



BSKYB'S RESPONSE TO OFCOM'S INVITATION TO COMMENT ON MEASURING PLURALITY ACROSS MEDIA

1. INTRODUCTION

- 1.1 The existing regulatory framework, comprising media ownership rules, media public interest test, public service broadcasting obligations, together with competition law and broadcast content regulation, is the appropriate framework to ensure media plurality.
- 1.2 The Secretary of State's request to Ofcom in his letter of October 2011¹ to consider aspects of the media plurality regulatory framework derives in large part from Ofcom's own report on the public interest test on the proposed acquisition of British Sky Broadcasting Group by News Corporation, 31 December 2010² (the PIT Report). In that report Ofcom identified a number of developments that it alleged raised plurality concerns that the current regime was not capable of remedying (namely the adoption and use of new media technologies, organic changes in market shares, changes into wholesale news provision and the evolution in upstream content provision). Ofcom argued that the absence of specific rules to enable intervention outside of a merger suggested that "*a more fundamental review and possible reform of the current statutory framework may be required*".³
- 1.3 In Sky's view, Ofcom's PIT Report overstated the risks to plurality and gave insufficient consideration to its existing powers and duties. None of the future market developments identified by Ofcom in the PIT Report pose a threat to media plurality justifying reform of the current regulatory framework. Even if there were the possibility of any threat resulting from these developments, the existing framework is capable of safeguarding media plurality.
- 1.4 Outside of this regulatory framework, media plurality is best served by Parliament and regulators creating an economic and regulatory environment that encourages investment and innovation in the provision of news and current affairs content, such that plurality continues to increase through the entry and development of new media enterprises and services.
- 1.5 We look forward to further engagement with Ofcom in relation to all aspects of the work that it proposes to undertake to respond to the Secretary of State's request, and to the eventual consultation on any draft recommendations.

2. SCOPE OF OFCOM'S ADVICE TO THE SECRETARY OF STATE

- 2.1 In setting out the terms of reference for its proposed advice on media plurality, Ofcom appears to have taken an unduly narrow view of the Secretary of State's request. By doing so Ofcom risks providing incomplete advice to the Secretary of State.
- 2.2 The Secretary of State's letter sets out the two different elements of his inquiry:
 - a) that Ofcom "*undertake some work into the feasibility of measuring media plurality across platforms, and recommend the best approach*"; and
 - b) that Ofcom "*consider how practical it is to set limits which would protect plurality **without unnecessarily restricting growth or producing perverse incentives***" (emphasis added).

¹ http://www.culture.gov.uk/images/publications/CMS_188245_Ensuring_Meda_Plurality.pdf

² Paragraph 7.8 of the [PIT Report](#).

³ Paragraph 7.12 of the PIT Report.

- 2.3 The Secretary of State then sets out the specific questions for Ofcom to answer which are replicated in Ofcom’s Invitation to Comment⁴ (the ‘ITC’), before finally raising the possibility of extending the current media plurality public interest test to address issues of concentration arising from organic growth or market exit.
- 2.4 Sky submits that it is not sufficient for Ofcom to consider the specific questions alone, but that its review ought properly to consider the context of the request, and in particular the Secretary of State’s acknowledgment of the potential limitations on measuring media plurality, and, most importantly, the possible negative consequences of regulatory intervention, i.e. “*unnecessarily restricting growth or producing perverse incentives*” that might preclude any further action.
- 2.5 As presented in the ITC, Ofcom’s workplan does not appear to include consideration of the limitations of attempting to measure cross-media plurality, or the significant negative consequences of intervention. Without an understanding of such matters the Secretary of State will not be able to assess whether changes to the current framework are warranted, and accordingly, Ofcom should seek to answer fully the questions posed by the Secretary of State.

3. QUESTIONS

What are the options for measuring media plurality across platforms? What do you recommend is the best approach?

What are the potential metrics that could be useful to assess plurality (for example, in the past we have used reach, minutes, share of references, ‘main source’ of news)?

