

## Submission by the Campaign for Press and Broadcasting Freedom to Ofcom Consultation 'Measuring Plurality across Media'

16 November 2011

The CPBF was established in 1979. It is a leading independent organisation dealing with questions of freedom, diversity and accountability in the UK media. It is membership-based, drawing its support from individuals, trade unions, cultural and civil society organisations. Since it was established, it has consistently advanced policies designed to encourage a more pluralistic media in the UK and has regularly intervened in public and political debates over the future of media across the United Kingdom.

### 1. A broad definition of media pluralism

In order to protect plurality it is essential that there is adequate recognition of the breadth of plurality concerns. The assessment of media plurality needs to proceed on the basis of a broad definition. We note that the questions from the Secretary of State for Culture, Media and Sport are broadly framed. Media plurality is not defined, but nor is it restricted in scope in any of the questions except the second which refers specifically to news. Ofcom proceeds differently. Ofcom asserts (1.6) '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'. This is a reasonable and straightforward statement about why pluralism matters and many would agree that it states why pluralism matters *most*. It draws upon ministerial, parliamentary and other statements about the importance of media pluralism in a democracy. However it does not serve as a comprehensive statement of media plurality concerns expressed within UK media policy. It is also far removed from the policy consensus on media plurality informing international associations such as the Council of Europe.

The Council of Europe (CoE) has adopted a broad definition of media pluralism as the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through the media. The CoE understands media pluralism to encompass 'the diversity of media supply, use and distribution, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests'.<sup>1</sup>

Media pluralism draws on three main sets of concerns: economic, political and geo-cultural. As a recent study summarises, '[i]n mature democracies media pluralism encompasses political, cultural, geographical, structural and content related dimensions'. This *Independent Study on Indicators for Media Pluralism in the Member States*, prepared for the European Commission Directorate-General Information Society, identifies five dimensions of media pluralism: political pluralism, cultural pluralism, geographic/local pluralism, pluralism of media ownership and control, pluralism of media types and genres.

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<sup>1</sup> Independent Study on Indicators for Media Pluralism in the Member States – Toward a Risk-Based Approach: Final Report, Prepared for the European Commission Directorate-General Information Society and Media, Leuven, July 2009

Cultural pluralism refers to (p12):

the fair and diverse representation of and expression by (i.e. passive and active access) the various cultural and social groups, including ethnic, linguistic, national and religious minorities, disabled people, women and sexual minorities, in the media. It comprises a plurality of themes and voices being present in the media, socialisation through multiple forms of media access and participation, choice between different forms of interaction and the representation of diverse values, viewpoints and roles, in which citizens belonging to various cultural and social groups...can recognise themselves.

Media pluralism is not restricted to news but encompasses broader forms of cultural expression and communication. Rather than being a discrete set of policies concerning news media, the protection of pluralism involves a wide range of policy measures and obligations including measures to ensure pluralism and diversity in cultural expression. These include UK commitments under the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, adopted on 20 October 2005.

A recent European Commission working paper states:<sup>2</sup>

Media ownership rules need to be complemented by other provisions... Media pluralism, in our understanding, implies all measures that ensure citizens' access to a variety of information sources, opinion, voices etc. in order to form their opinion without the undue influence of one dominant opinion forming power.

Within UK policymaking there has also been recognition and support for a broad definition of media pluralism. This has underpinned support for public service media, action to tackle concentration of media ownership, and a range of regulatory measures and forms of support for media. For instance, the Government paper *Media Ownership: The Government's Proposals* (DNH 1995, para 1.4) stated:

A free and diverse media are an indispensable part of the democratic process. They provide the multiplicity of voices and opinions that informs the public, influences opinion, and engenders political debate. They promote the culture of dissent which any healthy democracy must have. In so doing, they contribute to the cultural fabric of the nation and help define our sense of identity and purpose...Special media ownership rules, which exist in all major media markets, are needed therefore to provide the safeguards necessary to maintain diversity and plurality.

The *Consultation on Media Ownership* (DTI/DCMS 2002) acknowledged the argument that plurality 'maintains our cultural vitality [...] A plurality of approaches adds to the breadth and richness of our cultural experience'.

