

Legislating for plurality

By Robert Kenny

Many issues are jostling for attention in any Communications Bill. One that has surely moved up the queue as a result of the events of recent weeks is plurality. The 2003 Communications Act cites as a public interest: “the need, in relation to every different audience in the United Kingdom ... for there to be a sufficient plurality of persons with control of the media enterprises serving that audience”. However, this test only applies in the event of a prospective merger. In theory a media organisation could grow organically to control the entire UK news¹⁶ market, and avoid any plurality test. The absence of any standing plurality test to use in response to organic growth was an issue which Ofcom highlighted in its consideration of the prospective News Corp / Sky merger in December, and which has been raised again recently (alongside calls for explicit limits on cross-media ownership).

Before discussing how (or if) to legislate further for plurality, it is worth remembering that it is certainly not a panacea. In a plural environment, the hacking of a dead girl’s phone is sadly no less likely, and certainly no less reprehensible. Equally, whether a newspaper is part of a large media organisation or a small one, an editor’s threat to turn over the personal life of a politician will be no less alarming, not least because a scandal run in one newspaper will generally be picked up by other papers and broadcasters.

Plurality’s value is primarily in its contribution to vibrant political discourse. In its 2001 consultation on media ownership rules, DCMS said that a “healthy democracy depends on a culture of dissent and argument, which would inevitably be diminished if there were only a limited number of providers of news.”¹⁷

Hence the 2003 requirement for ‘sufficient plurality’. However, neither parliament then nor any official body since has made a serious attempt to define either ‘sufficient’ or ‘plurality’. This is a problem in the current narrow context of a merger test for plurality, but it would become a much more serious problem if there were a standing test. Unless these terms were defined with some precision, how would any media group know if it were in breach?

In its December report on the News / Sky merger¹⁸, Ofcom made heavy use of share (of the market, of ‘reference’¹⁹ and so on) in its assessment of plurality. Share is a much-used metric in competition regulation. However, it has real limits as a tool to understand plurality.

Consider a scenario where there are only two newspapers, the Guardian and the Telegraph. Initially half the population reads one, and half reads the other. Then the Telegraph ups its game, and as a result the Guardian readers start taking the Telegraph as well. In this scenario, the Telegraph’s share has gone from 50% to 66%, and the Guardian has dropped from 50% to 33%. From a competition perspective this may be a worrying development, but from a plurality perspective it is surely a good

¹⁶ The Comms Act does not restrict the requirement for plurality to news, but in practice this has been taken as the critical genre in which to maintain plurality

¹⁷ DCMS, Consultation on media ownership rules, 26 November 2001

¹⁸ Ofcom, *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, 31 December 2010

¹⁹ Which news outlets consumers reported they used, and which were most important to them

thing, since half the population are now exposed to divergent opinions and are able to form their own views. Any share-based test will miss these important subtleties.

While obviously simplified, this is more than a purely hypothetical case. The rise of multi-channel TV and increasing consumption of online news mean that there is much more multi-sourcing today than there was in 2003.²⁰

More generally, while blogs, Twitter, Facebook and their ilk are in no way substitutes for traditional media, they do add voices and may influence the agenda. This increases the overall level of plurality, but sets us the practical challenge of how to factor them in to our overall assessment of sufficiency of plurality. (It is therefore welcome that the Leveson Inquiry's scope has been expanded to include social media).

Not only do we not have a good metric to determine our current level of plurality, nor do we have any substantial body of precedent to guide us. (The Competition Commission's review of Sky/ITV and Ofcom's initial review of News/Sky are the only applications of the test so far). Moreover we also have no idea what 'sufficient' plurality is. Our only references are the market situations at 2003 and 2007, the dates of the Comms Act and the dismissal of plurality concerns relating to Sky/ITV, on the basis that Parliament and the CC respectively presumably felt plurality was sufficient at those points. However, that doesn't tell us if plurality was ample then, or just barely enough. Clearly if we expect entities to obey a plurality requirement, we need to give them some sense what line it is that should not be crossed.

However, this brings us to another challenge with a standing plurality requirement. Plurality is a feature of the market as a whole, not of individual participants in it. If (having defined more rigorously some plurality metrics) we discover plurality has fallen to an insufficient level, perhaps as a result of a newspaper closing, to whom do we turn to put it right?

Simplistically, the natural response might be to constrain the media outlet with the loudest voice – but this is the BBC. According to Ofcom's report, the BBC is roughly three times as likely as News International and Sky combined to be a consumers' main news source.²¹ Presumably we don't wish to muzzle the BBC in response to a diminution of plurality, but if scale is not to be the basis on which we select the 'victim' of any remedy, then we need to identify what is.

There is also a question of fairness. To continue our example of the newspaper closure, do we respond by requiring that a larger media group (however selected), which may not be selling a single extra copy or garnering a single extra audience-hour, be penalised?

And we need to decide what the form of remedy is. Will print-runs of newspapers be limited? Or websites required to go dark after a certain number of unique users in a month? Conceivably media organisations could be required to spin out newspapers (or other outlets), but given substantial cross-subsidies in the market, this could simply lead to more titles being closed – making the plurality problem worse not better.

²⁰ Ofcom did briefly address multi-sourcing (see paragraphs 4.69-4.80 of their report), but left it to the Competition Commission to assess its significance

²¹ Para 4.43

Even if a standing plurality requirement never triggers remedies it could still have unintended consequences. It is likely to have a chilling effect on competition and innovation if any large media group is worried that consumers switching to their products could cause it to be punished in some way.

The plurality test in the 2003 Communications Act is extremely vague – simply taking this test and dramatically widening its scope into a standing requirement will likely do more harm than good. If there is to be a standing plurality requirement, we have some hard thinking to do to define what we mean by plurality, and what level is sufficient. Moreover, the existing test is at least attached to a very clear and targeted remedy – the blocking of a proposed merger. Before we have a standing test, we need to know what its remedies are, and to whom they will apply. Above all, we need to set any meaningful analysis of plurality in the context of fast changing patterns of digital media consumption, not just in the old more narrowly defined press and broadcasting world

Disclosure: Robert Kenny worked with News Corp on plurality issues during Ofcom's December review of its potential acquisition of Sky. However, this note is on his own initiative and represents strictly his own views