ENDERS|ANALYSIS

Annex 1: Media ownership rules

Claire Enders

30 April 2012

This paper argues for a cap on the share of the total revenues of the UK's media industries that can be held by any one company. The purpose of this change is to ensure that plurality – the diversity and range of suppliers of media to UK citizens – is maintained at a high level.

We argue that focusing on the plurality of providers of news and current affairs is not sufficient to ensure true diversity. Any sufficiently large company, whether or not it participates in the provision of news, can strangle the vibrancy and dynamism of the UK's creative industries which are so important to future employment and exports. A cap on the percentage share of the media market will protect against any one company having too much control.

Media ownership: the background

The UK and many other countries have laws that control media ownership. The purpose of this legislation is principally to maintain a minimum amount of plurality.[1] The word 'plurality' has never been adequately defined in UK legislation but research carried out for us has proposed that it means 'a large number or quantity or profusion'.[2] In putting rules in place to maintain diversity of ownership of media, national parliaments have wanted to ensure that mass media are controlled by a large number of different people and businesses. Legislators have wanted to maintain plurality of media because it 'protects the citizen and democratic institutions from limitations on the freedom of expression and because it helps maintain cultural vitality.[3]

The Bill that became the 2003 Communications Act proposed to loosen media ownership regulations and some legislators were concerned that the change would eventually cause a deterioration in the degree of plurality in UK media. The parliamentary Joint Committee, chaired by Lord Puttnam, that scrutinized the draft legislation therefore proposed a number of measures to help buttress existing levels of diversity of media ownership.

The Committee was successful in inserting a clause into the Act that gave the responsible Secretary of State (originally of Business, now of Culture) the right to order an inquiry into whether individual takeovers might result in an unacceptable diminution of plurality. The Secretary of State is entitled to refer any proposed merger to Ofcom for an investigation, followed if necessary by a full scale inquiry by the Competition Commission. At the end of this process, he or she is entitled to block the combination on the grounds that the remaining plurality will be insufficient.

Secretaries of State have used the right to order an inquiry on two occasions. First, the government asked Ofcom to investigate the possible threat to plurality arising from the purchase of ITV shares by BSkyB in late 2006. In 2010, Vince Cable, the

[1] See, for example, Ofcom's *Media Ownership Rules review*, November 2009

[2] Concluding paragraph of note by Professor Charlotte Brewer, University of Oxford, submitted by Enders Analysis to the Ofcom review of the proposed takeover of BSkyB by News Corporation, December 2010

[3] *Consultation on Media Ownership Rules*, DCMS, November 2001

For Distribution to CPs

Secretary of State for Business, ordered an inquiry into whether News Corporation's proposed bid for BSkyB would reduce plurality to an insufficient level.

The current exclusive focus on news provision

In recent years, British institutions have tended to assume that plurality very largely refers to the diversity and choice of news media, not the entire mass communications industry. Parliamentarians, Ofcom and the Competition Commission have focused their attention on whether the provision of factual reporting, comment and opinion through the press, radio and TV are becoming concentrated in too few hands. For example, the Competition Commission's long plurality review of the 2006 purchase of ITV shares by BSkyB examined little except news provision. Ofcom's 2010 investigation of the proposed News Corporation bid for BSkyB focused closely on news because it 'is the most important content type'.[4]

The need to widen the meaning of plurality

The diversity of news providers is an important part of plurality. But it is only a part. Media ownership legislation was originally intended to make sure that our communications industries retained vitality and choice by ensuring that no one company could ever gain too large a share of society's expenditure on mass media.

Just 10 years ago, a DCMS consultation paper said that 'plurality maintains our cultural vitality. Different media companies produce different styles of programming and publishing, which each have a different look and feel to them. A plurality of approaches adds to the breadth and richness of our cultural experience'.[5]

Although the focus for the last few years has been entirely on the sources of news, those working on the last Communications Bill during 2002 saw clearly that plurality was a much wider concept. The Joint Committee on the draft Bill said that 'All decisions on media ownership controls ... [reflect] ... a balance between plurality and cultural considerations, on the one hand and economic efficiency, on the other.'

The UK's distinctive, fast-changing culture and the important industries that support it depend on creative people being able to find a route to their public. A wide spread of ownership means that one set of dominant ideas, or the interests of a small group of media proprietors, cannot direct or control the evolution of national culture or of public opinion. Britain has perhaps the most innovative and path-breaking cultural industries in the world, partly due to the plurality of our mass media.

