A new framework for media plurality: final submission to the Leveson Inquiry

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Background

1. The danger to democracy of an overly concentrated media is not simply in closing down the number of potential voices, but in the undemocratic exercise of corporate power which, if unchecked, can distort the democratic process by wielding too much influence over voters, citizens, regulators, competitors, elected politicians, and the conduct of public life. Plurality must therefore encompass both a sufficient number of competing media enterprises and (separately) the prevention of an unhealthy accretion of power by any single enterprise.

2. Existing legislation is not founded on any proper understanding of the democratic principles behind legislative action, nor does it provide for a credible and workable process by which these principles can be protected. The current framework emerged as a last minute "fix" to the 2003 Communications Act in order to avoid a threatened rebellion by Government members in the House of Lords. It uses the pre-existing Enterprise Act and therefore can only be activated as a result of merger or acquisition activity. Moreover, it employs different tests for newspaper mergers ("sufficient plurality of views") and cross-media mergers ("sufficient plurality of owners") which make little sense in a world where ownership extends increasingly across different platforms. It further takes no account of the so-called "digital intermediaries" such as Google and Facebook, which can have a material influence on the distribution – if not the creation – of relevant material.[1]

3. The current regime is too vulnerable to political intervention, too susceptible to corporate manipulation, and its terms are too opaque.[2] It is not fit for purpose and should be replaced by a new legislative framework designed to implement clearly articulated high level principles through a transparent, accountable, and independent regulatory process. What follows are therefore three sections which propose a way forward: first, a statement of underlying principles; second, a framework for a new regulatory process; and third, a draft statute to enshrine key elements of both the principles and the process.

Statement of principles

4. Plurality as a concept extends beyond the narrowly political to the wider cultural environment. It is rooted in an understanding that corporate decisions made by large media conglomerates will have a material impact on the knowledge, ideas, information and opinions circulating within civil society. Even in an online "connected" world, large media organisations still act as informational gatekeepers for the great majority of the population. In particular, original newsgathering is concentrated in the hands of very few

[1] This issue is well covered in "News Plurality in a Digital World" by Robin Foster, Reuters Institute, July 2012.
[2] For example, in the recent News Corp/BSkyB case, Ofcom chose to base its public interest assessment purely on whether the merger would involve a diminution of voices in the news market, despite there being no such stipulation on the face of the Act beyond ensuring a "sufficient plurality" of owners.

media organisations which still command mass audiences and therefore wield inordinate cultural and informational power. Of these, probably the greatest power is exerted by those who own mass circulation newspapers which can be highly partisan in support of particular causes and have a recognised agenda-setting influence on broadcast news.

5. Plurality therefore cannot be confined simply to allowing opposing views to be aired on matters of controversy or political import. It must recognise that corporate cultures will have a direct bearing on decisions such as whether to prioritise celebrity stories, or invest in foreign news bureaux, or hire polemical columnists, or run a specific campaign (e.g. on Europe, sentencing policy in the criminal courts, or benefit levels) and that these in turn will impact on the national conversation. The greater the number of such powerful organisations, the greater the opportunities for diversity of all forms of expression. This wider definition of plurality needs to be acknowledged in any new legislative framework.

6. This more generalised approach to plurality must also recognise the enhanced capacity for major media owners to mobilise editorial support for their own commercial interests (e.g. new product launches, pricing innovations, major sports contracts, new TV programmes, internet start-ups, new films etc.) and to distort or remove coverage of rival initiatives.[3] Thus, the greater the consolidation, the smaller will become the scope for genuinely independent and critical reflection across a whole range of reporting activities, and the fewer opportunities will arise for innovation and fresh initiatives in news production. Plurality must therefore take into account the myriad ways in which voices might be constrained or reduced.

7. Beyond the power to control editorial content, overly powerful media conglomerates are able to consolidate and entrench their power (and disadvantage competitors) through exercising disproportionate influence over the regulatory environment. Lengthy and costly litigation drains the resources of regulator and competitor parties. Unchecked dominance in the market-place confers an unfair economic advantage in the competition for rights and for talent which, again, can have serious cultural and editorial consequences in closing down the number of voices. The risks of this imbalance must be recognised as an integral element of a new plurality regime, rather than simply as a competition issue.

