

KPD 6/3/1/24 pl. 3 Plurality

- 1. Difficult to give reasons
- 2. Rules have same problem but they are clearly set out and agreed by Parliament.

PLURALITY DUTY – PROS AND CONS

Introduction

Plurality in broadcast media ownership is concerned with the number of providers of a service. It should be differentiated from diversity which refers to the choice of material open to a viewer or listener.

2. In broadcast terms, we have sought to ensure that there is a degree of choice between service providers. For example, the radio ownership rules will ensure at least two owners in addition to the BBC in well-developed markets. In TV, even with a joint owned channel 5 and channel 3, there would be at least three owners. The rules do not seek to do anything other than ensure a certain number of owners. They do not consider the way in which the owner may operate mainly because, in the case of broadcast media, there are already strict rules about accuracy and impartiality. There are nevertheless potential issues about coverage and selection of material, so it important that no one voice should be able to dominate the supply of broadcast services.

3. It is important to recognise at the outset that plurality is a subjective value and the appropriate amount of plurality is a matter of judgement. It is not possible to conduct the sort of analysis that one can in competition law which can produce an answer which has an economic justification. Plurality will never be that objective. Our approach has been to assume that three owners is generally about right but, there is no exact science to that number; it just "feels" about right.

Pros

Bill Handling

4. The obvious advantage of a plurality test is that it should greatly assist with the passage of the Bill. A plurality test is seen by many as being the solution to all the potential problems associated with plurality (Lord Puttnam's amendment is attached).

Ability to Adjust to Changing Circumstances

5. A plurality test could give Ministers an opportunity to look at the specific circumstances of a particular case even where it satisfies the media ownership rules (or where there are no media ownership rules). Clearly we are prepared to accept the consequences of the maximum degree of concentration allowable under the new rules or we would not have proposed the changes that we have. However, it is arguable that changing circumstances in the future might make it reasonable that Ministers could prevent a merger consistent with the proposed rules on the grounds that circumstances had changed sufficiently to make the current rules inadequate in all circumstances.

6. Take Channel 5 as an example. If in the future Channel 5's share of the TV audience exceeded Channel 3's, it would not be possible to prevent someone with over 20% of the newspaper market from holding what would then be the largest free-to-air terrestrial broadcaster (although it would be possible to introduce a nominated news provider or increase its public service broadcasting requirements). A plurality test could allow Ministers to block such an acquisition on the grounds that circumstances had changed from the time when the rules were changed, and the merger represented an unacceptable loss in plurality. This is probably the strongest argument in favour of a plurality test and the basis for Lord Puttnam's case.

7. More generally, a plurality test could give Ministers/OFCOM more confidence about dismantling the existing ownership rules over time. Having had rules for so long, it would be odd to remove them completely and be left with nothing but competition law.

Greater Flexibility

8. In some cases the ownership rules have a clearly arbitrary element. The obvious example is the rule preventing someone with more than 20% of the newspaper market from holding a Channel 3 licence. This rule would not prevent someone with 19% of the newspaper market from holding the licence, and it does not differentiate between someone with 20% and someone with 30% or 40% of the market. A plurality test would allow Ministers to take decisions which reflect these graduations. It would be possible, for example, to block an acquisition of a company with a ITV licence by someone with 19% of the newspaper market. This would of course only be possible where the jurisdictional thresholds of share of supply/turnover are satisfied although in this example no doubt turnover will be satisfied. It could also be relevant in the context of Channel 5 where Ministers, having removed the 20% restriction, could conclude that it was acceptable for someone with 21% of the newspaper market to hold a channel licence but not someone with, say, 35% of the newspaper market.

Limited Impact

9. The plurality test would be triggered by Ministers; but only where jurisdiction satisfied – Ministers will not be able to trigger the test in mergers which do not satisfy these thresholds, just like competition issues cannot be looked at under the merger regime unless these thresholds are satisfied. You could not fetter your discretion by saying in advance that you would not use the power and you would have to look at each case on its merits. However, given that you have just agreed the package of media ownership rules, it would not be unreasonable for you to conclude in most if not all cases that any acquisition or merger consistent with the proposed rules would not raise plurality concerns. In other words, Ministers will not need to use the power unless they want to, and it may be that the power is never used (although future administrations may act differently).

Cons

An additional Burden

10. At present media acquisitions have to comply with the media ownership rule and with competition law. The obvious criticism of a plurality test is that it represents, in Puttnam's formulation, an additional regulatory burden. In other words, a media acquisition would have to satisfy the ownership rules and competition rules and also pass (or at any rate not be caught by) a plurality test. This looks a bit like double jeopardy as the plurality test and the media ownership rules both relate to the same issue (unlike, for example, the special newspaper regime which looks at competition and plurality). But the plurality public interest will be discretionary and when exercising the power regard must be had to all relevant facts to ensure proportionality.