The media industries act as the gatekeepers between the creative professions and citizens. We suggest that the core purpose of plurality obligations is to ensure that no gatekeeper can ever exert too much power. Since such power is generally exerted through financial dominance, it may make sense to restrict the percentage of the flow of money controlled by a single company.

A company or individual with very large financial firepower could easily control output in a certain media – through paying more for popular journalists, scoops,

[4] Ofcom *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, December 2010
[5] Consultation on media ownership rules, DCMS, November 2001

MOD400001724

For Distribution to CPs

successful TV shows or the rights to televise popular sports such as Formula 1 motor racing. One consequence would be that this company would probably gain viewers and revenues, creating a greater concentration of media power that would force less successful players out of the market.

The unrestrained operation of the free market - which always tends to drive out all but the most financially successful companies - and the maintenance of plurality and cultural vitality will sometimes be in conflict. The UK needs ownership legislation that ensures that no one company can dominate the media industries. Competition law is not enough to maintain vibrant and culturally diverse mass media.

Patterns of media ownership regulation around the world

Most developed countries impose controls on the ownership of the media. The regulations fall into three groups: restrictions on foreign ownership, limitations on the share of one medium and controls over the percentage of multiple media held by one company.

Restrictions on foreign ownership

Many large countries do not allow foreign proprietors to control enterprises in the TV, radio or press industries. Smaller countries, usually eager to attract investment and unsure of the commercial viability of their national media companies, tend to allow foreign holdings. In the debates on the 2003 Communications Act, which swept away foreign ownership restrictions on TV, parliamentarians were concerned that US companies would see ownership of TV companies as a route to market for American programmes. The health of the national TV production industry might be affected, they thought, by the influence of a media gatekeeper able to influence the source of programming.

This argument was rejected by Parliament and the UK has no foreign ownership restrictions unlike, for example, France, the US and Canada. Canada's rules exist to 'safeguard, enrich and strengthen the cultural, political social and economic fabric' of the country. [6] Australia has relaxed restrictions but retained the right to veto transactions carried out by non-nationals. Many other countries have also moved to reduce limits on foreign ownership.

Limitations on the share held of one medium

Competition law, which seeks to ensure that one company does not exert economic control in an industry, is increasingly used around the world as the means to ensure plurality inside individual media such as TV or newspapers. However many countries also retain caps on the maximum share that any one entity can own of a broadcast medium, either across the country as a whole or in any local area. The assumption in many countries is that competition law and practice – which often accepts that a market with only three participants is sufficiently competitive to ensure that no company dominates – does not ensure proper plurality in the sense we have identified of a multiplicity or profusion of providers.

The US restricts the number of TV and radio stations an entity can control in one geographic market. Spain forbids local or national dominance of radio while France insists that no one company can control more than half of the voting rights

[6] Broadcasting Act, Canada, 1991

MOD400001725

of a company that holds a satellite broadcasting licence. TV licence holders in Germany cannot hold more than 30% of viewing, or less if the broadcaster has large-scale interests in other media.

Cross media controls

Many countries try to ensure that a single company does not hold too powerful a position across the media industries. Competition law, which tends to see TV, radio, press and internet as in separate economic markets, and therefore not affecting each other in any way, struggles to deal with the issues created when single companies own large stakes in several different media. The assault on plurality that may arise when one firm builds a large share in two or more content distribution industries needs to be addressed though clear rules on cross media ownership. As media converge, the need to control total ownership, not just the market shares in one medium or another, becomes more and more obvious.[7]

Some jurisdictions have therefore put in place rules that seek to protect diversity. Australia, where News Corporation controls a very large fraction of all newspaper sales, insists on metropolitan areas having five different media 'voices'. In Germany, a plurality regulator examines proposed mergers to check that companies with large market shares in one industry cannot also become powerful in another market. France restricts national broadcasting licences to those companies that control less than 20% of the national daily press.

Enders proposal

Our suggestion, based on the experience in other jurisdictions, is that the most effective way of ensuring plurality is to introduce a cap on the share of the revenues of the total media market controlled by any company. The definition of the market might include advertising and subscription revenues, ticket sales, newsstand payments and physical media such as DVDs. A measure such as this could be implemented quickly and simply in the UK.

