

Media Plurality: Under the Skin of Control – Concept, Context, and Reform

Antonio Bavasso
Allen & Overy

MEDIA PLURALITY: UNDER THE SKIN OF CONTROL - CONCEPT, CONTEXT, AND REFORM

Antonio Bavasso*

ABSTRACT:

The concept of media plurality has achieved a remarkable degree of prominence recently, particularly in the United Kingdom and more generally in Europe. This article looks at the U.K. experience and, on that basis, it aims to illustrate how the legal concept and policy aims have been affected by transformational effects of new media forms. The first section considers the current regulatory regime applicable to traditional media and the concept of media plurality the regime aims to protect, and illustrates the wide range of interventions already in place. The second section argues for the importance of judging the plurality of media, and thus the need for any further intervention, on the basis of a cross-media assessment, rather than taking individual types of media in isolation. The third section considers how technological developments are shaping the outlook for media plurality today. Based on this analysis, I question whether the regulatory regime relating to plurality requires either a major overhaul and/or the emphasis that it currently attracts in the regulatory reform agenda. On the other hand, it seems clear that we need to remain vigilant about new and more subtle forms of influence on public discourse that flow from the evolving methods of news distribution and consumption.

I. INTRODUCTION

The concept of media plurality has achieved a remarkable degree of prominence recently, at a time when the transformational effects of the internet are taking an increasingly defined shape and have already produced a tangible impact in patterns of media consumption. Media plurality not only relates to the number of persons with control of media companies, but (per the U.K. Ofcom) also refers to the number of persons with a broader “ability to influence and inform public opinion.”

In the United Kingdom, regulatory authorities and courts have had the opportunity to review the concept and relevant statutory provisions as a result of acquisitions, mostly in the

*Partner, Allen & Overy LLP; Visiting Professor of EU Competition Law and Co-Founder and Executive Director of the Jevons Institute for Competition Law and Economics at University College London. The author is grateful to Chris Best for his work on this paper.

broadcasting sector.¹ In addition, a number of parliamentary and departmental initiatives, and, perhaps most prominently, a judicial inquiry chaired by Lord Justice Leveson, have reviewed directly or indirectly the concept of, aims, and policy relating to media plurality.

A central aim of the Leveson Inquiry is to make recommendations “for a new and more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence.”² Following a request from the Secretary of State for Culture, Olympics, Media and Sport in October last year, Ofcom has consulted upon questions relating to media plurality (in particular, its measurement), and in mid-June this year published a report which will be taken into consideration both by the Leveson Inquiry and the Government’s ongoing Communications Review.³ Roughly in parallel with this, the House of Commons’ Culture, Media, and Sport Committee has been conducting an inquiry into media plurality and completed a public consultation on the topic in January this year.⁴ The Secretary of State has also replied to Ofcom requesting further advice on certain points by September, which will, in turn, be fed into the Communications Review.⁵

There are also signs of activity at European level. In October 2011 Commissioner for the Digital Agenda Neelie Kroes inaugurated the High Level Group on Media Freedom and Pluralism, which will report by the end of this year on the adequacy of current legal frameworks. The goal is to ensure respect for media pluralism and make recommendations for reform with particular attention to the level (i.e. national, EU, or international) as to which action should be taken.⁶

This flurry of reform activity comes at a time when the impact of the internet on the media

The concept of media plurality has achieved a remarkable degree of prominence recently, at a time when the transformational effects of the Internet are taking an increasingly defined shape and have already produced a tangible impact in patterns of media consumption.

¹ Specifically, in proceedings relating to the acquisition by British Sky Broadcasting Group plc (“Sky”) of shares in ITV and News Corporation’s proposed acquisition of the remaining shares in Sky (referred to as “Sky/ITV” and “News/Sky” respectively). The author advised Sky in the Sky/ITV case and News Corporation in the News/Sky case

² Point 2(a) of the Inquiry’s terms of reference. The author made submissions on media plurality to the Leveson Inquiry on behalf of NI Group Limited.

³ Ofcom, *Measuring media plurality: Ofcom’s advice to the Secretary of State for Culture, Olympics, Media and Sport*, June 19, 2012, available at <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>

⁴ Details of which are available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/inquiries/parliament-2010/media-plurality/>

⁵ http://www.culture.gov.uk/images/publications/SoS_letter-to-Ofcom-18-June-2012.pdf

⁶ http://ec.europa.eu/information_society/media_taskforce/pluralism/index_en.htm

landscape is more and more evident as it becomes, increasingly, the platform of choice for the provision, consumption, and exchange of ideas. The danger that proponents of reform resulting in more intrusive plurality regulation pose is that often their thinking remains rooted in a paradigm which the industry and media consumption have already moved away from - a world in which public debate and free speech could be dominated by one or a small number of controllable sources - by a “master switch” to borrow the expression used by Tim Wu.⁷

This article aims to illustrate how any threats to the policy aims that plurality regulation is intended to protect do not come from traditional media. The first section considers the current regulatory regime applicable to traditional media and the concept of media plurality the regime aims to protect, and illustrates the wide range of interventions already in place. The second section argues for the importance of judging the plurality of U.K. media, and thus the need for any further intervention, on the basis of a cross-media assessment, rather than taking individual types of media in isolation. The third section considers how technological developments are shaping the outlook for media plurality today. Based on this analysis, I question whether the regulatory regime relating to plurality requires either a major overhaul and/or the emphasis that it currently attracts in the regulatory reform agenda. On the other hand, it seems clear that we need to remain vigilant about new and more subtle forms of influence on public discourse that flow from the evolving methods of news distribution and consumption.

II. THE EXISTING REGULATORY FRAMEWORK

In order to identify the relevant regulatory architecture, it is useful to begin with an understanding of the public interest considerations underpinning the concept of plurality. These were expressed by the House of Lords Communications Committee in 2008 as follows:

In 2001, the Government published a consultation paper on media ownership in which it was stated that “A healthy democracy depends on a culture of dissent and argument, which would inevitably be diminished if there were only a limited number of providers of news.” This was a sentiment shared by the previous Conservative administration: A free and diverse media are an indispensable part of the democratic process. They provide the multiplicity of voices and opinions that informs the public, influences opinion, and engenders political debate. They promote the culture of dissent which any healthy democracy must have. If

⁷ Tim Wu, *The Master Switch* (Knopf, 2010).

one voice becomes too powerful, this process is placed in jeopardy and democracy is damaged.⁸

There is a broad consensus in the relevant academic literature that the need for media plurality derives primarily from its importance for democracy.⁹ That is, in broad terms, a range and variety of voices, none of which has too much influence over public debate and the political agenda, contributes to healthy and effective democratic discourse.

As expanded upon below, U.K. regulators and courts have likewise endorsed this range and variety of voices as the aim of the U.K. media plurality regime. However, the same goal is also furthered by a range of other regulatory instruments. In considering them, it is important to recognize their respective ambits of application and their complementarities, as well as the areas of tension and trade-offs.

There is a broad consensus in the relevant academic literature that the need for media plurality derives primarily from its importance for democracy.

