

<p>1 2 (2.00 pm) 3 MR JAY: Sir, the first witness this afternoon is Mr Foster, 4 please. 5 LORD JUSTICE LEVESON: Thank you. 6 MR ROBIN EDWARD FOSTER (sworn) 7 Questions by MR JAY 8 MR JAY: First of all, please, your full name. 9 <b>A. Robin Edward Foster.</b> 10 Q. Thank you. You have kindly provided us with a witness 11 statement dated 17 July 2012. Are you content to 12 confirm the truth of its contents? 13 <b>A. I am.</b> 14 LORD JUSTICE LEVESON: Mr Foster, thank you very much indeed 15 for the statement and for the report on news plurality 16 in a digital world, which you've clearly prepared 17 timeously. I'm very grateful to you. 18 <b>A. Not at all. It was a great coincidence that it was</b> 19 <b>published this very day.</b> 20 LORD JUSTICE LEVESON: Oh, it's today? 21 <b>A. Today, yes.</b> 22 MR JAY: Mr Foster, you explain to us your expertise in 23 paragraph 1.1 of this statement and indeed what 24 Communications Chambers is. Can I ask you, in your own 25 words, to summarise that for us?</p> <p style="text-align: center;">Page 1</p>	<p>1 <b>society and plurality is an important aspect of that.</b> 2 <b>It involves two main things in my view, and this is not</b> 3 <b>new thinking by any means. I think you'd find this in</b> 4 <b>most material about plurality. The two things are to</b> 5 <b>make sure there is a reasonably wide range and diversity</b> 6 <b>of news and opinion available to the public, and the</b> 7 <b>second is to make sure that no single one of those news</b> 8 <b>providers or a few news providers become so powerful</b> 9 <b>that they have too much of an influence on</b> 10 <b>opinion-forming and the political agenda.</b> 11 <b>So two aspects of plurality. As I say in my report,</b> 12 <b>there are a number of different measures available to</b> 13 <b>regulators and policy-makers to try and secure those</b> 14 <b>outcomes.</b> 15 Q. Thank you. Are you looking at news provision in the 16 main or are you looking at or across the whole range of 17 media industries as other witnesses might be encouraging 18 us to do? 19 <b>A. Well, I think there is certainly a case for starting</b> 20 <b>with a wide perspective and looking at wider cultural</b> 21 <b>activity and output in the UK. Certainly different</b> 22 <b>aspects of culture and content can have an impact on the</b> 23 <b>way in which we think about society and our</b> 24 <b>understanding of social and political issues, but in my</b> 25 <b>view, one has to be practical about these things and in</b></p> <p style="text-align: center;">Page 3</p>
<p>1 <b>A. Yes. I'm an adviser on media policy regulation and</b> 2 <b>strategy and I was one of the founding members of</b> 3 <b>Communications Chambers, which is a consultancy</b> 4 <b>organisation which does work in those areas. I was</b> 5 <b>previously in senior strategic positions at Ofcom, the</b> 6 <b>Independent Television Commission, and the BBC, and</b> 7 <b>since leaving Ofcom I've worked in a number of policy</b> 8 <b>roles, most notably being on the independent steering</b> 9 <b>board of the previous government's Digital Britain</b> 10 <b>project. I've written quite extensively on media policy</b> 11 <b>issues, including plurality, and as has just been noted,</b> 12 <b>I've just completed a report on news plurality in the</b> 13 <b>digital world for the Reuters Institute, which was</b> 14 <b>funded by the Joseph Rowntree Reform Trust.</b> 15 Q. Thank you. We're going to focus on your statement, not 16 the report, although we've read the report, unless there 17 are any particular points at the end of your evidence 18 which you'd like to bring out of your report which we 19 haven't adequately covered in your estimation. 20 The importance of plurality, first of all. Maybe 21 all the witnesses are going to be agreed about the 22 underlying concept here, but in other words could you 23 explain to us how you see it? 24 <b>A. Yes. I think most people would agree that the news</b> 25 <b>media have a significant role to play in our democratic</b></p> <p style="text-align: center;">Page 2</p>	<p>1 <b>the end, the most important focus for any debate about</b> 2 <b>plurality, it seems to me, is on news media and related</b> 3 <b>current affairs, opinion and debate.</b> 4 <b>So whereas it would be nice to think about</b> 5 <b>everything, the most important aspects, in my view, are</b> 6 <b>plurality issues related to the provision of news.</b> 7 Q. So your approach is similar to, if not identical to, 8 Ofcom's approach on that particular point? 9 <b>A. If I can be described as having an approach, yes,</b> 10 <b>I would agree with that, yes.</b> 11 Q. You tell us on the second page of your statement three 12 main approaches to securing media plurality. The first 13 one is a structural approach. Could you explain that 14 one for us, please? 15 <b>A. Yes, I think it's the structural approach which tends to</b> 16 <b>get most focus in the plurality debate. That is about</b> 17 <b>ensuring, through media ownership and concentration</b> 18 <b>rules, that there are, if you like, enough news</b> 19 <b>providers in any particular market. So structural</b> 20 <b>approaches might include things like caps on the number</b> 21 <b>of media outlets you can own as a company or as an</b> 22 <b>individual -- so, for example, a number of television</b> 23 <b>stations or number of newspapers -- or they could</b> 24 <b>involve caps on market share -- so the amount of the</b> 25 <b>newspaper market in terms of readership or revenues.</b></p> <p style="text-align: center;">Page 4</p>

<p>1 <b>So a couple of different approaches, but essentially</b>                  2 <b>they are measures designed to influence the structure of</b>                  3 <b>the industry and the number of players in it.</b>                  4 Q. Behavioural approach may be self-explanatory but again,                  5 in this particular area, what does it amount to?                  6 <b>A. I hope it is self-explanatory. It already exists in</b>                  7 <b>a number of forms in the UK. For instance, we have</b>                  8 <b>regulation of broadcast news, which requires a certain</b>                  9 <b>amount of an investment in and type of news content. In</b>                  10 <b>other countries, behavioural regulation is used to</b>                  11 <b>influence the way in which news providers present</b>                  12 <b>content and provide access to alternative view points.</b>                  13 <b>The idea is that rather than focusing on the number</b>                  14 <b>of players or the size of news providers, the focus here</b>                  15 <b>is on what they do and regulating a sort of plurality,</b>                  16 <b>an internal plurality outcome.</b>                  17 Q. Public support. That one is self-explanatory. We're                  18 talking largely about forms of subsidy and other means                  19 of encouraging behaviours by paying for them?                  20 <b>A. That's right, and we already have two big interventions</b>                  21 <b>in the UK in the broadcasting news market in the form of</b>                  22 <b>the licence fee which funds an extensive news gathering</b>                  23 <b>operation at the BBC and also the way in which we</b>                  24 <b>regulate ITV, Channel 5 and Channel 4.</b>                  25 Q. I asked the Ofcom witnesses about the differences</p> <p style="text-align: center;">Page 5</p>	<p>1 <b>economic interests to do so. So there are similar</b>                  2 <b>effects at work in the news market too.</b>                  3 Q. The risk of overconcentration now, Mr Foster. You've                  4 identified two important contradictory but related                  5 trends affecting the UK and worldwide news market at                  6 present which have complicated consequences for market                  7 concentration. Those are economic pressures facing                  8 established news providers and continued growth in                  9 popularity of new digital media and social media.                  10 So these trends are, on one level, pointing in                  11 different directions, one for a greater concentration                  12 into fewer hands, one for greater proliferation, but you                  13 also point out that there is a degree of causal link                  14 between the two. Have I correctly understood it?                  15 <b>A. Yes, that's exactly so, and I think that -- there are</b>                  16 <b>these two forces working in the market at the moment and</b>                  17 <b>I don't think anyone really quite understands what the</b>                  18 <b>outcome is going to be. The established news providers</b>                  19 <b>undoubtedly are facing significant economic challenges,</b>                  20 <b>but there are also substantial opportunities for them in</b>                  21 <b>the digital world. The new digital news providers seem</b>                  22 <b>to offer quite a lot more scope for, if you like,</b>                  23 <b>pluralistic supply of news, but I would suggest in a way</b>                  24 <b>that the development of those sources is still at</b>                  25 <b>a reasonably fragile state. So a lot of uncertainty</b></p> <p style="text-align: center;">Page 7</p>
<p>1 between plurality and competition. You've provided your                  2 own explanation of the difference. The one concentrates                  3 on individuals as consumers, the other is individuals as                  4 citizens, and of course, plurality is concerned with the                  5 latter, not the former.                  6 <b>A. That's right. I thought I would insert a paragraph into</b>                  7 <b>my statement to that effect just because quite often one</b>                  8 <b>response to the plurality debate is: well, can't we just</b>                  9 <b>leave it to the normal workings of competition law,</b>                  10 <b>competition policy? And while the outcome of</b>                  11 <b>competition law can help the plurality of news</b>                  12 <b>provision, it doesn't necessarily provide all of the</b>                  13 <b>things which we, as a society, might want in terms of</b>                  14 <b>range and diversity of news, and hence there is, in</b>                  15 <b>addition to competition -- the competition framework,</b>                  16 <b>a public interest framework which I think needs to be</b>                  17 <b>applied.</b>                  18 <b>I suppose the analogy I would use is rather like --</b>                  19 <b>if you think about supermarkets, the competition</b>                  20 <b>authorities can make sure that there is effective</b>                  21 <b>competition between four or five main supermarket chains</b>                  22 <b>and that they behave sensibly in terms of pricing and</b>                  23 <b>quality of goods, but what competition law can't do,</b>                  24 <b>I suggest, is make sure that they all offer a very big</b>                  25 <b>range and diversity of products if it's not in their</b></p> <p style="text-align: center;">Page 6</p>	<p>1 <b>ahead. Some opportunities, but also some big risks,</b>                  2 <b>too.</b>                  3 Q. You've identified the threats flowing really from the                  4 economic pressures. This is paragraph 3.1.                  5 <b>A. Mm.</b>                  6 Q. I think we understand the first four bullet points, but                  7 the fifth one, please, on the next page, page 4, where                  8 you say:                  9 "As yet, no clear sign that enough consumers will be                  10 willing, through direct payment, to make up the gap in                  11 lost advertising revenues in order to support a full                  12 service news proposition."                  13 Can you please explain that one for us?                  14 <b>A. Yes. To an extent, that is linked to the previous</b>                  15 <b>bullet points and the different trends which you can</b>                  16 <b>observe in the market. What's happening to the</b>                  17 <b>providers of packages of news, the established media</b>                  18 <b>brands, is that they are facing more competition, they</b>                  19 <b>are, to an extent, losing readers, their revenues, which</b>                  20 <b>are -- have in the past relied substantially on</b>                  21 <b>advertising are moving to new media, not necessarily in</b>                  22 <b>the news market but to other digital media companies,</b>                  23 <b>and if they are going to survive and prosper in the new</b>                  24 <b>digital world, eventually they will have to find new</b>                  25 <b>sources of revenues to make up the difference.</b></p> <p style="text-align: center;">Page 8</p>

<p>1 LORD JUSTICE LEVESON: Effectively they've not been able to                  2 monetise online newspapers. The Paywall --                  3 <b>A. So far some progress is being made. The prospects                  4 offered by the new newspaper apps for smartphones and                  5 tablets offer greater prospect of future revenue, but                  6 you're quite correct; at the moment, I don't think any                  7 newspaper firm really knows whether if they're going to                  8 be able to replace the lost revenues from the analogue                  9 world, if you like, with new sources of digital income.</b>                  10 LORD JUSTICE LEVESON: It is rather disturbing, in one                  11 sense, that a newspaper puts effort and devotes                  12 resources into producing news which it then makes                  13 available for free to anybody on the Internet.                  14 <b>A. I think that's been one of the big problems, that in the                  15 rush to get involved with the early stages of digital                  16 media, newspapers took the view that it was important to                  17 get readers rather than income. I think now those                  18 strategies are starting to change and the uncertainty                  19 about the future is how quickly they can change their                  20 strategic direction and start, as you say, to monetise                  21 their valuable product.</b>                  22 I've seen various commentators, for example,                  23 postulate that the future of news in the end will be                  24 highly polarised. There will be a small number of                  25 providers of high value news to those who are really</p> <p style="text-align: center;">Page 9</p>	<p>1 goes on to say:                  2 "Even markets the size of the UK may not in future                  3 be able to support the range of competing local or                  4 national news brands that have been available to date."                  5 May I ask you this question: leaving aside the issue                  6 of subsidy, can these market pressures be overcome by                  7 restricting concentration through limits on ownership or                  8 is it simply that the available consumer revenues will                  9 not support the level of diversity that we have now?                  10 <b>A. I don't think I know the answer to that. I think the                  11 point that I was trying to make is that given those                  12 uncertainties, we have to be very careful in introducing                  13 regulation which makes it even tougher for the                  14 newspapers to make a living, and as -- I go on in my                  15 statement to note that I think one of the good things                  16 which Ofcom has proposed is a series of periodic                  17 reviews, because this market is changing over time and                  18 we need to keep those changes under review while                  19 deciding what to do about plurality.</b>                  20 Q. Looking at the digital environment, of course, there are                  21 different types of provider and Ofcom have explained                  22 those to us. You say though that:                  23 "Online only investment in news origination is still                  24 comparatively small."                  25 To what extent is this because it's comparatively</p> <p style="text-align: center;">Page 11</p>
<p>1 interested and prepared to pay for it, and the rest will                  2 be relatively -- I hesitate to use the word "low value",                  3 but probably low investment news which will be made free                  4 of charge for those who are less interested, and there                  5 is a risk that the middle market might disappear, if you                  6 believe that sort of future prediction.                  7 LORD JUSTICE LEVESON: An example of the former working                  8 would be the Financial Times.                  9 <b>A. Yes, and certainly the newspapers which have found it                  10 easiest to start to monetise their product are those                  11 which have something of special or unique value which                  12 their target audience is prepared to pay for. It's                  13 harder for general interest newspapers to persuade                  14 consumers that it's worth paying for something which                  15 they can find a lot of free of charge elsewhere on the                  16 Internet.</b>                  17 I think, if I may, the point that I was making at                  18 the end of all of this was that because of these                  19 economic uncertainties, I think it is sensible and                  20 appropriate to take a relatively cautious approach in                  21 thinking about new caps or ceilings on ownership in the                  22 news media market for the very reason that we just don't                  23 know what the -- how those economic forces are going to                  24 develop.                  25 MR JAY: You've already touched on this, but your statement</p> <p style="text-align: center;">Page 10</p>	<p>1 easy to source news from elsewhere?                  2 <b>A. I'm sure that's part of the reason. I'm also sure it's                  3 because -- also part of the reason is that none of this                  4 looks particularly economically attractive to new                  5 entrants, so the business models don't add up. So we've                  6 identified one of the causes of that but there are no                  7 doubt other reasons as well.</b>                  8 Q. Would you anticipate that as traditional news generation                  9 sources reduce, there will be a corresponding increase                  10 in investment in news from online only providers?                  11 <b>A. I wouldn't like to go that far, no. I think this is one                  12 of the big issues that we really don't know the answer                  13 to are.</b>                  14 What I would say, though, is that I don't think we                  15 should assume that the game is up for established news                  16 providers. The point I'm trying to make is that they                  17 have some tougher challenges ahead, but because they                  18 have the brands that they can call on, they have the                  19 loyalty of still quite large readership bases and                  20 because they have the investment in high quality                  21 journalism, they do stand a chance of creating                  22 compelling new digital products which are better than                  23 those offered by new entrants. So the game isn't over                  24 by any means; it's just a very tough transitional time                  25 that they're going through.</p> <p style="text-align: center;">Page 12</p>

