

Cover sheet for response to Invitation to comment on measuring plurality across media

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To (Ofcom contact):

Name of respondent: Professor Natalie Fenton

Representing (self or organisation/s): Co-ordinating Committee for Media Reform

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Name Natalie Fenton

Signed (if hard copy)



Co-ordinating Committee for Media Reform

THE MEDIA AND THE PUBLIC INTEREST – preliminary briefing paper, 4 November 2011. For further information, please contact info@mediareform.org.uk.

INTRODUCTION

The Co-ordinating Committee for Media Reform is a newly-formed umbrella organisation of advocacy groups, academics and individuals campaigning for meaningful reform of the UK media. The CCMR was established to represent the interests of civil society in the light of the Leveson Inquiry and the Communications Review and to draw up policies designed to sustain the public interest and foster a more democratic media system.

PLEASE NOTE: This submission contains draft proposals that have come out of a period of discussion and deliberation with a range of groups and individuals involved in the CCMR. The ideas in this document were presented at a public meeting on the 17 November and will be discussed and revised further before a final submission is made to the Leveson inquiry. As this is a draft document it does not necessarily represent the views of all of the associated members of the CCMR.

Recent allegations, revelations and admissions relating to the wrongdoing of journalists have focused the public mind upon the least acceptable aspects of media behaviour. The more complex challenge facing society now is to decide what it wants and expects from journalism; to set some clear and realisable standards for the institutions and individuals that investigate, report and make sense of the world for the rest of us. By articulating such standards, and the principles upon which they are based, we can hope not only to prevent repetition of some of the more egregious practices that have been brought to light recently, but also to work towards a commonly meaningful language through which journalists, politicians and the public can reflect upon, scrutinise and assess the relationship between the media and the public interest. This will involve proposals for a strengthened public interest test and a more robust approach to media concentration in order to secure media pluralism and diversity.

Section 1: News Media and Democracy

Plurality of news content

In beginning to set out such principles and standards, we shall need to be as clear as possible about what we mean by the public interest. In this document we are referring to

the public interest in terms of promoting media pluralism and diversity. While media pluralism serves the public interest, it is not in itself the public interest. Public-interest journalism is characterised by a particular mode of address: one that appeals to people directly and consistently as citizens, co-existing within a democratic community, rather than as mere subjects of the state or only as consumers in the marketplace. As citizens, people possess forms of agency that enable them to act upon the world around them, making a difference to their social reality as well as enduring its rules and routines. When journalism serves the public interest, there is an acknowledgement that citizens are considered capable of comprehending the policies and decisions that affect them; of applying their experience and values to arguments when presented to them; and of acting (at least potentially) in ways that can make a difference to the world around them.

Complex societies are dependent upon the circulation of news, not least because of the inevitable distance between the local places where people live their lives and the diverse and dispersed places in which events are happening, decisions are being made, ideas are circulating and conflicts are occurring that might have an effect upon them. News is a form of common knowledge that everyone needs to know or, at least, have an opportunity to find out about, because they might have an interest in its outcome. Not everyone will agree about what the public needs to know (the news agenda), who is best placed to relate and explain it (authoritative news providers) and how best to frame news stories and analyses so that they can contribute to public understanding. As there can be no single, demonstrably objective version of the news, citizens are best served by a broad range of sources, accounts and explanations of what is happening in the world around them. At its best, such a range will include a plurality of assumptions about what constitutes news; how best to investigate, report and explain it; and how to combine it with other content and genres in order to make it more accessible.

Ownership and control

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. There have always been anxieties over the ownership of the media because of its agenda-setting role. Media owners have, over time, been shown to influence the way their organisations present news and in turn have some bearing on public debate and political opinion. 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, 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. This may derive from a certain vision of a particular owner or an editor in chief, from a particular family ownership tradition or from structural and organisational principles which impose a particular form of editorial direction. All of these can influence the types of journalism that are valued and promoted and what kinds of stories are followed.