A. The Broader Regulatory Landscape

1. Competition and General Merger Control Rules

Media companies are subject to ordinary competition rules prohibiting anticompetitive agreements and subjecting any company holding a position of market dominance to special responsibilities as to its market conduct. Indeed, during consultations and debates leading to the Communications Act 2003 (“CA 2003”) many commentators felt that competition rules in the United Kingdom, which had themselves recently been strengthened in the Competition Act 1998 and the Enterprise Act 2002 (“EA 2002”), would be sufficient to guarantee that U.K. media would remain free and competitive. However, it was felt that some additional degree of regulation was still needed. Lord McIntosh of Haringey expressed the Government’s position on the matter as follows:

Media plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any one person to control too much of the media because of his or her ability to influence opinions and set the political agenda. It is therefore essential to set limits on concentrations of

⁸ First Report of the House of Lords Select Committee on Communications, June 11, 2008 (<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12208.htm>), ¶ 202.

⁹ Summarized in Annex 7 of Ofcom’s June 2012 report.

ownership. Competition law will do that to some degree and may, in fact be all that is needed in many cases. But there is no guarantee that that will always be so.

That is particularly true in the case of cross-media concentrations, where the competition authorities may well take the view that the markets are separate and that consequently there is no effect on competition. That is a completely proper conclusion as regards competition but it may not be sufficient to safeguard the appropriate level of plurality.¹⁰

Consequently, additional protections to address this concern and to safeguard plurality were included in the CA 2003, as described below.

Any media company in the United Kingdom that seeks to grow by acquisition must either (depending on the application of fixed-revenue thresholds) seek prior clearance from the European Commission or be subject to the jurisdiction of the Office of Fair Trading (“OFT”) and the Competition Commission. Any merger that substantially threatens competition can be blocked and/or unwound on competition grounds. The Secretary of State has additional powers to intervene to protect the public interest, on the basis of certain public interest considerations set out in section 58 of the EA 2002. A number of these are relevant to media markets. The Secretary of State has the power to intervene on the basis of the following specified considerations:

- (2A) The need for:
 - (a) accurate presentation of news; and
 - (b) free expression of opinion;

in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

- (2C) The following are specified in this section:

- (a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to

¹⁰ Hansard, HL Deb, 2 July 2003, cc 912-913. (<http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030702/text/30702-09.htm>).

be a sufficient plurality of persons with control of the media enterprises serving that audience;

(b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

Considerations 2B and 2C(a) expressly concern plurality, the first in relation to newspapers and the second in relation to those in control of media enterprises (defined in section 58A(1) of the EA 2002 as consisting in or involving broadcasting). Considerations 2A, 2C(b) and 2C(c) provide the Secretary of State with additional flexible tools to intervene to protect certain aspects of the functioning of media markets should adverse consequences be anticipated as the result of an acquisition.

Media plurality is also a separate and distinct consideration from competition, which by contrast has its own well-established field of analysis and range of economic tools. It is desirable that media plurality regulation should avoid duplicating the territory covered by a competition review based on a rigorous economic assessment. For instance, the proper place for a forward-looking analysis of market behavior and of the potential for future market exclusion is as part of a rigorous competition law assessment.¹¹

2. Broadcast Content Regulation Generally

The United Kingdom also has specific rules on impartiality which apply only to broadcast news providers. As explained below, the absence of such rules in the case of the U.K. press leads to a greater range and variety of voices among newspaper titles, meaning that newspapers make

¹¹ This distinction is reflected by the division of competencies in the U.K.'s regulatory regime applicable to mergers raising media public interest concerns: the Secretary of State must follow the advice of the relevant competition authorities (the OFT and, in the case of a second-stage review, the Competition Commission) as to the competition aspects of the transaction, but retains ultimate decision-making power as to any media plurality concerns and is not obliged to accept the advice of Ofcom.

¹² As noted above "accurate presentation of the news" for newspaper is also a relevant public interest consideration in relation to newspaper mergers under s. 58(2A)(a) EA.

Prior to 1954, the BBC held a monopoly on public service broadcasting and its strict internal rules on impartiality were viewed as sufficient.

a greater overall contribution to media plurality.

Sections 319 and 320 of the CA 2003 require Ofcom to set standards for the content of television and radio news programs. Ofcom sets such standards in a “Broadcasting Code,” which requires broadcasters to ensure that news is reported with “due accuracy”¹² and “due impartiality” and that no undue prominence is given to any one point of view, particularly in matters of political or industrial controversy or current public policy.¹³

Impartiality and accuracy obligations imposed on broadcasters were first introduced by the Television Act 1954, which provided for the creation of ITV (the main U.K. commercial broadcaster). Prior to 1954, the BBC held a monopoly on public service broadcasting and its strict internal rules on impartiality were viewed as sufficient.¹⁴ The Television Act 1954 required the *Independent Television Authority* to satisfy itself that, so far as possible, the programs that it broadcast complied with requirements, including:

that any news given in the programmes (in whatever form) is presented with due accuracy and impartiality;¹⁵

and

that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy.¹⁶

¹² As noted above “accurate presentation of the news” for newspaper is also a relevant public interest consideration in relation to newspaper mergers under s. 58(2A)(a) EA.

¹³ § Five of the Broadcasting Code (<http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/broadcastingcode2011.pdf>). It is worth noting that in this context impartial means balanced not neutral: This is how the concept is explained in the Broadcasting Code Meaning of “due impartiality”: “Due” is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. “Due” means adequate or appropriate to the subject and nature of the programme. So “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signaled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important.

¹⁴ See Reville, *Broadcasting Law and Practice* (Butterworths, 1997), ¶ 3.31

¹⁵ § 3(1)(c).

¹⁶ § 3(1)(f)

The concept of a specific code for content was introduced in the Television Act 1964 and retained in subsequent broadcasting legislation,¹⁷ with the immediate predecessor of Ofcom's Broadcasting Code being the content code established by the *Independent* Television Commission under the Broadcasting Act 1990.¹⁸ The Broadcasting Act 1990 set out very similar guidelines for news content to those which apply today and required news content to be "presented with due accuracy and impartiality."¹⁹

The particular situation of broadcast media in the United Kingdom, and the differences between broadcast media and other media formats, were explicitly acknowledged in the legislative process leading up to the CA 2003. The White Paper, *A New Future for Communications*, acknowledged that the level of regulation of public service broadcasting which had previously existed was rooted in spectrum scarcity and would not, in future, be able to be justified for these reasons:

5.2.2 [...] At first spectrum scarcity meant that there could be only a few radio, and then television, channels. Since there could not be many providers to ensure choice, it was decided that broadcasting should be publicly owned and that there should be variety and range within the channels. The independence and impartiality of broadcasting were also quickly established.

[...]

5.2.4 [...] the era when the extent of broadcasting was determined by spectrum scarcity is drawing to a close. With the switchover to digital expected between 2006-2010, we are less than a decade away from every television household having access to dozens of channels.²⁰

However, despite the increased ease of access for broadcasters, the White Paper argued for the retention of accuracy and impartiality requirements in respect of broadcast news specifi-

¹⁷ § 4(1)(a). For a comprehensive account of the development and regulation of commercial broadcasting in the United Kingdom, see *Independent Television In Britain* (volumes written by Bernard Sendall, Jeremy Potter, and Paul Bonner and Lesley Aston; published at intervals between 1982 and 2003).

¹⁸ §§ 6(3) and 7.