- 3.1 The current media public interest test is predicated on a concept of plurality meaning “*both the range of and the number of persons with control of media enterprises*”⁵ This view was endorsed subsequently by the judgment of the Court of Appeal in the Sky/ITV case:⁶

“The word plurality can connote more than just a number exceeding one. It may carry an implication of range and variety as well.”⁷

- 3.2 In the Sky/ITV case, the Competition Commission and the Court of Appeal made clear that, in assessing whether a transaction may be expected to operate against the public interest, the authorities should have regard to whether the merger will have the effect of so diminishing the number and range of voices serving a relevant audience as to mean that there will, after the merger, be an insufficient number and range of voices to protect the public interest. By focussing on the number and range of viewpoints available, the current test permits both a quantitative and a qualitative assessment, providing an effective proxy for concerns relating to plurality.
- 3.3 It was only during Ofcom’s consideration of the proposed News Corp/Sky bid that it sought to assess ‘plurality’ by reference to media enterprises’ ‘ability to influence and inform opinion’ and to adopt a broad range of metrics. At the time, Sky argued that this methodology was flawed, as the measures adopted by Ofcom (audience share and reach, share of minutes of use and share of references) reflected cross media news consumption, and could not be taken as being synonymous with ‘ability to influence’, for a number of reasons, including that such usage metrics:
- a) do not take into account the varying ability of different media to influence opinion;
 - b) do not take into account the impact of multi-sourcing on opinion forming;

⁴ <http://stakeholders.ofcom.org.uk/binaries/consultations/890630/summary-folder/measuring-plurality.pdf>

⁵ Paragraph 5.7 of the [Competition Commission Report](#) in the Sky/ITV case.

⁶ [British Sky Broadcasting Group Plc v The Competition Commission & Anor \[2010\] EWCA Civ 2 \(21 January 2010\)](#)

⁷ Paragraph 90 of the Court of Appeal judgment. See also paragraphs 114 and 116 of that judgment.

- c) do not take into account consumers' own judgments as to impact of media.⁸
- 3.4 Sky notes in this regard that in the PIT Report, Ofcom noted that it had “looked at ability to influence and inform opinion by reference to a number of factors since there is no single standard industry measure which can be used consistently across media platforms”, before concluding that “[w]hile each of these measures may not individually capture all the different features of cross media consumption and the effects of the proposed transaction, they provide useful insight.”⁹
- 3.5 It is submitted that that such metrics are, at best, only capable of providing ‘useful insight’ and should not be relied upon to provide absolute measures of media enterprises’ ability to influence and inform opinion, and therefore of cross-platform media plurality. Furthermore, from a practical perspective, where Ofcom is acting as an expert during the first phase review of a merger, it requires an objective and measurable mechanism by which to assess particular transactions. The assessment provided by the Competition Commission in the Sky/ITV case, namely examining number and range alone, provides such a methodology.

Is there a way to assess the relative importance of different media in shaping public opinion?

- 3.6 Sky considers that the relative importance of different media in shaping public opinion cannot be determined in a mechanistic and general fashion but rather varies by individual and source. Accordingly, any attempt to come to an overall assessment of the relative importance of different media would have to take into consideration many contradictory factors and in doing so would likely be inconclusive. This is illustrated by the section on ‘Critical evaluation and trust of the media’ in the PIT Report, which ends with the following statement:

“These different perceptions and interests could suggest different degrees of influence of different media brands. While quantitative metrics on media usage provides some indication of relative influence between different media players, they are not perfect measures. Some media players may be more influential than these metrics would suggest, whereas the opposite may hold true for others.”¹⁰

News and current affairs have been established as key genres particularly critical for informing democracy. Should any other genres be considered, and what evidence is there of their capacity to influence public opinion?

