

Media plurality and the UK agenda

The House of Lords call for Evidence

The House of Lords Inquiry

Much political, legal and economic ink has been spilled on the issue of media regulation. This topic is once again at the forefront of the political agenda following the House of Lords' Call for Evidence which closed on 1 May. This follows the now familiar public debate of the effectiveness of UK media regulation in the wake of the News Corporation/BSkyB transaction and the Leveson Inquiry. As the Committee reflects on the submissions made, this is likely to be the beginning of a new period of debate as to what, if anything, should be done to improve the existing regulatory framework. Below we provide a brief summary of our response to the main issues and questions raised by the Inquiry.

Does a clearer objective for plurality policy need to be thought out and incorporated into statute than is currently the case? What should this be?

Policy objectives should be clearly defined. Given the (positive) effect the internet is having on plurality, together with the fact that the last major legislative measure was made in 2003, plurality policy could be revisited and objectives reconsidered. Any incorporation into statute needs to balance certainty for stakeholders against the need for some flexibility in interpretation.

In the absence of a definition of plurality in statute, what is the best definition, or should it be improved?

The current UK media public interest considerations are set out in section 58 of the Enterprise Act 2002. The relevant "considerations" differ depending on whether the transaction concerns only newspapers or broadcasting/cross-media mergers. Ofcom devoted considerable attention and effort to developing its working 'definition' of media plurality. Ofcom's working definition (incorporating a range of metrics with no single measure being decisive) is an excellent first position. While there may possibly be a need for some minor enhancements/refinements, a radical revision is not advisable unless new robust evidence has come to light since the consultation.

What should the scope of media plurality policy be? Should it encompass news and current affairs or wider cultural diversity in content provision as well?

The scope of media plurality should encompass news and current affairs only; media plurality is concerned with the plurality of viewpoints. Other genres are not directly relevant although some genres (e.g. soaps) may influence people's viewpoints. On the supply side, news provision is better defined and a reasonable indicator of relevant content than other genres

What are the appropriate triggers for a review of media plurality and with whom should discretion to trigger a review reside, or indeed should reviews be periodic?

The appropriate trigger is a relevant media merger. Ofcom reviews the status of media ownership rules on a periodic basis, and thus media plurality is implicitly assessed on a regular basis. Regulatory certainty should be paramount for all stakeholders.

Should reviews be periodic while still retaining the possibility that a review can be triggered under certain circumstances? What should those circumstances be?

There should not be a back stop power to review that can be called upon at ministerial or regulatory discretion. This would effectively leave a 'sword of Damocles' hanging over industry and risks disincentivising organic growth.

For the purposes of a review of media plurality, what should 'sufficient plurality' mean as described in Sections 3 and 375 of the Communications Act 2003? How should the growing role played by digital intermediaries acting as gateways to content be taken into account?

Sufficient plurality is a qualitative concept (exercising judgment based on a range of quantitative and qualitative evidence) and it must be assumed that there was sufficient plurality at the time the Communications 2003 Act was enacted. Essentially, there needs to be a sufficient range of viewpoints available to audiences in the UK across all media. Online

news provision (and BBC services) should be included in the assessment and both the demand side (consumption, including multi-sourcing within and across media) and the supply side (news) provision should be taken into account. Companies that are successful in the plural and increasingly cross-media environment should not be penalised for their success.

Should the BBC's output be included in a review of plurality?

The BBC cannot be excluded from the plurality landscape. If it is accepted that a commitment to impartiality, of its own, is not enough to guarantee plurality – though it contributes to it – BBC's governance structure should not prevent it being considered. It still has scope to influence the news agenda.

How can internal plurality be sensibly measured against external plurality?

Both these mechanisms for contributing to plurality are valid. The distinction between external plurality (achieving plurality through a number of media outlets) and internal plurality (ensuring content diversity through a single supplier) has been accepted in the UK. In the context of BSkyB's proposed acquisition of a 17.9 per cent interest in ITV, the UK Competition Commission thought "that it was appropriate to distinguish between the range of information and views that are provided across separate independent media groups (external plurality) and the range that are provided within individual media groups (internal plurality)".

What structural and/or behavioural remedies are appropriate if insufficient plurality is found?

The choice between structural or behavioural remedies is not a binary one, i.e. a choice between one and the other remedy. The focus of competition authorities on structural remedies in cases raising concerns of market concentration has given way to a more sophisticated approach which selects the appropriate remedy on a case by case basis. In some instances, a behavioural solution may be more effective than a divestment remedy such

as where access to content or prohibition from discrimination is key to ensuring the viability of independent offerings.