¹⁹ § 6(1)(b)

²⁰ 5.2.2 and 5.2.4 of the White Paper (Cm 5010)

cally as a counterweight to the partiality of news in non-broadcast media and due to the level of public trust that had built up in broadcast media over time:

One of the cornerstones of broadcasting in the UK has been the obligation on all broadcasters to present news with due accuracy and impartiality[...] The Government believes that these obligations have played a major part in ensuring wide public access to impartial and accurate information about our society and the opportunity to encounter a diverse array of voices and perspectives. They ensure that the broadcast media provide a counter-weight to other, often partial, sources of news. They therefore contribute significantly to properly informed democratic debate [...]"²¹

The level of public trust in the broadcast media is such that broadcasters have been able to build on trusted brand names to extend the provision of such accurate and impartial news into new media [...]"²²

Lord McIntosh of Haringey, speaking for the Government during a House of Lords debate on an amendment to the Communications Bill relating to the public interest test in newspaper mergers, drew the following distinction between newspapers and broadcast media:

[...]the broadcast media are different from newspapers. Newspapers are free in this country; no licence is required to publish a newspaper. But, because of spectrum scarcity over many years, there has been in place a system of licensing for broadcast media. It is under that system, ever since plurality of broadcasting started - with Radio Luxembourg before the war and ITV in 1955 - that governments have exercised the public interest criterion through the licensing procedure. [...]

We have a plurality test for newspapers because there are no licences, and we have to ensure the accurate expression of news and the free expression of opinion -

²¹ ¶ 6.6.1. The Department for Culture, Media and Sport also emphasized this counterweight function in a memorandum submitted in connection with the House of Lords Communications Committee's First Report in September 2007 (*available at* <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/8040202.htm>)

²² ¶ 6.6.2 of the White Paper.

although not within a single newspaper [...] If we started to say that individual newspapers had to be balanced we would be transforming our view of the relationships between Government and a free press. In broadcasting the licensing regime makes it possible to set simple rules, based on licence holdings, and there are already statutory requirements for accurate and impartial news and the prominence that can be given to any particular viewpoint.²³

Generally, ongoing content regulation on impartiality is best suited to monopolistic or highly concentrated markets. In areas that lend themselves to licensing regimes, such as broadcasting, there could be additional content requirements that either promote plurality directly or otherwise help achieve an informed public. For example, in the United Kingdom, ITV (the main commercial broadcaster) is required to provide a range of high-quality and diverse programming, including high-quality news and current affairs programs.²⁴

3. Broadcast Content Regulation - Direct Market Presence

State intervention in the provision of media services, in particular news services, is another form of regulatory intervention. The BBC is one of the most successful manifestations of this type of intervention. It is by far the most influential news organization in the United Kingdom. According to Ofcom, the BBC has a significantly wider reach than any other organization (more than 80 percent of U.K. adults) and is the market leader in each platform where it has a news presence, including online.²⁵

The BBC's Royal Charter obliges it to be independent from political and commercial interests and to produce high quality news content, and the BBC's obligations regarding news are bolstered in the BBC Agreement. The BBC is held to account by the BBC Trust, which ensures that it continues to meet its public interest objectives, specifically including the provision of accurate and impartial news and analysis of current events and ideas.²⁶

The BBC's position and prominence means that the specific regulatory regime applying to it indirectly influences the U.K., news environment more broadly, not only in television but

²³ Hansard, HL Deb 05 June 2003 vol 648 cc1447 – 1449 (<http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030605/text/30605-05.htm>). Strictly, prior to 1990 licenses were not granted. Rather, programs were produced under contracts awarded by the Independent Television Authority (later the Independent Broadcasting Authority).

²⁴ § 279(1) of CA 2003

²⁵ Ofcom, *Measuring media plurality*, *supra* note 3, ¶ 5.139.

²⁶ Clause 6(1) of the BBC Agreement.

Plurality primarily concerns the number and range of 'voices' and not whether those voices are impartial.

also online and therefore cross media.

B. Plurality, Impartiality, and "Media Capture"

Despite their occasional confusion in public debate, it is important to understand that the concepts of "accuracy" and "impartiality" central to broadcast content regulation are not the same as plurality.

The key point is that **plurality** primarily concerns the number and range of "voices" and not whether those voices are **impartial**. Plurality can be achieved by a multiplicity of voices that are not subject to specific regulatory requirements of impartiality. This is currently the case for print media and, to a large extent, for online news provision. Most importantly, pursuing plurality as a policy aim postulates that availability of **diversity** of views (including very partial views) is a key factor that underpins democratic debate.

That said, impartiality requirements may increase plurality where they contribute to the availability of a multiplicity of separate voices within an individual media group, particularly those active across media. Where only some of the activities of a media group are subject to impartiality requirements, this is likely to lead to greater "internal plurality" within a media group (e.g. in the United Kingdom, where a group comprising newspaper and broadcast will be more internally plural because of the additional impartiality obligation applying to broadcast news which does not apply to newspapers).

However, such "internal plurality," while it helps complete the picture, does not entirely replace the need for a plurality of media controllers. Impartiality provisions were taken into account as part of its overall analysis by the Competition Commission when considering the extent of "internal plurality" in its review of Sky/ITV:

In television news, existing regulatory mechanisms - including quality controls (eg in the Broadcasting Code), requirements for impartiality and quotas for television news and current affairs programming - reduce the scope for influence over editorial decisions by owners of television channels which broadcast news.²⁷

Finally, we need to consider the extent to which plurality contributes to prevent or reduce "media capture." Governments have strong incentives to control the media industry.²⁸

²⁷ ¶ 5.54 of the Competition Commission's report in *Sky/ITV, Acquisition by British Sky Broadcasting Group plc of 17.9 percent of the shares in ITV plc*, 14 December 2007 (the "Competition Commission's Report").

²⁸ A. Pratt & D. Stroember, *The Political Economy of Mass Media*, February 11, 2011 <http://econ.lse.ac.uk/staff/prat/papers/mediasurvey11.pdf>, p. 45

Pluralism can help reduce their ability to do so. But there are equally - if not more - pernicious forms of distortion in news provision when the agenda of the news provider is influenced by commercial motives relating not to the media industry but to unrelated activities of the controllers.²⁹ We should be particularly vigilant where media owners form part of groups that otherwise have nothing to do with media. In this light, there is a risk that the fragmentation that plurality requirements help achieve may be an obstacle to a media organization attaining the scale necessary for financial viability in its own right, which is the best guarantee of its *independence and credibility*.

C. The U.K. Legal Concept of Plurality

In the United Kingdom the principal legislation giving effect to the concept of media plurality is the EA 2002 as modified by the CA 2003. Prior to 2003 media regulation tended to focus on restricting ownership of media.³⁰ However, strict media ownership rules were felt to be inflexible and increasingly inappropriate in a fast-developing media landscape, and contrary to trends in modern regulation.³¹ Therefore, a wide range of specific media ownership and cross-media ownership restrictions were removed by the Communications Act 2003 at the same time that powers were granted to the Secretary of State to ensure that media plurality was maintained.

Restrictions on cross-media ownership were retained specifically as regards “Channel 3”

²⁹ *In The Observer and George Outram & Company Limited*, (a report on the proposed transfer of *The Observer*, a newspaper of which Atlantic Richfield Company is a proprietor, to George Outram & Company Limited, a subsidiary of Scottish and Universal Investments Limited, whose parent company is Lonrho Limited, 29 June 1981), under the FTA the Monopolies and Mergers Commission recommended that conditions be attached to the Secretary of State’s consent to safeguard editorial independence against a potential conflict of interest arising out of the extensive business interests of Lonrho.

