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**Ofcom Plurality Submission**  
**5th December 2011, Guardian Media Group**

## **Monday 5th December 2011**

This submission responds to Ofcom's invitation to comment on measuring plurality across media. It is structured as follows:

1. Summary of GMG's position
2. Background: Guardian Media Group
3. Background: Events of 2010/11 - lessons for media plurality
4. Assessment: Weaknesses of media plurality framework
5. Response to Secretary of State's questions:
  - I. How should we measure media plurality?
  - II. Should there be limits on news market share?
  - III. What could trigger a review of plurality?
  - IV. Should websites be included in plurality?
  - V. Should the BBC be included?

This submission contains several new proposals for measuring plurality which we have sketched at a high level at this stage. We kindly request a meeting with you to discuss these proposals in more detail.

## 1. SUMMARY

- 1.1 ***The proposed acquisition of 100% of BSkyB by News Corp exposed what we believe are wider weaknesses in the media ownership rules and the media public interest test, specifically media plurality.*** At each stage of that proposed transaction, it was argued that relevant parties followed the appropriate legal process. Yet the result which almost ensued – the largest media company in Britain doubling in size – appears to clearly breach wider public interest concerns that justified intervention, namely media plurality. We submit that these events and other developments in recent years indicate the clear need to review both media ownership rules and processes by which public interest concerns are defined and addressed.
- 1.2 ***It is essential to make changes now, to acknowledge the dramatic evolution in media in the past decade.*** While true that no new set of laws can endure for very long in the light of accelerating technological change, we are currently operating within a 2003 framework that is not cognisant of significant developments in the sector. In recent years - as well as News Corp's bid - Northern & Shell have acquired Channel 5, ITV has been operating as a single entity, rulings against local newspaper mergers have led to titles closing down and newspaper ownership has changed hands in several cases. More significantly, online players have become hugely powerful players in the news and media ecosystem. A failure to update the framework at this stage will exacerbate current problems. Hoping for a period of “steady state” in which to consider enduring reforms is unrealistic.
- 1.3 ***We believe that more convergence and industry consolidation will lead to other newspaper groups or digital media companies soon enjoying high levels of dominance,*** with potentially detrimental effects on plurality and the wider public interest. The competition law regime is unlikely to be able to deal with some of these detrimental effects, especially given that it is concerned with economic strength in a relevant economic market which tends to support narrow definitions of single-media markets, and so as intended, it is through media ownership regulation and the wider public interest framework that they must be addressed.
- 1.4 ***The problems in the current rules that need addressing are:***
- Media ownership rules which were written almost 10 years ago and are now out of date, given developments in the sector. Historic public interest arguments for restricting newspaper ownership of an ITV licence but not of Sky TV for example do not serve plurality well today. There is also no restriction of media ownership involving what are now very large online players
  - Economic dominance which, while on the face of it, is a competition issue, has significant knock-on effects on plurality and the wider public interest that need recognition
  - Political dominance, widely acknowledged this year by all political parties as a fundamental problem in relation to News Corp, is inadequately dealt with, if at all, in current plurality law

1.5 ***The problems in the current process for assessing plurality that need addressing are:***

- Transaction-triggered decision making which we believe inadequately addresses deterioration in plurality. This deterioration can either happen gradually – in the case of News Corp's organic growth and dominance – or quickly – in the case of digital media platform dominance such as Google, Facebook, Apple and others. A new framework needs to anticipate and respond to very rapid changes
- Too much power is vested in the Secretary of State, which as events of the past year illustrate, results in a lack of market, political and public confidence

1.6 ***Therefore we would argue that the overall framework should be changed immediately in two significant ways:***

i. Amend UK media ownership regulation – in two ways:

1. *Include entities of comparable size or influence to ITV in the specific media ownership rules* thus recognising that Sky for example, is a far more significant TV company today than ITV on almost all metrics. Moreover, digital switch-over and the onset of internet TV make the current special treatment for analogue stations outdated
2. *Include internet within the remit* so that cross-media mergers between very powerful digital companies and newspaper groups would be caught in accordance with the relevant binary test

ii. Introduce a periodic review of media plurality – this would require Ofcom to review plurality at regular intervals, not just at the point of transaction, thereby enabling emerging threats to plurality to be identified and addressed. It would also allow Ofcom to initiate public interest interventions in media mergers as well as the Secretary of State, as recommended by the Lords Communications Committee in its 2008 First Report

1.7 ***Periodic reviews of media plurality should incorporate several factors that we now know can harm plurality even if they pass competition tests, including:***