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<sup>2</sup> European Commission (2007:5) *Commission staff working document. Media pluralism in the Member States of the European Union*. Brussels. European Commission. SEC (2007) 32

Ofcom has previously argued:<sup>3</sup>

Plurality is at the heart of successful PSB provision. It involves the provision of complementary services to different audiences...a range of perspectives in news, current affairs and in other types of programmes; and it provides competition to spur innovation and drive quality higher.

We welcome Ofcom's recent acknowledgment that 'different business models and ownership structures' have led to 'a strong mixed broadcasting ecology'.<sup>4</sup> However, notwithstanding such support for diversity in broadcasting, there has also been a tendency in recent documents to interpret media pluralism narrowly, with consequences for the identification of problems and remedies. This is evident, for instance, in the present consultation paper and in Ofcom's recent analysis of the public interest issues in News Corporation's planned takeover of BSkyB (Ofcom 2010). It is right that concerns regarding news, information and opinion are paramount. It does not follow that media pluralism should be restricted to news, or to the impact of media on 'public opinion', however broadly conceived.

While some of the consultation questions Ofcom has formulated are broad, and Ofcom invites consideration of the genres that should be included, the focus is on media impact on public opinion. This is in line with Ofcom's definition of plurality concerns in the BSkyB public interest test report as 'the range and number of persons having control of media enterprises in the context of their ability to influence opinions and control the agenda' (Ofcom 2010: 5). It is vital to ensure the existence of a sufficient number of distinctive organisations such that the circulation of diverse viewpoints to citizens can be guaranteed. However, Ofcom defines plurality so narrowly as to ignore a range of other important concerns, including:

1. Content variety and cultural diversity
2. Media access (social, cultural and economic access for individuals and groups in society, especially marginalized groups)
3. Independence of creators, programmers and journalists
4. Owner influence affecting media content and performance in entertainment, fiction and factual programmes as well as 'news'
5. Plurality of sources of funding for media

Plurality matters. A healthy media culture should mean that there is a real range and diversity of voices, of creative expression, ideas, information and opinion. Such a plurality of voices, reflected in the media citizens use and consume, is necessary for democracy. But such a range of voices is also needed to foster understanding, dialogue and social action, and to address divisions based on social experience and cultural values. The widest possible range of creative expression is vital for cultural, as well as economic, enrichment.

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<sup>3</sup> Ofcom (2004:7) *Ofcom review of public service television broadcasting. Phase 2: Meeting the digital challenge*, London: Ofcom.

<sup>4</sup> Ofcom (2011) *Open Letter about a report by Ofcom to the Secretary of State under s.229 of the Communications Act 2003*, London: Ofcom

## 2. Measuring plurality

The breadth of plurality concerns has implications for the measurement and assessment of plurality. No single form of measurement is adequate to capture the range of plurality concerns that arise. The recent *Independent Study on Indicators for Media Pluralism*, prepared by an international expert group, shows how varied are the measures applicable and how complex is the task of finding suitable indices.

It is possible to start more simply. We advocate the use of ownership and market share measures to determine thresholds. While there are difficulties in determining control, there are standard and reliable measures to assess the number of enterprises supplying services in a particular market. Market share analysis is also beset by complexities, but is comparatively easy to assess for most media markets. These provide the most important sets of measure for determining plurality of ownership and are the central, or at least relevant, consideration across all assessment of plurality by type. However, the assessment of plurality is necessarily varied, taking account of different considerations and involving qualitative assessment and judgment. We also believe that the assessment of media plurality requires effective democratic involvement and oversight in determining whether activities serves the public interest in protecting media pluralism. There is a vast literature on the complexity of measuring media plurality, but what many studies neglect is that these are, and should be, democratically informed decisions. Deciding whether there is too much media concentration or insufficient cultural diversity in a nation or region should be fully open to public opinion, consultation and deliberation.

We believe that the assessment of media pluralism should involve analytical tools, such as market share analysis, and fair and transparent processes that are as objective and rigorous as possible. However, assessment should not be limited to economic and market analysis but encompass the range of relevant indicators to provide a reasoned, evidence-based assessment of plurality concerns and risks. Above all, we believe that determining what is in the public interest must be achieved through effective democratic participation, as proposed in our revised public interest test.