³⁰ These rules on media ownership were bolstered by more general obligations imposed on the regulators to ensure range and variety in content; for example, under the Broadcasting Act 1990, to “ensure that a wide range of [television programme services] is available throughout the United Kingdom.” Similar obligations to ensure a suitable variety of broadcast content are replicated at section 3(2)(c) of the Communications Act 2003.

³¹ See Cm 5508 *The Draft Communications Bill – The Policy (“Policy”)* which explained the government’s position with regard to the need for reform of media regulation, in particular ¶¶ 9.1 and 9.2.

The legal concept hinges on the notion of control over a voice. However, looking at controllers in isolation is not sufficient to guarantee variety and range.

licences (the majority of which are held by ITV plc)³² – often referred to as the “20/20 rule.”³³

The EA 2002 (as modified by the CA 2003) empowers the Secretary of State to intervene in a merger to ensure that the transaction is not contrary to the public interest in terms of any one of a number of specified public interest considerations. As noted above, the relevant considerations for present purposes are, for newspaper mergers:

The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom.³⁴

And for other media mergers:

the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience.³⁵

In assessing the public interest considerations relevant in the Sky/ITV review, the Competition Commission stated that: “a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences.”³⁶

The legal concept hinges on the notion of “control” over a voice. However, looking at controllers in isolation is not sufficient to guarantee variety and range. A purely quantitative enumeration of voices under **separate** control cannot be a paramount policy imperative *per se*. Indeed, the value of a multiplicity of voices is questionable when those voices have to operate within strict limits of “impartiality.”

³² The licenses under Chapter II of Part I of the Broadcasting Act 1990 pursuant to which the various television services comprising Channel 3 broadcast.

³³ These rules are set out in Schedule 14 of the CA 2003 and apply to any person who: (i) runs a national newspaper having a national market share of 20 percent or more; or (ii) runs national newspapers which together have a market share of 20 percent or more. Such a person is not permitted to hold a Channel 3 licence or to have more than a 20 percent interest in a body corporate that holds a Channel 3 licence.

³⁴ *Id.*, § 58(2B).

³⁵ *Id.*, § 58(2C).

³⁶ Competition Commission’s Report, ¶5.10.

Nor does a number of **distinct** voices under **separate** control necessarily translate into variety and range. For instance, in the U.K. broadcasting sector the combined effect of content regulation and the presence of the BBC results in a limited range of styles of news broadcasting.

Equally, one cannot simplistically assume that there cannot be plurality among voices under common control.

D. Under the Skin of Control: Internal and External Plurality

The Sky/ITV case put in sharp focus these important distinctions. Plurality of controllers is ancillary to the ultimate policy aim of plurality of viewpoints. The latter may also be, to a certain extent, achieved within the same corporate group if common ownership does not translate into unity in viewpoint output, for instance as a result of regulatory and/or behavioral constraints.³⁷ This underpins the distinction, now mainstream in regulatory jargon, between “external plurality” (distinct voices which operate under separate control) and “internal plurality” (distinct voices within a media group). The contrast was made explicit by the Competition Commission in Sky/ITV:

We thought it important to draw a distinction between the plurality of persons with control of media enterprises and the implications of that plurality for the range of information and views made available to audiences. We also thought that it was appropriate to distinguish between the range of information and views that are provided across separate independent media groups (external plurality) and the range that are provided within individual media groups (internal plurality).³⁸

This analysis was supported by the Court of Appeal:

[...] it seems to us that the Commission was correct to hold that, whereas in reckoning the number of controllers of media enterprises for the purposes of section 58(2C)(a) only one controller is to be counted in respect of both or all of the relevant enterprises (here Sky and ITV), nevertheless, when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant

³⁷ For example, impartiality requirements applying only to the broadcast activities of a media group.

³⁸ ¶30 of the Competition Commission’s Report.

The assessment therefore has to be a qualitative one taking into account a number of factors: the actual degree of control, the regulatory and behavioral constraints on the supply side, and patterns of consumption on the demand side.

enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control.³⁹

Ofcom, the U.K. sectoral regulator, which initially rejected this distinction in Sky/ITV, has now

endorsed this position:

We note that a diversity of viewpoints can be formed within an organisation and between organisations. Both are relevant to the question of plurality.⁴⁰

As well as the availability of a range and variety of voices, patterns of news consumption, and the extent to which consumers tend actually to have exposure to a range and variety of opinions, form an essential part of an overall plurality assessment.

The assessment therefore has to be a qualitative one taking into account a number of factors: the actual degree of control, the regulatory and behavioural constraints on the supply side, and patterns of consumption on the demand side.

The public interest review in the Sky/ITV merger case required - as provided for in the EA 2002 - an assessment of the sufficiency of plurality of persons in control of media enterprises in the United Kingdom. The Competition Commission recognized that this required a qualitative assessment of the range and variety of views available:

We took the concept of plurality of persons with control of media enterprises to refer both to the range and number of persons with control of media enterprises. We concluded that a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences.⁴¹

³⁹ *British Sky Broadcasting Group Plc v Competition Commission* [2010] EWCA Civ 2, ¶ 121.

⁴⁰ ¶ 3.10 (emphasis in the original) of Ofcom's June 2012 report (*supra* note 3).

⁴¹ Competition Commission's Report, *Acquisition by British Sky Broadcasting Group plc of 17.9 percent of the shares in ITV plc*, sent to the Secretary of State for Business, Enterprise and Regulatory Reform on 14 December 2007 (http://www.competition-commission.org.uk/rep_pub/reports/2007/fulltext/535.pdf) (hereafter, the Competition Commission's Report), ¶¶ 5.10 and 30.

The Competition Commission's understanding of plurality as a qualitative test was supported by the Court of Appeal in the appeal of the Competition Appeal Tribunal's decision in the same case:

We agree with the Commission on this [...] The word plurality can connote more than just a number exceeding one. It may carry an implication of range and variety as well. Certainly it has that meaning in subsection (2B). We consider that it does so in subsection (2C)(a) as well.

and

The Secretary of State, Sky and the Commission submit, and we agree, that the Commission's task is not just to count the number of media enterprise controllers, but also to make a qualitative assessment of the position following from the [relevant merger situation].⁴²

In its recently-published report, Ofcom formulated its own definition of plurality based on these precedents in the following, essentially qualitative, terms:

a) ensuring there is a diversity of viewpoints available and consumed across and within media enterprises and b) preventing any one media owner or voice having too much influence over public opinion and the political agenda.⁴³

Significantly, Ofcom also confirmed that ensuring a range of viewpoints should be the main focus of its regulatory activities, since this, in turn, constrains the influence of any particular media owner over the political process.⁴⁴

E. The Scope of Media Plurality

A further question is which genres of content media plurality regulation should cover. It might seem relatively clear that the range and variety of voices in relation to certain genres are not a matter of sufficient public interest to justify regulatory intervention, but for other genres

⁴² *British Sky Broadcasting Group Plc v Competition Commission*, ¶¶ 90 and 118.