Despite the ownership regulation that we currently have, a small group of owners in the national and regional press have a large market share, thus a limited number of people and

approaches potentially dominate the media agenda and can influence public debate and political opinion.

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

Politics, news and the public interest

How well does contemporary British journalism serve the public interest? Journalistic approaches to the news tend to revolve around two perspectives. The first represents the political world as a game in which the attainment and retention of power is the principal goal. This account is dominated by reports of ‘winners’ and ‘losers’, strategies designed even to ‘sell’ unpalatable policies to an unwitting electorate and accounts of an inner political world often laced with Machiavellian manipulation and deception. Faced with such a political world, citizens come to feel like spectators, observing the skills of an opaque sport, or cynics, withdrawing in frustration from a system of political communication that rarely takes them seriously. The second journalistic perspective is to see the democratic polity as a civic forum in which issues and policy proposals are discussed on their merits. This approach is characterised by a canvassing and sifting of competing arguments; an acknowledgement that mature democracy entails trade-offs between different preferences and values; and an historical sense that stories and events have long-term pre-histories and consequences that add up to more than a stream of isolated episodes. In this context, a clear relationship is envisaged between people as news consumers and people as reflective, monitoring, arguing, voting, active citizens.

In the real world of contemporary democracy, political communication entails a mixture of these two orientations, with politics depicted through the frames of both the competitive game and the civic forum. But the presentation and analysis of news is currently showing signs of radical imbalance, with game-oriented journalism rising and civic-oriented public-interest journalism in decline. While it cannot be denied that high-quality journalism based upon serious investigation and astute analysis can still find its way into print and broadcast

news; that even some of the most populist newspapers manage to stimulate important public debates; and that a significant range of voices and perspectives can now be accessed online by those with the time to search for them, the news landscape as a whole is increasingly devoid of civically relevant content.

This serious problem for democracy is exacerbated by three pressures. Firstly, newspaper circulation and readership levels are at an all time low and key advertising revenue has reduced sharply. The tremendous growth in the number of free newspapers, emergence of 24 hour television news and the popularisation of online and mobile platforms have presented the newspaper industry with some real challenges. Maintaining profit margins and shareholder returns is increasingly dependent upon the use of fewer journalists doing more work in less time to fill more spaces than ever. This results frequently in greater use of unattributed rewrites of press agency or public relations material and cut-and-paste practices that are now commonly referred to as 'churnalism', a practice that is antithetical to the kind of public-interest values upon which the democratic public sphere depends. The broken business models of mainstream newspapers and the need to find the means of funding news in the public interest is covered in the third CCMR working paper.

The concentration of media ownership

Secondly, the media system is increasingly dominated by a fierce competition for public attention. Irresponsible editors push journalists to almost any lengths to break a story, even when the methods adopted are ethically repugnant or, as we have seen, criminal. Political communication is increasingly shaped by this intense competition, reducing news holes for politics and placing a premium upon arresting stories rather than the cultivation of civic knowledge. One consequence of this is the creation of a particularly bouncy news agenda: what is 'the story' one week (sometimes, one day) is superseded by a different one the next week, leaving citizens with an impression of politics as an overwhelming succession of mishaps, unmanageable events, incompetent authorities and suspicious circumstances.

Thirdly, the purchase which parties and leaders once had upon the media as channels for the promotion of ideas and policies has declined. Whereas in the relatively recent past, political communication strategists had a limited range of press, television and radio bases to cover, they are now involved in multi-dimensional impression management. This leads to an inevitable loosening of their control over the political agenda, forcing politicians into a predominantly responsive mode or an attempted news-management one. To cover the broad, dynamic and often unpredictable media environment in which they now operate, political actors are compelled to adopt elaborate cross-media strategies, which may amount to little more than keeping up with the incessant flow of relevant information and hoping to spot embarrassing media content before it damages them. To help them cope with these incessant pressures, politicians have come to rely upon journalists-turned-spin doctors who advise them to adapt to the logic of the media ecology, regardless of its civic defects.

