

**Campaign for Press and Broadcasting Freedom response to draft criteria for Module 4 of the Leveson Inquiry, plus summary statement of what kind of regulation is required and how it should work.**

The Campaign for Press and Broadcasting Freedom (CPBF) is a leading independent organisation dealing with questions of freedom, diversity and accountability in the UK media.

## **Section 1**

### **MEDIA PLURALITY, OWNERSHIP AND THE PUBLIC INTEREST TEST**

The Campaign for Press and Broadcasting Freedom believes that module four of the inquiry should engage with its original terms of reference, which called for recommendations “for a new more effective policy and regulatory regime which supports...*the plurality of the media*’ and address ‘how future concerns about press behaviour, *media policy, regulation and cross-media ownership* should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police” (emphasis added).

This is an important moment and historic opportunity to address the totality of communications regulation. The UK media system has high levels of concentration of ownership, bottlenecks and gateway control at key points across the press, TV, radio and online media markets. Current media ownership rules do not adequately protect pluralism. As Ofcom highlighted in its review of the proposed News Corporation/BSkyB merger, once a merger is approved, ‘there is no subsequent opportunity or mechanism to address...plurality concerns that may emerge in future’<sup>1</sup>. Under the merger proposals, News Corp/BSkyB would have increased its reach amongst regular news consumers to 51 per cent. That level of market concentration contradicts the presumption that media ownership rules can be relaxed due to naturally occurring digital diversity. Strong *ex ante* powers are required to assess and where necessary prevent levels of concentration that would stifle innovation, domestic production, and choice and quality for viewers and users. We propose an approach that is democratic, flexible and responsive to media plurality problems in the way media content services are organised and supplied across the UK.

## **Summary**

**The CPBF proposes that such a policy and regulatory regime should centre on the “Public Interest” (PI) test established by the Communications Act 2003, and that this should be revised and expanded for the purpose. We regard the test as one important means of helping to secure media pluralism and extend PI obligations to commercial media firms that have a significant reach and influence.**

**Strong cross-ownership rules are needed with clear ceilings on the share across media markets.** Any supplier with a 15 per cent share in a designated media market should be subject to a PI test in respect of any merger or acquisition in the same or another media market. Ownership concentration and cross-ownership above the 15% threshold may be permitted

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<sup>1</sup> Ofcom (2010) *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, London: Ofcom, p15.

subject to organisations meeting certain public interest obligations in their practice. 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).

**Ofcom should have concurrent powers to initiate the PI test rather than control resting exclusively with the Secretary of State.** The test could be applied in accordance with any of the following conditions:

- The passing of market share thresholds.
- In response to evidence of 'significant public concern'
- Initiated by Ofcom or the Secretary of State when public interest considerations arise.

Determining media pluralism should involve a combination of quantitative measurement, qualitative assessment, democratic input and oversight. The PI test should be initiated principally on the basis of market share. However, we recommend a discretionary dimension that would allow the Secretary of State or Ofcom to initiate a PI test in accordance with criteria and processes established in law. Ofcom should be required to have regard for evidence of significant public concern and to initiate the test in response to such concern. Ofcom should be subject to periodic review by the Culture Select Committee on the operation of the test as part of a review of media plurality and regulation.

#### **Market thresholds**

**No provider with a 15% share in a designated market should be permitted to own any further properties in the same market or 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, and contribution to the 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).

Defining the market by revenue would not provide a sufficiently sensitive instrument to identify problems of market and media power. We favour a more compound approach that involves:

- A total market threshold
- The relevant total market may be best defined as the market for media content services across UK television; newspapers and periodical publishing, radio and online.
- Thresholds in designated markets (the markets for news and markets for media content services). Key designated markets would include national and regional news services; television and radio content services.
- Discretion to allow the regulator to initiate the test on PI grounds.