## 3. Revising the public interest test

There is a need to assess concentrations of media ownership and cross-media ownership to ensure that the public media on which we rely provide pluralism of voice and opinion, sufficiently diverse sources of news and information, and diversity of cultural expression. The government should clearly and transparently set out public policy objectives, independently of the general competition framework, concerning the degree of concentration of ownership that should be considered permissible in converging media sectors. These should go with the grain of the previous rules that applied in the Enterprise Act Public Interest Test regime and the Communications Act Schedule 14 Rules. Such important rules should be subject to transparent and open public consultation and debate. We regard the public interest test as one important means of helping to secure media pluralism and extend public interest obligations to commercial media firms that have a significant reach and influence. However, we regard all such measure as being additional to the maintenance of well-funded public service media. This section includes proposals of the Coordinating Committee on Media Reform to which we have contributed as a founding member.

The existing public interest test applies different criteria for press and broadcasting in a manner that is inconsistent, unsuitable and insufficient as media markets and services converge. We believe the test would be strengthened by identifying broader criteria that could be considered wherever appropriate. These would recognise the special importance of plurality in news, but would also incorporate criteria relevant to all other forms of public media. Here criteria should include those currently assigned for broadcasting and cross-media mergers under the public interest test, namely the quality and range of content, and the suitability of suppliers, wherever these are relevant. The criteria should also include relevant obligations and commitments made by the UK government under international agreements. These include commitments under the UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Audiovisual Media Services Directive, recommendations made by the Council of Europe and international commitments on freedom of expression and other human rights.

The public interest test process would determine whether a merger or market share position was permissible or not. But it could also extend the power to impose remedies other than simple approval/disapproval that refer to *'behavioural'* conditions on the conduct, performance, and governance of organisations. Such behavioural conditions would include measures concerned with protecting editorial standards and independence, the treatment of workers, terms of supply, and so on. Requirements could also include interventions in ownership structures, for instance requiring that public trusts or co-operative ventures are established when firms exceed a certain market-share or level of cross-ownership.

The nature of behavioural controls that could be included in the case of media mergers include:

- *Protection of the editorial independence of media workers:* The power to appoint or dismiss editors could be safeguarded against decisions made by those with a controlling interest. Media owners and others with a controlling interest could be required to adhere to publishers' and journalists' codes of conduct, as well as to undertakings drawn up for specific practices.
- *Investment in Newsgathering:* Evidence of a consistent approach to and commitment to newsgathering and in particular to investigative journalism.
- *Forms of ownership and control:* The existing enforcement powers include alteration of the constitution of a body corporate. Another important way in which the merger regime could be enhanced would be to grant powers to the relevant competition authorities to require that entities subject to merger approval adopt designated forms of corporate status, ownership and governance as a condition of approval. For instance a firm that was dominant in a market and sought to expand into other media in the same market could be required to establish the new entity as a public trust, co-operative venture, non-profit distributing company, or other form.
- Under such alternative ownership structures or as conditions imposed on privately owned companies, there could also be requirements to provide or

share resources, under favourable terms, to other users in order to serve public interest objectives. This could take the form of sharing, or allowing access to, facilities and resources at favourable rates. This might include links with public bodies, charities, community organisations and non-profit companies as well as commercial competitors under certain conditions to sustain plurality of supply and voice. The proposed sharing of local news resources by the BBC shows the importance of such initiatives to help sustain media services and pluralism in creative production.

Establishing a Stronger Legal Framework for the Public Interest: What is required is an expanded listing in statute of public interest considerations that may be addressed. The process of public consultation should allow any and all relevant criteria to be addressed by respondents, and Ofcom should be required to summarise and respond to all criteria.