Given these pressures, it is hardly surprising that public trust in certain types of news is very low and disengagement from the formal political process increasing. These trends have been intensified by the sordid revelations that have recently come to light in the phone-hacking scandal, but they exist independently of these exceptional acts of inhumanity and

illegality. Setting standards for journalism must amount to more than simply not repeating such scandalous practices. Key to a new system should be three fundamental principles:

- *The promotion of a diverse news landscape and high quality journalism in the public interest;*
- *The protection of the public from unethical and unlawful newsroom practices;*
- *The regaining public trust through transparent mechanisms of accountability.*

We are a group of media practitioners, commentators and academics who have conducted research and engaged in public discussion over a number of years about the relationship between journalism and the public interest. We all believe in the freedom of the press, in the sense that it should be independent from government and fearless in holding power to account. We also consider that we are now at an unprecedented juncture in which there is an opportunity to set out some agreed principles and standards for the British news media. While we do not believe that a single public inquiry, code of ethics or regulatory mechanism can repair the ills that have become apparent in some of our contemporary journalism, we are convinced that the cultural relationships of political communication can be refashioned through a combination of policy and education. In the remainder of this document and in the two complementary CCMR briefings on journalistic ethics and alternative funding models) we set out some clear policy proposals as a contribution to the reinvigoration of the cultural foundations of the fourth estate.

Section 2: Reforming the Public Interest Test

Media pluralism and diversity of media content are essential for the functioning of a democratic society and have been defined by the Council of Europe as ‘the corollaries of the fundamental right to freedom of expression and information as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms’.¹

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. In this section we review the UK public interest test and make recommendations for its enhancement. The purpose of the amended test is to ensure that concentrations of ownership and the behaviour of those providing public media services does not operate against the public interest in terms of media plurality.

Since 1994 the Council of Europe has been concerned about adopting recommendations to Member States on the promotion of media pluralism. With Recommendation (94) 13, the Council focused specifically on measures to promote media transparency as a pre-requisite for anti-concentration provisions especially in the context of global multimedia groups. Furthermore, Recommendation (99)1 focused specifically on measures to promote media pluralism. It underlined that ownership limits alone are not sufficient to ensure diverse media content and recommended the adoption of other measures (such as quotas and editorial agreements).

¹ Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content, 31 January 2007

In 2005, the UNESCO Convention on the protection and promotion of the diversity of cultural expressions stressed once again the importance to protect the diversity of cultural expression. In 2007 a Committee of Ministers Recommendation² by the Council of Europe underlined that ‘media pluralism and diversity of media content are essential for the functioning of a democratic society and are the corollaries of the fundamental right to freedom of expression and information’. It also demanded the adoption of legislation that can limit ‘the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets.’³

In 2009 the European Commission published a study on media pluralism indicators.⁴ The investigation highlights that 16 countries in Europe regulate cross-ownership in two or more media sectors, while 20 EU countries enforce specific restrictions on same-sector 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.’⁵ Furthermore, the CoE states that the rules

should take into account the horizontal integration phenomena, understood as mergers in the same branch of activity – in this case mono-media and multi-media concentrations – as well as vertical integration phenomena, that is, the control by a single person, company or group of some of the key elements of production, distribution and related activities such as advertisement or telecommunications.⁶

The UK regulatory framework for media pluralism in the UK has developed over a long period of time, but with a persistent acknowledgment that sector specific absolute limits on media ownership are needed to control concentrations of media power. This policy objective has been underlined by the reports of successive Royal Commissions on the Press, and has been progressively enshrined in the sector specific competition rules and Broadcasting law. Despite the rise of commercial broadcasting and then television, followed by the relative decline of press audiences and the rise of the internet, there is a remarkable continuity in the core policy principles evident in the Royal Commissions/ Government Commissioned Inquiries in 1949, 62, 77 and by successive parliamentary committee reports.

So whilst the rules set out in Schedule 14 of the 2003 Communications Act do establish numerical limits that apply to broadcasting licensees, and the merger regime sets out a public interest test, these no longer provide the safeguards required by the public.