<p>1 Q. Under the subheading "A wider debate":                  2 "If news supply of direct relevance to the UK itself                  3 is only modestly improved by the Internet, there's a                  4 much greater increase in the volume and diversity of                  5 discussion, commentary and opinion."                  6 Can I ask you, please, to amplify that point?                  7 <b>A. I don't think I have a huge amount more to say that                  8 I have in my witness statement. The point is that                  9 although we tend to think of the important aspects of                  10 news as being focused around original journalism,                  11 investigative reporting and possibly high-cost                  12 correspondents around the world, in my view there is                  13 some value in what digital media do, which is to allow                  14 individuals to talk about these things in a much more                  15 wide and open manner than was ever available before.                  16 So although the original news reports may be limited                  17 in number, the opportunity through blogs, through social                  18 media, through -- like Facebook and Twitter, for                  19 example -- for individuals to take a subject, talk about                  20 it, share their views with other people, and indeed even                  21 start to create their own news is something we should                  22 value and something which adds to the plurality of                  23 debate in the country.</b>                  24 Q. Multi-sourcing of news. Of course, that's relevant to                  25 plurality, as the Ofcom witnesses have explained. It's                  Page 13</p>	<p>1 <b>because if you're using a search engine to access news,                  2 for instance, and you are prepared to have personalised                  3 searches, the search engine itself will learn your                  4 preferences over time and start to present certain types                  5 of news or news supplier in front of you, perhaps to the                  6 detriment of a wider range and diversity of sources.</b>                  7 <b>It is --</b>                  8 LORD JUSTICE LEVESON: As I said this morning, that's rather                  9 like deciding that you're going to go to a newsagent and                  10 buy one newspaper as opposed to another.                  11 <b>A. Absolutely. I was going on to say that it's not clear                  12 to me that that is any worse than the position we had in                  13 the past, although you could argue that even the                  14 partisan newspapers did tend to include a sort of range                  15 of different commentators and views which you might not                  16 otherwise have come across, to varying degrees in                  17 varying newspapers, but I was going to say that looking                  18 further at this, the evidence so far seems to be fairly                  19 inconclusive, because some studies have been done which                  20 show that the effect of using digital media channels                  21 simply complements what people were accessing already                  22 through their traditional news media rather than                  23 substitutes for it.</b>                  24 <b>So, for instance, there's been a piece of research                  25 done by the Pugh Centre of the US, which I think found</b>                  Page 15</p>
<p>1 on the next page, page 5. A world in which everyone                  2 accesses a range of news sources is inherently more                  3 pluralistic than one in which most people watch only one                  4 channel or whatever, and you say here the data is                  5 encouraging, the figure of 4.8 being the average number                  6 of sources consumers use for news.                  7 <b>A. Yes, I think it is encouraging and Ofcom are right to                  8 start to include this when they think about plurality,                  9 because clearly if you have a world in which large                  10 numbers of people consume half a dozen sources of news                  11 that's different from one where we relied on one or,                  12 at most, a couple of sources, perhaps their main                  13 newspaper and their main broadcast news supplier. So                  14 this is one thing which digital media makes possible.                  15 It's a big benefit going forward.</b>                  16 Q. Search and social media. I think this subheading is                  17 self-explanatory. Facebook and Twitter and the way in                  18 which these are capable of adding to the plural mix.                  19 But can I ask you please to explain the filter bubble                  20 phenomenon which you do in the next subparagraph?                  21 <b>A. Yes. This, I suppose, is the counter to the benefits                  22 which I've just talked about of sharing and creating                  23 news, that for various reasons digital media has been                  24 accused of limiting the range of news and views which                  25 people over time have access to, the reason being</b>                  Page 14</p>	<p>1 <b>that social media in particular tend to provide news                  2 stories which are incremental to the news which people                  3 were already accessing, rather than narrowing down the                  4 field.</b>                  5 <b>Nevertheless, I think it's one of those things which                  6 many people have written about and we shall be aware of.</b>                  7 MR JAY: A related issue: new digital intermediaries. The                  8 rise of those -- you call them gatekeepers, who are                  9 playing an increasingly important role in helping news                  10 providers get to market and new users find and access                  11 news content on a range of digital devices. And the                  12 devices or the mechanisms are identified in the four                  13 bullet points on the next page.                  14 <b>A. Mm.</b>                  15 Q. Those are capable of influencing the news to which we                  16 have access, presumably?                  17 <b>A. Well, they could be. It's one of the things which                  18 I talk about in the report which I've written for the                  19 Reuters Institute. As you say, there are different                  20 categories of digital intermediary which I've tried to                  21 identify, they're not all the same and they have                  22 different characteristics, but they all do provide                  23 channels by which we, as users, can access a range of                  24 news suppliers. So we need to be interested -- should                  25 be interested in what they do and how they arrange their</b>                  Page 16</p>

<p>1 activities.</p> <p>2 <b>What I did in my report was look at four different</b></p> <p>3 <b>aspects of their activity: the extent to which they are</b></p> <p>4 <b>increasingly important channels through which we access</b></p> <p>5 <b>news, the extent to which they themselves take what I'd</b></p> <p>6 <b>describe as editorial-like decisions about the content</b></p> <p>7 <b>they provide, their impact on the overall economics of</b></p> <p>8 <b>news provision, which could be quite significant, and</b></p> <p>9 <b>finally, whether they have the appetite for and the</b></p> <p>10 <b>capacity to exercise any significant degree of political</b></p> <p>11 <b>influence. It seems to me obviously true that those are</b></p> <p>12 <b>four quite important areas that we should try and</b></p> <p>13 <b>understand in thinking about the future of the news</b></p> <p>14 <b>market.</b></p> <p>15 Q. You point out the current plurality framework has little</p> <p>16 to say about the activities of these entities at all.</p> <p>17 I think the Ofcom view was that this was something</p> <p>18 government or Parliament should address through</p> <p>19 executive action. Would you side with their view?</p> <p>20 <b>A. I would, because it seems to me that at the very least,</b></p> <p>21 <b>if Ofcom is asked, as it has, I think, proposed -- if it</b></p> <p>22 <b>is asked to carry out a periodic review of plurality in</b></p> <p>23 <b>the news market in the UK, then the influence of these</b></p> <p>24 <b>digital intermediaries, how they impact on the news we</b></p> <p>25 <b>have access to and the range of different news sources</b></p> <p style="text-align: center;">Page 17</p>	<p>1 <b>to include them in a market review of plurality and to</b></p> <p>2 <b>properly assess both their positive and potentially</b></p> <p>3 <b>negative effects in reaching a view about the</b></p> <p>4 <b>sufficiency of plurality at any particular point in</b></p> <p>5 <b>time.</b></p> <p>6 MR JAY: The inferences you draw from the market trends you</p> <p>7 survey. You say, under 3.4:</p> <p>8 "We should act cautiously when considering the</p> <p>9 introduction of any new structural rules to address</p> <p>10 shortfalls in media plurality."</p> <p>11 Looking at the point really by way of overview, if</p> <p>12 digital developments, you say, meet more optimistic</p> <p>13 expectations, then plurality will be secured by those</p> <p>14 developments without more, and one therefore doesn't</p> <p>15 need more rules. But in any event, you have some</p> <p>16 principled or practical objections to ownership and</p> <p>17 concentration rules which you identify in the four</p> <p>18 bullet points you see there. Can I ask you, please,</p> <p>19 about the first? You say that they may well ensure the</p> <p>20 existence of a number of different news providers but</p> <p>21 they cannot in themselves ensure that a diverse range of</p> <p>22 news is supplied. Is that through a want of internal</p> <p>23 plurality? What's the problem there?</p> <p>24 <b>A. I guess one can envisage an outcome in which the</b></p> <p>25 <b>plurality rules have -- formulated have managed to</b></p> <p style="text-align: center;">Page 19</p>
<p>1 which are easily available, those are the sorts of</p> <p>2 things which absolutely should be part of an Ofcom</p> <p>3 plurality review, and my understanding is that there</p> <p>4 would have to be some definitional change in the Act to</p> <p>5 make sure that they were incorporated as a media</p> <p>6 enterprise so that they could come within the Ofcom</p> <p>7 remit.</p> <p>8 I have to confess I haven't looked in detail at the</p> <p>9 sort of legislative changes which would be required but</p> <p>10 it does seem to me this is one of those changes.</p> <p>11 LORD JUSTICE LEVESON: Mr Foster, let's take as a given that</p> <p>12 if there is to be a change it requires Parliamentary</p> <p>13 imprimatur, but with respect, that jumps to the end and</p> <p>14 may tell me little more than I knew when I began. What</p> <p>15 I need to understand is what are the risks of doing</p> <p>16 whatever possible courses of action there are and what</p> <p>17 are the benefits.</p> <p>18 <b>A. Yes.</b></p> <p>19 LORD JUSTICE LEVESON: Your enormously valuable expertise,</p> <p>20 I hope, can help me, recognising of, course, that</p> <p>21 Parliament ultimately has to decide, as it will have to</p> <p>22 decide about any recommendation I make.</p> <p>23 <b>A. Absolutely. I think, as I was saying, it seems to me</b></p> <p>24 <b>the minimum step as far as these digital intermediaries</b></p> <p>25 <b>is concerned is to make sure that Ofcom has the ability</b></p> <p style="text-align: center;">Page 18</p>	<p>1 secure, say, half a dozen different news suppliers in</p> <p>2 the market, but then there is no particular guarantee</p> <p>3 that those news suppliers will provide a range and</p> <p>4 diversity of news. They'll be guided by a number of</p> <p>5 influences, one of which will be what their advertisers</p> <p>6 want to see. Another will be the -- may be the</p> <p>7 political preferences of their proprietors.</p> <p>8 So all I'm pointing out here is that these are quite</p> <p>9 blunt tools. They may well achieve a positive outcome</p> <p>10 but they're not guaranteed to.</p> <p>11 Q. There might be some sort of relationship though between</p> <p>12 the number of news providers on the one hand and the</p> <p>13 range of news supplied on the other.</p> <p>14 <b>A. That might be --</b></p> <p>15 Q. The causal link may not be that powerful?</p> <p>16 <b>A. Yes, exactly so. That may well be the case.</b></p> <p>17 Q. Can I ask you to explain your third point, the ethics</p> <p>18 and conduct of the news media. Doesn't that raise</p> <p>19 a separate point from plurality considerations?</p> <p>20 <b>A. I think it does, and you're correct to point that out.</b></p> <p>21 <b>The linkage, I guess, would be that -- and this may be a</b></p> <p>22 <b>point I make only in my main Reuters report, rather than</b></p> <p>23 <b>in my witness statement, but the linkage may be this:</b></p> <p>24 <b>that the larger and more powerful the media company</b></p> <p>25 <b>is -- the more it may come to believe that it itself is</b></p> <p style="text-align: center;">Page 20</p>

<p>1 beyond the grasp of the law of the land, so it's -- it</p> <p>2 may not be a huge point but there is some linkage</p> <p>3 between the two.</p> <p>4 <b>Here I was noting really that if you were looking to</b></p> <p>5 <b>plurality rules to make a big impact on ethics and</b></p> <p>6 <b>conduct, you're probably looking in the wrong place.</b></p> <p>7 LORD JUSTICE LEVESON: You say that there is some linkage,</p> <p>8 but is that a linkage which you derive evidentially or</p> <p>9 just intuitively because of the way in which media</p> <p>10 companies operate?</p> <p>11 <b>A. I think it would be intuitively.</b></p> <p>12 LORD JUSTICE LEVESON: There may be evidence to support it,</p> <p>13 but I'm just looking to see whether there was any</p> <p>14 particular evidence you had in mind.</p> <p>15 <b>A. No.</b></p> <p>16 MR JAY: After your fourth bullet point, you refer to the</p> <p>17 possible need for consolidation to secure ongoing</p> <p>18 viability of news provision. Then you deal with the</p> <p>19 question of organic growth. You may have a commercial</p> <p>20 entity which is successful enough to acquire greater</p> <p>21 market share and you're saying: well, if that entity</p> <p>22 runs the risk of being divested in some way or pruned</p> <p>23 back in a mandatory fashion, then that would be highly</p> <p>24 undesirable as a matter of principle, really. But some</p> <p>25 would say it's essential to achieve greater plurality,</p> <p style="text-align: center;">Page 21</p>	<p>1 <b>its market share is because somebody else has lost</b></p> <p>2 <b>readers or viewers or has exited the market.</b></p> <p>3 Q. In the fourth chapter of your evidence, you consider</p> <p>4 changes which could deal with problems and risks. There</p> <p>5 are four different areas here. The first one, 4.2 this</p> <p>6 is:</p> <p>7 "Improved measurement and processes."</p> <p>8 Some of those, as you say, have been recognised by</p> <p>9 Ofcom. In a nutshell, is your view very similar to</p> <p>10 Ofcom's view on these matters?</p> <p>11 <b>A. I didn't hear their evidence this morning, but I have</b></p> <p>12 <b>read the paper which Ofcom prepared and I would say that</b></p> <p>13 <b>is a fair assessment.</b></p> <p>14 <b>It may be worth just saying what lies behind that,</b></p> <p>15 <b>because this is all about, it seems to me, whether you</b></p> <p>16 <b>can have a hard and fast simple metric for measuring</b></p> <p>17 <b>plurality or whether you have a more discretionary</b></p> <p>18 <b>judgmental approach, which I would favour and Ofcom,</b></p> <p>19 <b>I think, is proposing.</b></p> <p>20 <b>It seems to me the way -- you can see the advantages</b></p> <p>21 <b>of a bright line, straightforward ceiling or cap-based</b></p> <p>22 <b>on one form of measurement. It provides a lot of</b></p> <p>23 <b>certainty in the market. It gives everyone a sense of</b></p> <p>24 <b>where they are. It avoids a lot of regulatory wheelspin</b></p> <p>25 <b>in making assessments and so on.</b></p> <p style="text-align: center;">Page 23</p>
<p>1 wouldn't they?</p> <p>2 <b>A. Yes. I think there are trade-offs to be made here. It</b></p> <p>3 <b>becomes harder with organic growth, I think, than with</b></p> <p>4 <b>the case of mergers and acquisitions. With organic</b></p> <p>5 <b>growth, I guess -- let's imagine we're talking about</b></p> <p>6 <b>a world in which it has been suggested or that has --</b></p> <p>7 <b>a cap on market share has been introduced of, say,</b></p> <p>8 <b>25 per cent and the company is very successful in</b></p> <p>9 <b>building readers and breaches that limit. There is then</b></p> <p>10 <b>a difficult choice to be made. The plurality case may</b></p> <p>11 <b>be to tell that company it has to stop being so</b></p> <p>12 <b>successful. The interest of securing high quality news</b></p> <p>13 <b>may be -- which people like to read or to watch or</b></p> <p>14 <b>consume may work in the other direction.</b></p> <p>15 <b>Where there is a merger and acquisition being</b></p> <p>16 <b>proposed, I think it is slightly more straightforward,</b></p> <p>17 <b>that you're not intervening in the case of something</b></p> <p>18 <b>which has developed in the market. It's, if you like,</b></p> <p>19 <b>a more artificial transaction.</b></p> <p>20 <b>Likewise, if you think about a threshold applying in</b></p> <p>21 <b>a world of organic growth, a company, a newspaper or</b></p> <p>22 <b>a broadcaster could find itself going above the</b></p> <p>23 <b>threshold purely because somebody else has done badly,</b></p> <p>24 <b>which again would seem rather unfair, to take action on</b></p> <p>25 <b>the successful company if the reason it has increased</b></p> <p style="text-align: center;">Page 22</p>	<p>1 <b>The problem may be that it is entirely wrong in</b></p> <p>2 <b>terms of its impact on the market and there may be other</b></p> <p>3 <b>many more nuanced issues which a regulator should really</b></p> <p>4 <b>take into account when thinking about real plurality in</b></p> <p>5 <b>the marketplace.</b></p> <p>6 <b>How do you decide which route to take? I would use</b></p> <p>7 <b>a couple of areas to guide that decision. The first, it</b></p> <p>8 <b>seems to me, is: can you find a simple and effective</b></p> <p>9 <b>single metric which you could use for a bright line cap</b></p> <p>10 <b>or ceiling? Secondly: is the market that this would</b></p> <p>11 <b>have to be applied in sufficiently robust to withstand</b></p> <p>12 <b>getting it slightly wrong now and again?</b></p> <p>13 <b>I think in the world in which we live here, first of</b></p> <p>14 <b>all, we can't find a simple, straightforward single</b></p> <p>15 <b>metric, as Ofcom has explained, and secondly, as I was</b></p> <p>16 <b>pointing out earlier on, I think the market is going</b></p> <p>17 <b>through a very unpredictable transitional stage, so it</b></p> <p>18 <b>seems to me that the dangers of having a single,</b></p> <p>19 <b>straightforward bright line approach at the moment</b></p> <p>20 <b>outweigh the risks of going down the other route. That</b></p> <p>21 <b>might change over time, but at the moment that's how</b></p> <p>22 <b>I see it.</b></p> <p>23 Q. Ofcom places particular emphasis on the metric of</p> <p>24 consumption, on my understanding of their evidence.</p> <p>25 You suggest, as you say on page 8, that more work</p> <p style="text-align: center;">Page 24</p>

