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I. INTRODUCTION

Recent events in the United Kingdom, including the furor surrounding the newspaper “phone hacking” scandal which led to the Leveson report,² have focused attention on possible new legislation concerning media plurality. These events follow an inquiry in the European Union that is longer lasting but less likely to bear legislative fruit.³ Broad questions are raised in these debates, but the focus here is upon the relationship between legal provisions for media plurality and competition law and, in particular, upon such questions as:

- To what degree does competition law include consideration of media plurality issues?
- To what degree can competition law be expected to promote the goals of media plurality?
- Are measurement approaches used in competition law likely to be of help in measuring plurality?
- To what degree are there similarities between remedies applicable under competition law and remedies applicable under actual or prospective plurality legislation?
- Does the process by which competition law has been enacted and grown to maturity have any lessons for a similar development in the area of the case of media plurality?

Although some of these questions are of general application, others can only be answered within the context of a particular country’s legal system. In the present article, that country is chosen as the United Kingdom.

II. CURRENT U.K. COMPETITION LAW AND MEDIA PLURALISM RULES

Until recently, the general test applied by U.K. competition authorities in implementing the law was a public interest one. This went back to the original Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, which left the task of defining that public interest to the relevant authority. This practice was followed in the Fair Trading Act 1973, although in 1984 the then government enunciated the so-called Tebbit doctrine, which stipulated that henceforth merger references to the competition authorities would primarily be made on competition grounds.⁴

¹ Imperial College Business School and the U.K. Competition Commission. The views expressed here belong to the author alone, but he is grateful to Richard Collins for advice and comment.

² LORD JUSTICE LEVESON, REPORT INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS (November 2012).

³ See R. Collins & M. Cave, *Media pluralism and the over-lapping instruments needed to achieve it*, 37 TELECOMMUNICATIONS POL’Y 311-320 (2013).

⁴ http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/our_role/speeches/pdf/freeman_singapore_15010, p. 3.

The focus on competition was embodied formally in the Enterprise Act 2002, which defined public interest cases as an exception to the general rule of determining cases on competition grounds, expressly identifying national security as a public interest issue—to which media plurality and financial stability were subsequently added. In such cases (and only in such cases), the final decision would rest with the Secretary of State and not the competition authority.⁵

The principal media plurality case carried to a conclusion under the Enterprise Act arose when BSkyB, the satellite pay-TV company, bought 17.9 percent of ITV, the U.K.'s main free-to-air advertiser-financed station. The U.K. Competition Commission found that the proposed acquisition did not trigger plurality concerns but did raise competition concerns.⁶ The Secretary of State supported these decisions and endorsed the remedy, which was that BSkyB should be required to sell down its stake to 7.5 percent.⁷ Then, in 2010, News Corporation sought to acquire the remaining shares in BSkyB. But the offer was withdrawn in 2011 before a reference to the Competition Commission could get under way.

The Employment and Regulatory Reform Act 2013 made certain minor changes to these arrangements, but left them largely intact.

Several decades before these events, the U.K. Parliament enacted a great deal of separate legislation limiting ownership or cross-ownership of broadcasting and other media. These have now shrunk to a restriction on the combined ownership of more than 20 percent of an ITV license and of national newspapers with a more than 20 percent market share.

Since 2011, radical proposals have been put forward for additional legislation to preserve or enhance media pluralism. These have included, from the U.K. Labour party, a proposal for a limit on a single firm controlling more than 30 percent of newspaper circulation or more than 15 percent of ownership of the media as a whole.⁸ Rather than evaluating these proposals, the present article focuses on the relationship between media plurality and UK competition law.

⁵ The EU Merger Regulation ((139/2004/EC) also contains a provision for media mergers with a community dimension to be considered in Brussels for the competition test; it also permits Member States to take measures to protect “legitimate interests” including media plurality.

⁶ Competition Commission, *Acquisition by British Sky Broadcasting Group plc of 17.9 percent of the Shares of ITV PLC, 2007*. The test in the Act is to satisfy “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.”