⁴³ *Measuring Media Plurality*, ¶ 1.3

⁴⁴ *Id.*, ¶ 3.6

However, news and current affairs content is the type of media content that is most key to the formation of public opinion on important issues.

this question may be more finely balanced (political drama, for example).⁴⁵

However, news and current affairs content is the type of media content that is most key to the formation of public opinion on important issues. It is for that reason that this kind of content has been appropriately regarded as the focus of media plurality assessments. This was confirmed by the Competition Commission in its review of Sky/ITV (and a similar approach was also adopted by Ofcom in its review of the News/Sky deal and its recent report on measuring media plurality):⁴⁶

The parties overlap in a broad range of content, but news and current affairs are the genres most closely connected with the formation of public opinion about issues of national significance through the communication of a range of information and views. National news is an important genre of programming for both ITV and BSkyB. Considering all content genres, including current affairs, documentaries and satire, viewers rank news first in terms of ‘societal importance’, with a majority of the public saying that news helps them feel part of the democratic process. We also believe that news provision is a reasonable indicator of, and better defined than, a wider range of other content relevant to the formation of public opinion about issues of national significance. We therefore focused on national news and refer to the range of information and views communicated to audiences through the news as the ‘plurality of news’.⁴⁷

Historically, this concern for news and current affairs content has concentrated on newspapers, television news, and radio news. Increasingly, however, the internet is an important source of such content for many consumers, and, as discussed in more detail in Section IV, the

⁴⁵ Although Ofcom’s June 2012 report ultimately concluded that news and current affairs genres should be the focus of plurality assessment, section 2.4 of Annex 7 summarizes academic literature highlighting the democratic importance of other genres. For example, Curran suggests that films and TV series have influenced public conceptions of war and U.S. national security, while Franklin notes that politicians may use other genres such as chat shows to communicate with the electorate, often addressing larger audiences. See, respectively, J. Curran, *Entertaining Democracy*, Media and Society (J. Curran, ed.) (2010) and B. Franklin, *Talking Past Each Other: Journalists, Readers and Local Newspapers’ Reporting of Election Campaigns*, 4(4) J. Public Affairs pp. 338-346 (2004).

⁴⁶ E.g. ¶ 3.16: “We believe news and current affairs are the most relevant forms of content for the delivery of the public policy goals. We recommend that the scope of any plurality review should be limited to these.”

⁴⁷ Competition Commission’s Report, ¶ 5.32. The Court of Appeal did not directly address this point, but quoted without criticism the Competition Commission’s assessment that “a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences” (¶ 100 of the Court’s judgment, emphasis added).

resulting proliferation in news sources and increasingly plural consumption must be taken into account in assessing plurality.

III. MEDIA PLURALITY IN A CROSS MEDIA ENVIRONMENT

Before concluding with an assessment of the outlook for media plurality in the United Kingdom, it is worth making a few observations on how this plurality should be measured; a question that was the particular focus of Ofcom's recent consultation and report.⁴⁸

The vital point is this: A meaningful assessment of media plurality must consider all news sources and, importantly, **all media**. It is not enough simply to look at one medium in isolation, since this would fail to consider the full range and variety of voices available to audiences and could therefore lead to an inaccurate assessment of the public interest.

This point is underscored by the increasingly blurred boundaries between traditional media and new media. It is increasingly difficult to conduct a meaningful analysis of any one news medium, for example newspapers, without taking into account the provision of news content over the internet. Many people who read content produced by a particular newspaper title will now read that content on-line or via an app rather than in a print newspaper. This blurring of the boundaries reflects the fact that the internet is a "converging medium." Offline news sources such as newspapers and broadcasters also tend to be the most important online news sources (although it is important to understand that the internet also increases plurality in news reporting by adding to conventional offline sources and providers, a point returned to below).

Another factor emphasizing the importance of measuring plurality across all media is the declining influence of traditional news sources - in particular newspapers - relative to other sources. In 2005, according to Ofcom, 16 percent of consumers cited newspapers as their main source of U.K. news. By 2010, this figure had fallen to 6 percent, and Ofcom recently found that the percentage of U.K. adults claiming to use newspapers as even one of their news sources had declined from 73 percent in 2007 to 53 percent today.⁴⁹ During the same period, the proportion of customers citing the internet as their main source of news was slowly rising, reaching 7 percent - and overtaking newspapers - in 2010. All national daily newspapers have seen declines in print circulation of at least 2 percent per year since 2006, with many suffering

⁴⁸ See *supra* note 4; see also R. Kenny, *Plurality Regulations – Still a Wise Market Intervention?*, 7(2) CPI at 5, (Autumn, 2012).

⁴⁹ ¶ A4.7 of Annex 4 to Ofcom's June 2012 report (*supra* note 3).

larger declines.⁵⁰ In aggregate, newspaper circulation has fallen by just under a quarter since 2000. In place of traditional newspapers, consumers are tending to consume ever more numerous and diverse sources of news, particularly online, as explained further below.

The upshot is that it is not sufficient to consider **intra-medium** plurality in isolation (i.e. the range and variety of voices available within one specific traditional medium, e.g. the range of printed newspaper titles available in the United Kingdom). Instead, plurality assessments must also take account of **inter-media** or **cross-media** plurality. Indeed the market has moved away from this paradigm and, in the United Kingdom, the National Readership Survey now combines print and website data.⁵¹ This is likely to affect significantly the findings of any assessment of media plurality in the United Kingdom today and therefore s.58(2B) which may appear to look at newspapers in isolation is anachronistic.

Taking 2003 as a benchmark, when a deliberate decision was taken by Parliament to relax media ownership restrictions in the Communications Act 2003, the U.K. printed press is not less plural today, to any appreciable extent. In terms of national titles there have been only two significant changes. There has been a loss of one voice - the *News of the World*. There has also been a new entry into national newspaper print media in the form of I; the first national daily to launch since *The Independent* in October 1986.

Broadly, therefore, looking at printed media alone, it must be concluded that the U.K. press is as plural today as it was in 2003. This single-media perspective is increasingly inappropriate in a modern media landscape, however, as noted above.⁵²

Taking a broader - cross media - perspective, it is clear that the U.K. media environment is becoming more plural, and exponentially so. In particular, on the supply side, new technolo-

⁵⁰ According to ABC circulation figures.

⁵¹ <http://www.nrs.co.uk/padd.html>.

⁵² While the relevant considerations in the competition context are not identical (e.g. the impact of a merger on the choice available to advertisers is viewed as particularly important), it is nonetheless interesting to note that the OFT accepts the need to consider cross-media constraints in assessing newspaper mergers. In a 2009 report on the local and regional media merger regime, the OFT found that there was no need for legislative change in large part because the existing regime was able to take account of competitive constraints arising cross-media (Ofcom, *Review of the local and regional media merger regime: final report*, ¶ 4.71 (June 2009)). Likewise, in its recent decision on the anticipated acquisition by Northcliffe Media Ltd of Topper Newspapers Limited (June 1, 2012), the OFT found that alternate media would pose at least some competitive constraint post-merger (e.g. ¶ 126).

gies have facilitated the availability of an increasing range and variety of news sources.⁵³

These developments provide convincing evidence that there is no lack of plurality in the U.K. media today. However, they also bring new challenges for regulators.

IV. THE OUTLOOK FOR MEDIA PLURALITY TODAY

Technological developments have had an important impact on the ready availability of a wide range and variety of news and current affairs content for many consumers. Not only are consumers able to access a far wider range of traditional news sources such as TV news channels, but they are also able to access entirely new sources of news such as dedicated smartphone and tablet apps, go online, and interact with the debate in new ways. Technological advances have made multi-sourcing easy as there is an increasing convergence in the platform of access to news. This enhanced choice is reflected in actual consumption patterns, which show increasing multi-sourcing and thus decreased influence on the part of any specific media outlet. Accorded their proper importance by a cross-media approach to assessing plurality, these developments provide convincing evidence that there is no lack of plurality in the U.K. media today. However, they also bring new challenges for regulators.

