



**SKY'S RESPONSE TO
OFCOM'S CALL FOR INPUTS ON A MEDIA PLURALITY
MEASUREMENT FRAMEWORK**

1. Introduction

- 1.1 Sky welcomes the opportunity to comment on Ofcom's call for inputs on a media plurality measurement framework ("the call for inputs").
- 1.2 Media plurality is clearly an essential part of democratic society, ensuring that people have the opportunity to access a range of news sources and views in order to understand and form their own judgements about national and global news stories.
- 1.3 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. There is a lack of certainty as to how any measurement framework will be employed

- 2.1 Sky notes that Ofcom's call for inputs has been prompted by a request from Government to develop a media plurality measurement framework that would "*allow the first ever baseline assessment of media plurality in the UK*"¹. What is not clear is how any measurement framework or resulting 'baseline assessment' will interact with the existing regulatory framework for plurality, namely the public interest test under s.58 of the Enterprise Act 2002 arising in the context of relevant transactions ('the Public Interest Test').
- 2.2 Indeed, the DCMS Consultation Report on Media Ownership and Plurality² notes that the "next step" for considering media plurality is to commission Ofcom to develop a suitable set of indicators to inform the measurement framework for media plurality. Whilst it is clear that these indicators would allow for a baseline market assessment, it is not clear in what other context they would be used or for what purpose plurality would be assessed.
- 2.3 Without clarity on this point, stakeholders will not be able to provide Ofcom with fully considered input. Recommendations on how to measure plurality cannot be properly formed unless the overarching framework and the consequences of any assessment have been made clear. In light of this uncertainty, any media plurality assessment can only be qualitative and not determinative.
- 2.4 Absent detail on this issue, Sky's response to the call for inputs is based on the assumption that the existing regulatory framework will endure, and that any measurement framework and/or baseline assessment will be used to inform future Public Interest Tests. We would welcome further clarity on how the measurement framework will be deployed as Government and Ofcom develop their proposals.

¹ Letter from Secretary of State to Ofcom, 9th September 2014, http://stakeholders.ofcom.org.uk/binaries/consultations/plurality-cfi/annexes/Plurality_request_from_SoS.pdf

² DCMS: Media Ownership & Plurality Consultation Report – Government response to the House of Lords Select Committee on Communications Report into Media Plurality, 6 August 2014, page 7.

3. Additional measures would create uncertainty and disincentivise investment

- 3.1 Sky continues to consider that the existing regulatory framework, comprising media ownership rules, media Public Interest Test, public service broadcasting obligations and broadcast content regulation, together with competition law, are the appropriate tools for safeguarding media plurality. Given the transformation of the news market through the online availability of content and the considerable growth in the number of news sources available to consumers resulting from direct broadcast, it is clear that this existing regulatory regime is able to facilitate plurality. We see no reason to fundamentally change a system that is working well for consumers.
- 3.2 A number of bodies (including Ofcom) that have examined this issue in recent years have intimated that additional measures should be adopted in order to safeguard media plurality³. These measures have included ownership limits and plurality reviews triggered by organic growth or market exit.
- 3.3 Such approaches would create significant risk by undermining commercial operators' incentives to invest in news and, as a consequence, threaten plurality. For example, reviews that were triggered if a particular metric breached a specified threshold at any given time would create a significant lack of certainty for market players, potentially restricting growth and resulting in perverse outcomes. This would impact on activities not only at or near the level at which the threshold was set, but also well below that level, as providers alter their behaviour and investment decisions to account for the possibility of reaching the limit.
- 3.4 Outside the existing 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.

4. Ofcom's current task as set out by Government does not necessitate a complex set of metrics

- 4.1 Government's request to Ofcom included a number of requirements that any measurement framework must satisfy, namely:
- a) Online content should be included within the scope of any new measurement framework
 - b) The type of content which is most relevant to media plurality is news and current affairs
 - c) The scope should include all organisations that impact the news and current affairs that UK consumers access
 - d) The BBC's impact on plurality should be in scope
 - e) The framework must deliver indicators capable of indicating the situation at a UK level and in each of the Nations

³ See Ofcom's Public Interest Test on the proposed acquisition of BSkyB by News Corp, 2010, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78516/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf, and the Lords Communications Committee report on media plurality, 2014, <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf>

- 4.2 Government further stressed its expectation that “*at least one of the measures should be focused closely on media ownership*”⁴.
- 4.3 Sky notes that these requirements in the main relate to the types of content and content providers that should be included in any media plurality measurement framework. They do not suggest that the framework itself needs to be particularly complex and based on a multifarious set of metrics. By extension, Ofcom should not consider itself bound by the previous work it conducted in 2012, which established three broad categories that it contended contributed to plurality, along with a range of indicators and metrics within those categories.
- 4.4 Indeed, adopting an unduly complex approach to measuring plurality would leave operators facing significant uncertainty when making investment decisions related to news and current affairs.
- 4.5 In the call for inputs, Ofcom states that the measurement framework will allow “*considerations on how far the UK is from an “ideal” media market in terms of plurality*”⁵. Sky queries how an “ideal” media market would be defined. Additionally, Sky notes that this starting point pre-supposes that the current media market is in some way deficient in terms of plurality. Sky would contest that, given the explosion in news services brought about by technological innovation (in particular through internet delivery, but also through other developments such as digital broadcasting), the UK market is likely to exhibit greater plurality than at any previous time.