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

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

⁴ Independent Study on Indicators for Media Pluralism in the Member States – Toward a Risk-Based Approach: Final Report, Leuven, July 2009

⁵ Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content, 31 January 2007, para 2.3

⁶ Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content, 31 January 2007 para 2.4

Historically the key moments of danger to media power and pluralism have taken place either during a merger involving two or more media enterprises, or at the point when a broadcasting license changes hands. It has been historically appropriate that the regulatory framework 'bites' at the point of a merger or a change of licence. Hence the '20-20' rules on cross media ownership. But in a rapidly changing and converged media landscape this regulation is now outmoded and unsatisfactory.

The government should clearly and transparently set out public policy objectives, independently of the general competition framework, 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 transparent and open public consultation and debate.

Currently legislation on Public Interest in the UK is part of The Communications Act 2003 that amended the Enterprise Act 2002 to extend 'public interest' considerations to the media. This incorporated a revised and expanded version of the newspaper merger rules (and repealed the newspaper merger provisions of the Fair Trading Act 1973). The new 'media public interest considerations', as they are collectively referred to in the legislation, are set out in section 58(2A) to (2C) of the amended Enterprise Act. The public interest requirements for newspaper mergers are as follows:

(2A) The need for—

- (a) accurate presentation of news; and
- (b) free expression of opinion; in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

For broadcasting and cross-media mergers, the following considerations are specified under 2C:

- a) 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;
- (b) the need for the availability throughout the United Kingdom of 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; and
- (c) the need for persons carrying on media enterprises, and for those with control of such 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.

Application of the public interest test

The public interest test has only been invoked in two cases since 2004, both involving BSkyB. It was first fully applied in the BSkyB/ITV share acquisition in November 2006 (*British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907; [2010] EWCA Civ 2)⁷. The News Corp-BSkyB merger bid was the second invocation of the public interest test when Vince Cable referred the New Corp bid on grounds of media pluralism. Ofcom, following a public consultation and review, concluded that the merged company would have 51% share of the UK news market, a lack of pluralism that would operate against the public interest, and recommended a full Competition Commission enquiry. Yet the handling of the merger exposed plenty of flaws too.

Problems and deficiencies of the public interest test

1. Scope of the test

The public interest test combines part of an established newspaper merger regime with new considerations for broadcasting. However, this results in anomalies and omissions. The public interest criteria for newspapers are 'accurate presentation of news' and 'free expression of opinion' and 'a sufficient plurality of views in newspapers in each market'. The criteria for broadcasting are 'the need for the availability throughout the United Kingdom of 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'. This is much broader, encompassing entertainment as well as news and including cultural criteria of audience tastes and interests.

In regard to newspaper mergers, the test focuses on content diversity in news and opinion, freedom of expression and accuracy. For mergers involving broadcasting companies, however, the criteria include source as well as content diversity, high quality of content and commitment to meet content standards set out in the Communications Act. It is not apparent why these criteria diverge to the extent they do. The problem of concentration of sources is identified as a concern in broadcasting but it is not clear why this is not specified in regard to the press. Such inconsistencies provide a poor basis for considering newspapers and broadcasting but, even more so, converging multimedia entities.

Reference is made to adherence to standards. Although these are statutory requirements in the case of broadcast license holders, in contrast to newspaper self-regulation standards, it is anomalous not to have regard for the latter in respect of newspapers. The Human Rights Act 1998, for instance, asks the courts to have regard for publishers' compliance with the PCC code in respect of Article 8 privacy issues.

2. Application and interpretation of the test

⁷ See Cartlidge, Howard and Broderick, Dervla (2009) BSkyB/ITV: Competition Appeal Tribunal dismisses BSkyB's Appeal, *Utilities Law Review*, 17 (2): 47-53. Cartlidge, Howard and Mendia Lara, Francisca (2010) "BSkyB/ITV: Court of Appeal Dismisses BskyB's Appeal on Competition Grounds." *Utilities Law Review* 17(5): 174-176.

