27. Ofcom (2012) proposes that reviews of plurality should be limited to news and current affairs considered across television, radio, the press and online. The PI test should not be limited to news markets alone nor to criteria solely concerned with news and information services. The existing PI test provides grounds for intervention in media mergers on behalf of considerations including

- Accurate presentation of news (newspapers).
- Free expression of opinion (newspapers).

- A sufficient plurality of persons controlling media enterprises serving an audience (broadcasting).
- The need for a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests (broadcasting).
- The need for persons carrying on media enterprises to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (broadcasting).

28. This list needs to be expanded and updated for convergent media. Criteria for the PI test and remedies should include:

- source diversity
- content diversity
- freedom of expression (including protection for editorial freedom)
- transparency (disclosure of corporate and commercial communications interests)
- fair dealing
- adherence to standards (i.e. relevant self-regulatory codes; compliance with relevant rules and law)
- application of the fit and proper person test.

29. The scope to influence political opinion formation and public opinion makes the control of news and current affairs information and discussion the most important area of concern. However, as we have argued, media pluralism is much broader than this. It includes the diversity of content, share of voice and quality of access to ideas, information, imagery and opinions. The regulation of media plurality must not be restricted to news media but encompass all media services that are public facing and which provide content services to large aggregated audiences. This includes print, television, radio, and online media content services. We believe that Ofcom should be required to include all such public media in assessing pluralism. Such assessment would need to include the totality of domestically produced programmes, and domestically-produced children's programmes, for instance, both of which have been acknowledged concerns for Ofcom in recent reports. It matters that children have access to UK national and regional programmes that can educate, entertain and inform them, and which reflect both cultural diversity and cultural proximity.

30. We argue that the public interest test should not be restricted to news, not only because of the need to embrace wider notions of cultural pluralism but also because this is the best way to safeguard plurality in news. If media plurality is shrunk to news it allows commercial media services to expand and consolidate relatively unchecked, but these services and their profit maximising dynamics increasingly impinge on the production and circulation of news.

Conditions and obligations

31. Firms may be permitted to operate up to a market share of 30 per cent subject to meeting any conditions imposed by Ofcom or undertakings drawn up and agreed with the regulator.

No commercial entity would be permitted to have control above 30% in designated markets. A higher share would only be permitted where the supply was under public ownership and governance. Ofcom would have powers to safeguard public interest consideration by requiring divestment, above 15% market share, or other structural remedies, or by requiring behavioural conditions.

32. 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 (see 22 above). 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.

Measuring plurality

33. 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.

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

35. Enders Analysis has proposed a cap on total media market revenue (15% for any single firm). This is simple and impactful, but total market measurements that include wider sectors such as all publishing and computer games are problematic as they would permit significant concentrations within news publishing, television and radio before total market thresholds were met. In addition, defining the market by revenue would not provide a sufficiently sensitive instrument to identify problems of market and media power. We favour a more compound approach that involves:

- A total market threshold
- The relevant total market may be best defined as the market for media content services across UK television; newspapers and periodical publishing, radio and online.
- Thresholds in designated markets (the markets for news and markets for media content services). Key designated markets would include national and regional news services; television and radio content services; online news;
- Discretion to allow the regulator to initiate the test on PI grounds.

36. 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.

37. 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.¹ 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.

38. Ofcom (2012:28), in its response to the consultation on measuring media plurality, rejects any discretionary basis for a public interest review based on market share or any other metrics. Its principal objection is that this would result in a 'lack of certainty to market players – since at any point in time it is possible that a change in market share by one player will trigger a review of the entire market, in a manner that may not be particularly transparent to the market as a whole'. We agree these are important considerations but not that the system we propose lacks appropriate safeguards. Firms will be able to plan within the parameters of market thresholds and guidance, such as that of the DTI (2004), which supports the existing public interest test. Changes arising from the market exit of other providers can be addressed by allowing a suitable period for firms to address public interest obligations. Predictability for business is an important criterion by which the public interest test should be measured and enforced, but it is the public interest that should be the overriding consideration for regulation. Any market actor with significant impact in a relevant market (like news) should expect to meet and be answerable to public facing standards that are established in law. The objection that tests initiated by market share lack predictability is overstated, not least given the inherent unpredictability for market actors in the favoured option of periodic reviews. The current test is supported by extensive guidance and such guidance would be drawn up to help market actors operate under the new public interest test.