- News market share. This is already used today and should continue, applying both within channels such as TV or the national press as well as across channels. We should recognise however that only measuring news market share - while necessary - is not sufficient in measuring media plurality
- Platform dominance. This is already recognised in pay TV for example with Sky constrained on its use of the EPG but may soon be relevant for large digital players who attract larger audiences than television
- Distribution dominance. This may take several forms. For example: News Corp bundling newspaper content of its titles with pay TV packages; or internet search engines permanently preferring one newspaper source over

another as a result of a commercial alliance

These three factors can all lead to deterioration in plurality either in and of themselves or by accelerating the market exits of others and creating barriers to new entrants. In addition, a fourth factor would be:

- Excessive influence on public affairs. Though explicit and implicit in statute, this has only been measured to date through the proxy of news market share. However the stark events of the summer reveal this is an inadequate way to measure this influence.

1.8 ***We recognise the practical difficulties in broadening the test of media plurality.*** Some of the factors above are principles based, with some ripe for objective tests and others not. The respective role of elected politicians and regulatory bodies is not straightforward. However, given the chain of events that caused this consultation, it must be its purpose to explore how we can simultaneously broaden our assessment of what drives plurality while establishing the most efficient and effective process possible for making these assessments. That is why we seek a process of engagement with Ofcom to develop these proposals.

## 2. GUARDIAN MEDIA GROUP

2.1 Guardian Media Group (GMG) is one of the country's leading commercial media organisation controlled entirely within the UK. GMG is owned by the Scott Trust Limited, which exists to secure the independence of the Guardian in perpetuity. The Group has a portfolio of assets and investments which provide financial stability for the core business Guardian News & Media (GNM). These assets are not managed in a conglomerate or multimedia company but are managed at arms length from The Guardian and Observer newspapers. The Group's portfolio of investments includes:

- A majority share in Trader Media Group: one of Europe's largest specialist media companies, and publisher of the Auto Trader website and magazine. Trader Media Group is jointly owned by GMG and Apax Partners
- A minority share in Emap: the B2B publishing, events and information business, also jointly owned by GMG and Apax Partners
- GMG Radio: radio stations across the UK under the Real Radio, Smooth Radio and Rock Radio brands

2.2 As well as being a leading national quality newspaper (which recently celebrated its 190th birthday and is currently Newspaper of the Year), the Guardian has championed a highly distinctive, open approach to publishing on the web and has grown its global audience to 60 million unique browsers a month.

### **3. BACKGROUND: EVENTS OF 2010/11 – LESSONS LEARNED FOR MEDIA PLURALITY**

The events of 2010/11 provide a case study for the failings of the current plurality framework. We explain this below by reviewing media plurality law, what happened during the BSkyB bid, and relevant factors from the Leveson Inquiry to which this consultation inputs.

- 3.1 Media Plurality. The foundation of the media plurality test is expressed in DTI Guidance on the operation of public interest merger provisions in the Enterprise Act 2002, as quoted by Ofcom in their advice to the Secretary of State in December 2010 in relation to the News Corp / BSkyB bid, which states that the public interest consideration:

*“is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality”*

In the same report Ofcom also draw on the Government statement during the debate of plurality provisions, namely:

*“plurality is important for a healthy and informed democratic society. 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”*

- 3.2 Unsurprisingly therefore, given the substantial increase in power and ability to influence the acquisition represented, Ofcom recommended the Secretary of State refer the bid to the Competition Commission. Months later, in July 2011, current party leaders, former prime ministers and many others across public life attested to the undue influence of News Corp and Rupert Murdoch, even prior to owning all of BSkyB. The current media public interest test and in particular the process followed where public interest considerations are relevant was such however, that this widely accepted if not often expressed view did not impact on the Secretary of State’s judgement. We would submit therefore that this indicates clear failings in both the public interest test as well as the process.
- 3.3 The national debate, in Parliament and outside, since July 2011 has reinforced the view that there are harmful effects of media concentration in Britain. For example, on Rupert Murdoch specifically, while his power to determine the outcome of elections was debated, commentators universally agreed (including his former



editors) that 'Rupert backs winners'. The very fact that a dominant proprietor backs anyone and that, in the eyes of politicians, this impacted how they behaved towards him, is clear evidence of one person setting the political agenda.