The Enterprise Act 2002, as amended, provided little guidance on how the media public interest considerations should be interpreted. The consequence, according to Craufurd Smith, has been that 'considerable discretion has been passed back to those bodies required to implement section 58, leading to contested decisions and uncertainty for the companies involved'.⁸ The BSkyB-ITV case took three years to resolve and involved BSkyB and other parties challenging decisions through the Competition Appeals Tribunal and Court of Appeal.

The DTI issued guidance that public interest interventions in broadcasting would only occur where the merger would previously have been restricted by media ownership rules that have since been removed by the 2003 Communications Act or in 'exceptional circumstances'. The guidance also indicates that interventions in newspaper mergers will be rare. According to Rowbottom⁹:

While this policy may have advantages in providing greater certainty for media companies, such a limited approach means that the competition laws and remaining ownership rules will be the primary safeguards, despite the limits of such strategies... Consequently, while the public interest provision has the potential to control the biggest concentrations of the media, the policy adopted on interventions suggests it will be used so sparingly as to provide at best a minimal safeguard.

There are also limitations if existing levels of plurality are taken as the base line in considering mergers. Further, the lack of clarity and objective standards by which the criteria may be identified and assessed may encourage regulators to adopt a narrow and cautious approach. In the News Corp-BSkyB case, having cited plurality as the public interest consideration, government lawyers insisted that they could not subsequently introduce others, such as whether the Murdochs were 'fit and proper' persons to own a broadcasting licence. The law was a source of restriction, highlighting limitations in the original legislation, yet the scope of the enquiry was influenced by political judgments, and also delimited by regulatory analysis. Ofcom shrank plurality concerns down to news and current affairs, and the government utilized such narrow framings to justify the restricted scope for intervention. For instance, Ofcom acknowledged News Corp.'s cross-promotion as a possible concern but grouped this amongst longer-term effects of the transaction that were inherently uncertain. Cross-promotion, bundling of services or launching new integrated products were developments that could not be linked exclusively to the proposed merger, might occur anyway, and might have consumer benefits, even where the effect on plurality was detrimental Ofcom argued. Ofcom therefore stated that its formal advice was based entirely on the 'static' analysis of the immediate impact of the merger on share of news.

⁸ Rachel Craufurd-Smith (2011) 'Is the UK "Media Plurality Test" Fit For Purpose', Available at <http://www.law.ed.ac.uk/courses/blogs/medialaw/blogentry.aspx?blogentryref=8705>, accessed 30 August 2011.

⁹ Jacob Rowbottom, (2008) "Written evidence on media ownership" (House of Lords Communications Committee, Jun 2008) *The ownership of the news*, HL Paper 122-1, London: The Stationary Office. Available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/122we14.htm> (accessed 22 September 2011)

While this was less assailable under legal appeal, it meant that neither the likelihood nor consequences of increased cross-promotion were examined. As Ofcom itself noted, the merger regulations were an insufficient substitute for ex ante rules on ownership, or ex post powers to tackle abuses.

3. *The power of the Secretary of State and political influence*

The power of the Secretary of State to determine the matter contradicted the shift to more transparent regulation, and justified the fears of the House of Lords Communications Committee (2008: 73) of a conflict of interest 'if the same people who want, and need, to stay on the right side of a media company, have the final say on that company's business interests'¹⁰. Such concerns arose when the Conservative government did not refer Rupert Murdoch's purchase of the *Times* and *Sunday Times* to the Monopolies and Mergers Commission in 1981, and more recently, when the Labour government did not refer Richard Desmond's takeover of *Express* newspapers in 2000 or subsequent acquisition of Channel Five in 2010. In the News Corp-BSkyB case, there was dispute about the extent to which the legal requirements of the test or the adoption of an overly restrictive interpretation by government served to bracket out not only consideration of 'fit and proper' governance but other concerns about the media and market power and behaviour of News Corporation.