<p>1 needs to be done in two areas. Can I ask you, please, 2 to explain what you have in mind there?</p> <p>3 <b>A. Yes. Consumption is a very good starting point and 4 I agree absolutely with what Ofcom says there in terms 5 of the need to look at share of consumption, the reach 6 of news media and the multiple sourcing. I think, 7 though, the problem we have with all of these metrics is 8 they tell us about exposure to news media but they don't 9 tell us about impact and influence. Ofcom, I believe, 10 have done some work to look at how you might get 11 a better sense of the impact that different news media 12 have on individuals, as they're thinking about matters 13 of public importance. I think that there is still more 14 work to be done here, which is what I'm suggesting in 15 this report -- in this statement. Not necessarily that 16 it will provide a single more sophisticated metric to 17 use, but it will add further helpful background when 18 working out whether we have enough plurality or not.</b></p> <p>19 <b>One particular example I think is worth noting: 20 a lot of the surveys which tend to be used at the moment 21 talk about news, not surprisingly, and the importance to 22 you of news as an individual. I think that the focus on 23 the word "news" may be missing the point somewhat, in 24 that there are lots of other elements of news media -- 25 commentary, debate, discussion, investigation -- which</b></p> <p style="text-align: center;">Page 25</p>	<p>1 <b>plurality means and how it should be judged and the sort 2 of general criteria that Ofcom would be expected to 3 bring to bear on any analysis they carried out. So 4 they're not operating in a complete vacuum.</b></p> <p>5 <b>Now, that guidance could range from a qualitative 6 description of what a pluralistic market might like look 7 like, but I wouldn't rule out the idea that such 8 guidance could be given about such aspects as market 9 shares, consumption metrics and so, not as a cap or 10 threshold or trigger but as a sort of context-setting 11 piece of explanation or analysis which Ofcom would then 12 need to take into account when carrying out a review or 13 reaching a decision.</b></p> <p>14 <b>And I think that -- as I go on to say in my witness 15 statement, I think that may then lead you in a direction 16 of being able to remove some of what is now a sort of 17 political contribution or involvement at various stages 18 of any plurality issue.</b></p> <p>19 <b>Q. So although sufficiency is a necessary fluid concept, 20 you would wish Parliament to set up about seven or eight 21 factors which would be taken into account in assessing 22 whether there is sufficient plurality but it would be 23 for Ofcom or the relevant decisionmaker to decide how to 24 weigh each factor up against the other in any particular 25 case?</b></p> <p style="text-align: center;">Page 27</p>
<p>1 <b>might have more of an impact on the way people make up 2 their minds about key issues than actually reading the 3 news.</b></p> <p>4 <b>So I think there is scope for doing a bit more 5 sophisticated research here, which will help us get 6 a better understanding of just how those factors work on 7 individuals.</b></p> <p>8 <b>Q. Then we move to the issue of sufficiency of plurality. 9 Sufficiency, of course, is part of the statutory test in 10 the Enterprise Act, and you, as others have done, have 11 pointed out that there's no objective measure here, 12 which I'm sure is correct inasmuch as it's always going 13 to be judgmental and may always depend on the state of 14 the market and societal expectations; is that correct?</b></p> <p>15 <b>A. I think that is correct, but I think we have to think 16 about how a regulator is going to be able to work 17 effectively against that sort of background. I mean, 18 thinking back to my experience at Ofcom and the work 19 I used to do there, it was always very helpful to have 20 set out in the Communications Act the various duties and 21 responsibilities and criteria which needed to be taken 22 into account on different matters. So the proposal that 23 I'm suggesting here is that there is scope for 24 Parliament, through, I guess, a new Communications Act, 25 to set out in a little bit more detail what it thinks</b></p> <p style="text-align: center;">Page 26</p>	<p>1 <b>A. Yes. That's a very good way of putting it. I think 2 then you can have a debate about what those factors 3 should be, how specific they could be, given the 4 background of uncertainty which we've discussed, but 5 I think that would go some way towards providing 6 a degree more transparency in the plurality application 7 of plurality rules.</b></p> <p>8 <b>Of course, one of the criticisms of not having 9 a clear market share cap or ceiling is the uncertainty 10 that that creates in the marketplace. I think to an 11 extent that is inevitable, but you can address that, in 12 my view, by having these sorts of criteria or 13 obligations spelt out with greater clarity, and also by 14 making sure that there is a clear process for Ofcom to 15 follow.</b></p> <p>16 <b>Q. Thank you. The next subheading is dealing with new 17 media, because the current plurality rules are, in one 18 sense, antiquated, looking at old media. Can you 19 summarise your recommendation here?</b></p> <p>20 <b>A. Yes. The recommendation is that new online news 21 providers should be part of a consideration of news 22 plurality in the UK. They do quite clearly provide 23 alternative sources of news and debate. The interesting 24 and difficult question is working out how important they 25 actually are, because they do cover all sorts of</b></p> <p style="text-align: center;">Page 28</p>

7 (Pages 25 to 28)

<p>1 different types of news provision. So, as we were                  2 discussing earlier, they range from blogs to full-blown                  3 news sites. They cover news providers who are focused                  4 on the UK and news providers who are focused on                  5 international news and debate.                  6 So it's not going to be easy, but as the market                  7 changes, I think there is -- there should be an                  8 expectation that Ofcom looks at all of this and decides                  9 how best to bring them into the fold, so to speak.                  10 LORD JUSTICE LEVESON: But that's exercising subjective, not                  11 an objective judgment.                  12 <b>A. Not -- well, the objective part is measuring the</b>                  13 <b>consumption --</b>                  14 LORD JUSTICE LEVESON: Yes, you have the metrics but there                  15 must be sufficient flexibility -- this isn't just                  16 putting the facts in, turning the handle and getting the                  17 answer out.                  18 <b>A. Sure. So the first step is to get the metrics in place,</b>                  19 <b>but then -- I absolutely agree that you have to take</b>                  20 <b>a view based on accumulated expertise of the extent to</b>                  21 <b>which these different types of online news providers do</b>                  22 <b>have an impact on plurality of supply. So, for</b>                  23 <b>instance, one of the -- you may say, "Well, of course,</b>                  24 <b>we can now get access to the New York Times online.</b>                  25 <b>That's another great increase in plurality of news in</b>                  Page 29</p>	<p>1 <b>within the terms of their statutory obligations but do</b>                  2 <b>have a degree of discretion as they make their</b>                  3 <b>decisions.</b>                  4 MR JAY: I think you have two related proposals here.                  5 First, taking the decisions out of the political domain                  6 and handing them to Ofcom, and secondly, having                  7 considerations which may be implied in the                  8 Enterprise Act made more explicit and listed in the new                  9 statute so that everyone knows the criteria which Ofcom                  10 must or may apply in any individual case. Is that how                  11 you see the issue of accountability?                  12 <b>A. That's correct; whether it's the Enterprise Act or the</b>                  13 <b>Communications Act or one of the two. It was designed</b>                  14 <b>to try and address the concern that quite clearly exists</b>                  15 <b>about political involvement at a detailed level on</b>                  16 <b>a case-by-case basis, which at least leads to the</b>                  17 <b>perception of influence on decisions, but also to</b>                  18 <b>address the concern that: should we really be leaving</b>                  19 <b>these fundamental democratic issues to a technocratic</b>                  20 <b>regulator to decide? It's my best -- really, the</b>                  21 <b>proposal is my best effort at trying to get a balance</b>                  22 <b>between those two conflicting objectives.</b>                  23 Q. People may still say: well, Ofcom has its agenda, which                  24 may become apparent through the way it deals with cases                  25 over a period of time, in the same way as politicians                  Page 31</p>
<p>1 the UK." Well, of course it isn't really, because not                  2 many people will consume it but also it may not be                  3 talking about the issues of importance to society and                  4 politics here.                  5 So you're absolutely right; there has to be some                  6 sort of discretion applied in working out whether these                  7 are important or not.                  8 LORD JUSTICE LEVESON: But the question is whether that                  9 discretion should be exercised politically or by a body                  10 such as Ofcom.                  11 <b>A. Sure.</b>                  12 LORD JUSTICE LEVESON: Because whatever happens, it's going                  13 to have to be open and transparent.                  14 <b>A. Mm. So what I was -- trying to square that circle,</b>                  15 <b>I was suggesting that there is an important role for</b>                  16 <b>political discretion and decision-taking that could be</b>                  17 <b>accommodated at the start of the process in any new</b>                  18 <b>legislation in setting out the parameters which Ofcom</b>                  19 <b>should apply, but then the regulator would be then free</b>                  20 <b>to exercise discretion within those more closely drawn</b>                  21 <b>or clearly drawn parameters when it came to looking at</b>                  22 <b>an individual plurality case, and that would not be that</b>                  23 <b>different, I think, from the application of regulation</b>                  24 <b>in other areas of competition law -- for instance, where</b>                  25 <b>the professional bodies are obliged to operate obviously</b>                  Page 30</p>	<p>1 may have their agenda.                  2 <b>A. Well, I guess so. I do recall, though, from my time at</b>                  3 <b>Ofcom that it's quite difficult to have your own agenda</b>                  4 <b>when there are some very clear processes in place for</b>                  5 <b>carrying out duties and responsibilities, and in a way,</b>                  6 <b>personally, I would have more confidence that</b>                  7 <b>a professional body constrained by statute would -- and</b>                  8 <b>subject possibly to some sort of appeal process as well,</b>                  9 <b>would be able to deal with these issues, perhaps in</b>                  10 <b>a more robust way than individual politicians.</b>                  11 LORD JUSTICE LEVESON: Although there isn't the same                  12 accountability.                  13 <b>A. There isn't accountability in the sense that you can</b>                  14 <b>vote Ofcom out, I know, and that, for many, is the big</b>                  15 <b>issue. The accountability, I think, has to be built in,</b>                  16 <b>as I suggest, in the way in which Parliament sets out</b>                  17 <b>the approach that Ofcom can take and the factors that it</b>                  18 <b>needs to take into account, but I don't deny that these</b>                  19 <b>are quite difficult choices to make.</b>                  20 I'm not sure, I should add, that Ofcom would                  21 particularly welcome doing any of this either. I didn't                  22 catch this morning whether they thought this sort of                  23 thing would be a good idea or not.                  24 LORD JUSTICE LEVESON: I think Ofcom have made it abundantly                  25 clear they're not looking for the responsibility of                  Page 32</p>



