

## ASSOCIATED NEWSPAPERS LIMITED

### RESPONSE TO OFCOM CONSULTATION ON MEDIA PLURALITY

This submission responds to Ofcom's invitation to comment of 21 October 2011 on measuring plurality across media.

#### **Should a framework for measuring levels of plurality include websites and if so which ones? And should the framework include the BBC?**

1. News gathering and news publishing are activities that need to be funded. Yet consumers increasingly expect to consume news for free. Many of the news sources which they use the most – the BBC, ITN, radio, the internet (with a small number of exceptions) – provide news to the consumer at no direct cost at the point of consumption.
2. Advertising revenues are therefore critical if commercial providers are to continue to be able to provide these services. Yet, in turn, audience size and quality drive advertising revenues.
3. Because of this circularity, media plurality is vulnerable to:
  - (a) state funded news gathering/publishing organisations which absorb news-seeking audiences yet are insulated from commercial funding pressures (e.g. the BBC); and
  - (b) media organisations which absorb news-seeking audiences without contributing anything to the process of news gathering (eg. Google and other news aggregation websites).
4. The BBC's public service activities play a particular and unique role in the UK. Yet there needs to be a better mechanism to regulate the impact that the BBC can have on plurality and the sustainability of other media sources. That said, any regulatory scrutiny and intervention needs to be proportionate, recognising the special status of the BBC's public service activities.

#### *Implications for local media*

5. Special rules are required to safeguard (not just to measure) media plurality at the local level.
6. Local media make a vital contribution to promoting social cohesion within local communities. In particular, the ability of local media organisations to gather and disseminate news on local campaign issues, local government decisions and community events is of critical importance; no other news source can provide this service.

7. The act of gathering this information, of course, has a cost. Local media organisations have become much more efficient in recent years. Local economies nevertheless find it increasingly difficult to support multiple local commercial media organisations.
8. The sufficiency of local media plurality needs to be judged in this economic context. In particular, the application of competition rules in the local media context may need to be tempered by the overriding need to safeguard local media plurality.
9. This is particularly salient in a merger control context. Consolidation designed to protect local media may be necessary where the local economy no longer sufficiently supports multiple local commercial media. Recognising the particular value of local news gathering, it seems appropriate to put in place a special system whereby the ordinary application of competition law can be overridden in cases where such consolidation is necessary.
10. In circumstances where Ofcom considers that local media sustainability may be jeopardised if a merger is not allowed to take place, Ofcom should have the power to override an adverse decision under the merger control provisions of the Enterprise Act. This is not a significant step beyond the existing provisions on public interest issues within a merger control context: as was demonstrated in *Lloyds TSB/HBOS*, the current system already provides for a public interest override in appropriate circumstances; our proposal simply provides that the decision-making role should shift (for the reasons set out below) to Ofcom. In the interests of clarity, Ofcom's ability to make such a decision should be made quite explicit in any reform of the current media plurality system.

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

11. The influence that any particular news organisation wields over the public – and over politicians – can best be measured by reference to that organisation's total share of news across all media. Yet the competition authorities have consistently maintained that different media operate in different economic markets – whether for advertisers, subscribers, readers or viewers. Logically, therefore, a single news organisation could organically or by acquisition achieve a dominant position in terms of news influence without achieving a dominant competitive position in any economic market(s) in which its media interests operate.
12. The regulation of news market share therefore needs to be decoupled from competition-based economic regulation.
13. How should this be done? Twenty years ago the UK's approach was to impose limits on holding interests within certain media and across certain media. The old regime existed in a nascent pay TV and internet age. By definition, therefore, the old rules applied only to what today we refer to as “traditional media”.
14. A new approach is required today.

15. Defining absolute limits by reference to aggregated news “share” across all media has a certain appeal. Ofcom’s own reviews have uniformly shown that citizens, spurred on by media owners, consume news on a multi-media basis. And this trend will only increase over time. Regulation of news share should therefore also operate on a multi-media basis.
16. Discussions about methods of measurement are all well and good. But the nub of the issue is whether to impose a hard cap.
17. We propose a dual approach:
  - (a) an absolute limit, applying to all media organisations apart from the BBC, on cross-media share in the UK (or a substantial part of the UK) – again, excluding the BBC. The cap needs to be set at a level that permits reasonable organic growth yet ensures that no single “voice” becomes dominant in the UK media (the *Cross-Media Cap*); and
  - (b) a new power for Ofcom to launch an investigation into plurality levels in any given medium or across media in the UK (or a substantial part of the UK), applying to all media organisations including the BBC, similar to the existing competition law market investigation regime (the *Sub-Cap Review*).