- 3.4 BSkyB Bid. It is also clear that while News Corp's potential full control of Sky News did add further to their ability to influence and control the agenda, the company would still have had too much influence without this control of Sky News. As such, the proposed remedies relating to Sky News (which we have previously argued would have been insufficient), were shown in July to be an inadequate remedy to plurality concerns.
- 3.5 The economic might that would have been acquired as a result of the News Corp / BSkyB deal does not appear to have been considered. While the European Commission passed the BSkyB bid on competition grounds, the same set of facts gave rise to plurality concerns that the Commission were naturally not concerned with. Cross-media ownership laws, with no reference to BSkyB, could not apply either.
- 3.6 The final lesson from the BSkyB bid relates to the role of the Secretary of State. Jeremy Hunt and indeed Ivan Lewis have both now stated that they do not believe one person should have the power of referral again. In one sense this is the logical extension of plurality principles: if one person is able to secure undue influence on the agenda, s/he is likely to be able to exert that influence on a single politician.
- 3.7 Leveson Inquiry. In setting up the Leveson Inquiry into the culture, practices and ethics of the press, the Prime Minister included media plurality in its terms of reference. This linkage recognises that the Government sees an inter-relationship between plurality and press practices. We believe there are two clear connections. The first is that one consequence of excessive power is a sense of impunity from which unethical practices flow and in the case of News of the World, escape adequate scrutiny even from the police. Perhaps more importantly however, is the unique need in media to have a sufficiently broad range of journalistic voices to ensure independent challenge of competitor behaviour. If competition should benefit us all as consumers, plurality should benefit us all as citizens. The risk of either deterioration or consolidation in the news sector (as Rupert Murdoch has predicted to three newspaper titles in Britain) may mean that the press's future ability to call out malpractice of its own is significantly reduced.

#### **4. ASSESSMENT: CURRENT WEAKNESSES OF MEDIA PLURALITY FRAMEWORK**

- 4.1 We believe that while News Corporation's BSkyB bid has been, and if reactivated remains, the most immediate threat to plurality, it is time to assess the entire media plurality framework to both learn the lessons from 2010/11 but also to reflect how the industry itself has changed since 2003 and is likely to change in the coming years. However, we should recognise it is impossible to design now a framework that can endure for the long term. Technologies and business models are changing

rapidly and it is not possible for policy makers to have a crystal ball. For example, as Claire Enders, Alastair Campbell and several academics have argued to the Leveson Inquiry, national newspapers still have extraordinary influence on British public life despite declining print sales. We need to accept that changes to the framework may need revisiting again as circumstances change.

We believe the changes now must address the following problems in both the rules and process for measuring plurality:

- 4.2 **Cross-media ownership laws are now out of date.** Plurality considerations are vital in looking at the public interest in cross media ownership concentration, especially given the propensity of competition authorities to see different media channels as different economic markets. Government accepts this already through a number of media ownership restrictions on newspaper groups. These laws were last revised almost 10 years ago and are now out of date, given developments in the sector. In particular, the public interest arguments for restricting newspaper ownership of an ITV licence but not of Sky TV do not appear to serve plurality well today. Sky has huge penetration and audience while digital switchover and the growth of internet TV render the special treatment of analogue spectrum outdated.

There is also no provision for cross media ownership involving what are now very large online players who may venture increasingly into cross-media mergers. To pose this as a thought experiment: it may well be that Northern & Shell owning Channel 5 and the Express/Star titles is less significant a plurality problem than Facebook owning News International titles.

- 4.3 **Market Power / dominance which, while on the face of it is a competition issue, has knock-on effects on plurality and the wider public interest.** As Enders Analysis argue in their submission, *“influence is partly by a media business’ share of the production and dissemination of news and opinion. However the main impact of a large company is felt through its financial power not its role in news production.”* We agree with this high level notion, and believe that the direct consequence of financial power for plurality can be seen.
- 4.4 First it allows the company to extend its power in the market place in critical areas, for example [through high levels of spending on] advertising, or distribution. This will tend to accelerate the dominance of one company and accelerate the decline of others and is likely to lead to accelerated market exits. In these circumstances barriers to entry also increase. In short there is less plurality and we would argue a reduction in innovation.
- 4.5 Second it allows the company to aggressively cross-promote and provide bundled services which reduce access for the public to a plurality of voices. While this threat is particularly relevant when considering likely bundling should News Corp own all of BSkyB, one could imagine other alliances and bundles involving TV, telephone, internet service, and news companies that would likewise exploit economic power and cross-promotion in a manner that threatens plurality.