<p>1 regulation in this area.</p> <p>2 MR JAY: Mm.</p> <p>3 <b>A. And some commentators have noted the risks, too, which</b></p> <p>4 <b>I think I should acknowledge, which are that the</b></p> <p>5 <b>regulator could become the subject of a huge amount of</b></p> <p>6 <b>expensive lobbying and influence from powerful media</b></p> <p>7 <b>companies if it had this sort of responsibility.</b></p> <p>8 LORD JUSTICE LEVESON: Oh yes. It doesn't solve the</p> <p>9 problem; it shifts it. Once you say that there isn't</p> <p>10 a technical answer, there isn't an objective or</p> <p>11 mechanistic approach to these issues but inevitably</p> <p>12 there are judgments, so whoever makes the decision is</p> <p>13 going to be the subject of submissions, lobbying, all</p> <p>14 sorts of pressure, and therefore the question is: who is</p> <p>15 best capable of withstanding that pressure to reach</p> <p>16 a robust decision in the public interest?</p> <p>17 I'm not suggesting either wouldn't, but it's</p> <p>18 abundantly clear that there are perception problems</p> <p>19 probably both ways, and it's a mistake to say: well, the</p> <p>20 answer is Ofcom or some other regulatory -- I'm not</p> <p>21 criticising Ofcom at all.</p> <p>22 <b>A. I absolutely agree and I guess what makes me veer</b></p> <p>23 <b>towards the Ofcom/other regulator solution is that this</b></p> <p>24 <b>is then strength in numbers, in process, in the</b></p> <p>25 <b>institutional framework for that regulator, whether it</b></p> <p style="text-align: center;">Page 33</p>	<p>1 <b>plurality toolkit than they have been in the past.</b></p> <p>2 Q. I suppose it flows logically that if, in a case of</p> <p>3 organic growth and a successful company, you're not keen</p> <p>4 on, some would say, the draconian remedy of divestment,</p> <p>5 then you're forced back to the position: well, in order</p> <p>6 to plurality, the next best thing we can do is consider</p> <p>7 behavioural intervention. There's nowhere else to go,</p> <p>8 is there?</p> <p>9 <b>A. Absolutely. Let me just be clear in case I've created</b></p> <p>10 <b>the wrong impression. I wouldn't rule out those, as you</b></p> <p>11 <b>describe them, draconian measures of divestment,</b></p> <p>12 <b>spin-off. They should still be kept in the toolkit.</b></p> <p>13 <b>The point I'm trying to make is we should need to make</b></p> <p>14 <b>sure we don't just think about those and we think about</b></p> <p>15 <b>these different types of behavioural remedies too and --</b></p> <p>16 LORD JUSTICE LEVESON: You run the risk otherwise of</p> <p>17 penalising success.</p> <p>18 <b>A. Yes, and I think from the point of view of a situation</b></p> <p>19 <b>in which we have organic growth, then perhaps this</b></p> <p>20 <b>behavioural remedy list is likely to be more useful or</b></p> <p>21 <b>more valuable than telling people to shut down or sell</b></p> <p>22 <b>off a newspaper or close down a television channel.</b></p> <p>23 <b>Again, these are not straightforward issues. There</b></p> <p>24 <b>are problems in devising behavioural remedies which can</b></p> <p>25 <b>then be properly monitored and enforced. So it's not</b></p> <p style="text-align: center;">Page 35</p>
<p>1 <b>be Ofcom or not, which may be better placed to withstand</b></p> <p>2 <b>the sort of pressures that I agree would be there than</b></p> <p>3 <b>an individual or a group of politicians. But, as you</b></p> <p>4 <b>say, if you don't get rid of the risk, it's still there</b></p> <p>5 <b>to be dealt with.</b></p> <p>6 LORD JUSTICE LEVESON: You've just moved the hole in the</p> <p>7 wall to another part of the wall.</p> <p>8 <b>A. And, I suppose, strengthened the wall a bit.</b></p> <p>9 MR JAY: You go on to address some behavioural remedies at</p> <p>10 the bottom of page 9, which might apply if one owner</p> <p>11 becomes too powerful through organic growth. Can we</p> <p>12 just understand how these might work in practice?</p> <p>13 I just take the first one.</p> <p>14 <b>A. I've lost it on my screen so I'll read it on my notes.</b></p> <p>15 <b>This is about requiring the content investment</b></p> <p>16 <b>commitments. In practice, there are precedents in</b></p> <p>17 <b>place, as I mentioned earlier, in broadcasting in the</b></p> <p>18 <b>UK. In other countries -- for instance I think in the</b></p> <p>19 <b>US, where there are local newspaper mergers, one of the</b></p> <p>20 <b>issues which is considered in deciding whether to agree</b></p> <p>21 <b>to the merger or not is whether the emerging parties are</b></p> <p>22 <b>committing to invest more money in news content. So one</b></p> <p>23 <b>can see a number of models around which could be</b></p> <p>24 <b>developed for application here if we took the view, as</b></p> <p>25 <b>I do, that these may have to become more central to our</b></p> <p style="text-align: center;">Page 34</p>	<p>1 <b>necessarily an easy and straightforward approach, but</b></p> <p>2 <b>I think there are ways of doing that which could apply</b></p> <p>3 <b>in some circumstances and be of some considerable value.</b></p> <p>4 MR JAY: Yes. Can we consider what the range of remedies</p> <p>5 logically are? We have divestment, spin-off</p> <p>6 undertakings in lieu and behavioural interventions.</p> <p>7 I may be wrong, but I can't think of many others, are</p> <p>8 there?</p> <p>9 <b>A. No, indeed, and the behavioural interventions may be</b></p> <p>10 <b>undertakings in lieu, so there's some crossover between</b></p> <p>11 <b>the two. The only other set of interventions, as I come</b></p> <p>12 <b>onto later, are those which apply specifically to</b></p> <p>13 <b>digital gateways -- so access interventions -- and then,</b></p> <p>14 <b>of course, public support, which is another dimension</b></p> <p>15 <b>entirely.</b></p> <p>16 Q. Indeed. Can I as you, please, to explain the access</p> <p>17 intervention. It applies, of course, to new digital</p> <p>18 intermediaries but what's the issue there and what is</p> <p>19 your thinking as to how to address it?</p> <p>20 <b>A. Yes. The issue is that new digital intermediaries like</b></p> <p>21 <b>Google, a powerful search engine, Facebook as a social</b></p> <p>22 <b>network, Apple as a mechanism for getting newspaper</b></p> <p>23 <b>apps, all place themselves between the news provider and</b></p> <p>24 <b>the consumer. So one concern would be if any one of</b></p> <p>25 <b>those, or perhaps a few of them collectively, became so</b></p> <p style="text-align: center;">Page 36</p>

<p>1 important that they were the main means of getting news.                  2 They would at least have the scope then, through their                  3 business policies, to start influencing the nature of                  4 news suppliers they provided access to and the ease with                  5 which we, as individuals, could find the news that we                  6 wanted to go to.                  7 I'm not suggesting that they do that at the moment.                  8 Indeed I think most would say that they try and provide                  9 a wide range of news sources which are of some relevance                  10 to their consumers, but nevertheless the possibility                  11 exists.                  12 We have looked at this issue before in the context                  13 of digital broadcasting and digital transmission                  14 systems, where, at a European level, it was decided that                  15 it was important, whatever the distribution channel you                  16 chose as a consumer, that you should have access to                  17 a wide range of broadcast services, and in particular to                  18 public broadcast services, whether you opted for cable                  19 or for satellite or for terrestrial transmission.                  20 It seems to me there may come a time where these                  21 gatekeepers are almost equivalent, in terms of                  22 distribution channels, to those broadcast distribution                  23 networks, in which case we may think that it's in the                  24 public interest to make sure that if you choose to use                  25 Google or you choose to use Facebook that you still have</p> <p style="text-align: center;">Page 37</p>	<p>1 Nevertheless, it may be that they are not as                  2 public-spirited as I would hope they would be, in which                  3 case I think that at the very least, if Ofcom then                  4 carries out a plurality review -- and as I've suggested,                  5 they should be part of the remit for Ofcom -- and finds                  6 that there are these problems or concerns, then it's at                  7 that point that it should consider what remedies could                  8 be introduced.                  9 So my own preference would be try to get them                  10 engaged. If it fails, Ofcom should monitor through its                  11 plurality reviews and then remedies -- access remedies                  12 or their equivalent if needed at that stage.                  13 There is a more nuclear, if you like, of saying this                  14 is so important we need to have action now along the                  15 lines of they must carry regulation we already have in                  16 broadcasting. I'm not sure we're quite there yet myself                  17 and it would be, I think, very helpful for the digital                  18 intermediaries to demonstrate what they can do                  19 themselves rather than being forced into doing it.                  20 LORD JUSTICE LEVESON: But wouldn't there be a complexity in                  21 relation to the digital media in respect of those who                  22 are based offshore or in countries which operate                  23 different legal regimes in relation to free speech?                  24 A. I think that is absolutely right and indeed, it's one of                  25 the factors behind my suggestion that in the first</p> <p style="text-align: center;">Page 39</p>
<p>1 access to a wide range of news sources.                  2 Q. Page 11, three bullet points towards the top of the                  3 page. You suggest a number of potential obligations                  4 that could be put on digital news intermediaries. Are                  5 you suggesting that this should be used only when                  6 a plurality problem is identified or do you think they                  7 should be introduced to avoid plurality concerns                  8 developing?                  9 A. It's a very good question and I think I would like to                  10 step back from that, if you don't mind, to say that                  11 first of all, in my Reuters paper, I suggest that we                  12 shouldn't leap to this sort of regulation in any event,                  13 because although it's possible to identify the potential                  14 threat, it's not clear that a regulatory solution, at                  15 least for the time being, is the right one, and indeed                  16 my proposal was to, in effect, for government and other                  17 interested parties, to challenge these big digital                  18 intermediaries to take part, if you like, in the                  19 plurality debate, engage in the concerns that we have                  20 and demonstrate how they would respond to them. I don't                  21 think it is totally ridiculous to think that they might                  22 find it in their interests to -- as a means of                  23 continuing to sustain the trust of their users in the                  24 UK, to demonstrate that they are on the side of doing                  25 all of these good things.</p> <p style="text-align: center;">Page 38</p>	<p>1 instance, we, in effect, try and bring them into the                  2 fold, wherever they may be located. I think Google and                  3 Facebook have registered in Ireland, I believe, and as                  4 you say, there are other international companies too.                  5 So setting aside whether it is easy or not to                  6 regulate these intermediaries, it would be a good idea                  7 to try and bring them into the debate and get them                  8 thinking about UK public interest and UK public                  9 expectations, and indeed I think they've already started                  10 to do that in terms of trying to observe UK laws even                  11 if, in practice, they don't have to because they're not                  12 always based here.                  13 LORD JUSTICE LEVESON: The trouble is it's all rather                  14 cumbersome. If you want to challenge something online,                  15 then you have to get some sort of order and that                  16 requires a ruling from an Article 6 compliant court,                  17 which has its own problems.                  18 A. I think that's absolutely right. I think the second                  19 line of attack, if you like, is then probably not at UK                  20 level but on an EU basis, rather along the lines of the                  21 Audiovisual Media Services Directive or the E-commerce                  22 Directive, because these are organisations which operate                  23 across the EU and may be based in other EU Member                  24 States, and while it may seem cumbersome, there is,                  25 I sense, a head of steam building up in Brussels for</p> <p style="text-align: center;">Page 40</p>

10 (Pages 37 to 40)

<p>1 <b>looking at and trying to address concerns in these</b>  2 <b>areas. So it may be that if the UK government wishes to</b>  3 <b>work with Brussels, it would be pushing at an open door</b>  4 <b>in some of these areas. But that would seem to be the</b>  5 <b>next stage.</b>  6 LORD JUSTICE LEVESON: Parallel to that is another  7 possibility: that you make the incentives of  8 participation sufficiently attractive to cause the  9 relevant companies to want to be involved. Now, what  10 incentives could we use to do that?  11 <b>A. I can think of a number of sticks as opposed to carrots,</b>  12 <b>which would be --</b>  13 LORD JUSTICE LEVESON: Sticks will do too.  14 <b>A. Really, this would be the threat of more draconian</b>  15 <b>regulation. And I don't for a moment suggest that we</b>  16 <b>would want to go down this route, but other countries do</b>  17 <b>find ways of controlling the activities of big</b>  18 <b>international search engines and other digital</b>  19 <b>companies --</b>  20 LORD JUSTICE LEVESON: We've not done very well on the  21 threat of more draconian legislation for UK-based news  22 outlets, have we?  23 <b>A. But here there may be some levers that can be pulled.</b>  24 <b>For instance, the Internet service providers would be</b>  25 <b>one way of getting at whether these organisations have</b></p> <p style="text-align: center;">Page 41</p>	<p>1 <b>would seem to be missing an opportunity of not taking an</b>  2 <b>overview of plurality measures in this case and omitting</b>  3 <b>a consideration of, for example, the measures which are</b>  4 <b>open to government to sustain high quality news on ITV</b>  5 <b>or to get more of a plurality push from the BBC. So</b>  6 <b>I understand it's not your main area of focus but</b>  7 <b>I think it is quite an important part of the overall</b>  8 <b>toolkit.</b>  9 <b>More generally, thank you for the opportunity of</b>  10 <b>giving you my views. As I say in my witness statement,</b>  11 <b>I think what I was trying to do was think of a set of</b>  12 <b>proposals which provided what I described as a sensible</b>  13 <b>balance between safeguarding plurality, but at the same</b>  14 <b>time as enabling the news market to grow and innovate.</b>  15 <b>I think it will be messy. I don't think there's</b>  16 <b>a single plurality magic bullet, but I think the range</b>  17 <b>of measures which we talked about this afternoon I would</b>  18 <b>hope would go some way towards providing a more</b>  19 <b>flexible, adaptable and predictable environment for</b>  20 <b>these issues to be discussed and regulated.</b>  21 MR JAY: Thank you very much.  22 LORD JUSTICE LEVESON: Yes, thank you very much indeed.  23 We'll take a break now.  24 (3.12 pm)  25 (A short break)</p> <p style="text-align: center;">Page 43</p>
<p>1 <b>wide access to consumers or not. You can look at the</b>  2 <b>extent to which UK advertisers can advertise on</b>  3 <b>compliant or non-compliant digital companies which are</b>  4 <b>based outside of the UK.</b>  5 <b>None of these sound terribly attractive to me at the</b>  6 <b>moment but they are, if you like, sticks which could be</b>  7 <b>waved a bit to encourage, which would be my</b>  8 <b>preference -- to encourage Google and the others to work</b>  9 <b>very closely with the relevant parties to deliver the</b>  10 <b>sorts of things we're hoping could be delivered.</b>  11 MR JAY: Thank you. The subheading "Positive support" is  12 largely self-explanatory but applies more to the BBC and  13 to public service broadcasting, possibly straying  14 outside our terms of residence. Is there anything you'd  15 like to say in conclusion on the effects of the changes  16 that you feel you may not have covered adequately,  17 Mr Foster?  18 <b>A. If I could just add a word of explanation on the</b>  19 <b>positive support, just to set the context. It seems to</b>  20 <b>me that quite your remit is quite rightly focused on the</b>  21 <b>areas we've discussed so far. More generally though, if</b>  22 <b>we are interested in news plurality, it is worth noting</b>  23 <b>that the majority of news people still get is from</b>  24 <b>television and in that respect not only the BBC but the</b>  25 <b>commercial news providers have a key role to play and it</b></p> <p style="text-align: center;">Page 42</p>	<p>1 (3.22 pm)  2 MR JAY: The last witness today is Claire Enders, please.  3 MS CLAIRE WHITMORE ENDERS (Affirmed)  4 Questions by MR JAY  5 MR JAY: Thank you. Your full name.  6 <b>A. Claire Whitmore Enders.</b>  7 Q. You've kindly provided us with a witness statement on  8 the issue of media plurality. It's dated 9 July 2012.  9 Are you content to put this forward as your formal  10 evidence to the Inquiry on that specific issue?  11 <b>A. Yes.</b>  12 Q. You also gave us a presentation at one of our seminars  13 on 6 October 2011 and the paper which you submitted has  14 now been put on our system. Again, are you content that  15 that be formally accepted in evidence?  16 <b>A. Yes.</b>  17 Q. We're not going to run through that today because you  18 explained it very clearly seven or eight months ago.  19 LORD JUSTICE LEVESON: Ms Enders, thank you very much for  20 both those contributions. Rather a lot of water has  21 flown under the bridge since the last one, so it's  22 perhaps fitting that you should come in at this sort of  23 stage of the Inquiry, having been at the very beginning,  24 but I'm grateful to you.  25 <b>A. Thank you.</b></p> <p style="text-align: center;">Page 44</p>