8. Finally, while acknowledging the wider definition of plurality, there needs to be recognition of the vital role of professional newsgathering and original journalism. This principle should accommodate the needs of media businesses to mitigate their economic difficulties – and where appropriate to allow a measure of consolidation – while balancing this with the need for a diversity of original editorial sources. The significance of newsgathering in calculations of plurality has been recognised by both the OFT and the House of Lords select committee on Communications.[4]

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[3] Despite denials by media owners in evidence, Private Eye amongst others has featured numerous examples of such self-serving editorial practices in News International newspapers and, latterly, in Express Newspapers.
[4] Office of Fair Trading, "Review of the local and regional media merger regime", 2009, Final Report, OFT1091, p53; House of Lords Select Committee on Communications, 2008, op cit, paragraph 243

A new process: transparent, accountable and independent

9. Discretion for initiating an inquiry should be vested in Ofcom rather than the Secretary of State, although the Secretary of State should be able to refer any public interest plurality concerns to Ofcom for consideration. This was a key recommendation by the House of Lords select committee in 2008 on the basis that it would "sit more comfortably with Ofcom's duty to *promote* the interests of the citizen".[5]

10. Greater flexibility is required in the circumstances which might trigger such an inquiry, including organic growth to a point which is deemed to threaten plurality. How that point is defined, what structural restrictions should be imposed (such as common ownership of national newspapers and terrestrial TV licences) and whether it should include revenue or share thresholds or some combination of measures, should be determined by Parliament as Ofcom has recommended in its report to the Secretary of State.[6] However, both the Secretary of State and the regulator must have discretion to act in the public interest.

11. Share of market and share of audience should be monitored on a regular basis by Ofcom (again as recommended in its report), as the basis for any necessary public interest interventions. In order to expedite its auditing process, Ofcom should be granted authority by Parliament to demand all relevant information on shareholdings and investment from media enterprises. Such information would be publishable, unless Ofcom is satisfied that publication could create a real risk of prejudicing commercial interests.

12. Regulatory overlap in investigating media plurality issues must be eliminated. Under the current regime, both Ofcom and the Competition Commission (CC) have a role in determining whether there are plurality grounds for refusing a merger or acquisition, and came to opposite conclusions during the inquiry into BSkyB's 17.9% stake in ITV.[7] Given Ofcom's statutory remit to promote the interests of consumers and citizens, these investigatory powers should lie with Ofcom. It could, of course, seek advice or consultation from relevant competition authorities in coming to its conclusions.

13. Final decisions on divestments, conditions, and mitigations at the conclusion of an inquiry should not be left to government ministers. Just as decisions on competition issues are currently binding – subject to appeal to a relevant competition appeal body and ultimately through the courts – so should regulatory decisions on plurality. Ofcom should, however, be accountable for its decisions (see below), and should be sensitive to any uncertainties it may create both in initiating and conducting an inquiry. It should therefore have discretion to allow a window of opportunity for interested parties to make arrangements to mitigate plurality concerns, in consultation with Ofcom.

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[5] House of Lords Select Committee on Communications, 2008, The Ownership of the News, Vol I: Report. London: The Stationery Office, HL Paper 122-I, paragraph 261.

[6] "Measuring media plurality: Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport", 19 June 2012, par 5.121.

[7] Because the CC ruled against the shareholding on competition grounds, this difference of opinion did not affect the outcome.

14. There is legitimate concern about forced divestment of media properties as an ultimate sanction. Especially in a challenging economic environment, plurality may not be best served by requiring a sale or closure of an otherwise sustainable news outlet. This problem can be mitigated through a range of public interest obligations that might be placed on media enterprises in return for continued ownership. These might include:

    - clear evidence of increased investment in high quality journalism.
    - setting up new - or improving on existing - journalism training schemes.
    - subsidising non-profit media initiatives elsewhere.
    - agreeing to transparent auditing of editorial decision-making processes to prevent undue corporate pressure on editorial output.
    - appointment of an independent ombudsman, answerable to an independent editorial board.
    - full participation in whatever regulatory system replaces the PCC.
    - An automatic right of reply, with equal prominence, for inaccurate stories.
    - Requiring adherence (in newspapers) to the principle of explicit separation of news and comment.[8]

15. Ofcom should be able to insist on any combination of such measures, as it deems appropriate, after due consultation with the parties concerned. However, all communication and negotiations between relevant parties – in whatever form and including informal contact – must be properly recorded and minuted. There should be an assumption in favour of publication throughout all dealings, although commercial confidentiality would be a basis for non-publication or redaction.

16. While investigations and decisions on plurality issues should be delegated to Ofcom to guarantee independence from political interference, there will need to be some mechanism of accountability to elected representatives. This could take the form of mandatory appearances in front of the Culture Media and Sport select committee and the House of Lords select committee on Communications, after both an ad hoc investigation and a periodic review. While constitutionally neither committee could overturn the regulator's decision, a highly critical (and unanimous) select committee report will bear heavily on subsequent Ofcom enquiries. In order to give added weight to Parliament's views, such appearances could involve a presentation of Ofcom's *provisional* recommendations with supporting arguments. While any final decisions would still lie with Ofcom it would, again, be difficult to ignore select committee recommendations. This option is not pursued in the following draft Statute, but could easily accommodated within it.