How should the deployment of these either structural or behavioural remedies be balanced with considerations of the wider context of news provision (e.g. the future of news provision and its financial viability)?

It is true that regulators face challenges when deploying remedies in fast moving and uncertain markets. This is particularly the case in the media sector where the rise of the internet, new technologies and distribution methods presents, on the one hand the prospect of increased plurality but also uncertainty about how the market may develop. Accordingly, remedies should be supported by an impact assessment given the recognised ambiguous impact of technological and economic development in the media sector.

With whom should power to deploy these remedies ultimately reside? What process for their deployment should be observed?

Historically, intervention on media public interest grounds has been the preserve of Government rather than an independent regulator. However, as with any review of the substantive rules, there should also be a review of orthodoxy which entails that the State should be decisive on this question. The conclusion may be the same but the inquiry should focus on what safeguards can be deployed to ensure that such important decisions are in the public interest. The role of the courts to review such decisions cannot be under-stated.

To what extent should plurality be seen in a wider EU context, particularly given the argument recently made that the Commission has competence to review and impose obligations in these areas?

The European Commission's ongoing consultation on a proposal for an EU wide measure on media plurality emphasises that this issue is to be seen in a wider international context even though the terms of reference for the UK Inquiry are domestic. The legal basis for a pan-EU measure is far from settled. The

difficulties of adopting relevant regulation against fast technological developments are multiplied when these need to take into account developments in different markets at different stages of development. Each member state's approach to media plurality should be treated similarly to public service broadcasting: i.e. each member state determines its own policy subject to competition rules.

What should the UK learn from international approaches to media plurality?

There is no one size fits all across jurisdictions and polar extremes in terms of the content and intrusiveness of regulation. Established regimes have revisited their lighter touch regulation in this area, sometimes in response to popular pressure. In Australia controversial reforms were proposed – and withdrawn – in March 2013. Emerging markets are also debating this area. For example, India's Telecoms Regulatory Authority launched a consultation on media and plurality in February 2013 but the final shape of regulation, if any, remains to be settled. Where the UK is held up as a beacon of best practices, it has a responsibility on the international stage to ensure that what it adopts is not only robust for the domestic market but is seen in its proper context and frame of reference. The dangers for UK companies overseas who encounter additional layers of regulation in new markets, themselves inspired by the UK example, cannot be overestimated.

CONCLUSION

The existing UK statutory objectives, while not fundamentally ill-conceived, could benefit from the following clarifications.

First, the definition of the media public interest could include for each of newspapers, broadcasting and cross-media mergers “the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience”.

Second, the definition could include for each of newspapers, broadcasting and cross-media

mergers “the need for the availability throughout the United Kingdom of a sufficient plurality of views and content which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests”.

Third, for each of newspapers, broadcasting and cross-media mergers there should be a commitment to the accurate presentation of news and free expression of opinion. In our view relating to market power or concentration are better addressed by competition authorities.

Concerns raised by the conduct of media owners are matters which more properly fall within relevant (and specifically directed) remits of press regulation, journalistic standards and Ofcom’s fit and proper person regulation.

NEXT STEPS

Although the first round of the consultation has closed, businesses across all media from traditional print to online will be watching developments to consider how the changing regulatory landscape will affect their interests. Experience has shown that comments from stakeholders can have a significant effect in shaping the resulting regulatory regime.

CONTEXT

This briefing has been prepared by Dr. Alison Sprague of CEG in consultation with competition lawyer Suzanne Rab. A joint initial and supplemental submission were provided to the Committee by the authors and can be found, together with other submissions at:

<http://www.parliament.uk/documents/lordscommittees/communications/Mediaplurality/MediaPluralityEvidence.pdf>

For details of the original consultation and invitation to comment see:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/communicationscommittee/news/media-plurality-new-inquirylaunch/>

<http://www.parliament.uk/documents/lordscommittees/communications/Mediaplurality/CfEMP0313.pdf>

Contact

Dr. Alison Sprague

M / +44 (0)7876 217 131

E / asprague@ceg-europe.com

Any opinions expressed in this communication are personal and are not attributable to Competition Economists Group

Suzanne Rab

M / +44 (0)7557 046 522

E / suzanne.rab@gmail.com