<p>1 MR JAY: Can you tell us briefly about yourself and about 2 Enders Analysis? 3 <b>A. Yes. It's quite hard to summarise a working life that</b> 4 <b>has spanned for than 30 years but I have been very</b> 5 <b>fortunate in being given many interesting problems to</b> 6 <b>think about and solve and in particular, I just wanted</b> 7 <b>to highlight the fact that I was an expert witness in</b> 8 <b>the proceedings that set digital copyrights in the US</b> 9 <b>congress as well as in the UK, and therefore I can be</b> 10 <b>said at least to be an expert in digital models. I hope</b> 11 <b>that's helpful.</b> 12 I also wanted to stress that my sole nationality is 13 British. I am not American. I ceased to be American 14 some time ago. So I have a -- I have been in love with 15 this country since I emigrated to it and my concern for 16 it is that of an immigrant. 17 Q. Thank you. Now, you explain monitoring the plurality of 18 news provision. You say there are several ways of 19 monitoring that -- 20 LORD JUSTICE LEVESON: I think we'd better just record that 21 you've spent 30 years as an analyst, strategist and 22 forecaster in the media and technology sectors in the 23 UK, and 15 years working in cable TV, satellite TV and 24 commercial public sector broadcasting before setting up 25 Enders Analysis in 1997, which creates comprehensive Page 45</p>	<p>1 <b>interacts over time.</b> 2 I do agree with Robin Foster that the issue of the 3 impact on politicians is left outside of this measure, 4 and indeed that is not Ofcom's job. But that is 5 something -- and indeed, Ofcom thought relatively deeply 6 about this matter when it was considering the 7 News Corp/BSkyB merger in 2010. So it thought quite 8 deeply about this matter and it ended up with a metric 9 that involved share of consumption measured at the time 10 as being around 17 per cent for News Corporation's share 11 of total UK news provision, plus BSkyB rising to 12 21 per cent. So this is something which has been dealt 13 with and is relatively advanced as a metric. 14 Q. Is one of the other advantages of the share consumption 15 metric that it's reasonably objective, non-judgmental 16 and uncontroversial -- some of the other metrics have 17 a greater judgmental and subjective element and 18 therefore there's more argy-bargy about what they might 19 mean on the one hand and amount to on the other? 20 <b>A. Yes. These are all imperfect measures and they involve</b> 21 <b>estimates and so on, and they are quite complicated</b> 22 <b>calculations to make, but what matters in any case is</b> 23 <b>not absolute specifics. It's actually trends or -- you</b> 24 <b>know, the big pieces in any story are what matter. But</b> 25 <b>also the problem with share of consumption is also that</b> Page 47</p>
<p>1 models and forecasts of all parts of the UK media, 2 telecoms and technology sectors. 3 <b>A. Thank you.</b> 4 LORD JUSTICE LEVESON: Well, it's just so that it's all in 5 one place and anybody watching this evidence can know 6 the background from which Ms Enders speaks. 7 <b>A. And also, if you'd like any background about Enders</b> 8 <b>Analysis, I can provide it to you, but in summary, I own</b> 9 <b>100 per cent of the company and you know, I work at it</b> 10 <b>every day. We produce written research which the list</b> 11 <b>of companies in the relevant companies in the annex</b> 12 <b>support for by paying for it.</b> 13 MR JAY: Thank you. The different means or ways of 14 monitoring/measuring news plurality. There are three of 15 those. In terms of identifying the candidates, your 16 position is the same as Ofcom's. You favour the share 17 of consumption metric. May I ask you to explain why? 18 <b>A. Well, like Ofcom and indeed other commentators, this</b> 19 <b>metric ends up by being one of the best ways of giving a</b> 20 <b>guide, a set of estimates, to (a) the number of media</b> 21 <b>and of course the actual minutes of viewing or listening</b> 22 <b>or reading and so on that are allocated by members of</b> 23 <b>the public, and as a result of that -- essentially,</b> 24 <b>consumption is a very good proxy for how the public</b> 25 <b>interacts with all media and indeed how the public</b> Page 46</p>	<p>1 <b>it doesn't measure the relative impact of -- I think</b> 2 <b>Robin Foster also alluded to that -- various types of --</b> 3 <b>different forms of consumption, and indeed supporting</b> 4 <b>consumption and debate, around any particular use of</b> 5 <b>a medium. So it's a soft measure but it's as good as</b> 6 <b>we've got.</b> 7 Q. The television might be on, but one might not be 8 watching it? 9 <b>A. Correct, and indeed in the case of radio listenership,</b> 10 <b>people do leave their radios on for very long periods of</b> 11 <b>time and may be in and out of listening and so on. So</b> 12 <b>it is a very imperfect soft measure, but it gives an</b> 13 <b>idea.</b> 14 LORD JUSTICE LEVESON: How about the news? Is there 15 Data Research on how long people read newspapers for? 16 <b>A. Yes, there is, actually.</b> 17 LORD JUSTICE LEVESON: So that's how you do that? 18 <b>A. On the other hand, just to the point made by Mr Jay,</b> 19 <b>although for instance, in this country, an average</b> 20 <b>newspaper reader -- again, who's an average? -- would</b> 21 <b>read a newspaper for 40 minutes a day, a consumer of</b> 22 <b>a newspaper website will only consume for around 15</b> 23 <b>minutes a month. So these are very, very different</b> 24 <b>media in terms of impact, but also in the case of</b> 25 <b>newspapers, the work that we submitted to you subsequent</b> Page 48</p>

1 to the first appearance indicated that, depending on the  
 2 newspaper, the idea of news is a very broad picture. It  
 3 includes news of celebrities, news of TV shows, news of  
 4 movies, news of a million things that we wouldn't really  
 5 put in the serious buckets. Indeed, news of bridge  
 6 triumphs and sporting triumphs as well. So there are  
 7 many different kinds of things that are encompassed in  
 8 newspapers, so even newspaper readership itself is not  
 9 a good proxy -- that 40 minutes a day is not a good  
 10 proxy for the readership of hard news.

11 Of course, in the vast continuum of newspapers,  
 12 which the UK is blessed in having an extraordinary  
 13 number -- and indeed, newspaper readership in the UK is  
 14 exceptionally high by comparison with all other nations  
 15 except for certain very small ones, but nonetheless,  
 16 within that, the fact is that the tabloids have  
 17 relatively less hard news, and the quality papers, which  
 18 are a very small subset of total circulations  
 19 themselves, have more. So I think that it is a very,  
 20 very difficult thing to get a grip on in any kind of  
 21 adequacy, but it's as good as we have.

22 MR JAY: You say in relation to the next metric, which is  
 23 reach, it has less value. You explain how it's  
 24 calculated. The modes of calculation appear to be about  
 25 as objective or as subjective, depending on your point

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1 of view, as the consumption modes of calculation. Is  
 2 that a reasonable assessment?

3 A. Yes, that's right, but remember that these calculations  
 4 came about out of a chance remark made by Lord Puttnam.  
 5 When he was asked what plurality meant, he said "share  
 6 of voice". So these calculations have somewhat emerged  
 7 from sort of an accident off-the-cuff remark, so one  
 8 can -- one is trying to find something that fits with  
 9 the law.

10 Q. Why is reach of less value than consumption?

11 A. Well, we think that the -- can I get back to you about  
 12 that? It's just not something I really --

13 Q. Yes, fair enough.

14 A. Thank you.

15 Q. So the multi-sourcing, which is -- again, you say it has  
 16 some use but less than the consumption measure. You  
 17 refer to the modes of calculation again. Really, it's  
 18 the same point. They're as good or as bad as the  
 19 consumption and reach modes of calculation, are they?

20 A. Mm-hm.

21 Q. I think the point that Ofcom sought to make -- can  
 22 I sort of put it to you in these terms? -- is that  
 23 really one has to combine these measures to get at the  
 24 best end point, when my understanding of your evidence  
 25 is that you would prefer to focus on consumption but not

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1 look at reach and multi-sourcing. First of all, have  
 2 I correctly understood where you're coming from? And if  
 3 I have, what's wrong with the combined approach?

4 A. We don't make any suggestions about the combined  
 5 approach or indeed -- you know, Ofcom's really very  
 6 expert in these matters.

7 I must say, to our credit as an organisation, Ofcom  
 8 decided to use the methodology that we had advanced  
 9 in November 2010 in order to come to a view, but  
 10 I wouldn't want to underestimate the difficulty of  
 11 coming to those views or the effort that Ofcom has put,  
 12 nor its greater understanding than I have about the  
 13 different impacts.

14 It is still a measure that is a proxy and gives only  
 15 a sense of what is going on in the media marketplace.  
 16 But Ofcom has thought very deeply about this because it  
 17 prefers this kind of measurement and it prefers  
 18 measuring. So it's very fond of that.

19 LORD JUSTICE LEVESON: Because it's more objective than  
 20 subjective, but it actually buries within it -- this is  
 21 what I was rather suggesting -- all sorts of subjective  
 22 questions.

23 A. That's right. And also I sometimes wonder whether the  
 24 focus -- and I think it's something I point out in my  
 25 submission -- I wonder if Ofcom's almost exclusive focus

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1 on news and plurality as calculated in this way is in  
 2 fact what was originally embodied in the legislation,  
 3 the 2003 legislation, and my understanding is that it is  
 4 not. I think I make the arguments in my submission that  
 5 there are many other forms of plurality that should be  
 6 more important than counting this kind of impact,  
 7 although it is important -- it is important to have an  
 8 understanding of how it is that people in the UK are  
 9 consuming all kinds of media outlets.

10 I mean, for instance, it is always a source of great  
 11 surprise to people that the BBC has such an  
 12 extraordinary share of voice in the UK, mainly because  
 13 there are apparently so many news media, there is -- of  
 14 course, this is the most digital nation, there's the  
 15 most extensive use of online news and media in this  
 16 nation than there is anywhere in the world. So it is  
 17 a paradox of plenty versus a concentration on the supply  
 18 side. So this -- you know, Ofcom is right to put a lot  
 19 of emphasis on it, but I think that in the recent report  
 20 that Ofcom put out on these matters, I felt that the  
 21 emphasis on what it can count reliably in terms of  
 22 consumption rather missed the point of the whole  
 23 plurality debate in its totality.

24 MR JAY: May we look next, please, at paragraph 8 of your  
 25 witness statement, Ms Enders. We're identifying here

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<p>1 a definition of plurality. You commissioned                  2 Professor Brewer to examine this question for you and                  3 she made it clear that plurality unambiguously means                  4 a large number. When we talk of plurality, we're                  5 talking of a profusion, a multiplicity and an abundance.                  6 Aren't we also talking about difference, not just large                  7 quantity?                  8 <b>A. Yes, absolutely. I mean, diversity. Diversity,</b>                  9 <b>differentiation and so on. Yes, definitely. As I go on</b>                  10 <b>to say in my submission, that is definitely how it is</b>                  11 <b>that different points of view can be expressed in</b>                  12 <b>a complex and interesting society.</b>                  13 Q. Yes. Ofcom have pointed out that the reality of the                  14 news market is such that there will be a tendency these                  15 days to consolidate and that sustainable provision may                  16 not be compatible with a profusion or abundance of                  17 provision. Do you agree with that?                  18 <b>A. That's certainly true on the news side. There is</b>                  19 <b>a great difficulty in economic models for all news,</b>                  20 <b>whether it's in the newspapers or on TV or on radio.</b>                  21 Q. I suppose the point is that one can't force new voices                  22 into news provision, so plurality must be dependent on                  23 the willingness of the market to provide it, mustn't it?                  24 <b>A. Or the willingness of its patrons, because after all, it</b>                  25 <b>is a patronage -- it is funded by patronage. I mean,</b>                  Page 53</p>	<p>1 overconcentration of control over news and current                  2 affairs provision?"                  3 You point out that:                  4 "Society has said that news plurality is important."                  5 And you give a number of reasons why that's so. Can                  6 I ask you about point (b):                  7 "All other matters being equal, plurality is greater                  8 if providers have roughly equal shares of news                  9 consumption than if one or two news sources have large                  10 shares and others have very small shares."                  11 Why is that so?                  12 <b>A. I'm just using the sort of economic theory around</b>                  13 <b>oligopolies, which is that -- oligopolies are more</b>                  14 <b>effective if there's more equal strength between the</b>                  15 <b>parties. In the UK, for instance, there is ITV,</b>                  16 <b>Channel 4 and Channel 5 that all sell advertising and</b>                  17 <b>indeed there is a plethora of multichannels that do so</b>                  18 <b>too, but ITV has 50 per cent of net advertising revenue,</b>                  19 <b>and that's quite a concentrated market. The other two</b>                  20 <b>main players are very, very small indeed, one really</b>                  21 <b>very small. So it's just the effectiveness of real</b>                  22 <b>competition is always based on economic power and</b>                  23 <b>financial muscle. That's the truth of the world.</b>                  24 LORD JUSTICE LEVESON: It's also the size of the megaphone,                  25 isn't it?                  Page 55</p>
<p>1 the BBC is funded by public patronage and the Times is                  2 funded by News Corp and the Guardian is funded by the                  3 Scott Trust and so on. Patronage is quite a common                  4 feature of the provision of newspapers and of news more                  5 generally.                  6 I believe there are only two major news                  7 organisations in the world that are profitable and very                  8 significantly profitable, and that's Fox News and CNN,                  9 and that's probably because of the size of the American                  10 market.                  11 Q. It may be market forces are working against new patrons                  12 coming into being?                  13 <b>A. Well new patrons come into being because they make money</b>                  14 <b>in other places. You know, they make money through</b>                  15 <b>property in the case of the Barclay brothers or they</b>                  16 <b>make money in mining in the case of Ms Rinehart or</b>                  17 <b>indeed, in the case of Lebedevs, in other activities in</b>                  18 <b>Russia. So actually new patrons for newspapers come</b>                  19 <b>into being, I presume, at least once a month.</b>                  20 Q. Fair enough. Question one, which you now address in                  21 paragraph 9 and following --                  22 LORD JUSTICE LEVESON: I wish it was once a month.                  23 <b>A. That would be nice. Well, they come along regularly.</b>                  24 MR JAY: The question was, in question one:                  25 "Is there a risk that there is or could be an                  Page 54</p>	<p>1 <b>A. Yes, absolutely, and the megaphone across many different</b>                  2 <b>places, you know, in the City or in government and so</b>                  3 <b>on. Financial power is immensely significant in every</b>                  4 <b>way.</b>                  5 LORD JUSTICE LEVESON: So if there are lots that are broadly                  6 the same -- I don't say they cancel each other out, but                  7 there is a fairer hearing for all than if some have                  8 particularly large multi-decibel megaphones that                  9 actually can --                  10 <b>A. Also they can also invest -- there's more leeway. But</b>                  11 <b>obviously we're not talking about a country in</b>                  12 <b>isolation; we're talking about the UK and the UK as it</b>                  13 <b>really is.</b>                  14 MR JAY: Point (d) on the next page, 01769, page 4:                  15 "Regulatory and court judgments and departmental                  16 guidance documents ..."                  17 Sorry:                  18 "Although the point is poorly expressed there, it                  19 seems to be the conventional assumption that at some                  20 point decreasing plurality would result in an                  21 overconcentration of control over news and current                  22 affairs provision."                  23 And that carries with it the associated vice of too                  24 much power in too few people and that, you say, is                  25 a matter of common sense; no more, no less than that?                  Page 56</p>