[8] This list is not meant to be exhaustive, but accords with proposals made by the Co-ordinating Committee for Media Reform, and its stated principle that "public responsibilities should be attached to significant media power". http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Coordinating-Committee-for-Media-Reform.pdf

A New Statute on Media Plurality

1. Duty of sufficient plurality of ownership and diversity of media voices

(1). It shall be the duty of the Office of Communications ("Ofcom") to ensure

(a) that at all times there is a sufficient plurality of media owners and a sufficient diversity of media voices; and
(b) that no media owner or enterprise is allowed to acquire or exercise undue influence.

(2). In determining whether there is a sufficient plurality of media owners and a sufficient diversity of media voices, in subsection (1)(a) Ofcom shall take into account:

a) The different manifestations of cultural expression, beliefs and ideas which can enrich public life.
b) The scope for significant influence over cultural expression by large media enterprises with access to mass audiences.
c) The particular importance of fostering a diversity of news and information sources, and of newsgathering.

(3). In determining whether a particular media owner or enterprise is acquiring or exercising undue influence in subsection (1) (b), Ofcom shall take into account:

a) The potential for an overly powerful media enterprise to exercise undue influence over distribution of and access to rights, talent and other forms of cultural expression.
b) The potential for an overly powerful media enterprise to promote its own business interests through its editorial outlets, to the detriment of competitors and the wider public interest.
c) The undue pressure which an overly powerful media enterprise can exert on the regulatory and political environment, to the detriment of competitors and the wider public interest.

(4). Parliament shall determine an appropriate framework for guiding Ofcom on measures and thresholds for assessing sufficient plurality and undue influence. These may consist of structural safeguards, revenue and/or market shares, market characteristics and consumer behaviour, or a combination of approaches.

2 Plurality Reviews

(1). For the purpose of assisting its monitoring and scrutiny roles, Ofcom shall

(a) from time to time – and at least every four years – conduct a full plurality review.

(b) on an annual basis, publish updated figures on market shares within relevant media sectors, and details of ownership structures and shareholdings.

(2). Companies must comply with requests from Ofcom for any information deemed necessary to fulfil its obligations under Subsection (1).

3. Plurality Inquiries

(1) In furtherance of their duty under section (1) Ofcom shall, where it believes there is a threat to plurality, give notice of a decision to initiate an inquiry. Ofcom shall determine the scope, length and requisite market information for undertaking such an enquiry.

(2). If at any time the Secretary of State for Culture, Media and Sport believes there may be a risk to plurality as laid out under section 1, he shall notify his concerns to Ofcom. Ofcom shall then *either* give notice of an inquiry under sub-section (1) *or* provide reasons to the Secretary of State as to why such an inquiry is not required. These reasons shall be made public.

(3) For the purpose of

(a) deciding whether to carry out an Inquiry under sub-section (1) or
(b) how to carry out an Inquiry under sub-section (1)

Ofcom shall
i. consult with other competition and regulatory bodies as it sees fit.
ii. allow whatever time it feels appropriate up to a maximum period of 24 months for affected parties to make their own arrangements to mitigate plurality concerns.

(4). In conducting its Inquiry and coming to a view, Ofcom may enter into negotiations with relevant parties about any conditions, obligations or undertakings which are compatible with its duties under Section 1.

(5) All negotiations, formal and informal, with relevant parties shall be officially recorded and published unless, in Ofcom's view, publication would lead to a real risk of damage to a party's commercial interests.

4. Powers relating to Plurality Duty

(1) After conducting a Review or Inquiry, Ofcom shall have the power to issue directions to media organisations or any other body.

(2) These directions may cover matters related to the divestment or sale of media properties, new obligations or requirements, and other matters to be set out in regulations made under this section.

(3) Subject to section (5) any decision or direction by Ofcom, shall be binding on the parties concerned and on the Secretary of State.

5 Appeals

(1) Any party affected by a decision or direction of Ofcom following a Review or Inquiry may appeal to the relevant appellate body.

(2) Regulations made under this section will establish, or specify, the nature of the relevant appellate body and the procedures governing its conduct and that of interested parties.

6. Media Plurality: Miscellaneous

(1) As soon as is practicable after announcement of its recommendations – and within a maximum of 3 months – Ofcom shall present its report and conclusions, including all relevant negotiations, research and market data, to a select committee of the House of Commons. It may further be called to a select committee of the House of Lords.

(2) Regulations made under sections (4) and (5) shall not come into force unless agreed by an affirmative resolution of both Houses of Parliament.