- 4.6 In the internet space, those companies with distribution might could cross-promote the content of some titles over others as part of a commercial alliance. As with Sky in pay TV, these companies with “dominant distribution” power, so important to news and other content providers, should be subject to plurality obligations.
- 4.7 Third, this economic might and conglomerative effects increase the power of the company in the minds of politicians. It could surely be argued that Richard Desmond does not own enough media to be as influential as Rupert Murdoch and Guardian Media Group's choice not to leverage conglomerative effects among its companies likewise make it less influential.
- 4.8 **Political power and influence is inadequately dealt with in the current plurality regime.** The original fears of individual proprietors being able to set the agenda were borne out quite dramatically this year. Yet up to this point, authorities had been minded to measure this test of influence by proxy i.e. by looking at share of news audience. We now know that this is insufficient. We need a broader assessment of whether a media company is exerting undue influence on the conduct of public affairs that is more textured than simply testing news audience share. This will not be easy but we need direct scrutiny of political influence not indirect proxies
- 4.9 **A reliance on transaction-led decision making has evidently failed.** The gradual accumulation of more and more power and influence by News Corporation and the ongoing potential for any media company to threaten plurality through behaviours rather than transactions indicate that plurality needs to be reviewed periodically or, though potentially less efficient, on an ongoing basis. It should also be noted that deterioration in plurality can either happen gradually – in the case of Sky's growing dominance – or quickly – in the case of digital media platform dominance such as Google, Facebook, Apple and others. Therefore we appreciate that further consideration could have to be given to the circumstances in which Ofcom could intervene between periodic reviews
- 4.10 **Too much power is invested in the Secretary of State, which undermines public confidence.** The failure to refer the News Corp bid for BskyB is a clear example of this as has been recognised by Jeremy Hunt and his then shadow Ivan Lewis. However it is important that elected politicians should still have a say on public interest matters, including and especially whether undue influence is exerted over public affairs. We recognise that the right constitutional arrangements to resolve this is therefore a complicated question. We would as a minimum endorse the position taken by the House of Lords Communications Committee First Report in 2008 which suggests joint and concurrent powers for the Secretary of State and Ofcom. (<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12209.htm>).

## 5. RESPONSE TO THE SECRETARY OF STATE'S QUESTIONS

In light of the assessment provided in Section 4 above, we provide the answers below in response to the Secretary of State's questions. Note that these responses are brief and high level – we would like to discuss them in more detail face to face given that much of this is new ground.

### 5.1 How should we measure media plurality across platforms?

We would suggest doing two things:

- i. Amend UK media ownership regulation – in two ways:
  1. *Include entities of comparable size or influence in the specific media ownership rules* thus recognising that Sky for example, is a far more significant TV company today than ITV on almost all metrics. Moreover, digital switch-over and the onset of internet TV make special treatment for analogue stations outdated
  2. *Include internet within the remit* so that cross-media mergers between very powerful digital companies and newspaper groups would be caught in accordance with the relevant binary test
- ii. Introduce a periodic review of media plurality – this would require Ofcom to review plurality at regular intervals, not just at the point of transaction, thereby enabling emerging threats to plurality to be identified and addressed. It would also allow Ofcom to initiate public interest tests for media mergers as well as the Secretary of State, as recommended by the Lords Communications Committee in its 2008 First Report

Periodic reviews of media plurality incorporate several factors that we now know can harm plurality even if they pass competition tests, including:

- News market share. This is already used today and should continue, applying both within channels such as TV or the national press as well as across channels. We should recognise however that only measuring news market share - while necessary - is not sufficient in measuring media plurality
- Platform dominance. This is already recognised in pay TV for example with Sky constrained on its use of the EPG but may soon be relevant for large digital players who attract larger audiences than television
- Distribution dominance. This may take several forms. For example: News Corp bundling newspaper content of its titles with pay TV packages; or internet search engines permanently preferring one newspaper source over another as a result of a commercial alliance

These three factors can all lead to deterioration in plurality either in and of themselves or by accelerating the market exits of others and creating barriers to new entrants. In addition, a fourth factor would be:

- Excessive influence on public affairs. Though explicit and implicit in statute, this has only been measured to date through the proxy of news market share. However the stark events of the summer reveal this is an inadequate way to measure this influence.

- 5.3 **Should there be limits on news audience share?** Yes, as stated above, we believe Ofcom's current approach is necessary, but not sufficient
- 5.4 **What could trigger a review of plurality?** As stated above, we believe Ofcom should conduct periodic reviews of plurality. These would in turn provide ongoing guidance to market players who would self-regulate in between reviews
- 5.5 **Should websites be included in plurality?** We believe any website which has sufficient economic or distribution power to threaten UK media plurality should be included. Several websites in UK media today are dominant content providers themselves and perhaps more significantly have a distribution role that underpins the future success of almost all news content providers
- 5.6 **Should the BBC be included?** We believe that the BBC's conduct in relation to this broad view of plurality is already addressed adequately in the regulatory framework for the BBC and see no need to include them in this framework