11. It may, however, be possible to design a test so that it only operated where there were no longer any media ownership rules. Thus it would not apply in the case of radio acquisitions (because we still have the 2+1 rules) or where a newspaper wanted to acquire a channel 3 licence (because of the continuation of the 20/20 rules) but it would apply in the case of a newspaper wishing to acquire Channel 5 (since, with the removal of the 20/20 rules, such an acquisition would be governed only by competition law.) In effect you would be saying that, rather than waiting for all the ownership rules to be removed and then considering whether a plurality test was required as a long stop, a plurality test should be introduced as and when specific areas of media ownership have their media ownership rules removed. (But it would still be discretionary so there may not be any harm in it being potentially applicable in all cases).

Uncertainty

12. The concept of a plurality test was not generally welcomed by those most likely to be affected by it. It undoubtedly introduces a greater level of uncertainty into media acquisitions and, while businesses may be used to dealing with uncertainty, it is not a good in itself and should only be introduced where there are clear and balancing advantages.

Operation of the test

13. Although a large number of people support a plurality test, it is not always very clear how they anticipate such a test being applied in practice.

14. As indicated above, plurality is inevitably a subjective matter. We developed a plurality test for the media ownership consultation exercise (copy attached) but all that test really does is indicate the things to be measured. It does not (and cannot) give any guidance as to what the "right" amount of plurality should be. Given this, Ministers may have difficulty in explaining and justifying why an acquisition which complies with the ownership rules nevertheless does not pass the plurality test. This would suggest that the test

should be limited to those areas where there are no longer any media ownership rules.

Scope of test

15. There is a danger of creating a test which is purely cosmetic. If the intention is to give Ministers a second chance to look at a merger, there is every likelihood that they will conclude that it is acceptable as it complies with the media ownership rules which they have endorsed. If it therefore appears that the test will never be used, and adds nothing of substance to the existing rules (or lack of them); it may not work as a concession.

16. There are ways in which the test could be made more substantial. Two possibilities suggest themselves:

(a) the test could look not just at the effect of plurality in terms of number of providers of services but also look at the nature of those providers. This would allow the Secretary of State to look at each proposed merger or takeover on a case-by-case basis to see whether there may be reasons to believe that the particular proprietor in question might, for example, be considered to put too much strain on the impartiality rules. If it was felt that they would, the merger could be blocked or other enforcement action taken. This would again be a matter of judgement and one could foresee possible judicial review from a newspaper owner whose merger was blocked on the grounds that they were being unfairly singled out. We would in effect be saying that we were not convinced that the content rules would always be adequate in the case of some owners.

(b) the test could take into account other media interests, not just those covered by the media ownership rules. For example, under the proposed and existing rules, a person who controls a cable or satellite network is treated no differently from anyone else making a media acquisition. The plurality test could allow the Secretary of State to take this into account as a factor in reaching a decision on a media acquisition. (Indeed, the test could be defined so as to allow OFCOM to take into account any media interest including magazines and publishing, but we would not recommend extending it this far). This gives a plurality test more substance and it could provide a justification for blocking a merger which the proposed rules would otherwise permit. However, ~~it is not especially easy to justify why running a cable or satellite network should be a relevant consideration.~~ Under the present arrangements platform owners have to allow fair, reasonable and non-discriminatory access to these platforms. Against this background, it is not clear why platform ownership should be a relevant consideration in the acquisition of another media interests, and decisions may be judicially reviewed.

17. Both of these approaches are likely to be controversial to those who may be caught by them. In all cases, we can anticipate it being difficult for

Ministers to provide a convincing reason for exercising their powers under the plurality test as the inevitably subjective nature of the test may make it appear arbitrary and unfair. This, of course, need not be a problem if the intention is either not to use it in practice or only in those few cases where a clear case can be made – the public interest regime of the EA 2002 is intended to be used exceptionally. The policy is that for most cases competition will be enough, for some it may not be and Ministers should make those decisions. The difficulty could be reduced to some extent through producing guidance although the guidance itself is inevitably likely to suffer from the same lack of clarity as the operation of the test itself.

Puttnam plurality test

Media plurality public interest consideration

- (1) Section 58 of the Enterprise Act 2002 (c. 40) (specified considerations) shall be amended as follows.
- (2) After subsection (2) there shall be inserted—
“(2C) The public interest in—
 - (a) the maintenance of a range of media owners and voices sufficient to satisfy a variety of tastes and interests;
 - (b) the promotion and maintenance of a plurality of broadcast media owners, each of whom demonstrates a commitment to the impartial presentation of news and factual broadcast programming; and
 - (c) the promotion and maintenance, in all media including newspapers, of a balanced and accurate presentation of news, the free expression of opinion and a clear differentiation between the two;
is specified in this section.”
- (3) In subsection (3), after the words “any consideration”, there shall be inserted “(other than the consideration specified in subsection (2C))”.

G:\BPD 6\Stuart\media ownership\plurality paper.doc