#### *The Cross-Media Cap*

18. In competition law thinking, hard caps are counter-cultural. But there are good reasons for supporting hard caps in plurality regulation. Chief among these is the difficulty of making detailed, fact-based assessments about the extent of “influence” afforded by a given level of news share, other than through an immensely detailed and time-consuming investigation. Plurality assessments are inherently subjective in a way and to an extent that is not the case for economics-based competition assessments. This creates problems around justiciability – as the UK’s Competition Commission and appellate Courts found to their evident frustration in the *BSkyB/ITV* case.
19. As noted above, the BBC has a particular and unique role in the UK. It would not be appropriate for the hard cap to apply to the BBC. Yet the BBC should not be entirely beyond the reach of a regulatory regime designed to safeguard plurality; hence the proposal, developed below, that the BBC should potentially be capable of regulation by means of a Sub-Cap Review.
20. Although a hard cap may import an element of “rough justice”, in plurality regulation it is a pragmatic pre-requisite. The cap should, of course, be set at a level high enough to minimise the scope for such “rough justice”; and the cap should operate on an aggregate, cross-media basis, as this is a corollary of the way citizens consume news and news organisations think about developing their business.

#### *The Sub-Cap Review*

21. There should be a residual power to intervene, *in extremis*, where news plurality within a single medium or across media has grown to a level that it threatens to give rise to an adverse effect on plurality; such an intervention should take place by way of a full inquiry by Ofcom.
22. Why might such intervention be warranted? For example, suppose the media sector has resolved down to only two or three big players, none of whom individually breaches the cap but who in aggregate have a dominant share of news provision across all media. Or what if a single news organisation had built up a huge news share in a single medium yet without exceeding the cross-media cap? One regulatory approach to deal with these situations would be to give the competent authority jurisdiction to intervene at levels below the cross-media cap if, on a preliminary review, the authority had concerns that there might be “features of news provision in the UK, which are having an adverse effect on plurality” (howsoever plurality is defined). A test for intervention along these lines would therefore mirror the UK competition-based market investigation regime, which allows the authorities to intervene where there are concerns that “features of the market” are having an “adverse effect on competition”.
23. Critics of a “qualitative” test for regulatory intervention at levels below the hard cap might point to the lack of up front certainty inherent in such a test: might this lead to over- or under-intervention? Experience of recent cases suggests that the competent authority would be cautious to intervene at levels below the cap and order divestitures unless the authority had developed a compelling ‘theory of harm’ backed by sufficient evidence. This approach would be welcome and strike the right balance between over- and under-intervention.
24. The BBC’s strength and its unique funding mechanism have a significant impact on the ability of commercial providers to support sustainable news gathering operations. The BBC clearly has power to distort the market for the gathering and dissemination of news in ways that may adversely impact news plurality and sustainability. A good example may be seen in the BBC’s proposals for a network of local news websites featuring video content; this proposal clearly had the ability substantially to distort local commercial news plurality and sustainability. This particular proposal was blocked by the BBC Trust. It is inappropriate, though, that a body which (a) lacks the expert capabilities of Ofcom, and (b) is not perceived to be sufficiently independent of BBC management, should have final decision-making power in this respect.
25. The BBC should therefore not be entirely beyond the reach of a general regulatory regime designed to safeguard plurality. One solution is that the BBC’s position should be capable of being considered within the Sub-Cap Review process. Ofcom’s consideration whether to initiate a Sub-Cap Review into matters involving the BBC would of course need to take account of the BBC’s special status and purpose. So too for Ofcom’s substantive assessment, once a Sub-Cap Review had been initiated. Moreover, in the event of an adverse conclusion on plurality issues, any remedies would similarly need to be calibrated with due regard to the BBC’s special position. Situated within a Sub-Cap Review regime whose overriding status is as residual intervention power to be used *in extremis*,

these additional, BBC-specific safeguards should ensure a fair balance between over- and under-regulation of the BBC.

26. The Sub-Cap Review should also take account of the influence of aggregators (of whom Google is the most frequently cited example). Aggregators have immense influence over the news sources and stories that are given prominence on the internet, and they have a unique role as a starting point for much news consumption (28.5% of visits to DMGT sites start with a Google search). Aggregators also have an important influence on news plurality and sustainability by absorbing audiences (e.g. visitors who want to view news headlines but never click through to any source material, and so are not represented in traffic figures that drive advertisers). For both of these reasons, the Sub-Cap Review should have the capability also to consider the effect of aggregators on media plurality in the UK.