A. New Technology and News Consumption

In TV news, there has been a marked increase in the range of choice of TV news channels now accessible to the majority of households. Even excluding non-English language news channels, there is an increasingly wide choice of news provision available to many U.K. viewers.

There has also been an explosion in the number of online news sources accessible to most consumers. In the United Kingdom, comScore tracks monthly visitors to over 550 news websites, of which more than 150 have over 100,000 UK visitors per month; many of whom will, of course, visit more frequently.⁵⁴ The daily traffic of individual news sites is substantial; for example, *The Guardian* has 1.5 million daily U.K. visitors online (considerably higher than its daily print readership).⁵⁵

Most U.K. consumers now have access to broadband internet, which facilitates access to this wealth of content. At the time of the Communications Act in 2003 only 13 percent of U.K. consumers had a broadband connection, whereas today this is 76 percent of U.K. house-

⁵³ Ofcom identified the impact of new technologies in this respect in its first review of media ownership rules in 2006, ¶ 2.29

⁵⁴ Monthly total unduplicated unique visitors accessing news/information, comScore, November 2011.

⁵⁵ ABC figures, July 2012. See also Kenny, *supra* note 48, p. 4.

holds.⁵⁶ Further, those with access to online services are ever more likely to use the internet for news.

Online news sites include not only traditional U.K. news organization websites (broadcasters and newspaper publishers) but also non-U.K. news websites such as the *New York Times* which have a considerable readership in the United Kingdom, online-only news titles such as the *Huffington Post* (owned by AOL since 2011), news agencies (PA and Reuters), and news aggregator sites (Google News, Yahoo, YouTube). The *Huffington Post* now attracts more U.K. visitors than online sites for *The Independent* or *The Times* (the latter of which is now behind a pay-wall); it launched a U.K.-specific site in July 2011.⁵⁷ Indeed, it is noteworthy that of the top 10 sources of internet news used “nowadays” by U.K. internet news consumers identified by research for Ofcom’s media plurality report, only half were associated with traditional of-line news providers, with Facebook and Google News in second and third place after the BBC website and ahead of any newspaper or commercial broadcaster’s website.⁵⁸

As online access increasingly involves access via mobile devices, dedicated news applications are an important mechanism for media companies to reach their audience. Seven U.K. news sources have applications with over half a million downloads.⁵⁹ *The Daily* was the first major international title to be launched especially for tablets but is unlikely to be the last. Around 67 percent of iPad owners and 72 percent of iPhone owners have downloaded a news application (the second most popular category for downloads after social networking).⁶⁰

The increasing degree of ubiquity of internet access (the United Kingdom had an 80 percent internet take up in 2012) and the explosion in the number of smartphone and tablet users also encourage consumers to consume more content and to actively engage in distributing news content and commenting on stories of interest to them which might originate in a wide variety

⁵⁶ Communications Market Report, Ofcom, July 18, 2012 p. 4, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf.

⁵⁷ According to comScore data for November 2011.

⁵⁸ Kantar Media quantitative research study, results set out at Figure 10 of Annex 4 to Ofcom’s June 2012 report.

⁵⁹ Android Market, Economist, Guardian, Times report.

⁶⁰ Apps Tracker, News International Insight

of news sources. Around 39 percent of consumers now use their mobile phones to access web content, an increase of 29 percentage points since 2009;⁶¹ around 44 percent of consumers use their mobile phones to access general news (21 percent regularly).⁶² In 2011 almost 10 percent of traffic to key U.K. newspaper websites now comes from non-computer devices⁶³ and 17 percent of U.K. adults state that they get news via mobile internet or apps, a dramatic increase from 3 percent in 2007.⁶⁴

Social media is one aspect of online media that potentially has the most transformative effects on news gathering and provision.

Forty-one percent of U.K. adults use the internet for news. The share is still smaller of those using TV (85 percent) and radio or newspapers (53 percent) but it is growing rapidly. In 2007 the same figure was 27 percent.⁶⁵

Internet news is not limited to well-known media brands but also includes a long tail of additional voices. The internet has transformed the ability of smaller media organizations, individual commentators, politicians and, indeed, institutions such as government departments, companies, and charities to speak directly to relevant audiences. This can be via direct emails, blogs, websites, Twitter, Facebook, YouTube or other means - each is suited for different purposes.

Blogs are an important, and plural, source of news and contribute greatly to the genuine plurality of views available on the internet. Political bloggers and political websites have demonstrably been able to break stories that were subsequently picked up by traditional media outlets. Political bloggers such as Paul Staines (founder of the *Guido Fawkes* blog) and Matt Drudge (the *Drudge Report*) are acknowledged to have significant influence and can bring to public attention stories that are initially bypassed by mainstream media.

B. The Role of Social Media

Social media is one aspect of online media that potentially has the most transformative effects

⁶¹ Communications Market Report, Ofcom, 18 July 2012 p. 221 (http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf).

⁶² Communications Market Report, Ofcom, 18 July 2012 p. 225 (http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf).

⁶³ Ofcom International Communications Market Report, 2011 (<http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/icmr/ICMR2011.pdf>).

⁶⁴ ¶ A4.9 of Annex 4 of Ofcom's June 2012 report (*supra* note 3).

⁶⁵ Ofcom, "Measuring media plurality," *supra* note 3, ¶ 5.40.

on news gathering and provision. It is through social media that the fragmentation, which is one of the defining characteristics of the internet (and, indeed, one of the reasons why it was invented),⁶⁶ challenges the traditional media. Twitter now has over 100 million active users worldwide and plays a number of roles in the new media landscape.

In terms of news distribution, Twitter provides a mechanism for key individual players to communicate directly with the public and to add their voices directly to the public debate. This can include companies, senior business figures and commentators, politicians, and celebrities.⁶⁷ Indeed, the increasing significance of Twitter as a platform to break news, and the level of competition between Twitter and traditional media in keeping people informed, is further illustrated by recent announcements that newsrooms at the BBC and Sky have adopted formal Twitter policies forbidding their journalists from breaking stories on Twitter without first notifying newsrooms.⁶⁸

Social media platforms such as Facebook, YouTube, and Twitter are increasingly important as a source of news and enable consumers to directly influence the news agenda by posting links to content or re-Tweeting stories of interest as well as adding new contributor voices directly by distributing their own user-generated content.⁶⁹ This contributes significantly to the plurality of sources available to and accessed by consumers.

Twitter and other social media sites also increasingly play an important role in breaking news in real time, often due to the direct contribution of content by individual users who

⁶⁶ ARPANET the pre-cursor of the internet was originally invented by the U.S. military to preserve communications in case of nuclear attack on its headquarter. The idea was that messages would be converted into packages and transmitted in disaggregated form to be reassembled on receipt. This reduced the risk of a successful attack on the communications system in the same way as the use of the internet today reduces the risk of centralized threat to voices transmitted to it.

⁶⁷ See Kenny, *supra* note 48, p. 8, which notes, for example, that the aggregate Twitter following of just ten U.K. politicians reaches 3.4 million (albeit with a degree of duplication), and that other public figures can reach a yet wider audience.

⁶⁸ <http://www.guardian.co.uk/media/2012/feb/08/twitter-bbc-journalists>.