⁷ See, Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group’s acquisition of a 17.9% shareholding in ITV plc (29 January 2008), *available at* http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2007/itv/pdf/sky_berr_decision.pdf.

⁸ <http://www.theguardian.com/media/2013/jun/13/harriet-harman-media-ownership>. An interesting account of the operation in the Netherlands of a rule of this kind based on newspaper circulation can be found in A. W. Hins, *Plurality of Political Opinions and the Concentration of Media*, accessed on SSRN. A report on media plurality (to which the present author gave evidence on which this article is based) has also recently been published by the House of Lords Communications Committee, *Media Plurality, 2014*, *available at* <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf>

III. DIFFERENCES BETWEEN COMPETITION LAW AND MEDIA PLURALITY RULES

Both the main terms in the above heading (“competition” and “plurality”) are subject to multiple interpretations: especially the latter. For the present purposes, a definition of plurality borrowed from Ofcom is useful: plurality entails i) a diversity of viewpoints, and ii) the prevention of one media owner having too much influence.⁹ These are not the same, of course. It is possible to conceive cases of “internal pluralism,” in which a single media outlet or a group of co-owned outlets espouses radically different points of view—though this would carry the obvious risk that the firm might adopt a new business policy that would lead to ideological uniformity. As the discussion below shows, it becomes important to decide how to handle such cases—in other words to decide whether the two requirements noted above are alternatives or are cumulative.

The three conventional dimensions of media plurality are: the availability of, consumption of, and impact of, media outlets.¹⁰ Of these the first, though important as a precondition, does not seem related closely enough to either of the above-noted notions of pluralism, for the obvious reason that available media which few consumers choose to consume are unlikely to add to diversity or to impinge upon a dominant owner’s influence. Equally, the impact or influence of a firm’s media outlets on consumers, though an excellent yardstick in theory, is exceptionally difficult to measure.

It is a problem with consumption measures of pluralism that, usually, they are made only in aggregate terms, neglecting the structure of an individual’s consumption. Half the population being exposed to A and the other half to -A is less “pluralistic” than the whole population being exposed on a smaller scale to both A and -A. But taking individual multi-sourcing into account is complex.

Competition law, by contrast, is concerned with the presence or absence of constraints on a firm’s capacity to exploit its customers or exclude its competitors in a market. In some circumstances, an important constraint can be provided by the presence of successful rivals for customers’ spending; in others, exploitation can be deterred by the mere potential availability of substitutes. The focus is less on consumption than on availability of products on level terms. If the bulk of customers faced with an unconstrained choice opt for one option, this is not a problem in itself, although it may become so if the supplier attains and abuses a dominant position. While many people believe that high market shares are automatically a major competition problem, modern competition law does not take this view, even as it recognizes that large market shares can create opportunities for abuse.

In competition law, what determines the set of alternatives to which priority is given in the analysis is, broadly, consumers’ behavior in the face of the options available. It is substitution between options by the totality of individual consumers which defines the market within which most of the analysis is conducted. This bottom-up method sits in contrast with pluralism discussions, where it is normally the assessor (e.g. the relevant regulatory authority) that decides top-down which media products to “count.” In future, some method of induction from

⁹ Ofcom, *Measuring Media Plurality*, 8 (June 2012).

¹⁰ *Id.* at 17.

consumer behavior might take over from this top-down approach, but since the currency of pluralism is not dollars of expenditure but consumption of opinions, developing such a process would prove difficult.

The relationships among quantities, quality, and impact operate differently in the market place for goods and the marketplace for ideas. A high quality product can have an impact disproportionate to its level of consumption, with volume measures failing to capture its effects (think of the iPhone). In competition law quality differences can partly be captured in market shares by value. To adopt a similar approach in relation to plurality, quality/enhanced impact effects would have to taken into account in some way.