5. Measures of availability are most relevant to plurality

- 5.1 In Sky’s view, Ofcom’s approach to measuring media plurality should be primarily focused on ‘availability’ – namely the number and range of providers available at the point of consumption. Despite Ofcom’s assertion that an assessment of availability ‘offers limited insight on its own’, Sky considers that this category and its associated metrics are by far the most relevant for measuring and assessing media plurality, particularly given the existing regulatory framework.
- 5.2 The current Public Interest Test is predicated on a meaning of plurality adopted by the Competition Commission (since subsumed into the Competition and Markets Authority) and endorsed subsequently by the Court of Appeal – “*both the range of and the number of persons with control of media enterprises*”⁶. In the context of Sky’s acquisition of 17.9% of the shares of ITV (the “Sky/ITV case”), these bodies made clear that authorities should have regard to whether any merger would have the effect of diminishing the number and range of voices serving a relevant audience so that there would, after the merger, be an insufficient number and range of voices to protect the public interest. This approach to the test permits both quantitative and qualitative assessments, providing an effective proxy for concerns relating to plurality.
- 5.3 Although Ofcom has subsequently sought to adopt a broader consideration of plurality, it should retain these quantitative and qualitative assessments as the core elements of its media plurality measurement framework.

⁴ Letter from Secretary of State to Ofcom

⁵ The Call for Inputs, paragraph 1.13

⁶ Paragraph 5.7 of the Competition Commission Report to the Secretary of State (BERR) regarding the acquisition by British Sky Broadcasting Group plc of 17.9% of the shares in ITV plc, 14 December 2007, http://www.competition-commission.org.uk/rep_pub/reports/2007/fulltext/535.pdf; and paragraph 90 of the Court of Appeal’s judgment in *British Sky Broadcasting Group plc v the Competition Commission* [2010] EWCA Civ 2.

- 5.4 As the call for inputs notes, a measurement of availability provides an indication of the potential diversity of viewpoints that citizens have to choose from when determining their news and current affairs consumption. It is a less transient metric than others Ofcom has suggested and therefore less likely to vary significantly in short time periods through organic growth or short-term market developments⁷. In the context of the existing regulatory framework, availability is an objective metric which can be effectively used in assessing a given transaction.
- 5.5 When measuring availability, Ofcom should ensure that it does so in a manner that captures the totality of ways and means by which consumers are accessing news content. This requires that all relevant providers are included in such a measurement.
- 5.6 On the basis that those who decide whether to make news available to the public and what content it should comprise have a significant influence over the news that people choose to consume, it is logical that all organisations and services that provide news directly to consumers should be included in any availability measurement. This would include, for example, online news aggregation services where selected news from other sources is presented for consumption by users.
- 5.7 In the case of broadcasting, whilst ‘wholesale’ providers such as ITN and Sky News may produce news for other broadcasters, this is done according to clear commercial specifications which result in editorially distinct news services. This can be seen in ITN’s output for ITV, Channel 4 and Channel 5, or Sky News’ wholesale radio contract with IRN which delivers national and international news to commercial stations in a variety of customisable formats. It therefore follows that these news providers should be counted separately in an availability assessment, rather than attributing these services to ‘wholesale’ providers who do not have editorial control over the final news output.
- 5.8 Sky also considers that some metrics which Ofcom categorises as ‘contextual factors’ are in fact aspects of availability. In particular, internal plurality, internal governance processes and editorial plurality will all commonly serve to create distinct news services even in the case of common ownership, thereby contributing to the number and range of voices serving audiences. As such, Ofcom should seek to include consideration of these aspects when undertaking an assessment of availability (by, for example, including a count of news services in total).