⁶⁹ It is interesting to note that people who use Twitter for news rate its importance to them highly compared to the importance afforded several traditional media outlets by their users. According to Kantar Media research for Ofcom, such Twitter users rated its personal importance to them as a source at an average of 7.2/10; higher than the ratings given by readers of the *Times*, *Telegraph*, Channel 4 or the *Daily Mail* to those outlets respectively. See Figure 17 of Annex 4 to Ofcom's June 2012 report.

witness newsworthy events. For example, the death of Osama bin Laden was first reported on Twitter.⁷⁰ Both President Obama and President Sarkozy chose to announce their presidential campaigns on Twitter in 2012.⁷¹ When a plane crashed into the Hudson in New York in 2009, Twitter broke the news around 15 minutes before the mainstream media alert.⁷² Twitter also spread the news of terrorist attacks in Mumbai in 2008 well ahead of the mainstream media.⁷³ This makes live blogs and Twitter better positioned to cover ongoing (real-time) events. And followers have a large choice of reporters to follow.

More than 50 percent of social networks users aged 18-24 use social media to access breaking news:

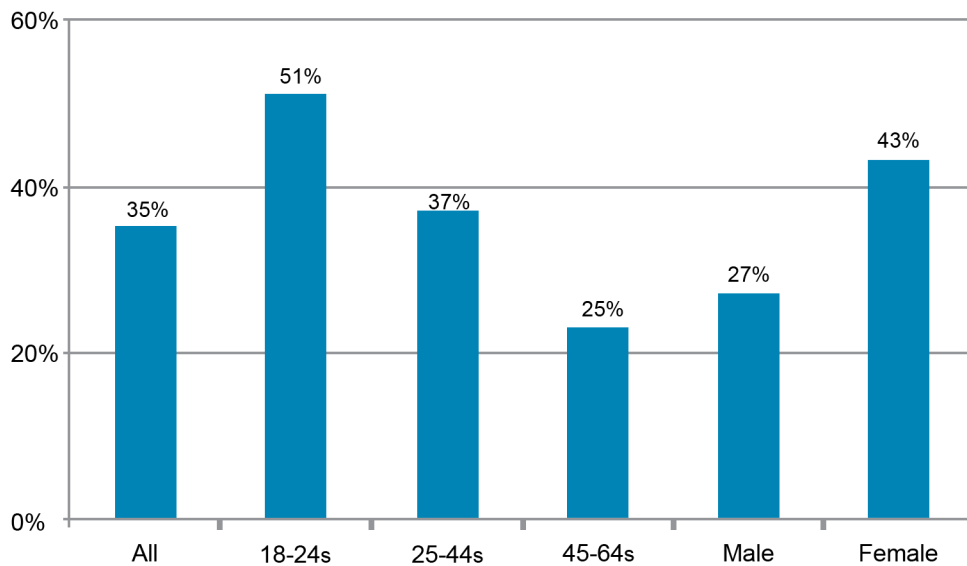


Figure 1: Proportion of social network users who use social media to access breaking news⁷⁴

⁷⁰ <http://www.reuters.com/article/2011/07/08/us-twitter-factbox-idUSTRE76700F20110708>. <http://www.guardian.co.uk/technology/blog/2011/may/02/twitter-osama-bin-laden-death-leaked>.

⁷¹ <http://www.reuters.com/article/2011/07/08/us-twitter-factbox-idUSTRE76700F20110708> and <http://www.guardian.co.uk/world/2011/apr/04/barack-obama-twitter-facebook-election>; http://articles.cnn.com/2012-02-15/world/world_europe_france-sarkozy-election_1_twitter-account-marine-le-pen-french-people?_s=PM:EUROPE

⁷² <http://www.telegraph.co.uk/technology/twitter/4269765/New-York-plane-crash-Twitter-breaks-the-news-again.html>.

⁷³ <http://socialmediainfluence.com/2008/11/27/twitter-redefining-the-concept-of-breaking-news/>.

⁷⁴ Ofcom Communications Market Report, August 2011.

This increased ability for individuals to communicate directly with enormous audiences, and for information to be rapidly dispersed on a global basis, weakens traditional news organizations' control of the dissemination of news and the news agenda.

Of course social media is not only an alternative to traditional centrally edited forms of news distribution. Traditional media organizations can use Twitter to generate interest in their stories and content. Individual journalists can use Twitter in a similar way to generate interest in their more formal journalistic content and to communicate directly with audiences. The BBC alone lists 1,163 Twitter accounts for different BBC news feeds, correspondents, staff, and programs.⁷⁵

The dispersed nature of news provision, together with the endorsement of social media including Twitter, by the traditional media means that users are empowered to enrich the plurality of the views that they wish to hear to the degree that they wish. The famous 140-character limit on Twitter does not prevent tweeters constantly cross-referencing longer pieces. Therefore, a Twitter user can become his/her own editor by choosing the sources of news he or she wishes.

With this significant proliferation of direct channels of communication, consumers are exposed to an increasing variety of sources.

C. Trends in Multi-Sourcing

The effects of new technology in facilitating access to a wide range of news sources are magnified by trends in multi-sourcing. A market in which individual consumers consume news from multiple sources is more plural than a market in which each consumer uses fewer sources, even if more sources are available.⁷⁶

Already today most consumers use multiple sources of news on a regular basis and, despite the absence of relevant official data, the available evidence makes clear that this trend is increasing. A BBC survey conducted in 2011 found that consumers tended to use around 3.2 distinct news sources across media (excluding regional newspapers and certain other sources), and Kantar Media research in 2012 found that U.K. news readers use an average of 3.3 news providers.⁷⁷

⁷⁵ Sourced from Twitter.

⁷⁶ This idea is illustrated in a table contained in Figure 1 of the Perspective report submitted to Ofcom by News Corporation in the context of the News/Sky review. See also Kenny, *supra* note 48

⁷⁷ At the retail level (average of 3.1 wholesale providers)—see ¶ A4.64 of Annex 4 to Ofcom's June 2012 report.

It is also clear that consumers tend to use more than one type of media to consult news sources. For example, FD's 2010 Media Monitor report suggested that the average consumer used around five different news media. FD's findings in this respect had changed markedly since the survey was launched in 2003 when more than half of the sample stated that they used two or fewer media. Mintel estimated that the average consumer accessed around five different news media.⁷⁸

Online news consumers have a tendency to be much more promiscuous in terms of content consumption than those who rely primarily on more traditional media.

There are marked differences within each medium as to the extent to which consumers tend to consult multiple sources of news. Online news consumers have a tendency to be much more promiscuous in terms of content consumption than those who rely primarily on more traditional media. This is only to be expected given the ease, immediacy, and low (often zero) cost of accessing multiple views online, especially using search engines⁷⁹

News aggregators bring a vast range of sources to their audience, including many they would otherwise likely never come across. Google News claims to use 4,500 English language news sources from around the globe and provides unprecedented access to an international perspective on news stories. Among the news aggregators, each of Yahoo!, MSN, AOL, CNN and Google News now has over a million U.K. visitors per month.⁸⁰ YouTube is increasingly playing a similar role as a centralized site to access multiple sources of audiovisual news content. It has a "news and politics" subcategory featuring content from a wide variety of news providers as well as user-generated content.

Social media also makes an increasing contribution to the plurality of consumption. According to the Bureau of Investigative Journalism:

Social media is of increasing importance for the dissemination of news, and allows people who would never normally read a particular newspaper to be aware of its journalism by recommendations by people they are connected to via social media sites.⁸¹

⁷⁸ Mintel report, *Consumer Perceptions of News Media*, September 2010.