This approach to the examination of public interest issues and application and enforcement of remedies would not meet strict criteria of predictability. However the inherent unpredictability of a quasi-legal public interest test can be mitigated in various ways. First, setting out criteria in the legislation for public interest considerations and for the types of conditions and remedies that may be imposed will provide clarity about the scope of the public interest test. Second, advice and information should be published to explain the considerations to those likely to be affected by them. Such provisions were included in the Communications Act 2003, resulting in the DTI guidance issued in 2004. Third, the procedures and rulings of the regulatory bodies, and higher courts in cases of appeal, will establish a substantive body of regulatory decision-making and case law. This will be a quasi-legal process only, since it will involve public consultation and deliberation. Yet, there should be suitable predictability so that firms know when their current or future activities may become subject to a public interest test.

Process and democracy: A greater role for public involvement and oversight is required. This necessitates that the process should be quasi-legal only. The merger process should remain subject to judicial review and appeal to the Competition Appeals Tribunal. However the courts should have regard to Ofcom's powers to determine the public interest considerations and its authority on matters that are not strictly matters of competition law. The courts had traditionally deferred to the special expertise of regulatory bodies except in areas where the court has competence, such as process, reasonableness and application of law. Clarifying the grounds for challenging decisions on public interest criteria will help to reduce litigation. It will also assert the democratic and cultural criteria informing those decisions which competition law cannot adequately address.

There are other revisions needed that arise from the News Corp-BSkyB merger case. The public interest considerations should not be restricted to those set out in an intervention notice. All relevant considerations should be addressed through the review and consultation process. The regulatory authorities should have the power to intervene at any stage in a merger process if new information comes to light.

## CONSULTATION QUESTIONS

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

We favour an approach that combines the rigorous application of specific measures, in particular ownership and market share, with scope to apply a broader range of criteria and considerations as set out in new legislation.

The principal measure should remain that of the number of persons controlling media in designated markets. We believe that media ownership and control remain vital measures that should underpin rules on media concentration and cross-ownership. The market share of suppliers in designated markets remains the second key measure for the purposes of identifying media concentration and cross ownership. The calculation of market share varies between media markets in terms of the most appropriate indices. We recognise that there are a complex range of measurements, and choices about measurements, that can be made. We favour a discretionary approach that involves Ofcom selecting and justifying appropriate measures. This process should be informed by effective public consultation.

It is valuable to make efforts to assess the ‘total market’ wherever relevant. However we do not believe that the total media market can yet be determined with sufficient clarity and precision to form the basis for numerical thresholds. We also favour an approach which is more responsive to media plurality problems occurring within and across media markets as defined by platform, service, political and other content aspects, geographic and cultural markets served. This requires a variety of measures that derive from the different areas of concern: economic, political and geocultural. The Council of Europe’s Committee of Ministers Recommendation of 2007 requests the use of ‘thresholds based on objective and realistic criteria, such as the audience share, circulation, turnover/revenue, the share capital or voting rights’.<sup>5</sup> Furthermore, the CoE states that the rules ‘should take into account the horizontal integration phenomena, understood as mergers in the same branch of activity – in this case mono-media and multi-media concentrations – as well as vertical integration phenomena, that is, the control by a single person, company or group of some of the key elements of production, distribution and related activities such as advertisement or telecommunications’.<sup>6</sup>

We welcome the use of various measures whenever relevant. We also welcome the recognition that the process of assessing the public interest is inherently qualitative and cannot be determined by quantitative measurement alone, vital as this is. As Ofcom has stated it has wide discretion in relation to the assessment of sufficient plurality under the public interest test.<sup>7</sup> The Court of Appeal in BSKyB/ITV confirmed that Ofcom should provide a qualitative assessment of the position resulting, or likely to result, from the proposed merger.

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<sup>5</sup> Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content, 31 January 2007, para 2.3

<sup>6</sup> Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content, 31 January 2007 para 2.4

<sup>7</sup> Ofcom (2010) *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, London: Ofcom

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

Yes. We believe that the maximum market share should be 30 per cent for national news; regional news on all platforms and in each of the following platforms - radio, television, newspapers, online. There should also be a 30 per cent maximum threshold for share of audio-visual content services.