The need for ownership thresholds

No media organisation should be too large and hence too powerful, either within a news sector or in aggregate across news sectors. Over recent decades regulation on ownership has slipped but could be strengthened once again.

The public interest test was a rearguard action to inject some democratic and cultural considerations into a narrow economic and competition law process. The public interest test and other aspects of media ownership regulation need to be reconfigured to serve a more progressive media policy agenda. In particular they need to engage with the issue of how to ensure against unhealthy concentrations of media power while keeping pace with rapid changes in the way communications are organised, made and used. One way of doing this is to establish a more effective public interest test that can be applied whenever proposed media mergers or market concentration reaches a particular threshold, such as 15 per cent share of supply in a relevant market. In such cases, a stronger public interest test than we have at present could be applied, one which would assess media ownership against criteria set out in law, including, plurality of ownership and supply, cultural diversity, corporate behaviour, and content issues.

However, the establishment of media ownership thresholds should not be to the detriment of other criteria for initiating a public interest test. Under the existing procedures the test is only initiated by the Secretary of State but he has powers to issue a special intervention notice in public interest cases where the standard merger jurisdictional thresholds relating

¹⁰ House of Lords Select Committee on Communications (2008) *The Ownership of News. First Report of Session 2007-8*, HL Paper 122-1, London: The Stationery Office.

to share of supply and turnover are not satisfied.¹¹ Such powers should be retained but shared with Ofcom.

This would be also in line with the recommendation of the Council of Europe.¹² Under these proposals Ofcom would have the powers to initiate and conduct public interest test investigations. With its statutory remit to further the interests of citizens as well as consumers, Ofcom is the right authority to make assessments of plurality, democracy and protecting the public interest. The power of the Secretary of State to initiate a test should be retained, in line with the recommendations of the House of Lords Communications Select Committee in 2008, but with Ofcom being solely responsible for the conduct of the test.¹³

The introduction of ownership thresholds should not preclude any other merger and acquisition activity or market conditions from serving as the basis for a public interest test. Further, the test should automatically apply wherever a party to a proposed transaction has, or would thereby obtain, a share of 15 per cent in the market for national news or regional news on all platforms and in each of the following platforms: radio, television broadcasting, newspapers, video on demand, internet. In addition to news, the 15 per cent share of supply threshold for an automatic public interest test should also apply in respect of suppliers of commercial media content services on any platform for the total UK market or any significant geographic market in the nations and regions, and apply on a more discretionary basis in respect of cultural as distinct from geographically defined markets. Under the current system, a consideration for mergers involving broadcasting include regard for the quality and diversity of programmes and their appeal to a variety of taste and interests. In future, Ofcom should have regard for the effect of a transaction on cultural provision serving any group of users or viewers that might be significantly affected by it.

In general, any party with a significant share of 15 per cent in one media market will be subject to a public interest test before being permitted to acquire a greater share in the same market or in other media markets. The 15 per cent threshold finds its justification in the argument that no less than six owners in a market is a suitable benchmark for pluralism in media supply rather than the four permitted under the standard merger threshold, and is justified by the public interest benefits of pluralism for both citizens and consumers. At the same time, an upper limit of 30 per cent market share would allow the necessary scope and flexibility to permit greater concentration within markets, while imposing conditions to obtain the best public interest outcomes.

The regulator Ofcom should have discretion, but there should also be safeguards and also democratic mechanisms both to review and initiate public interest tests. Tests should be automatic whenever ownership and market share thresholds apply. For other tests, Ofcom should specify its reasons based on objective criteria set out in legislation. These will be

¹¹ In standard cases the threshold for public interest intervention is based on satisfying at least one of two tests, a 'turnover test' (£70 million) and a 'share of supply' test of 25% share of the supply of goods or services of any description in the UK or in a substantial part of the UK

¹² Recommendation [Rec\(2000\)23](#) on the independence and functions of regulatory authorities for the broadcasting sector

¹³ House of Lords Select Committee on Communications (2008) *The Ownership of News, First Report*. London: The Stationery Office.