<p>1 <b>A. I think it's also been constantly considered at regular</b>  2 <b>intervals, anyway. Certainly in the 2003 concept, which</b>  3 <b>I remember very well, there were a number of issues</b>  4 <b>around the specificities of the UK which Lord Putnam and</b>  5 <b>many other peers sought to frame. So they have always</b>  6 <b>been conscious that there is always a danger and</b>  7 <b>actually, I think that this is not the only society to</b>  8 <b>look at those issues. I mean, there are -- every major</b>  9 <b>country in the world has thought of these issues and</b>  10 <b>fears overconcentration of control in news and current</b>  11 <b>affairs and believes that would be anti-democratic for</b>  12 <b>that to be allowed to develop. Although Robin didn't</b>  13 <b>mention it, there are other kinds of structural remedies</b>  14 <b>that people have in place, indeed to even remove the</b>  15 <b>prospect of a foreign owner, for instance, having --</b>  16 <b>being an actor in an overconcentration.</b></p> <p>17 <b>Q. Thank you. In paragraphs 10 and 11, you point to the</b>  18 <b>distinction in the legislation between newspaper mergers</b>  19 <b>on the one hand and cross-media or broadcast mergers on</b>  20 <b>the other. In relation to the former, the statute looks</b>  21 <b>at a sufficient plurality of views in newspapers but in</b>  22 <b>relation to the latter, the statute looks at</b>  23 <b>a sufficient plurality of persons with control. So in</b>  24 <b>one case, it's views which we want a significant or</b>  25 <b>sufficient number of but in the other case it's persons.</b></p> <p style="text-align: center;">Page 57</p>	<p>1 LORD JUSTICE LEVESON: I think the consequence of that was  2 that some papers closed.</p> <p>3 <b>A. Indeed, that is what happens when those mergers are not</b>  4 <b>allowed. So it is a paradox of our situation in the UK</b>  5 <b>that indeed, with a few behavioural remedies, the</b>  6 <b>News Corp/BSkyB transaction was well on the way to full</b>  7 <b>approval with Ofcom's blessing.</b></p> <p>8 MR JAY: In terms of plurality of views or rather the lack  9 of plurality of views, the risk you identify in  10 paragraph 15 is that the range of news, comment and  11 opinion reaching the citizen is lower than is beneficial  12 for a healthy democracy and so that's, as it were, the  13 policy underlying the relevant provision in the  14 Enterprise Act. Here, I think, we're looking at section  15 582A and 2B.</p> <p>16 Can I ask you, please, to develop what you mean in  17 paragraph 15 about the risk to a democracy?</p> <p>18 <b>A. I think this is a very conventional view and also</b>  19 <b>a theoretical one, in the sense that reading all the</b>  20 <b>literature on these matters, whether produced by</b>  21 <b>academics and so on, there is a sense -- a systematic</b>  22 <b>sense that -- to Lord Leveson's point, it's that</b>  23 <b>noisiness of the voices, the differentiation of the</b>  24 <b>voices, it's something that you feel is there or isn't</b>  25 <b>there, and that what it does -- the fourth estate has</b></p> <p style="text-align: center;">Page 59</p>
<p>1 In terms of the background to the legislation, could  2 you help us, please, as to why in newspaper mergers it's  3 points of views which count and not numbers of persons?</p> <p>4 <b>A. I'm not a specialist in this area, but it is</b>  5 <b>a long-running leitmotif around issues of local markets</b>  6 <b>and local advertisers, as well as local consumers. So</b>  7 <b>recently there was a case involving the Kent Messenger</b>  8 <b>Group in which a small local merger was turned down, and</b>  9 <b>so in practice, you know, the existing legislation has</b>  10 <b>precluded consolidation in local papers to</b>  11 <b>an extraordinary degree because of a fear of loss of</b>  12 <b>means of entry for advertisers as well as consumers --</b>  13 <b>more importantly for advertisers. In most of the cases</b>  14 <b>that I have some knowledge of, it has been around</b>  15 <b>allowing advertisers to reach that local market through</b>  16 <b>separate media because local media are quite</b>  17 <b>concentrated. I mean, it's very hard to -- if the</b>  18 <b>economics of supply are quite questionable on a national</b>  19 <b>and global front, I can tell you that on the local front</b>  20 <b>they're also quite difficult in many cases.</b></p> <p>21 <b>So there has been a longstanding view that local</b>  22 <b>media markets should be looked at separately and on</b>  23 <b>a case-by-case basis. It is quite an extraordinary</b>  24 <b>paradox that these small scale mergers have been</b>  25 <b>systematically rejected by the Competition Commission.</b></p> <p style="text-align: center;">Page 58</p>	<p>1 <b>always had this extraordinarily important role in</b>  2 <b>society in terms of being almost a confrontational force</b>  3 <b>to power blocs and indeed vice versa.</b></p> <p>4 <b>So I think that part of the protection of plurality</b>  5 <b>as envisaged in the law is a protection of consumers, of</b>  6 <b>citizens, from forces that are around them that they may</b>  7 <b>not understand that would end up by diminishing the</b>  8 <b>range and diversity of the voices that reached them, and</b>  9 <b>which they can't understand, as it were, on the ground,</b>  10 <b>going about their daily lives.</b></p> <p>11 <b>And I think that that is something which I think is</b>  12 <b>extraordinarily important to any healthy society, but</b>  13 <b>above all to this one, because this one is a very</b>  14 <b>creative society, not only with the highest per capita</b>  15 <b>consumption of printed material and so on in the world</b>  16 <b>but also one which depends for its lifeblood -- many</b>  17 <b>economic sectors in the UK depend on plurality as</b>  18 <b>a whole to survive, flourish, prosper and innovate.</b>  19 <b>This is an exceptionally wonderful country from that</b>  20 <b>perspective, so there's such a range of creative</b>  21 <b>enterprises.</b></p> <p>22 <b>I mean, to give you an example, this market which,</b>  23 <b>after all, has about 50 per cent smaller number of</b>  24 <b>households than Germany -- 36 million in Germany and</b>  25 <b>around 25 million here -- has a media market which is</b></p> <p style="text-align: center;">Page 60</p>

<p>1 almost the same size as Germany's. So it is actually of</p> <p>2 vital economic importance as well as democratic</p> <p>3 importance and this is why plurality of owners is</p> <p>4 an immensely valuable concept here.</p> <p>5 Q. I think you mean plurality of views is a valuable</p> <p>6 concept because you go on in paragraph 16 to look at</p> <p>7 plurality of owners.</p> <p>8 A. Indeed.</p> <p>9 Q. Which is --</p> <p>10 A. Which is related.</p> <p>11 Q. Yes, related but separate, because we're looking at a</p> <p>12 different provision of the Act this time.</p> <p>13 A. That's right.</p> <p>14 Q. It's section 58.2C. You draw attention to the fact that</p> <p>15 the News Corp/BSkyB merger was considered not under the</p> <p>16 newspaper rubric, which is "plurality of views", but</p> <p>17 under the cross-media rubric of "plurality of owners".</p> <p>18 That, I suppose, was inevitably really given the issue</p> <p>19 but you then say what the risk is in paragraph 17:</p> <p>20 "Low levels of ownership plurality cause problems</p> <p>21 for different reasons to poor plurality of views."</p> <p>22 Can I invite you to expand on what those different</p> <p>23 concerns are in a low plurality of owners type of case?</p> <p>24 A. As I explain in here, the world is so made that there</p> <p>25 are only so many patrons and only so many news outlets</p> <p style="text-align: center;">Page 61</p>	<p>1 politician becomes the bearer of a specific agenda of</p> <p>2 a specific owner, an agenda which may affect the lives</p> <p>3 of many ordinary people. For instance -- I can give you</p> <p>4 a very good example of this. There was a lot of lead-up</p> <p>5 to the 2010 election around issues to do with the</p> <p>6 existence and powers of Ofcom or the income of the BBC,</p> <p>7 and all of those decisions, taken very much on the spur</p> <p>8 of the moment as the incoming government had intended,</p> <p>9 would have had very, very far-reaching consequences.</p> <p>10 The original proposal of a 40 per cent cut in the BBC's</p> <p>11 income would have had far-reaching implications for</p> <p>12 people's lives and although the people advancing these</p> <p>13 various ideas may not listen to Radio 4 or may not enjoy</p> <p>14 medium wave or may not ever listen or view any of the</p> <p>15 services which are available to people in this country,</p> <p>16 all of these media -- public service broadcasting in</p> <p>17 particular -- are a bedrock of our culture and our</p> <p>18 understanding, and if these products, if these services</p> <p>19 are removed by people by political fiat through the</p> <p>20 pursuit of a specific agenda, especially when that</p> <p>21 organisation is not exactly co-adventuring with the rest</p> <p>22 of us, it is quite a threatening state for a society to</p> <p>23 be in. Or I saw it that way. I mean, I may be</p> <p>24 exceptional in seeing things this way, but I did feel</p> <p>25 that the agenda carried forward by News Corp in</p> <p style="text-align: center;">Page 63</p>
<p>1 and inevitably the further concentration one gets, the</p> <p>2 less diversity, you know, the less porousness of the</p> <p>3 system.</p> <p>4 In the UK in particular, but in many other nations,</p> <p>5 you know, this problem of ownership plurality -- I think</p> <p>6 Italy comes to mind as a country where ownership</p> <p>7 plurality has been at the top of the political agenda</p> <p>8 for some time, and I think that these situations emerge</p> <p>9 and people are extremely concerned about them and also</p> <p>10 understand and have understood historically what the</p> <p>11 negative impact -- and I go on to talk about, you know,</p> <p>12 capture of politicians and vice versa. But I think</p> <p>13 these things are a matter of historical record, really,</p> <p>14 that in effect there have always been examples of those</p> <p>15 patrons of news organisations seeking to gain political</p> <p>16 or other kinds of favours.</p> <p>17 Q. So it's a risk of corruption, really. You put it as</p> <p>18 boldly as that in paragraph 20, that compacts will be</p> <p>19 entered into.</p> <p>20 A. Yes. I think that's a good -- I think it's a harsh</p> <p>21 term, perhaps, and people may wish to see compacts</p> <p>22 between politicians and media owners in other terms or</p> <p>23 there may, in fact, be many different levels of</p> <p>24 compacts, but I think that the risk to society is</p> <p>25 significant if a group of politicians or a single</p> <p style="text-align: center;">Page 62</p>	<p>1 particular, in the years leading up to the transaction,</p> <p>2 was very threatening of services and products that</p> <p>3 people in this country consume and enjoy. Perhaps</p> <p>4 others don't, but they certainly do here. So I feel</p> <p>5 that's quite threatening.</p> <p>6 Q. Thank you.</p> <p>7 A. And especially because -- I must tell you as I've been</p> <p>8 a media analyst for over 30 years. The fact is I've</p> <p>9 often found that politicians don't actually understand</p> <p>10 how people consume media. I've often found that</p> <p>11 a politician will tell me: "I don't like my local</p> <p>12 service, my local news", and I sit there and say, "Other</p> <p>13 people do. Have you checked out how many do? Or maybe</p> <p>14 you could try something else."</p> <p>15 So I think politicians themselves have a very</p> <p>16 distant contact with the media which is very sporadic</p> <p>17 and they may find it difficult to put themselves in the</p> <p>18 shoes of people who consume, after all, as the British</p> <p>19 do, a very large amount of radio and television and</p> <p>20 newspapers and books.</p> <p>21 Q. Paragraph 22 of your statement. You move on to</p> <p>22 a slightly different theme, namely whether the concept</p> <p>23 of plurality refers just to news and current affairs or</p> <p>24 whether it applies also to other types of information</p> <p>25 and entertainment. We heard from Ofcom, and I think</p> <p style="text-align: center;">Page 64</p>



<p>1 Mr Foster as well, that a fairly narrow definition of                  2 news is relevant here and one shouldn't allow that to                  3 overflow into other areas of entertainment, but you,                  4 I think, are keen that we should look more widely. Can                  5 you explain in your own words, please, why that's                  6 appropriate?                  7 <b>A. Yes. Firstly, I think in the earlier part of my                  8 testimony I made the point as to how difficult it is to                  9 disintermediate what is news and entertainment anyway                  10 within the context of newspaper readership. So I think                  11 that again, the idea of news is such a broad concept                  12 already and there are many, many different kinds of                  13 programmes that might fit into that thing.</b>                  14 Similarly, the issue of plurality also works across                  15 a very large number of different kinds of material --                  16 entertainment or documentaries and so on -- and I think                  17 that it's -- in a sense, we know it when we see it                  18 because in this country, the public service broadcasters                  19 have been greatly encouraged to be plural in their                  20 provision of material that is of interest to the                  21 population as a whole, and that's a well understood and                  22 well established concept here.                  23 But in economic terms, what I'm really talking about                  24 is the number of gatekeepers. So in this country, in                  25 reality, as I've pointed out in our annex 1 of media</p> <p style="text-align: center;">Page 65</p>	<p>1 <b>I think that the public -- that the politicians, as I                  2 point out in paragraph 23, have understood that at some                  3 level plurality is about our whole cultural vitality,                  4 and in my view, as a business analyst, part of our                  5 economic vitality.</b>                  6 Q. Once we're outside the realm of news and current                  7 affairs, aren't the matters here so soft, so difficult                  8 to concern, that if they weigh in the balance at all --                  9 we're talking about plurality in entertainment or those                  10 sort of areas -- it's scarcely worth taking into them                  11 into account even if they might feature theoretically?                  12 <b>A. I think that in economic terms that wouldn't be right.                  13 First of all, I don't think that definitionally they're                  14 all that difficult because Ofcom actually -- I mean,                  15 public service broadcasting licences require public                  16 service broadcasters to fulfil a number of commitments                  17 anyway and they are expressed in terms of entertainment,                  18 and the industry in this country certainly understands                  19 what Ofcom means by those words. So definitionally,                  20 there's no real difficulty with measuring plurality and                  21 entertainment any more than there is -- it's actually                  22 easier, I would say, than measuring plurality in news.</b>                  23 Secondly, it's really a broader economic point about                  24 not forgetting that plurality in a society actually                  25 operates, again, around the plurality of owners of large</p> <p style="text-align: center;">Page 67</p>
<p>1 ownership rules, there is actually -- in the Ofcom                  2 submission outline material, there is in fact quite                  3 a lot of information around the specific numbers                  4 involved. In this country, the BBC turns over around                  5 3.5 billion, BSkyB, excluding its telecoms activities,                  6 is at around the sort of 6 mark and so on, so -- 6                  7 billion mark.                  8 So we're looking at a very small number of very                  9 significant organisations in this country, and the                  10 oligopolistic nature of the media indicates that that's                  11 also true in the book publishing business and so. So                  12 you have a number of gatekeepers and they're the people                  13 who are going to commission scripts or allow a writer to                  14 spend the time to develop its material. This was the                  15 role that was once effected by, say, book publishers.                  16 Book publishers used to give advances, writers would                  17 have the time to complete their work and so on. So the                  18 whole creative landscape is formed by gatekeepers making                  19 investments in individuals or teams of individuals who                  20 will then bring creative enterprises to fruition.                  21 It is also, to my mind, incredibly important to look                  22 at plurality, especially because of the difficulties we                  23 face in defining news and current affairs -- is to                  24 define plurality in the effect, particular of                  25 a transaction, across all of its broadest elements and</p> <p style="text-align: center;">Page 66</p>	<p>1 enterprises and in reality in this country there are but                  2 a handful of those.                  3 Q. You've covered the disintermediation point in                  4 paragraph 27.                  5 <b>A. Yes.</b>                  6 Q. Unless there's anything else you'd like to say about                  7 that. Can I ask you, please, to explain the point                  8 you're making in paragraph 28: the unusual economics of                  9 mass media. The marginal cost of serving an extra                  10 customer is often zero.                  11 <b>A. That's right. It's one of the great truths of                  12 broadcasting companies and one of the reasons why they                  13 have such extraordinary longevity that once they're past                  14 the stage of covering their fixed costs, they can                  15 actually -- bar, obviously, economic cycles, they can                  16 actually increase their profitability, assuming that                  17 they face no competition.</b>                  18 So in a sense, they're completely different kinds of                  19 enterprises anyway. TV broadcasters tend to be very                  20 significant. BSkyB is a good example. ITV, the BBC.                  21 These are very, very significant enterprises which need                  22 very large scale investment and an ongoing capex, but                  23 once they're basically past their innovation stage,                  24 which is usually thought to be around eight to ten                  25 years, then actually they can just deal going.</p> <p style="text-align: center;">Page 68</p>