#### **Initiating the PI test**

**Ofcom should have discretionary powers to conduct a PI test initiated on grounds other than market share.** This should be done under criteria and processes that are set out in statute law and subject to parliamentary and judicial review.

Ofcom should have authority to make determinations on the public interest issues and remedies. The regulator should have a general power to act to ensure that in the UK or any part of the UK there is a sufficient plurality of views in each market for news content services and a sufficient quality, range and diversity of media content services on each of the main platforms by audience share.

The PI test should not be limited to news markets alone nor to criteria solely concerned with news and information services. The existing PI test provides grounds for intervention in media mergers on behalf of considerations including

- Accurate presentation of news (newspapers).
- Free expression of opinion (newspapers).
- A sufficient plurality of persons controlling media enterprises serving an audience (broadcasting).
- The need for a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests (broadcasting).
- The need for persons carrying on media enterprises to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (Broadcasting).

This list needs to be expanded and updated for convergent media. Criteria for the PI test and remedies should include:

- source diversity
- content diversity
- freedom of expression (including protection for editorial freedom)
- transparency (disclosure)
- fair dealing
- adherence to standards (i.e. relevant self-regulatory codes; compliance with relevant rules and law)
- application of the fit and proper person test.

### **Conditions and obligations**

**Firms may be permitted to operate up to a market share of 30% subject to meeting any conditions imposed by Ofcom or undertakings drawn up and agreed with the regulator.** No commercial entity would be permitted to have control above 30% in designated markets. A higher share would only be permitted where the supply was under public ownership and governance. Ofcom would have powers to safeguard public interest consideration by requiring divestment, above 15% market share, or other structural remedies, or by requiring behavioural conditions.

Public interest obligations (PIOs) would be applied

- to place specific structural or behavioural requirements on the activities of firms with a market share above 15%
- as a means of monitoring and enforcing adherence to broader standards of conduct, including codes of conduct
- as a broader agreed set of standards and requirements for media service providers in particular markets. For instance in news there might be obligations concerning investment in investigative journalism; in television services there might be obligations concerning investment in original programming.

The public interest test is not designed to restrict the size of publicly funded or publicly owned media. 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 PI test, but should also be granted special consideration as public service media.

There are other issues that policies for media plurality need to address. We have set out our proposals in responses to the Ofcom consultation on measuring media plurality and to the Culture, Media and Sport Committee Inquiry into Media Pluralism. One important problem to remedy concerns distribution. The move from rail to road distribution and the dominance of the system by the major publishers make it difficult for smaller publications to have equal access to markets as their larger competitors. This is an issue that needs to be addressed in the interests of plurality and equal access to markets. The French system, which guarantees distribution to smaller titles, is one that deserves examination.

## Section 2

### **RESPONSES TO MODULE 4 QUESTIONS AND PROPOSALS FOR REGULATION**

#### The criteria

The Campaign welcomes the draft criteria and wishes to draw attention to the following points. They are made with reference to the numbered paragraphs in the Draft Criteria document.

1.1d. The Campaign supports the idea that any system should be ‘capable of universal application’ but suggests adding ‘and accessible to all members of the public without charge’.

2.3. Delete ‘sufficiently’. The setting of media standards should involve consulting media interests (employers and trade unions), but ‘sufficiently’ implies that standards would be set by media interests, though in a manner designed to ‘command public respect’. This gives the media too great a role in the process.

3.3. Delete ‘editors’ and insert ‘editors and proprietors’; for as the evidence before the inquiry has shown, proprietors are ultimately responsible for the tenor and direction of their publications. Although they may delegate that authority, they must carry responsibility for the actions of their editors in relation to codes of practice or their equivalent.

4.1. The Campaign strongly endorses the view that remedies must be available to both individuals and groups.

5.1. Delete ‘sufficiently’ and ‘reasonable’. The aim should be to establish a financially viable organisation independent of the industry; this can be done without placing a disproportionate burden on the industry, the government or the taxpayer. It has been the lack of financial independence of the Press Council and the PCC from the proprietors that has underpinned the failures of those organisations.