subject to the safeguard of judicial review in individual cases and to parliamentary oversight in regard to Ofcom's performance in general. There should also be a strengthened undertaking to act upon evidence of public concern. This will be aided by requirements for Ofcom to consult the public on whether to conduct a public interest test in cases where Ofcom judges that a test is not warranted but where there is evidence of significant public concern. Such a preliminary consultation would provide suitable means to assess public opinion to determine if there were sufficient grounds to initiate a full public interest test. Already, the existing guidance states (DTI 2004: 28) 'Where a transaction gives rise to a significant volume of adverse third party comments regarding the impact or potential impact of the transaction on newspaper public interest considerations, it may be appropriate to *consider* intervention'¹⁴.

The Secretary of State can also intervene on public interest grounds in cases which fall to the European Commission under the provisions of the EC Merger Regulation. Such formal powers as are required by law should be retained but the determination of public interest considerations should rest with Ofcom rather than the government.

The public interest criteria that Ofcom should consider and the processes to be followed should be set out in legislation. Ofcom should have sufficient powers and resources to continue to conduct periodic reviews of media ownership, and pluralism and diversity in media markets. These should include any recommendations for revisions to the public interest test and criteria, and the Secretary of State should retain the power to add public interest criteria by means of statutory instrument.

Public service media require special consideration. The combination of requirements on public service media and systems of governance and oversight are not replicated across commercial media. Not only are public service media required to meet standards of internal pluralism across editorial content, including impartiality in news and opinion, but also the system of periodic authorization and review of public service media provides a mechanism to assess and sustain internal pluralism, both within individual suppliers and across the public service system as a whole. Together this provides the means of sustaining a measure of media pluralism for socially and culturally beneficial ends. Given this it would be perverse to allow the presence of public service provision to justify insufficient pluralism across privately owned commercial media. Rather it is socially beneficial to ensure that there is sufficient pluralism in private media to extend the benefits of pluralism beyond those obtained through public service media alone. With public service provision already at risk of shrinking to the provision of one provider, the BBC, in some areas, with reductions or abandonment of public service obligations on ITV and Channel Four, the need to ensure pluralism across contemporary media is even greater.

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 which must be included wherever relevant. But it does not follow that the BBC's market share should be included in assessing the

¹⁴ Department for Trade and Industry (2004) *Enterprise Act 2002: Public Interest Intervention in Media Mergers*. Guidance Document, London: DTI

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.

Criteria for intervention

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. 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, 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 international commitments on freedom of expression and other human rights.

The public interest test process would determine whether the merger or share was permissible or not. But it could also extend the power to impose remedies other than simple approval/disapproval that refer to *'behavioural'* conditions on the conduct, performance, and governance of organisations. Such behavioural conditions would include measures concerned with protecting editorial standards and independence, the treatment of workers, terms of supply, and so on. Requirements could also include interventions in ownership structures, for instance requiring that public trusts or co-operative ventures are established when firms exceed a certain market-share or level of cross-ownership.

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.

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.

Effective cross-ownership rules and appropriate flexibility

When the government set out criteria for ownership rules in 2001 it emphasized the economic case for allowing 'our companies sufficient freedom to be at the forefront of...growth' (DCMS/DTI 2001: 14)¹⁵. Yet its other aims serve as a useful test: to ensure 'a framework which is robust but adaptable to a rapidly changing technological and economic environment', to provide 'as much certainty and predictability as possible', 'to be reasonable and proportionate' (14).

There are strong democratic and cultural, as well as competition, grounds to set limits on media concentration and cross-media ownership. However overly rigid rules risk perverse outcomes, including for media pluralism. The alternative to approving some consolidations may be the loss of enterprises and jobs. Media consolidation may involve trade-offs between conflicting public goods. There are grounds, therefore, to adopt a system that has robust, transparent ownership rules combined with clear criteria for circumstances when media ownership should be investigated.

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.