<p>1       <b>Unfortunately, the economics of broadcasting also</b>  2       <b>work against organisations where, for instance, there is</b>  3       <b>a fall in consumption and in fact, it becomes very</b>  4       <b>difficult for organisations to recover unless they</b>  5       <b>savagely cut their costs. But it's -- I mean,</b>  6       <b>broadcasting is a large-scale model. It is -- in every</b>  7       <b>market in Europe, you see -- apart from Germany, which</b>  8       <b>has a lender system, so very strong local</b>  9       <b>broadcasters -- you see no more than three or four</b>  10       <b>mainstream broadcasters in general, including state</b>  11       <b>broadcasters and so on, and the mix is different.</b></p> <p>12       <b>I think the point I wanted to make was also just in</b>  13       <b>response to Robin Foster's evidence earlier in which he</b>  14       <b>said that there was so much uncertainty over digital</b>  15       <b>models and actually I wanted to remove that uncertainty</b>  16       <b>because I think we can say with certainty that digital</b>  17       <b>models will not fill the role of traditional</b>  18       <b>enterprises. We can say it with certainty because we</b>  19       <b>have the evidence. The MailOnline started a decade ago</b>  20       <b>almost. The impact of that is very simple. It's,</b>  21       <b>I believe, the second-largest newspaper website in the</b>  22       <b>world, but the website turned over 16 million --</b>  23       <b>16 million -- in the financial year that just went by,</b>  24       <b>and in contrast, the Mail and the Mail on Sunday turned</b>  25       <b>over 608 million. I believe that the MailOnline's</b></p> <p style="text-align: center;">Page 69</p>	<p>1       to monetise what they're doing online? I don't know the  2       figures; you probably do. You mentioned the Guardian,  3       without naming it. Stories put out by the Guardian,  4       read by X and online by --</p> <p>5       <b>A. Millions more people. I mean, the Guardian is another</b>  6       <b>very good example of an extraordinarily successful</b>  7       <b>digital operation. I believe that the revenues of its</b>  8       <b>digital operation were around -- I'm talking about the</b>  9       <b>newspaper; I'm not talking about the other stuff that</b>  10       <b>they do, although they do other things -- was around 14</b>  11       <b>million in their last financial year, which compared to</b>  12       <b>150 million of revenue from the Guardian and the</b>  13       <b>Observer. So it's around one tenth. If you look at</b>  14       <b>other newspaper groups, their digital revenues tend to</b>  15       <b>be below 10 per cent, or at 10 per cent in the case of</b>  16       <b>the Guardian.</b></p> <p>17       <b>It isn't through want of trying that these</b>  18       <b>organisations are having a struggle. There have been</b>  19       <b>many different experiments. You mentioned earlier pay</b>  20       <b>walls. The New York Times has gone down that route, as</b>  21       <b>has the Times and the Wall Street Journal and the</b>  22       <b>Financial Times, but the Financial Times and the Wall</b>  23       <b>Street Journal have made a better first of it and that's</b>  24       <b>because they have very specialised business information</b>  25       <b>that people really will pay a lot of money for.</b></p> <p style="text-align: center;">Page 71</p>
<p>1       website, which, as I said, is the second most popular  2       newspaper website in the world, is going to be breaking  3       even this year, but this is a very small enterprise.  4       This is really small, even though, as I said, it is one  5       of the most popular websites in the world.</p> <p>6       <b>So I think we do know that the digital revenues --</b>  7       <b>there is a very famous view by an American which</b>  8       <b>referred to digital as the transition between anaogue</b>  9       <b>dollars and digital pennies, and I think we know that</b>  10       <b>those digital pennies do not pay for origination and</b>  11       <b>that the origination of hard news has continued to be</b>  12       <b>the preserve primarily of the newspapers -- regional and</b>  13       <b>national newspapers in this country and elsewhere, and</b>  14       <b>I think that is why we do know all of this myriad of</b>  15       <b>enterprises, whether it's HuffPo, Huffington Post or --</b>  16       <b>that they're interesting phenomena, they may be heavily</b>  17       <b>used online, they may get a lot of buzz in the papers,</b>  18       <b>but in terms of being able to really employ journalists</b>  19       <b>to do very complex work -- I mean, the Traffigura</b>  20       <b>investigation, the Wikileaks, the MPs' expenses scandal,</b>  21       <b>the phone hacking story -- these are not enterprises</b>  22       <b>that have been taken forward by any enterprise but print</b>  23       <b>enterprises.</b></p> <p>24       LORD JUSTICE LEVESON: But doesn't that merely serve to  25       underline the need for these organisations to find a way</p> <p style="text-align: center;">Page 70</p>	<p>1       <b>So, you know, we have the paradox that the consumer</b>  2       <b>of the newspaper is prepared to pay a pound plus to</b>  3       <b>consume a product that that person will read for</b>  4       <b>40 minutes a day. That is the reality. That product is</b>  5       <b>really quite different from a website, which is grazed,</b>  6       <b>you know, to the tune of -- I think the average news</b>  7       <b>site user is 15 minutes a month, as I mentioned. That's</b>  8       <b>half a minute a day. It's not a significant engagement.</b>  9       <b>People will not pay for something with which they're not</b>  10       <b>significantly engaged.</b></p> <p>11       <b>I mean, an American writer called Nicholas Carr has</b>  12       <b>referred to this as the shallows. This is a shallow</b>  13       <b>world full of facts and they just buzz by and people</b>  14       <b>aren't reading long form online. And so it is quite</b>  15       <b>frightening and the digital media are no substitute for</b>  16       <b>the kind of engagement that people have with newspapers</b>  17       <b>in this country and the effort that people who read</b>  18       <b>newspapers make to think about political issues which</b>  19       <b>they will subsequently vote on.</b></p> <p>20       <b>So it isn't the fault of the newspapers for not</b>  21       <b>having found the magic bullet, because my heavens, they</b>  22       <b>have all tried and they've tried from one end of America</b>  23       <b>to the other. They've tried from one end of Europe --</b>  24       <b>I mean, the organisation called Mecom, which owns</b>  25       <b>newspapers, is one of the organisations we've looked at</b></p> <p style="text-align: center;">Page 72</p>

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<p>1 in detail and it runs newspapers in the Netherlands. In</p> <p>2 every single nation apart from Japan and Norway, which</p> <p>3 are very strong language groups -- and strong language</p> <p>4 groups will help to solidify the hold of the traditional</p> <p>5 media and to keep them going, but elsewhere, I really</p> <p>6 wouldn't task the newspapers with finding some wonderful</p> <p>7 model, because my heavens, they're desperate to do it</p> <p>8 and we, as their advisers, would be delighted if they</p> <p>9 could but so far the only method of staying alive has</p> <p>10 proved to be cutting your costs.</p> <p>11 LORD JUSTICE LEVESON: Sounds all rather depressing,</p> <p>12 actually.</p> <p>13 <b>A. It's the way things are.</b></p> <p>14 MR JAY: Paragraph 29 now, Ms Enders. To be clear, you say:</p> <p>15 "The plurality rules must have as their explicit</p> <p>16 purpose the distortion of the natural processes of</p> <p>17 competition."</p> <p>18 Do you mean by that natural market processes?</p> <p>19 <b>A. Yes.</b></p> <p>20 <b>Q.</b> You say:</p> <p>21 "They have to hold back the more successful, larger,</p> <p>22 financially stronger companies in order to help the</p> <p>23 smaller competitors."</p> <p>24 The point has been made before, but many would say</p> <p>25 all you're doing there is penalising success. How could</p> <p style="text-align: center;">Page 73</p>	<p>1 preserve choice for consumers or for suppliers or for</p> <p>2 advertisers or for whoever. I think this is a well</p> <p>3 understood thing.</p> <p>4 The idea that somehow -- especially in this country,</p> <p>5 where we have real enterprises -- we have a real BSKyB,</p> <p>6 a real BBC. We're not talking about any other country.</p> <p>7 In this country, we have very large media enterprises</p> <p>8 and then a plethora of very small ones. That's the way</p> <p>9 it is. So holding back the very, very large ones from</p> <p>10 predatory pricing, from engaging in destructive activity</p> <p>11 or indeed in leapfrogging their brethren in some way or</p> <p>12 in dominating the political agenda to knock another one</p> <p>13 back -- I don't think that that is something that we</p> <p>14 shouldn't be concerned about. I think that is a very</p> <p>15 real concern. It is very important.</p> <p>16 I think -- I do point out that, you know, we're</p> <p>17 really looking at ideas around transactions, around M&amp;A.</p> <p>18 We're not talking that much about organic growth. The</p> <p>19 big shifts occur primarily through transactions, not</p> <p>20 through organic growth. Indeed, organic growth for the</p> <p>21 BBC -- well, we know what that's going to be because the</p> <p>22 licensee formula is set out. For ITV, we know -- for</p> <p>23 the television sector as a whole, we know it would be at</p> <p>24 best a 2 per cent growth rate in the next five years.</p> <p>25 We know those outcomes. There's no mystery.</p> <p style="text-align: center;">Page 75</p>
<p>1 that possibly be justified, save in quite minor</p> <p>2 respects?</p> <p>3 <b>A. Well, actually -- but in this country people have a very</b></p> <p>4 <b>well understood idea of competition and it's been</b></p> <p>5 <b>applied for many years -- and again, I'm not</b></p> <p>6 <b>a competition specialist but all I can point to you is</b></p> <p>7 <b>that there has been a large scale series of mergers of</b></p> <p>8 <b>supermarkets, for instance, and divestments of</b></p> <p>9 <b>supermarkets within the acquiring group are a constant</b></p> <p>10 <b>feature, and in fact, the Competition Commission has</b></p> <p>11 <b>developed a whole means of establishing which</b></p> <p>12 <b>supermarkets should be sold where and it has done so</b></p> <p>13 <b>also in the cases of cinema transactions because cinemas</b></p> <p>14 <b>are also quite concentrated in this country.</b></p> <p>15 I think where there is a lot of concentration, the</p> <p>16 Competition Commission has a habit of forcing</p> <p>17 divestments and indeed of wishing to sustain competition</p> <p>18 thereby. So again, I think there may be</p> <p>19 a misunderstanding around the proposal that we've</p> <p>20 advanced that it's systematically penalises success,</p> <p>21 which of course is a no-go area. But actually in</p> <p>22 practice, in Britain, there are many, many examples of</p> <p>23 very successful, very innovative organisations which</p> <p>24 have secured the capital to take over their brethren and</p> <p>25 which are not backed by the Competition Commission to</p> <p style="text-align: center;">Page 74</p>	<p>1 <b>Q.</b> If success is penalised, if that's the right way of</p> <p>2 putting it, to meet the public interest reflected in</p> <p>3 anti-competition law, you say logically there's no</p> <p>4 difference between that and pro-plurality law. So you</p> <p>5 can do one in one case, which you can for competition --</p> <p>6 see your supermarket -- and why can't you do it in the</p> <p>7 other case? Because the public interest is of equal</p> <p>8 force, really. Is that what you're saying?</p> <p>9 <b>A. I think so.</b></p> <p>10 <b>Q.</b> Thank you. Can we deal then with question 2, which is</p> <p>11 the introduction of the proposal of a cap. Can</p> <p>12 I understand first how it's going to work. You outline</p> <p>13 the proposal in paragraph 32. We're going to look at</p> <p>14 total UK media market revenues and that each participant</p> <p>15 is only going to be permitted up to a certain ceiling</p> <p>16 within the -- percentage ceiling, rather, within the</p> <p>17 total media market revenue. You propose a ceiling of</p> <p>18 15 per cent, which will allow, therefore, for at least</p> <p>19 seven players on the arithmetic. Is that basically --</p> <p>20 <b>A. Yes, it's just a proposal. The fact is, as we point</b></p> <p>21 <b>out, there are definitional issues. Whether you include</b></p> <p>22 <b>books and games is an interesting question and so on.</b></p> <p>23 <b>So I don't want to attach any real significance to the</b></p> <p>24 <b>figure of 15 per cent. Nor indeed -- I mean, although</b></p> <p>25 <b>we've calculated it with some difficulty, the media</b></p> <p style="text-align: center;">Page 76</p>

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<p>1 market value -- those are real figures but how you draw 2 that market and how many participants you want -- 3 I mean, it might be, to your earlier point to Mr Foster, 4 that a market share of four players with 25 per cent 5 each is what society deems to be all right, or four 6 players with a market share combined of 70 per cent. 7 But -- I'm just trying to lay out for debate, in this 8 society going forward, what would be the comfort zone. 9 I mean, in supermarkets, I think the end point has been 10 around, you know, a three to four player market. 11 I think it's something to actually ponder: what is 12 the right level? Particularly in the context of -- the 13 real context of the real transaction that was introduced 14 in 2010, which would have very substantially moved the 15 market towards a higher level of concentration than it 16 had before. 17 So I think -- I'm not proposing 15 per cent. I put 18 it on the table. I just put it there. A seven player 19 market, a six player market, a five, a four. You know, 20 what are we comfortable with? In mobile telephony, we 21 have a five-player market. In broadband, effectively we 22 have a five-player market. These are very important 23 issues and I hope that this will be the beginning of 24 a debate or indeed that the debate will actually 25 continue as to what it is that society feels most</p> <p style="text-align: center;">Page 77</p>	<p>1 market, not actually a media market for plurality 2 purposes. If one went down that route, one would 3 obviously exclude -- for instance, the video games 4 market would not seem to fit naturally within that, but 5 we didn't -- we were trying to get at the numbers that 6 the European Commission uses and which would be useful 7 for -- in fact, just to put them down so people can make 8 a judgment around whether that particular medium should 9 be included. 10 Because -- you know, I agree with you. I mean, 11 these are all subjective views. Apart from the easy 12 ones -- for instance, music and books are quite 13 questionable to include in any market that has to be 14 measured for plurality, but they do -- 15 Q. If you want to cap revenue, why aren't we capping 16 revenue which is relevant to the issue of plurality? 17 Why are we including revenue which may probably be 18 irrelevant to the issue of plurality? 19 A. Well -- but remember that my sense of plurality is 20 perhaps a bit broader than that put forward by Ofcom 21 anyway. I'm including in that a number of creative 22 areas like music and books where a number of different 23 enterprises is an important factor in terms of ensuring 24 creativity and is understood that way. Anyone who's 25 following the Universal/EMI transaction in Brussels will</p> <p style="text-align: center;">Page 79</p>
<p>1 comfortable with, because of course we always have, as 2 a given, the BBC as a player and actor. So one of those 3 slots is always taken. 4 Q. It's clear from the companion document you've submitted, 5 which is annex one, that the media market might well 6 include advertising and subscription revenues, ticket 7 sales, news stand payments and sales of physical media 8 such as DVDs; is that right? 9 A. Well, we put as many items that seemed to fit in there 10 and of course, we discussed this with a number of 11 organisations and they felt that this was a sense of it, 12 but of course, you can expand and contract this and it's 13 really a question of relevance, what fits together. 14 I mean, you could draw the market much no narrowly, and 15 indeed Parliament has spent time doing that, believing 16 that the closeness between newspapers and television 17 should be something that's much more monitored. So 18 that's why there are cross-media ownership restrictions 19 on newspaper owners and ITV, for instance, ITV licences 20 historically. That's been brought to fit in political 21 terms and to be an issue. 22 Q. Why would you include something such as advertising 23 revenue within your media market? Why is it relevant to 24 the issue of plurality? 25 A. Well, I mean, we were just trying to draw a media</p> <p style="text-align: center;">Page 78</p>	<p>1 see that those issues are much to the fore. What's the 2 right number of big players in Europe to ensure 3 creativity and innovation? 4 Certainly -- I mean, this is, you know, for 5 discussion and consideration, but I do think that the 6 entertainment market as a whole is the right locus for 7 a view around plurality, particularly because, as 8 I said, there's a lot of blurring of categories around 9 programming, but also there are potential bottlenecks 10 which would inflict damage on either the economic side 11 of the equation for the UK or the consumption picture 12 for consumers if growth in power went unchecked. 13 But these are all for debate and consideration and 14 we don't -- you know, we don't have a new Coms Act yet 15 but we may do some day and there will be a lot of debate 16 around these points. I'm just throwing them out there 17 and hoping that people will take a view and take an 18 interest in this issue, because it's fundamentally about 19 how many major actors are the right number for the UK. 20 For the UK specifically. Four, five, six, seven? 21 People will take a view. 22 Q. You set up two contrary arguments against your proposal. 23 You've already dealt with one of them, I think, very 24 clearly. This is the penalising success point. But the 25 arbitrary limit point, Ms Enders, in paragraph 37 you</p> <p style="text-align: center;">Page 80</p>