**The nature of the regulatory regime**

A Media Standards and Freedom Council – MRFC - should be established by statute. Its remit would not include media providers already regulated by Ofcom under the provisions of Communications legislation.

Its **aims** should be:

- To foster high standards in the presentation of news and information in all forms
- To promote both the free dissemination of news and information in the public interest, and professional and ethical standards.

Its **duties** should be:

- To investigate and monitor matters relating to the freedom of expression, media standards, ownership and control in the industry and to report to Parliament on any matters it thinks appropriate to this end.
- To produce a code of ethical standards, which is applicable to the presentation of news and information across the media (other than those regulated by Communications legislation), in consultation with the media industry and the general public.
- To issue advice and guidance to the media and the public on matters relating to its responsibilities.
- To report annually to Parliament and consider any matter referred to it by either House of Parliament.
- To administer a public right to redress on matters relating to the application of its code of ethical standards.
- To maintain and publish detailed records of all its activities, including records of complaints mediated, and the progress and results of those taken further by the Council, calibrated closely to the provisions of the code of ethical standards.

Its **powers** should be:

- To assist members of the public in making a complaint to a media organisation under the Council's code of ethical practice, with a view to achieving resolution within 14 days of the complaint being laid before it.
- Where no resolution based on mediation is achieved to determine the question of whether there has been a breach of its code of ethical standards;
- Where it is satisfied that a complainant has established that there has been a breach, to order the publication to print an immediate acknowledgement online, and, where it considers appropriate, order a printed correction, retraction, clarification or apology in a section on the editorial page dedicated to the publication of responses to criticisms by readers. The wording will be agreed by the two parties with the council's ombudsman overseeing the process.
- Where an editor or publication does not comply with an order of the Council, to seek an order to enforce its ruling from the Courts of law; **or**
- Where the editor or publication is outside UK jurisdiction to order the relevant internet service provider(s) to suspend its distribution until the matter is resolved.

Once the Council begins to consider a complaint, and after mediation has failed, the complaint must be dealt with within a further 14 days.

Its **membership** shall consist of representatives of

- media owners and editors (20%)

- media trade unions (20%)
- members of the public nominated by civil society organisations (50%)
- members of the public selected by a process of public application (10%) – or some similar proportions.

The initial appointments process should be overseen by an **Appointments Commission**, appointed by the relevant Secretary of State, and scrutinised by a Select Committee of the House of Commons according a criteria designed to ensure that the process is transparent and the Commission representative of a wide range of views. Thereafter the Council will establish a **Renewal Committee** to oversee the replacement of members at three yearly intervals. No member of the Council can serve more than two terms of three years.

The Council will employ an **ombudsman** to receive complaints and handle the process of mediation.

The Council will delegate consideration of complaints where mediation has failed, to a Complaints Committee, made up of seven individuals, one a representative of the employers, one of the trade unions, 3 from the civil society organisations and one from the public section, plus an independent legally trained individual, who will chair the meetings, and will not be entitled to vote, if matters come to a vote. The rulings of the Complaints Committee will be reviewed periodically by the full Council.

The Council will also consider matters relating to its wider duties by establishing a Research Committee tasked with conducting and publicising research relevant to its duties.

The **financing** of the Council must be separate from government, should not be a burden on the taxpayer and should be borne by the widest cross-section of the media industry according to ability to pay.

The Council should therefore be funded by means of a levy on advertising revenues generated by the activities of the relevant groups, sufficient to fund its activities, but mindful of the varying capacities of organisations to pay as well as to overarching principles of fairness.

Provisions should be made for the Council to levy the revenue from the industry, so long as it is fair, reasonable and does not inflict incapacitating or damaging financial burdens on individual companies. The Council can, if it wishes, enter into arrangements with all or some of the industry bodies to facilitate the collection and payment of these levies.

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