The maximum share for news should apply to UK wide provision, to provision in the nations of Scotland and Wales, in Northern Ireland, and in regions throughout the UK. The current public interest test gives consideration to the total audience for media or any significant section, formulated as ‘every different audience in the United Kingdom or in a particular area or locality of the United Kingdom’. This scope is useful in considering regional markets as market definition is not solely a matter of analytical measurement but of significance is a matter for the communities and constituencies served by media and communications enterprises.

We propose that any market share that reaches or is liable to reach 15% should be subject to a public interest test. The measures that may be taken include divestiture but may also include other behavioural requirements and structural controls instead, as outlined above. The 30 per cent threshold for national and regional markets sets the limit beyond which no private enterprise should be able to exercise control. Private firms will be required to divest so that their share does not exceed 30 per cent. Alternatively, relevant holdings may be organized as public trusts or other publicly governed and accountable structures, following a public interest test review and agreement.

It is right that limits are placed on media ownership to restrict the influence that any one organisation may have, to guarantee access and to foster diversity of content.<sup>8</sup> Limits should be set on the maximum share that any private body may hold in designated markets. However, in some circumstances there may be publicly beneficial alternatives to divestment.

**The market share analysis used to calculate ownership limits should not include publicly-funded or publicly-owned media.** These public service media are already subject to detailed regulations to ensure they provide the benefits of pluralism. The presence of these media should not provide grounds for allowing a diminished level of pluralism across commercial media serving the same market. Rather, the public interest test should be used to ensure that the benefits of media pluralism are extended beyond those obtained through public service media alone (see further below).

We propose that a public interest test is initiated whenever a company with a 15 per cent share in one market extends or seeks to extend their share in that market or another designated market. Above 15 per cent the requirements imposed following the test may be for divestment or for approval subject to conditions on operations, structure and/or governance. The maximum permitted share for a private company should be 30 per cent. However, media services above the 30 per cent share may be

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<sup>8</sup> Robinson, B (1995) ‘Market Share as a Measure of Media Concentration’ in T. Congdon, A. Graham, D. Green and B. Robinson, *The Cross Media Revolution: Ownership and Control*, London: John Libbey



approved where they are provided by a public trust, or similar body. The 30 per cent rule would prevent a private company operating with a higher share but would not prevent them participating in a public trust, if that was approved following a public interest test review. This would enable private companies to provide resources and facilities and to continue to derive revenues from their investment. However, they would be prevented from exercising control and would operate within a system of governance oriented towards maximizing public benefit and accountability.

- **Strong cross-ownership rules and clear upper ceilings on the share across media markets are needed.** The regulator should have regard for transactions that would result in a supplier having a market share of 15% or greater in the relevant market. Any supplier with a 15% share in a designated media market should be subject to a public interest test in respect of any merger or acquisition in the same or another media market. A public interest test should be applied to existing market conditions as well as to any prospective change arising from merger or acquisition. This means that any provider with a 15% share in a designated market should not be permitted to own or extend properties in any other media market without the application of a public interest test. The test should assess the holding against clear criteria concerning plurality of information, diversity of cultural expression, contribution to public good (democratic, social and cultural). Ownership concentration and cross-ownership above the 15% threshold may be permitted subject to conditions. However, the maximum permitted holding in any of the following designated market should be 30% (national news; regional news on all platforms and in each of the following platforms - radio, television, newspapers, online)
- **Market concentrations above the upper ceilings (15%) would only be allowed where firms can demonstrate that they meet certain precise requirements and comply with conditions imposed by Ofcom.** The revised public interest test process would determine whether the merger or share was permissible or not. But it would also extend the power to impose remedies other than simple approval/disapproval that refer to *'behavioural'* conditions on the conduct, performance, and governance of suppliers of media services. Such behavioural conditions would include measures concerned with protecting editorial standards and independence, the treatment of workers, and terms of supply to third parties. Requirements could also include interventions in ownership structures, for instance requiring that public trusts or co-operative ventures be established when firms would otherwise exceed market-share or cross-ownership thresholds. In addition to existing ones, public interest criteria should include:
  - protection of the editorial independence of media workers
  - investment in newsgathering
  - effect on the range and diversity of cultural expression
- **Transparency is a pre-condition of any successful application of media ownership provisions.** Therefore the public should have access to basic information on media companies (ownership and management). Regulation should secure disclosure of information regarding