- 3.7 As set out in Sky’s response to the ITC, and as accepted in the PIT Report, no other genres are currently relevant to an assessment of media plurality. This reflects the oft cited statement of Lord McIntosh of Haringey when the relevant plurality provisions were introduced to Parliament:

“Media plurality is important for a healthy and informed democratic society. 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.”¹¹

- 3.8 At present, news and current affairs are the genres most relevant to the influencing of opinions and setting of the political agenda.

⁸ See section 4 of Sky’s response to the PIT Report.

⁹ Paragraph 5.18, PIT Report.

¹⁰ Paragraph 4.87 of the PIT Report.

¹¹ Lord McIntosh of Haringey (Parliamentary Under Secretary, DCMS) - [2 July 2003, Hansard, Column 912](#).

How might the market evolve in future and how might this affect options for measuring media plurality across platforms?

- 3.9 Sky agrees with Ofcom’s assessment in the PIT Report that the “*growth in availability, take-up and usage of different media services over recent years*”, “*supported by the development of a number of new technologies; convergence between different media services; and the growing availability of access to digital services via fixed and mobile broadband networks*”¹², has led to “*greater choice, convenience and control over how [consumers] consume content*”.¹³
- 3.10 These developments will continue to make it difficult to measure media plurality across platforms using the methodology and metrics previously used by Ofcom to assess ‘ability to influence and inform opinion’.
- 3.11 Consumers are likely to access an ever increasing number of media services over an increasing number of devices, both in the home and on a mobile basis, thus blurring distinctions between platforms. This is particularly the case in relation to television. As internet/IP connected televisions become the norm, consumers will have access to a wider set of services, including those providing news and current affairs content. As the aim of connected TV platforms such as YouView is to provide a seamless link between broadcast and online content, not only will there be a wider set of providers of relevant content, but potentially, the position of television as one of the most trusted media may be neutralised by the availability of internet services to the same screen. An approach based solely on number and range will fare better in such circumstances.

At what point in the news value chain is there potential for the greatest level of editorial influence over content?

- 3.12 It is self-evident that the potential for the greatest level of editorial influence arises at the point at which the decision is made as to whether to make news and current affairs content available to the public, and what such content should comprise, regardless of whether such decisions are taken on a daily basis or less often (as may be the case in a wholesale news arrangement).

Is it possible to define a set of characteristics of a market that could raise concerns about levels of plurality?

- 3.13 Any attempt to define a set of characteristics of a market that could raise concerns about levels of plurality would be problematic for the following reasons:
- a) It is difficult to predict how the sector will develop, particularly at this time of significant technological development and change in business models away from print to digital content. Accordingly, any set of characteristics identified today might well be irrelevant in ten years’ time (the likely duration of the current legislation); and
 - b) Depending on what happened were a set of identified characteristics to arise, the specification of those characteristics would likely produce perverse incentives for those involved in the sector, and may, as a result, restrict growth. For example, undertakings in the sector might actively seek to avoid a course of action which, although rational from a business perspective, might lead to the pre-determined characteristics arising, and the likely negative consequences. Alternatively, there could be unintended consequences, for example, if the characteristics were applied to a new sector and thereby punished an undertaking that had created the sector by investing and innovating, but, through first mover advantage, had a significant lead position that met the characteristics.

¹² Paragraph 6.3 of the PIT Report.

¹³ Paragraph .6.5 of the PIT Report.

- 3.14 Sky would therefore urge against identifying a set of characteristics that would raise concern about levels of plurality.

To what extent do other laws (for example the competition law) or sectoral characteristics (such as multisourcing by consumers) act as safeguards for plurality?