¹⁵ Department for Culture, Media and Sport (DCMS) and Department of Trade and Industry (DTI) (2001) *Consultation on Media Ownership Rules*, London: DCMS

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.

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 had 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.

There are other revisions needed that arise from the News Corp-BSkyB merger case. The public interest considerations should not be restricted to those set out in an intervention notice. All relevant considerations should be addressed through the review and consultation process. The regulatory authorities should have the power to intervene at any stage in a merger process if new information comes to light.

Section 3: Proposals

We believe that urgent consideration needs to be given to the following policy proposals:

- 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 per cent or greater in the relevant market. 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. 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 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)

- The power to initiate a public interest test should be assigned to Ofcom in line with Recommendation Rec(2000)23 of CoE. Ofcom should have concurrent powers to initiate the test rather than control resting exclusively with the Secretary of State because there may be, as the BSkyB bid so clearly revealed, a conflict of interest. Operating under new legislation Ofcom will be best placed to assess public interest considerations alongside competition issues. Ofcom can ensure the process is less susceptible to political interference while remaining properly subject to parliamentary and judicial oversight.
- The BSkyB exception should be remedied so that the News Corp's stake in BSkyB is reduced from 39 per cent to 15 per cent.
- Market concentrations above the upper ceilings (15 per cent) would only be allowed where firms can demonstrate that they meet certain precise requirements and comply with conditions imposed by Ofcom. The revised public interest test process would determine whether the merger or share was permissible or not. But it would also extend the power to impose remedies other than simple approval/disapproval that refer to 'behavioural' conditions on the conduct, performance, and governance of suppliers of media services. Such behavioural conditions would include measures concerned with protecting editorial standards and independence, the treatment of workers, and terms of supply to third parties. Requirements could also include interventions in ownership structures, for instance requiring that public trusts or co-operative ventures be established when firms would otherwise exceed market-share or cross-ownership thresholds. In addition to existing ones, public interest criteria should include:
 - protection of the editorial independence of media workers
 - investment in newsgathering
 - effect on the range and diversity of cultural expression
- Transparency is a pre-condition of any successful application of media ownership provisions. Therefore the public should have access to basic information on media companies (ownership and management). Regulation should secure disclosure of information regarding stakeholders, corporate governance, statements of editorial policies, interests in other media.
- The principle of transparency should be applied in dealings with journalists and news professionals at all levels of institutions. Meetings between politicians of all ranks, CEOs, police officers, etc., on the one hand, and editors and media owners on the

other, should be recorded and made publicly available on the websites of both media organisations and public institutions, including political parties, police constabularies, public companies and so on to ensure that all contacts between politicians, senior officials and representatives of media organisations are above board and in the public domain. The 'News Publishing Commission' that we are recommending as a replacement for the Press Complaints Commission (see CCMR document on 'Ethical Practice') should recommend standards on transparency at all levels and to include the following information:

- 1) The date and place of the meeting
 - 2) The circumstances behind the meeting being arranged (i.e. at whose initiative)
 - 3) The attendees
 - 4) The subjects discussed
 - 5) Any decisions taken
 - 6) Any other information that would assist the process of establishing public transparency and accountability
- More open publication of newspaper finances, cross-media ownership cost transfers, editorial expenses and the 'gifting' of journalists. How far this can go without endangering commercial confidence would need to be worked out, but movement towards greater financial transparency is clearly overdue. This should form part of the recommendations from the new News Publishing Commission (see above).
 - Journalists, once employed by non-news organisations, must cut all official ties with their previous news employer, in terms of being paid, retaining office space, etc. This should form part of the recommendations from the new News Publishing Commission (see above).
 - Finally, taking a lesson from the handling of the News Corp takeover of BSkyB, it is clearly not enough just to consult when deals are virtually done; applying public interest to media ownership considerations requires public involvement and oversight at all times. Media ownership regulation needs effective and continuous public consultation built-in so that public interest issues can be addressed by all those affected, with Ofcom and other regulators held to account by the parliaments or assemblies concerned.