The advantages of imposing a cap on the share of total media industry revenues are as follows:

- A cap of, say, 15% would ensure that no one company could completely dominate the UK media industry. At least seven companies will always be participants
- A company that is highly successful in one market will be restricted from buying a dominant stake in another. This both maintains plurality and ensures that the acquirer will not be able to use the profits of one industry to act as a predator in another, driving out weaker competitors
- No one company would dominate UK culture
- As media converge, a 15% cap on the share of the revenues of the total industry would be a better – and much clearer – regulatory intervention than other forms of control
- Unlike rules covering, say, shares of audience or shares of news consumption, the use of a percentage cap on revenue is a good way of controlling the total influence of a single company over customers, suppliers, regulators, governments and other institutions

[7] DCMS Secretary of State Jeremy Hunt made this point in his speech to the Royal Television Society on 14th September 2011.

A crucial initial task is to define what we mean by the media market. If our proposal is to put a rule in place that says that no one company or proprietor can control more than 15% of the revenues of the media market, we need to lay out a clear definition of what is included in this market. It is obvious that newspapers are media – they convey information and entertainment from a writer to a reader. But is Facebook? A phone directory? A video game?

We suggest the following definition.

> *An organisation (or individual) is in the UK media market if it produces or selects audio, visual or text-based content that is conveyed in physical, analogue or digital format to an audience of multiple consumers not present at the moment of initial creation of that material and who are not consuming the content principally for professional or business reasons. To be included in the market a company (or individual) must produce or select content that: (1) a reasonable person would consider to be targeted at the UK public; and (2) does not consist solely of advertising*

This definition *excludes:*

- Revenues from the live performances of music, exhibitions of art or ticket sales to football matches because there is no conveyance of the content to a remote audience. (But the revenue from selling cinema tickets to, say, a live performance from Covent Garden is media industry revenue.)
- Commissions or agency fees (such as advertising agency income or wholesaler margins in the newspaper trade) that arise from the performance of a service to media companies. As we define it, media industry revenue only includes the money actually accruing to the media company.
- Revenue that is derived from providing a communications pipeline of some form, such as a telecommunications provider offering broadband provision.

The definition *includes:*

- The revenue of companies that only have a limited role in producing new content. Most importantly, we see the revenues of Facebook and Google as being inside the media industry because these companies convey material to remote audiences. They select content of relevance to particular individuals and this is what makes their advertising slots valuable to advertisers.
- Both advertising, subscription and 'pay-per-view' revenues.
- Content that is owned by a non-UK company and provided from a non-UK physical location but which is intended for a UK audience.

How might a cap operate in the UK?

We believe that our definition means that the list of media inside the total market includes

- National newspapers
- Regional newspapers
- Consumer magazines
- Video games
- Television advertising
- Television subscription fees
- Books both in physical and digital form
- Recorded music both in physical and digital form
- Cinema
- Video/DVD rental and purchase
- Internet subscriptions
- Internet advertising
- Radio advertising

The attached Figure 1 shows that the total current revenue for this market was about £31.8 billion in 2010.

The attached Figure 2 lists our estimates of market share for the main participants in the market. The BBC is the largest provider with about a share of about 12%. News Corporation is the second biggest player at about 11% of the current total. (We have included a 39% share of BSkyB's revenue in this calculation because News Corporation has this size of stake in the company.) The rest of BSkyB is next, with 9%, and then ITV with 5%. Google also has about 5%.

If News Corporation were assigned the whole of BSkyB in this calculation, on the basis that it has substantial say in the running of the company, it would have a market share of about 20% in 201.Thus a combination of BSkyB and News Corporation would breach the proposed cap as, for example, would a merger of Virgin and BSkyB or News Corporation and ITV.

Our estimates of the figures for 2015 are provided in Figures 3 and 4.

Administering the regulation would not be complex. Each year Ofcom would produce an estimate of the total size of the market. It carries out very similar tasks already. It would calculate the shares of the major participants and publish the information. If a company breached the cap it would be obliged to sell a sufficient portion of its activities to bring it inside the limit within six months.

All transactions in the media industry would be assessed by Ofcom and the OFT to determine whether they would result in a breach of the cap. If so, they would be blocked. There will be no need to carry out 'public interest' investigations although mergers and takeovers will still be subject to the normal competition policy tests.

Market share caps, such as the one we propose here, are arbitrary. But they do provide two substantial advantages.