- 3.15 Plurality is effectively protected by the various media ownership rules that exist in addition to the media public interest test applied to mergers. In Ofcom's own words, "[i]n the interests of democracy, the rules aim to help protect plurality of viewpoints and give citizens access to a variety of sources of news, information and opinion."¹⁴
- 3.16 Ofcom is required by statute to review these rules every three years and report to the Secretary of State on the operation of the rules and any recommendations for change. In its last review in 2009, Ofcom recommended changes intended to liberalise the local media rules, but recommended no changes to the other rules, namely:
- a) the national cross media ownership rules which restrict cross ownership of Channel 3 and national newspapers;
 - b) Ownership restrictions which apply to television and radio broadcasting licences to guard against undue influence; and
 - c) the appointed news provider rule which helps ensure national and international news on Channel 3 is independent of the BBC and adequately funded.
- 3.17 It is noteworthy that Ofcom's comments in respect of the 'appointed news provider rule' are of particular relevance to the question of media plurality. Ofcom emphasises the role of Channel 3 as the largest alternative to the BBC "and as such it plays an important role in ensuring that there is adequate plurality in news provision". Ofcom's report suggests that one of the roles of the public service broadcasters, with obligations to provide news and current affairs programming, and protected by the media ownership rules (in the case of ITV) and corporate structures (in the case of the BBC, and to an extent, Channel 4), is to ensure media plurality, to the extent that it is not delivered by a competitive market.
- 3.18 This analysis fits with Ofcom's view of the media public interest test: the 2009 Report described the media public interest test as continuing "to provide a backstop for Government to intervene to prevent media mergers on public interest grounds, including for the protection of plurality" and that no change was necessary "as Parliament's original rationale is unaffected". (page 1) Ofcom had suggested in its consultation document that the importance of the test might increase if other media ownership rules were relaxed, and might be removed if its existence deterred media mergers or if competition automatically delivers plurality and diversity.
- 3.19 Competition law (excluding merger control and the media public interest test) also provides some protection for plurality by ensuring that anti-competitive conduct by dominant media enterprises does not harm competitors, for example, by protecting against exclusionary abuses. The maintenance of a 'level playing-field' in this way acts as a safeguard for plurality as it ensures competition on the merits and encourages investment and innovation.
- 3.20 Sky agrees with the Competition Commission in the Sky/ITV case, which found that the 'due accuracy and due impartiality' provisions of Ofcom's Broadcasting Code were "relevant to plurality of news",¹⁵ but did not, on their own, ensure a sufficiency of plurality of news.
- 3.21 Whether "sectoral characteristics" provide 'safeguards' for plurality will depend on what is meant by the term. Ofcom provides the example of 'multi-sourcing', which would suggest that 'sectoral characteristic' is intended to mean 'anything else that is not a law', such as patterns of news consumption (including multi-sourcing), as well as technological and behavioural developments. It is at least arguable that the evolution of the sector described

¹⁴ p.1 of Ofcom's [Report to the Secretary of State \(Culture, Media and Sport\) on the Media Ownership Rules](#), published 17 November 2009 ('the 2009 Report').

¹⁵ Paragraph 5.38 of the [Competition Commission Report](#) in the Sky/ITV case.

in paragraphs 3.9 – 3.11 above presages a sufficiency of plurality for the foreseeable future due to near universal access to the internet through fixed and mobile technologies.

Are there any regions, areas or audiences (such as the devolved nations) which may require separate consideration, and why?"

3.22 The local media ownership rules provide appropriate consideration for any regions, areas or audiences that may require separate consideration. Furthermore, the public interest test as part of the merger regime is sufficiently flexible to enable consideration of specific audiences that may be affected by a particular transaction.

Is it practical or advisable to set absolute limits on news market share?

3.23 Notwithstanding the difficulties in defining the relevant market, setting absolute limits on news market share is neither practical nor advisable, as it is very likely to restrict growth and result in perverse outcomes: not only at the level at which such a limit is set, but also well below that level, as undertakings adjust their behaviour to take account of the limit, and any consequences of reaching it, in their investment decisions.

3.24 From a practical perspective, one must ask what would happen were such a limit reached as a result of legitimate, organic growth? Any intervention would have to be aimed at reducing the relevant news market share to an 'acceptable' level. This may not be as simple as divesting assets or a separate business, as divestment requires a willing buyer, or a sustainable, standalone business, which is exceptional in relation to the provision of news and current affairs content, and may therefore actually reduce plurality if assets are removed from the sector as a result of the intervention.