**stakeholders, corporate governance, statements of editorial policies, interests in other media.**

*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?*

The scope to influence political opinion formation and public opinion makes the control of news and current affairs information and discussion the most important area of concern. However, as we have argued, media pluralism is much broader than this. It includes the diversity of content, share of voice and quality of access to ideas, information, imagery and opinions. The regulation of media plurality must not be restricted to news media but encompass all media services that are public facing and which provide content services to large aggregated audiences. This includes print, television, radio, and online content services. We believe that Ofcom should be required to include all such public media in assessing pluralism. Such assessment would need to include the totality of domestically produced programmes, and domestically-produced children's programmes, for instance, both of which have been acknowledged concerns for Ofcom in recent reports. It matters that children have access to UK national and regional programmes that can educate, entertain and inform them, and which reflect both cultural diversity and cultural proximity.

In addition, it is important to recognise that wider media than news and current affairs influence 'public opinion'. There is considerable academic recognition that fiction and entertainment engage with public issues, often at the interface of public and personal, in ways which influence people's understanding of themselves, others around them and public issues. This is why analysts insist on a suitably broad understanding of media pluralism. Further, as the consumption of news remains low or is falling, the influence of actual media consumption can be expected to increase.

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

We believe this is a critical issue. Under our proposals:

1. Ofcom would have concurrent powers with the Secretary of State (Culture, Media and Sport) to initiate a public interest test
2. The public interest test would apply whenever market share thresholds were reached, not only when there was merger or acquisition activity.
3. Ownership thresholds would not preclude the public interest test being initiated on other public interest grounds in accordance with criteria and process set out in legislation. For instance, there may be circumstances where it is appropriate to initiate the public interest test in regard to criteria such as the fit and proper person test, in the absence of either a merger or market share situation.

The introduction of ownership thresholds should not preclude the public interest test from being initiated where other public interest concerns arise, applying criteria and processes established by legislation. Further, the test should automatically apply wherever a party to a proposed transaction has, or would thereby obtain, a share of 15 per cent in the market for national news or regional news on all platforms and in each

of the following platforms - radio, television broadcasting, newspapers, online. In addition to news, the 15 per cent share of supply threshold for an automatic public interest test should also apply in respect of suppliers of commercial media content services on any platform for the total UK market or any significant geographic market in the nations and regions, and apply on a more discretionary basis in respect of cultural as distinct from geographically defined markets. Under the current system, a consideration for mergers involving broadcasting include regard for the quality and diversity of programmes and their appeal to a variety of taste and interests. In future, Ofcom should have regard for the effect of a transaction on cultural provision serving any group of users or viewers that might be significantly affected by it.

In general, any party with a significant share of 15 per cent in one media market will be subject to a public interest test before being permitted to acquire a greater share in the same market or in other media markets. The 15 per cent threshold finds its justification in the argument that no less than six owners in a market is a suitable benchmark for pluralism in media supply rather than the four permitted under the standard merger threshold, and is justified by the public interest benefits of pluralism for both citizens and consumers. At the same time, an upper limit of 30% market share would allow the necessary scope and flexibility to permit greater concentration within markets, while imposing conditions to obtain the best public interest outcomes.

The regulator Ofcom should have discretion, but there should also be safeguards and also democratic mechanisms both to review and initiate public interest tests. Tests should be automatic whenever ownership and market share thresholds apply. For other tests, Ofcom should specify its reasons based on objective criteria set out in legislation. These will be subject to the safeguard of judicial review in individual cases and to parliamentary oversight in regard to Ofcom's performance in general. There should also be a strengthened undertaking to act upon evidence of public concern. This will be aided by requirements for Ofcom to consult the public on whether to conduct a public interest test in cases where Ofcom judges that a test is not warranted but where there is evidence of significant public concern. Such a preliminary consultation would provide suitable means to assess public opinion to determine if there were sufficient grounds to initiate a full public interest test. Already, the existing guidance states (DTI 2004: 28) 'Where a transaction gives rise to a significant volume of adverse third party comments regarding the impact or potential impact of the transaction on newspaper public interest considerations, it may be appropriate to *consider* intervention'<sup>9</sup>.