⁷⁹ Oxford Internet Institute, *Next Generation Users: The Internet in Britain*, October 2011, and *see also* Kenny, *supra* note 48 at 5.

⁸⁰ Press Gazette, *Top 40 UK news websites: BBC still leads Mail Online*, September 7, 2011 (<http://www.pressgazette.co.uk/story.asp?sectioncode=1&storycode=47827&c=1>).

⁸¹ House of Lords Select Committee on Communications, *Inquiry into the future of investigative journalism - Oral and written evidence*, 12 September 2011 (<http://www.parliament.uk/documents/lords-committees/communications/Investigativejournalism/IJev.pdf>).

This disaggregated form of access to news means that media organizations have less influence over which stories generate most consumer attention.

The increasing use of the internet as a source of news therefore leads to increasingly plural patterns of consumption. While TV remains the most important source of news for consumers, as mentioned above the internet has recently overtaken newspapers with seven percent of consumers citing the internet as their main source of news.

Therefore, as the internet becomes an increasingly important source of news, it is to be expected that an increasing proportion of the population will be regularly exposed to a wide variety of “voices.”

Another important consequence of the internet’s ubiquity is that internet sources facilitate the ability of consumers to cross-check news stories with primary sources. This can be directly with companies, charities, politicians, or other individuals who are the subject of news stories (tweets, blog postings, and press releases can all be accessed directly by consumers) or by searching for information from individual witnesses.

Reporting its 2010 survey of online news consumers, Mintel highlighted the increasing possibility for consumers to check stories directly at source:

With the variety of written and broadcast media channels providing news, including the internet, this is now much more possible than it was five or ten years ago, so that people can check other media sources but can also go direct to the subject of the news itself because it will often have a website.

According to the Mintel survey, 66 percent agree that “[t]he internet means that it is easier to access news directly from its source (e.g. via websites, Twitter feeds etc.)”⁸² and this increases the ability of consumers to cross check facts.⁸³

Finally, and I believe most importantly, this disaggregated form of access to news means that media organizations have less influence over which stories generate most consumer attention. In aggregate, search and social media websites account for almost 50 percent of traffic to typical newspaper websites.⁸⁴

⁸² Mintel, *Consumer Perceptions of News Media*, September 2010.

⁸³ N. Fenton (ed.), *New Media, Old News*, 2010.

⁸⁴ Alexa research, January 2011. (N.B. Alexa reports are generated from self-selected internet users and so may not be fully representative.)

If we start from a concept of plurality designed to both achieve a diversity of viewpoints and preserve excessive influence over public opinion, measuring such plurality can be a daunting task. It seems clear that diverse ownership is not a surrogate (or even a guarantee) of diversity. This is no more than a starting point of a more complex analysis.⁸⁵ The prevalence of social media and search as a route into news websites means that media organizations have a reduced ability to influence which stories are most read. Therefore, the emphasis of control shifts away from ownership.

The impact of consumers creating and self-selecting content cannot be ignored by news organizations. Newsrooms have screens informing staff in real time of the most popular stories on its website and the strength and immediacy of public opinion also influences any editorial agenda. Combined with the ability of individuals to make their views known to a wider audience via social media in particular, this marks a fundamental shift in the relationship between the media and “the public.”

In a digital world this paradigm shift in access to news is accelerating. Therefore, looking forward, we need to consider forms of regulation that take into account the role of access as a key ingredient in ensuring diversity in the media landscape. At the moment “digital intermediaries” (search engines, aggregators, and social media platforms) do not exercise editorial control, except in the embryonic form of content guidelines. The incentives of powerful digital intermediaries to do so may change as their role evolves.⁸⁶

Even the growing importance and prevalence of supposedly “editorially neutral” online search engines are not without consequences for the diversity of the media landscape. Most search engines seek to make results relevant to the profile of the users, as a key way to compete. The consequence of this is a confirmation bias reducing the variety of viewpoints otherwise available online.

New dangers may also arise from the relationship between traditional media outlets and these digital intermediaries. Whereas media plurality regulation has, in the past, focused specifically on the ownership of news media which is rooted in a paradigm where ownership translates into an homogenous output of viewpoints, the increasing importance of online content raises the possibility that ownership of the intermediaries facilitating access to that content may be more determinative of the range of voices to which consumers are exposed.

⁸⁵ This is, for instance, recognized by Ofcom in *Measuring media plurality*, *supra* note 3, ¶ 5.38

⁸⁶ R. Foster, *News Plurality in a Digital World*, July 2012 Report for the Reuters Institute for the Study of Journalism of the University of Oxford, p. 41.

Properly understood and measured appropriately, there is no lack of plurality in the U.K. media today.

For instance, a vertically integrated group comprising a search provider or other key intermediary and news outlets might be able to exert considerably greater control than any traditional media group, by

directing consumers towards those outlets and not those of competitors. The potential for digital intermediaries to influence the web content accessed by the public has been underscored by the European Commission's ongoing investigation into Google, which is based in part on allegations that the company is favoring its own non-search services over competing services in how it ranks search results.⁸⁷

While the contribution of this type of media to the plurality of dissemination and consumption of news and opinion (and the consequent reduced ability of influencing stories read and, generally, the news agenda) seems indisputable we need to preserve the incentives to invest in content and journalism. Social media facilitates distribution of content and opinion but it is not a substitute for other traditional forms of professional journalism, which - as a result of these new forms of news distribution - is at risk of following the same trajectory of decline. Regulatory intervention needs to consider effects on those form media that are more likely to invest in journalism.

V. CONCLUSION

Properly understood and measured appropriately, there is no lack of plurality in the U.K. media today. There is also no lack of tools available to protect the interests of viewers and readers and to ensure a competitive, vibrant, and plural media landscape. This suite of regulatory tools reflects deliberate policy choices during previous regulatory initiatives which have sought to ensure that regulation did not stifle innovation or unduly constrain market developments or investment in U.K. news content, while maintaining adequate protection for U.K. consumers. It is essential that we are clear as to the appropriate policy objectives before embarking into an exercise of further regulation focused on ownership and market structures. Fragmentation of ownership cannot be a policy imperative. It is, at most, one factor to be taken into account (among many others relating to how news are produced and consumed) in order to achieve

⁸⁷ See Cases COMP 39.775 *1plus/ejustice.fr*, 39.765 *Francotel*, 39.740 *Foundem* and 39.768 *Ciao*. See also the House of Lords' Select Committee Communications and its call for Evidence on Media Convergence and Public Policy Access <http://www.parliament.uk/documents/lords-committees/communications/mediaconvergence/MCcf020812.pdf>.

the desired level of diversity of views alongside the requirements for investment, innovation, creativity, and program quality.

The current U.K. regime preserves the possibility of control over consolidation but there is no mechanism for structural regulatory interventions (e.g. break up or divestment) in the absence of a merger. Such interventions made in the name of re-establishing a supposed “plurality” that the market has moved away from would be worrying. The threat of regulatory fragmentation would risk undermining the financial independence of media enterprises, making them vulnerable to political influence or dependent upon proprietors with commercial interests unrelated to media.

Most importantly, new structural regulation would arguably miss the point as to the most significant potential threat to pluralism in the changed media paradigm: controlling access to and delivery of news and ideas through the internet.