3.25 Furthermore, any intervention to reduce share to a level below the limit would effectively punish the successful undertaking, and any divestment of assets may not lead to an increase in plurality, but might, perversely, lead to a reduction in plurality if the divested assets are not sustainable outside of the successful undertaking. Sky notes that such intervention would also lead to a mismatch with consumer demand.

What could trigger a review of plurality in the absence of a merger, how might this be monitored and by whom?

The Secretary of State identified concentration arising from organic growth and market exit in his recent speech. What other potential triggers might there be?

3.26 Ofcom is already obliged to review the media ownership rules every three years and make recommendations to the Secretary of State. As noted by Ofcom in the 2009 Report, the media public interest test as part of the merger control regime provide a useful backstop if required.

3.27 In addition, Ofcom's annual report in fulfilment of its duty to assess the designated public service broadcasters in terms of their delivery of the public service purposes set out in the Communications Act 2003, together with its five year PSB reviews, provide an appropriate opportunity to assess plurality of news provision in relation to broadcast media.

3.28 Alternative 'triggers', such as limits of news market shares, suffer the same disadvantages as noted above, namely unnecessary restrictions on growth and perverse incentives.

3.29 Relying on 'market exit' as a trigger could be particularly impractical as it would first be necessary to identify a relevant exit, and second, it is not at all clear what action could be taken to remedy any detrimental effect on plurality resulting directly from such exit.

Could or should a framework for measuring levels of plurality include websites and if so which ones?

- 3.30 All websites providing relevant news and current affairs content should be included in any assessment of plurality. There is no rationale for excluding such sources of news which are becoming increasingly important to consumers, and indeed, in its PIT Report Ofcom acknowledged that online services, and the convergence of the internet with traditional media platforms (for example through connected devices such as the YouView platform) are one of the key areas for future development of media plurality.
- 3.31 Online social media services, such as Twitter, are now an integral part of many people’s news experience, enabling individuals to broadcast news and opinions to the world, in addition to being featured or combined with traditional news media.

Whether or how it should include the BBC?

- 3.32 The BBC should be included in any assessment of media plurality as a very significant provider/source of news and current affairs. There is no logical basis for not including the BBC in any assessment of media plurality on the same basis as any other news and current affairs provider. Ofcom included the BBC in its public interest test in respect of the proposed News Corp/Sky bid.

4. OFCOM’S ADDITIONAL QUESTIONS:

How does the process of news gathering differ between:

- 1. organisations (e.g. between the BBC, compared to commercial organisations);**
- 2. platforms (ie online, press ,TV or radio)?**

Do any of these differences warrant differential treatment by platforms or media organisation?

- 4.2 The principal difference between BBC and commercial organisations is one of resources. The BBC has considerably greater resources available to it than its commercial rivals. For 2011, BBC News’ total budget was £61.1m (£17.1m on newsgathering, according to the notes to the BBC Annual Report),¹⁶ which one would not expect to include the cost of bulletins on other BBC channels, including BBC1, or the cost of the BBC’s online news services. The BBC online budget for the same period (limited now to news, sports, weather and iPlayer) was £194.2m. The resources available to the BBC’s commercial rivals are significantly less.
- 4.3 This disparity in resourcing manifests itself in number of foreign bureau and number of journalists sent into the field on stories. As a result, BBC’s commercial rivals are confronted by starker choices between competing stories and how best to serve the various different content platforms on which their content is made available.
- 4.4 Otherwise, the task of newsgathering is broadly the same irrespective of the platform, based around staffed news bureau around the UK and globally, in addition to sourcing news from agencies and freelance journalists and other news providers.
- 4.5 Any differences between organisations and platforms do not warrant differential treatment vis-à-vis media plurality.

Sky

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¹⁶ See note (v) on p.F40 of the [Full Financial Statements 2010/11](#).