- They are easy to administer

They provide clarity and certainty to industry participants. Every company will know with accuracy where it stands from year to year. Acquisitions will not therefore be subject to any regulatory uncertainty

MOD400001728

Figure 1: The size of the UK media market in 2010 [8]

	Total	News Corporation	
	Revenue (£bn)	Revenue (£bn)	Market share*
National newspapers	2.7	1.2	43%
Regional newspapers	1.9		
Consumer magazines	1.6		
Television	11.9	2.2	23% (39%)
Books	1.8	0.1	7%
Music	1.2		
Cinema	1.1	0.2	13%
Video/DVD	2.6	0.3	12%
Internet (print content)	0.2	0.1	4%
Internet (advertising)	3.7		
Radio	1.2		
Video Games	2.1		
TOTAL	**31.8**	**4.1**	**11% (20%)**

*Figure in brackets assumes 100% News Corporation ownership of BSkyB

Figure 2: Main participants in 2010

	Total revenues (£bn)	Market share**
BSkyB[9]	4.6	14% (9%)
News International	1.2	4%
Other News Corporation	0.6	2%
News Corporation incl. 39% BSkyB	3.5	11%
News Corporation incl. 100% BSkyB	6.3	20%
BBC	3.7	12%
ITV	1.7	5%
Google	1.6	5%
DMGT	0.9	3%
C4	0.9	3%
Virgin Media	0.8	3%
Vivendi	0.7	2%
Trinity Mirror	0.6	2%

**Figure in brackets excludes News Corporation's stake

[8] This excludes the providers of transmission services, and the revenue arising from these services in companies such as Virgin Media. So, for the avoidance of doubt, revenues arising simply from telecommunications services, such as broadband provision, are excluded from this table.

[9] The proposed cap would assign the revenues of companies to their ultimate owners. So News Corporation's share of 39% of BSkyB would mean that 39% of its revenue would be counted in the calculation of News Corporation's share of the total media market.

Figure 3: The size of the UK media market in 2015

	Revenue (£bn)	News Corporation share*
National newspapers	2.1	34%
Regional newspapers	1.4	
Consumer magazines	1.1	
Television	13.2	16% (42%)
Books	1.4	7%
Music	1.0	
Cinema	1.3	13%
Video/DVD	2.1	12%
Internet (print content)	0.7	4%
Internet (advertising)	6.7	
Radio	1.1	
Video games	2.7	
TOTAL	**31.8**	**10% (20%)**

*Figure in brackets assumes 100% News Corporation ownership of BSkyB

Figure 4: Main participants in 2015

	Total revenue (£bn)	Market share**
BSkyB	5.5	16% (10%)
News International	1.2	2%
Other News Corporation	0.6	2%
News Corporation incl. 39% BSkyB	3.5	10%
News Corporation incl. 100% BSkyB	6.3	20%
BBC	3.7	10%
ITV	1.7	6%
Google	1.6	9%
DMGT	0.9	3%
C4	0.9	3%
Virgin Media	0.8	3%
Vivendi	0.7	2%
Trinity Mirror	0.6	1%

**Figure in brackets excludes News Corporation's share

Important notice: By accepting this research note, the recipient agrees to be bound by the following terms of use. This research note has been prepared by Enders Analysis Limited and published solely for guidance and general informational purposes. It may contain the personal opinions of research analysts based on research undertaken. This note has no regard to any specific recipient, including but not limited to any specific investment objectives, and should not be relied on by any recipient for investment or any other purposes. Enders Analysis Limited gives no undertaking to provide the recipient with access to any additional information or to update or keep current any information or opinions contained herein. The information and any opinions contained herein are based on sources believed to be reliable but the information relied on has not been independently verified. Enders Analysis Limited, its officers, employees and agents make no warranties or representations, express or implied, as to the accuracy or completeness of information and opinions contained herein and exclude all liability to the fullest extent permitted by law for any direct or indirect loss or damage or any other costs or expenses of any kind which may arise directly or indirectly out of the use of this note, including but not limited to anything caused by any viruses or any failures in computer transmission. The recipient hereby indemnifies Enders Analysis Limited, its officers, employees and agents and any entity which directly or indirectly controls, is controlled by, or is under direct or indirect common control with Enders Analysis Limited from time to time, against any direct or indirect loss or damage or any other costs or expenses of any kind which they may incur directly or indirectly as a result of the recipient's use of this note.

© 2012 Enders Analysis Limited. All rights reserved. No part of this note may be reproduced or distributed in any manner including, but not limited to, via the internet, without the prior permission of Enders Analysis Limited. If you have not received this note directly from Enders Analysis Limited, your receipt is unauthorised. Please return this note to Enders Analysis Limited immediately.