Democratic involvement

¹ 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.

39. Ofcom (2012: 32) objects to calls for greater democratic involvement in media plurality decisions by arguing that it could create 'perverse incentives among well-funded or organised campaigns to 'flood' the process, making it a costly process to organise and run'. We do not propose that any one organisation or co-ordinated campaign should exercise undue weight. It is also important to guard against astroturf campaigns (pseudo - grassroots campaigns) orchestrated by commercial operators which would bring the process into disrepute. However, we do not think it is difficult to assess 'significant public concern' based on evidence of such concerns expressed across civil society and through mechanisms such as (e)petitions . The risk of abuse is a poor argument against facilitating greater democratic participation in media public interest decision-making.

Monitoring plurality

40. 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 Committees in both Houses have an important role here 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.

The BBC and Media Plurality

41. The public interest test we propose is not designed to restrict the size of 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 PI test, but should also be granted special consideration as public service media.

42. 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.

43. 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.

Tackling concentration in distribution of media

44. There are other issues that policies for media plurality need to address. We have set out our proposals in responses to the Ofcom consultation on measuring media plurality and to the Culture, Media and Sport Committee Inquiry into Media Pluralism. One important problem to remedy concerns **distribution**. The move from rail to road distribution and the dominance of the system by the major publishers make it difficult for smaller publications to have equal access to markets as their larger competitors. This is an issue that needs to be addressed in the interests of plurality and equal access to markets. The French system, which guarantees distribution to smaller titles, is one that deserves careful consideration.

Media plurality and related media regulations

45. **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.

46. 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.

47. Regulations have not kept pace with the pressures towards corporate cross-media promotion and to the integration of advertising and media (that is integration between 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.

48. The Campaign for Press and Broadcasting Freedom has been involved with the European Initiative for Media Pluralism (EIMP) from the start. The EIMP is a campaign initiated by around 100 civil society organisations, media, and professional bodies throughout Europe which calls for legislative actions to stop big media and protect media pluralism in Europe. We fully support the demands of the EIMP which call on the European Commission to draft a Directive for the protection of media pluralism. The EIMP demands: a) effective legislation to avoid concentration of ownership in the media and advertisement sectors; b) guaranteed independence of supervisory bodies from political power; c) definition of conflict of interests to avoid media moguls occupying high political office; d) clearer European monitoring systems to check up regularly the health and independence of the media in member states.

RESPONSES TO CONSULTATION QUESTIONS

Question:

1. Do you agree that online should be included within the scope of any new measurement framework?

49. Yes. It is neither feasible nor desirable to ignore online media. What is critical however is that measurement, taken as a whole,

does not ignore or diminish critical differences in the nature of content, in the institutions and arrangements for supply. There can be important differences in content services online depending on whether the relevant providers are private businesses or public service providers. The nature of the institution, how it is financed, its corporate structure and relations with other firms, its regulation and governance can all affect the content and services provided and so measures of online activities need to be capable of addressing these considerations. While they are convergent, the various platforms remain significant and should continue to be measured separately. The markets for national and regional news, and for audiovisual content services, should be measured on all platforms combined but also across the relevant platforms of print publishing, radio, television and online. For instance the measurement of newspaper, radio or broadcasting markets must include offline and online provision and access. Yet in each case the historical barriers to entry (economic, regulatory and historical-cultural), branding and marketing, and the awareness and expectations of users, continue to influence media markets and so must not be diminished in market measurements.

2. What type of content is relevant to media plurality?

3. Do you believe that scope should be limited to news and current affairs, or be widened to consider a wider cultural context?