The Secretary of State can also intervene on public interest grounds in cases which fall to the European Commission under the provisions of the EC Merger Regulation. Such formal powers as are required by law should be retained but the determination of public interest considerations should rest with Ofcom rather than the government. The public interest criteria that Ofcom should consider and the processes to be followed should be set out in legislation. Ofcom should have sufficient powers and resources to continue to conduct periodic reviews of media ownership, and pluralism and diversity in media markets. These should include any recommendations for revisions to the

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<sup>9</sup> Department for Trade and Industry (2004) *Enterprise Act 2002: Public Interest Intervention in Media Mergers*. Guidance Document, London: DTI

public interest test and criteria, and the Secretary of State should retain the power to add public interest criteria by means of statutory instrument.

- **The power to initiate a public interest test should be assigned to Ofcom in line with Recommendation [Rec \(2000\)23](#) of CoE. Ofcom should have concurrent powers to initiate the test rather than control resting exclusively with the Secretary of State because there may be, as the BSkyB bid so clearly revealed, a conflict of interest. Operating under new legislation Ofcom will be best placed to assess public interest considerations alongside competition issues. Ofcom can ensure the process is less susceptible to political interference while remaining properly subject to parliamentary and judicial oversight.**

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

Online media services should certainly be included in analysis of media pluralism. However it is important that these are assessed carefully. We believe Ofcom adopted the right approach in assessing the cross-media market share for news in its report on the proposed takeover of BSkyB by News Corporation. It would be wrong to draw the conclusion that the massively increased availability of content online diminishes concern about the sources and supply of news or the share and reach by media companies operating across various platforms. As Ofcom's report on BskyB highlighted, 'traditional media providers account for 10 of the top 15 online providers of news (eight newspaper groups plus the BBC and Sky), with the remainder predominantly being news aggregators rather than alternative sources of news. This suggests that today online news tends to extend the reach of established news providers as opposed to favouring the use of new outlets that are not present on traditional media'.

*Whether or how it should include the BBC?*

Public service media require special consideration. The combination of requirements on public service media and systems of governance and oversight are not replicated across commercial media. Not only are public service media required to meet standards of internal pluralism across editorial content, including impartiality in news and opinion, but also the system of periodic authorization and review of public service media provides a mechanism to assess and sustain internal pluralism, both within individual suppliers and across the public service system as a whole. The BBC is publicly funded and has to meet requirements for pluralism and diversity. Channel Four is governed by a public trust and has explicit obligations for cultural diversity, pluralism and impartiality. The commercial PSBs, ITV and Channel Five have weaker public service obligations, and as commercially-funded organisations should be included in the calculation of market share thresholds for the public interest test, but should also be granted special consideration as public service media. Together the regulation of public service media provides the means of sustaining a measure of media pluralism for socially and culturally beneficial ends. Given this it would be perverse to allow the presence of public service provision to justify insufficient pluralism across privately owned commercial media. Rather it is socially beneficial to

ensure that there is sufficient pluralism in private media to extend the benefits of pluralism beyond those obtained through public service media alone. With public service provision already at risk of shrinking to the provision of one provider, the BBC, in some areas, with reductions or abandonment of public service obligations on ITV and Channel Four, the need to ensure pluralism across contemporary media is even greater.

It is right that the BBC is included in the calculation and analysis of market share since the presence of BBC services has a market impact which must be included wherever relevant. But it does not follow that the BBC's market share should be included in assessing the degree of market concentration within non-public service media. The latter should be assessed alone as the basis for regulatory action to sustain plurality. This is necessary because the pluralism obtained by public service media should not be allowed to serve as grounds to diminish plurality across other media serving audiences in the same markets. The public interest test cannot directly remedy the risk of public service provision itself curtailing market competition and provision. However to the extent either problem arises it can be addressed through other mechanisms of public service governance. The purpose of the public interest test, by contrast, is to provide an available and effective mechanism to secure public interest outcomes by providers other than those designated public service media.

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