6. Other metrics suggested by Ofcom have limitations, and basing decisions on them could pose risks to plurality

- 6.1 Subsequent to the Sky/ITV case, Ofcom has considered evaluating plurality not only in terms of the number and range of providers but also by reference to media enterprises’ ‘ability to influence and inform opinion’. It is in pursuit of this factor that additional metrics focusing on consumption, impact and context were considered by Ofcom during the proposed acquisition of Sky by News Corp in 2010, and expanded upon in its 2012 report to the Secretary of State.
- 6.2 Sky has previously argued that this wider methodology is flawed, as none of the broader metrics proposed by Ofcom can be taken as being synonymous with media enterprises’ ability to influence and inform opinion. Consequently, while such metrics may, at best, be capable of providing additional qualitative insight, they should not be relied upon to provide absolute measures of cross-platform media plurality.
- 6.3 Ofcom’s 2012 report suggested a number of ‘consumption’ indicators, but also noted that measuring media consumption on a cross-platform basis presents particular challenges.

⁷ Although, as barriers to entry have lowered (notably through cheaper and faster distribution of content via the internet), the ease with which new providers can invest in and launch new services has significantly increased.

Sky agrees with this assessment. For example, each of the established industry-specific consumption metrics⁸ operates using a different methodology (varying from automatic monitoring to consumer recall), and indeed in some cases are unable to provide an estimate of whether news content has in fact been consumed⁹. As a consequence, these metrics cannot be easily combined to form a cross-platform view of news consumption.

- 6.4 Absent any standardised cross-platform approach, Ofcom has developed its own bespoke 'share of references' indicator which aggregates the individual news sources consumers report using and uses this to approximate cross-media news consumption. Ofcom states that this produces a cross-media share metric with "*consistent methodology and a consistent definition of news across all platforms*"¹⁰.
- 6.5 Sky accepts that this approach may give a more accurate snapshot of news consumption, relative to the industry-specific metrics used. However, it too has methodological weaknesses, for instance in relation to the reliance on consumer recall rather than active monitoring of consumption. Moreover, as with all consumption metrics, it falls short of being an accurate measurement of a provider's 'ability to influence' and by extension the sufficiency of plurality. It does not (and indeed cannot) take into account the varying ability of different media to influence opinion, the impact of multi-sourcing on opinion forming, or consumers' own judgments as to the relative impact of different media.
- 6.6 Ofcom proposed additional metrics in its 2012 report in an attempt to more closely measure the ability of media enterprises to influence consumers. In particular, Ofcom noted that 'impact' indicators might be needed to capture the influence of news content consumption on how people's opinions were formed. The call for inputs specifically gives 'personal importance' of either platform or provider as a potential metric in this context.
- 6.7 Sky considers that the relative importance of different media in shaping public opinion – i.e. the 'impact' that news providers have – cannot be determined in any 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.
- 6.8 Finally, Ofcom suggests that there may be 'contextual factors' which should be captured as part of a media plurality measurement framework. The examples given are of internal plurality, internal governance processes, editorial plurality, impartiality, and market trends and future market developments.
- 6.9 As noted, Sky agrees that some of these contextual factors are relevant to considerations of plurality and should be included as part of an assessment of availability. Regulatory factors such as impartiality are also broadly relevant to considerations of plurality, given that they further reinforce the editorial independence of news broadcasters. However, as with other metrics, it is difficult to see how such factors can be objectively measured on a cross-platform basis. At best, they act as additional qualitative insight.
- 6.10 With regard to market trends and future developments, Sky does not consider these to be separate 'contextual factors' that should be measured in any way. Rather, the key market developments – namely consumers accessing an ever-increasing number of media services over an increasing number of devices, both in the home and on a mobile basis – suggest that it will continue to be difficult to measure media plurality across platforms using the methodology and metrics proposed by Ofcom to assess 'ability to influence and inform

⁸ Ofcom lists these as BARB for TV, RAJAR for radio, UKOM for online and NRS for newspapers

⁹ RAJAR measures radio listening overall but not the programmes listened to. Therefore, it does not provide an estimate of listening to news content.

¹⁰ Call for Inputs, footnote 8.

opinion'. An approach based solely on number and range will fare better in such circumstances.

7. Conclusion

- 7.1 The current framework for media plurality works well by delivering certainty for commercial investors, and has underpinned a flourishing of news services serving the UK market. Ofcom's measurement framework for media plurality, and Government's subsequent use of this framework, must not undermine the existing regime and create uncertainty for organisations that currently deliver plurality.
- 7.2 The core focus of Ofcom's measurement should be availability – an assessment of the number and range of providers available at the point of consumption. This approach permits both quantitative and qualitative assessments, providing an effective proxy for concerns relating to plurality. In the context of the existing regulatory framework, availability is an objective metric which can be effectively used in assessing a given transaction.
- 7.3 Other metrics suggested by Ofcom around consumption, impact and contextual factors have limitations, and basing decisions on them could pose risks to plurality. None of these broader metrics can be taken as being synonymous with media enterprises' ability to influence and inform opinion. Consequently, while such metrics may, at best, be capable of providing additional qualitative insight, they should not be relied upon to provide absolute measures of cross-platform media plurality.

Sky

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