4. If so, how might a wider context be defined?

50. We answer questions 2, 3 and 4 as follows. As we have argued above, media plurality should not be limited to news and current affairs but encompasses entertainment and cultural expression. We believe that the UK should define media plurality broadly and do so in line with the Council of Europe and with regard to other international sources of authority. A practical starting point is to measure plurality in designated markets of news and markets for broadcasting (extended to audiovisual content services). The scope of media plurality should be the production and circulation of content for aggregate public audiences and the provision of communication and other services related to the above. Media plurality should not be limited to content alone. Plurality concerns include:

1. Content variety and cultural diversity
2. Media access (social, cultural and economic access for individuals and groups in society, especially marginalized groups)
3. Independence of creators, programmers and journalists
4. Owner influence affecting media content and performance in entertainment, fiction and factual programmes as well as 'news'
5. Plurality of sources of funding for media.

6. What sorts of organisations and services are relevant to media plurality?

Addressing media plurality must involve all the market analysis that applies in competition regulation (market power) with the added attention to media power that is concerned with the content of communications and with who communicates. All the organisations that provide or influence the provision of communication content and services are relevant to media plurality. We agree that all the types of organisation listed on page 20 should be capable of being included. Just as a competition analysis of the relevant market will need to determine which organisations and services can potentially exercise market power, so too media plurality analysis needs the flexibility to be able to address market and media power issues. We believe that content production and ownership and control of the channels and platforms for content delivery are the most important parts of the media supply chain in regard to media plurality concerns.

6. Do you believe that scope should be limited to publishers or include services that affect discoverability and accessibility?

51. Media plurality concerns arise at every point across the value chain from production to consumption and use. It is right that special attention is given to content production since what is produced for public consumption, by whom, under what influences and for what purposes are rightly central concerns regarding how media serves democracy. The main focus of media plurality regulation should be to ensure that there are limits on the concentration of ownership within content production. However, we agree that the measurement and assessment of media plurality in both news and entertainment must address how content reaches consumers through all the services and intermediaries that affect this.

7. Do you agree that the BBC's impact on plurality should be assessed as part of a plurality review?

52. We believe that the critical issue here is that the presence of the BBC in any area of service should not be allowed to serve as grounds to diminish plurality across other media serving audiences in the same market. We have discussed the position of the BBC further in sections 41-43 above.

The CPBF is very concerned by the failure to acknowledge in the consultation document critical differences between commercial media providers and the BBC as the major public service provider in the UK. No other media organisation has the breadth of requirements for internal pluralism, for public service obligations across news, entertainment, and culture, the regulatory and governance oversight to secure these objectives and the insulation

from market pressures that is designed to ensure public service objectives are achieved. The BBC cannot be compared directly with other organisations whose ownership, governance, financing and operations not only differs but also has important bearing on the nature of the media content and media services they provide. The BBC does not seek profits for its PSM, it is not answerable to shareholders and investors but to the public it serves, via rigorous systems of governance. The BBC should be included in media market analysis. However, BBC or other PSM services should not be included when the necessary task for regulation is to measure, and then secure, appropriate levels of plurality within non-public service media.

8. Are there specific factors that you think a measurement framework needs to capture in order to provide a picture of plurality in local communities?

53. There needs to be measurement of media concentration and cross-media ownership at local and regional as well as national levels. This should examine the share of provision in news. We believe that measurement is an essential element. However we believe that the determination of media plurality problems should be responsive to concerns raised by the communities affected. We have proposed that there should be mechanism to enable communities to demonstrate that there are sufficient concerns about media plurality to initiate a public interest test. This mechanism would be most amenable to geographic communities concerned about actions that might diminish plurality within any part of the United Kingdom. However, we very much welcome the consideration for communities of interest and the democratic mechanism we propose could work here too with appropriate thresholds and safeguards against abuse.

9. Do you agree that a measurement framework should also seek to assess the plurality of media serving other audiences or communities of interest? If so, which ones?

54. We welcome the proposal to consider provision and plurality for different demographic groups, or communities of interest. The establishment of Channel Four came from a process of a review of provision but one which also allowed the voices and arguments of those seeking to expand communications to be heard. We think that there will be significant benefits from mapping how different audiences or communities of interest are served. Such information will inform and support the public interest test process we have outlined above. Such measurement can underpin regulatory action but it can also help to support the extension of public service provision, funding initiatives, community ventures, social enterprises, businesses and creative partnerships. In its early years Ofcom mapped public service provision in the UK. In a convergent media environment mapping media and cultural pluralism will be a vital tool for policy and for all those interested in communications services and provision.

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