20 (Pages 77 to 80)

<p>1 address. Isn't it fair that you're really accepting in 2 paragraph 37 that your limit is an arbitrary one? 3 <b>A. I am accepting that it's an arbitrary one, but I am also</b> 4 <b>positing that it is very important to have a sense --</b> 5 <b>a multi-player -- active multi-player market and</b> 6 <b>therefore you do have to have arbitrary limits to</b> 7 <b>guarantee that.</b> 8 <b>Q.</b> In principle, you wouldn't want to have arbitrary 9 limits. You'd want a limit which was based on some sort 10 of principle, wouldn't you? It's objectionable a priori 11 to have a limit for which you can't justify, which 12 you're just plucking out of the air? 13 <b>A. No, well, I'm -- I didn't want to use the word</b> 14 <b>"arbitrary" in that way but it is, in a certain way,</b> 15 <b>arbitrary to take a decision that six players or seven</b> 16 <b>players or this media market definition or that. There</b> 17 <b>is a certain arbitrary -- there is going to be an area</b> 18 <b>of judgment involved in all of these phenomena.</b> 19 <b>Q.</b> I've been asked to put to you these points on the idea 20 of the cap as you have envisaged it. The first point is 21 this: is it not theoretically possible that under your 22 definition, all of the news provision in the UK could be 23 in the hands of one provider without triggering the cap 24 as long as they had no other media interests? 25 <b>A. Well, the purpose of our proposal is additive to</b> Page 81</p>	<p>1 <b>It's not our objective to penalise the success of</b> 2 <b>any enterprise that is generated through organic -- but</b> 3 <b>again, we're not talking about any other nation but this</b> 4 <b>one, and in this nation, commercial broadcasting is</b> 5 <b>going to struggle to grow at more than 2 per cent</b> 6 <b>a year. Newspapers will continue to dramatically fall,</b> 7 <b>both in circulation and in revenues, and that will</b> 8 <b>continue. The share of voice of the BBC will grow.</b> 9 <b>BSkyB will become more powerful in the mix. These are</b> 10 <b>all things that are baked in to the way things really</b> 11 <b>are.</b> 12 <b>Q.</b> If one looks at the figures for 2010 -- this is figure 2 13 to your April 2012 report, which is annex 1. It's 14 page 7 of 8, our page 01729. 15 <b>A. I have page 7. This is figure 1, the size of the UK</b> 16 <b>media market in 2010.</b> 17 <b>Q.</b> I think figure 2. 18 <b>A. Oh, figure 2.</b> 19 <b>Q.</b> This will tell us how the cap might operate. If you 20 look at News Corporation and you include the 39 per cent 21 BSKyB, which was the position as was, the market share 22 was only 11 per cent. 23 <b>A. That's right.</b> 24 <b>Q.</b> But you will say if you included the shares which News 25 Corporation wanted to buy, so therefore the 100 per cent Page 83</p>
<p>1 <b>proposals put forward by Ofcom and indeed other</b> 2 <b>proposals under -- or indeed existing law, and other</b> 3 <b>mechanisms of review of transactions in any case. We're</b> 4 <b>not proposing that this would replace all existing media</b> 5 <b>ownership legislation, but rather that it would be</b> 6 <b>additive.</b> 7 <b>Because also when the News Corp/BSkyB transaction</b> 8 <b>was announced, we seemed to enter into unknown territory</b> 9 <b>in relation to scale and scope of enterprises in the UK.</b> 10 <b>So this would be a mechanism of forcing any large actor,</b> 11 <b>whether that actor is specifically Google -- because</b> 12 <b>Google is, after all, a very significant organisation in</b> 13 <b>the UK -- or News Corp, from -- you know, at some level</b> 14 <b>this is what is behind our proposal. The trigger is</b> 15 <b>really M&amp;A -- sorry, mergers and acquisitions.</b> 16 <b>Q.</b> You could overreach the cap by organic growth, could you 17 not? 18 <b>A. That would be something where, again, if you looked at</b> 19 <b>it deeply, you would have to come to a view about what</b> 20 <b>is (a) the right definition of the market, and (b), the</b> 21 <b>number of players you want. It would not be our</b> 22 <b>intention for organic growth -- foreseeable organic</b> 23 <b>growth to cause that kind of breach. That would not be</b> 24 <b>our intention. So that's really a question of setting</b> 25 <b>it at the right number.</b> Page 82</p>	<p>1 BSKyB, you would then overtop the cap because you would 2 arrive at 20 per cent. So the way the cap would operate 3 would be on this approach: to prevent News Corporation 4 buying those extra shares or indeed all of those extra 5 shares. They could buy some of them to keep them at 6 14.9 per cent presumably. Is that how you envisage it 7 working? 8 <b>A. Indeed, or they could choose to divest themselves of</b> 9 <b>other interests in the UK, or indeed the position could</b> 10 <b>change over time and indeed, the newspaper circulation</b> 11 <b>and revenues would decline over time and at some future</b> 12 <b>point, there would be the right mix of things.</b> 13 <b>But again, it is not for me to say that 15 per cent</b> 14 <b>is the right number, or indeed 20, but it's to put</b> 15 <b>perspective into the proposals of what, after all, is</b> 16 <b>a transaction which seemed to cause all politicians to</b> 17 <b>pause very long and hard last year, and indeed, which</b> 18 <b>caused me to take a great interest in the situation when</b> 19 <b>it first emerged in June 2010, precisely because of the</b> 20 <b>issues of scale and scope -- and of course, of</b> 21 <b>increasing scale and scope because, of course, as</b> 22 <b>newspaper or other enterprises decline, then of course,</b> 23 <b>other -- BSKyB in particular will continue to grow</b> 24 <b>strongly and will become more powerful in the market and</b> 25 <b>have more economic power and more leverage and more</b> Page 84</p>

<p>1 <b>opportunities for regulatory capture.</b></p> <p>2 Q. One of the points Ofcom makes is that the cap would</p> <p>3 limit the economic strength of any one company,</p> <p>4 obviously I suppose, but doesn't target the issues of</p> <p>5 diversity or influence with any precision. What is your</p> <p>6 assessment of those criticisms?</p> <p>7 <b>A. I think that's absolutely right. It's just one proposal</b></p> <p>8 <b>and there are other proposals. I mean, Ofcom is keen</b></p> <p>9 <b>and it is important to measure news plurality the way</b></p> <p>10 <b>that it wants to measure it. That is one measure. It's</b></p> <p>11 <b>also important to have competition legislation. That's</b></p> <p>12 <b>another measure.</b></p> <p>13 <b>This would be something that would preclude the UK</b></p> <p>14 <b>from being colonised entirely by, say, two very</b></p> <p>15 <b>large-scale global organisations, which might not be an</b></p> <p>16 <b>outcome that the British public has really bought into,</b></p> <p>17 <b>but is possible. After all, what is possible under</b></p> <p>18 <b>existing legislation is the transaction that we saw</b></p> <p>19 <b>withdrawn last year.</b></p> <p>20 Q. The third question which you address in paragraph 39 of</p> <p>21 your statement, the effects you seek to achieve and why</p> <p>22 they're desirable, you explain that the principle effect</p> <p>23 of your proposal is to block any single owner</p> <p>24 controlling too large a share of the total media market</p> <p>25 now or in the future. It is through financial muscle</p> <p style="text-align: center;">Page 85</p>	<p>1 <b>come out of the local culture, companies like ITV, which</b></p> <p>2 <b>are relatively small.</b></p> <p>3 Q. I've been asked to put these points to you by another</p> <p>4 core participant. Do you accept that your proposal has</p> <p>5 in effect, rightly or wrongly, been rejected by Ofcom?</p> <p>6 <b>A. No, I expected it to be rejected by Ofcom because it's</b></p> <p>7 <b>very outwith the powers that Ofcom has and it's</b></p> <p>8 <b>a completely new approach. But I have only advanced it</b></p> <p>9 <b>not because of any certainty that it would be the right</b></p> <p>10 <b>single answer to the question of plurality in the UK,</b></p> <p>11 <b>but in order to advance the idea that people should</b></p> <p>12 <b>consider how many participants -- and core participants</b></p> <p>13 <b>are probably a good way to put this -- how many is the</b></p> <p>14 <b>right number for the UK at minimum. In the real world</b></p> <p>15 <b>with its structure of financial forces which are of</b></p> <p>16 <b>immense importance and, of course, as you know from</b></p> <p>17 <b>having heard a great deal of evidence on the matter, the</b></p> <p>18 <b>massive challenges and issues around the monetisation of</b></p> <p>19 <b>existing newspaper models and their future.</b></p> <p>20 <b>So it's on the threshold of the future where we know</b></p> <p>21 <b>that although the titles may not disappear, certainly</b></p> <p>22 <b>their resources are in very significant and sustained</b></p> <p>23 <b>decline.</b></p> <p>24 Q. The other point this core participant wishes me to draw</p> <p>25 to your attention is if you look at the submission you</p> <p style="text-align: center;">Page 87</p>
<p>1 that proprietors exert most of their influence and seek</p> <p>2 to ensure that no company ever gets too large:</p> <p>3 "The point I'm asked to put to you is this: if it's</p> <p>4 the financial power rather than use of media channels</p> <p>5 that is the root of influence, why do you consider that</p> <p>6 financial muscle in the media market needs to be limited</p> <p>7 in a way which would not happen in other markets such as</p> <p>8 banking or retail?</p> <p>9 <b>A. Again, it is one measure. The only reason I put it</b></p> <p>10 <b>forward so strongly is because it tends to be dismissed</b></p> <p>11 <b>in favour of the softer sense of influence, the</b></p> <p>12 <b>touchy-feely aspects of it and also the hearsay elements</b></p> <p>13 <b>of influence and impact on politicians and so on. What</b></p> <p>14 <b>I'm really trying to get at is financial power in the</b></p> <p>15 <b>real world, in the global world that we live in, is of</b></p> <p>16 <b>immense importance in terms of a company's ability to</b></p> <p>17 <b>carry out transactions, to capture regulatory processes</b></p> <p>18 <b>or to defend them, and then that is the reality in the</b></p> <p>19 <b>UK, so there are many wonderful thinkers in this field</b></p> <p>20 <b>which give a very wide array of views. Mine is just the</b></p> <p>21 <b>view of a business analyst with the emphasis that I make</b></p> <p>22 <b>on the forces that I see more clearly, which are the</b></p> <p>23 <b>forces of the economic forces and the capital forces</b></p> <p>24 <b>which power the world's largest media organisations and</b></p> <p>25 <b>which are not really accessible to companies that have</b></p> <p style="text-align: center;">Page 86</p>	<p>1 made on 16 November 2010, which of course was in the</p> <p>2 context of the BSKyB bid, our page 01731, you explain</p> <p>3 that the position was commissioned by a small group of</p> <p>4 Enders Analysis clients to provide them with clear and</p> <p>5 coherent arguments and relevant supporting data and</p> <p>6 references.</p> <p>7 <b>A. That's right.</b></p> <p>8 Q. Presumably those clients were opposed to the bid, and</p> <p>9 I think the point which I'm asked to make is whether you</p> <p>10 were putting forward a completely objective analysis or</p> <p>11 whether you were putting forward an analysis which</p> <p>12 reflected the underlying views of your client, which was</p> <p>13 to oppose the bid?</p> <p>14 <b>A. No, there was a group of clients and they're actually</b></p> <p>15 <b>well-known because they opposed the merger, but this was</b></p> <p>16 <b>the only work that they commissioned us to do. Looking</b></p> <p>17 <b>further back in time, the work that we did which</b></p> <p>18 <b>initially brought to Vince Cable's attention a number of</b></p> <p>19 <b>matters on which he should intervene, and subsequent --</b></p> <p>20 <b>all of the time that we've spent on these matters</b></p> <p>21 <b>subsequent to that particular submission -- I mean this</b></p> <p>22 <b>has all been my time and my gift to my wonderful nation.</b></p> <p>23 <b>So I'm afraid that these are not even the views of my</b></p> <p>24 <b>company. These are my views that I advance.</b></p> <p>25 LORD JUSTICE LEVESON: The reason it's important to ask that</p> <p style="text-align: center;">Page 88</p>

22 (Pages 85 to 88)

<p>1 is this: we're very familiar with barristers getting the                  2 cause and then thinking of arguments that justify the                  3 result that their clients want. That's what they do                  4 most of the time in litigation, I'm sure you're aware.                  5 Therefore I think it's a sensible question. Whatever                  6 you might have done in relation to this piece of work,                  7 what you're now providing me with, it's not a brief that                  8 you've been asked to deliver. This is your assessment                  9 of the position and how one could go forward in the                  10 light of your years of experience in the business. Is                  11 that --                  12 <b>A. That's right. And it is a slightly quixotic cause,</b>                  13 <b>since no one agrees with me.</b>                  14 MR JAY: Okay. That's very frank. The final point they                  15 wanted me to put is that we know that you met Dr Cable                  16 at City Airport, I think, he referred to it in his                  17 evidence. Can you remember what you discussed?                  18 <b>A. Well, yes. He didn't discuss anything with me</b>                  19 <b>because -- but he did smile at me, so that was nice.</b>                  20 <b>All I did was say, "Dr Cable, would you mind sitting</b>                  21 <b>down and listening to what I have to say, because I sent</b>                  22 <b>you a document and I have had no official or unofficial</b>                  23 <b>sense that you actually received it or read it, and</b>                  24 <b>I sent you this document about six weeks ago and so I'm</b>                  25 <b>wondering if I can just quickly explain to you what it's</b>                  Page 89</p>	<p>1 (The hearing adjourned until 10 o'clock the following day)                  2                  3                  4                  5                  6                  7                  8                  9                  10                  11                  12                  13                  14                  15                  16                  17                  18                  19                  20                  21                  22                  23                  24                  25                  Page 91</p>
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<p>1 about and why it is that there's no doubt in my mind                  2 that a ministerial intervention in the News Corp/BSkyB                  3 transaction is something which you must do without                  4 question."                  5 Anyway, he didn't say a word but he did politely sit                  6 down and he did give me a nice smile, and then his                  7 assistant sat right there and they listened to the whole                  8 thing and he said, "Thank you very much", and walked off                  9 to get his plane.                  10 So he never said a thing, but he was -- he did                  11 smile, so I did take that as an invitation to go forward                  12 with my pitch, and I managed to get it across in about                  13 five or ten minutes, I think. Maybe even five. Unlike                  14 today, sorry.                  15 MR JAY: I think it's clear from your evidence at all                  16 material times he acted quasi-judicially in relation to                  17 your representation. That's very helpful. Thank you                  18 very much.                  19 LORD JUSTICE LEVESON: Ms Enders, thank you very much                  20 indeed. Thank you for your help both at the beginning                  21 and now here we are approaching the end. Thank you.                  22 <b>A. Thank you so much.</b>                  23 MR JAY: Tomorrow?                  24 LORD JUSTICE LEVESON: 10 o'clock tomorrow.                  25 (4.35 pm)                  Page 90</p>	<p></p>
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