### **How should plurality be measured across platforms?**

#### *Measurement in the context of the Cross-Media Cap*

27. The cap on total cross-media share could operate using a test based on news minutage, excluding the BBC. This has the merit of sufficient simplicity such that it can be understood and applied readily, without the need for complex investigation or dispute.
28. Work undertaken for Associated Newspapers by Enders Analysis indicates that a robust and easily understood mechanism for calculating media minutage can be constructed. Using data from authoritative and publicly-available sources such as RAJAR, BARB, comScore and the NRS, Enders Analysis has analysed the average number of minutes of news consumption by adults in the UK, and its breakdown between different media and providers. This data is easy to collect, to measure and to understand.
29. At **Annex 1** we set out data prepared for Associated Newspapers by Enders Analysis showing shares of news minutage on various bases. It is likely that it would be most appropriate that the simpler among those bases would be most preferred in relation to the Cross-Media Cap, since they would promote certainty; the more nuanced bases would likely be of utility in the context of the Sub-Cap Review.
30. We recognise that there are some necessary limitations to this approach: in particular, it may not capture influence on the UK polity and culture from non-news media; we recognise that there may be merit in careful consideration of whether non-news media should also be considered in the context of the Cross-Media Cap (and possibly also the Sub-Cap Review).
31. The precise level at which the cap should be set is a matter for consultation. As noted above, the cap should be set at a sufficiently high level to allow reasonable organic growth that does not threaten cross-media plurality. 30% of media minutage could be an appropriate level.

*Measurement in the context of the Sub-Cap Review*

32. A more in-depth approach can be taken in the context of the proposed residual intervention power for Ofcom.
33. In this context, it is important to note the view of the Competition Commission and the Court of Appeal in the context of *ITV/BSkyB* that a mechanistic counting approach is counter-intuitive, particularly in a market as complex and sophisticated as the UK media sector. Ofcom should therefore make a qualitative assessment of plurality levels based on – at least – all of the following factors in the context of a market investigation-like process:
- (a) share of audience;
  - (b) reach;
  - (c) media minutage;
  - (d) importance as primary news source for consumers;
  - (e) indicators of internal plurality;
  - (f) revenues; and
  - (g) significance of news and editorial content (i.e. a recognition that some media or products may carry less news and editorial content than others, and that, for example, not all time spent reading newspapers relates to news – some, for example, may be spent doing the crossword).
34. In the context of a market investigation-like process, Ofcom will have the time to review these issues in depth and collect the data necessary for a full qualitative assessment. This will not necessarily be a simple task; indeed, it may be the opposite. This means that a fair assessment will require detailed analysis by an expert body.

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

35. As noted above, there is a strong case for introducing powers to review plurality even in the absence of a merger.

*The triggers for review – Cross-Media Cap*

36. A cross-media share cap will, in part, be self-policing: companies will know that a transaction which will breach the cap will lead to a requirement to bring themselves back under the cap, and so they will not undertake that transaction.
37. With respect to organic growth, Ofcom should conduct periodic reviews of the market to consider whether the cap has been breached.

38. The next question is therefore how often the competent authority should conduct the measurement exercise and, if the cap is exceeded, require divestments. The industry should not be under a constant cloud of investigation. Reviews therefore need to be sufficiently infrequent to ensure that the industry has a sufficient opportunity to adapt and evolve “between reviews”. A three year cycle of reviews should be sufficient to test compliance with the cap.

*The triggers for review – Sub-Cap Review*

39. In the competition law arena, a market investigation reference to the Competition Commission is preceded by a more or less formal initial review by the OFT.

40. A similar two-stage approach should be put in place within a new plurality regime, both to prevent regulatory overload and to ensure that investigations are well-targeted. As noted above, the trigger for the Sub-Cap Review by Ofcom should arise from an initial review by Ofcom leading to the conclusion that it may be the case that certain features in relation to the medium or media in question may give rise to an adverse effect on plurality.

41. Ofcom will need to put in place sufficiently robust safeguards to prevent “confirmation bias” in a subsequent in-depth investigation. The government is already considering this issue in the context of its proposal to merge the OFT and Competition Commission. Similar considerations should inform the structuring of the plurality process.

42. One important point of detail relates to remedies. Design of the competent authority’s powers to order remedial measures needs to take account of the proportionality and deliverability of such measures. In particular, divesting “news share” (whether expressed in terms of revenues or minutes) might not be straightforward, and there may be circumstances where a given market simply cannot support more than one provider (at least not without subsidy). In those circumstances, a full investigation would be likely to be otiose. A prior review of the availability of remedies would be no different in practice to the OFT’s existing approach prior to making a competition-based market investigation reference. For example, prior to the OFT’s recent decision to order a Competition Commission reference into statutory auditing services, the OFT conducted an in depth review of the availability of remedies (should they be required).

*Guidance*

43. Any plurality regime should give those who invest in the media at least as much up front certainty as does the competition regime. The competent authorities would therefore need to issue detailed guidance on the analytical framework they will adopt when assessing plurality in the context of both proposed processes. Such guidance should also identify the types of evidence the authorities will look for when making their assessment.