In short, the discussion so far suggests the presence of two mechanisms which operate with different goals and yardsticks: a consumer welfare standard in the case of competition law, and a variegated consumption standard in the case of pluralism. We return to the question of the congruence of these concerns after a digression into measurement of media pluralism.

IV. ARE THERE ANALOGIES IN MEASUREMENT?

Two key competition law concepts are “dominance” (the ability to behave to an appreciable extent independently of customers and competitors) and “substantial loss of competition” or “SLC” (used to appraise mergers). The indicators underlying a judgement of dominance are many, including market share of the candidate dominant firm(s), changes in share, countervailing buyer power, etc.

There is no generally accepted percentage threshold that establishes dominance. This reflects the more general proposition that competition law analysis focuses not on share but on absence of constraint; and, in some circumstances, firms in highly concentrated markets can constrain one another most effectively. Hence, as noted above, competition law does not look unfavorably on a large market share won “on the merits.” It is the process by which such market shares are gained or protected which usually comes under scrutiny.

In Ofcom’s view, plurality focuses both on the conduct of rivalry and on the outcome, as it requires i) the prevention of one media owner having too much influence and ii) a diversity of viewpoints. If it were the case that influence is a zero sum game, so that proprietors are competing for a fixed quantum of influence, then plurality would depend upon different firms’ **shares** of relevant impressions, and be independent of the absolute level of media consumption.

It is hardly surprising that it is impossible to capture in a single number the multi-dimensional complexity of the structural conditions and behavioral factors inherent either in a competitive market or in a pluralistic media universe. Merger policy in some jurisdictions sometimes uses the Hirschman-Herfindahl index (“HHI”) as a summary statistic describing the distribution of firm size in the relevant market. This is calculated by taking the square of each firm’s market share and adding up the sum of the squares. It ranges for 0 in perfect competition to 10,000 (100 squared) in a monopoly. As the index can be calculated over a series of years, comparison over time is possible.

In purely economic terms, under certain not very plausible conditions, it can be shown that the profit margin (more exactly, the mark-up over marginal cost) varies in direct proportion with the HHI.¹¹ It should be recognized that the HHI gives (by its “market share squaring” procedure) an enhanced weight to large firms and to increases in the share of large firms. However, the HHI (or changes in the HHI) is used in competition analysis at most as a screen to decide whether further analysis of a merger is needed, not to settle the question of whether the merger should be cleared, which requires consideration of a multitude of indicators.

Because it captures the overall spread of consumption, the HHI may seem more useful as a plurality measure.¹² However, it does not capture the range of views available. In a market, product homogeneity can sharpen competition. In small numbers markets, there may also be tendencies towards either convergence of rivals’ product characteristics or the proliferation of brands by a single firm seeking to deter entry by a competitor.¹³

Casual observation suggests that while commercial media companies differentiate their products by the age, affluence, and gender of the consumer, even when (like newspapers in the United Kingdom and broadcasters and newspapers in the United States) they are free of impartiality rules, they do not seem to pursue a general policy of proliferating viewpoints on the same issue—that is, they do not generally display internal plurality. It is not clear what is the purely commercial motive for this absence of full internal diversity, nor whether its origin lies with the demand or the supply side.

In summary, there seems to be some role for the HHI as a measure of plurality, even if its use in the enforcement of competition law—for which it was designed—is now limited. However, a separate check would have to be made on whether the various media firms are, individually or collectively, promulgating different viewpoints.

V. THE CONGRUENCE BETWEEN COMPETITION LAW AND PLURALITY GOALS

It was noted above that competition law and media plurality rules have different objectives. At the broadest level, they are both concerned with monopoly but in different senses of the word—the one with control of the commercial market place, the other with control content.

It may be helpful to visualize the relationship in terms of a simple Venn diagram. The left hand circle in Figure 1 contains the universe of media activities captured by a chosen pluralism measure in which competition problems may be detected. The right hand circle contains those media activities in which plurality issues may be considered to arise. Firms in areas A and C can

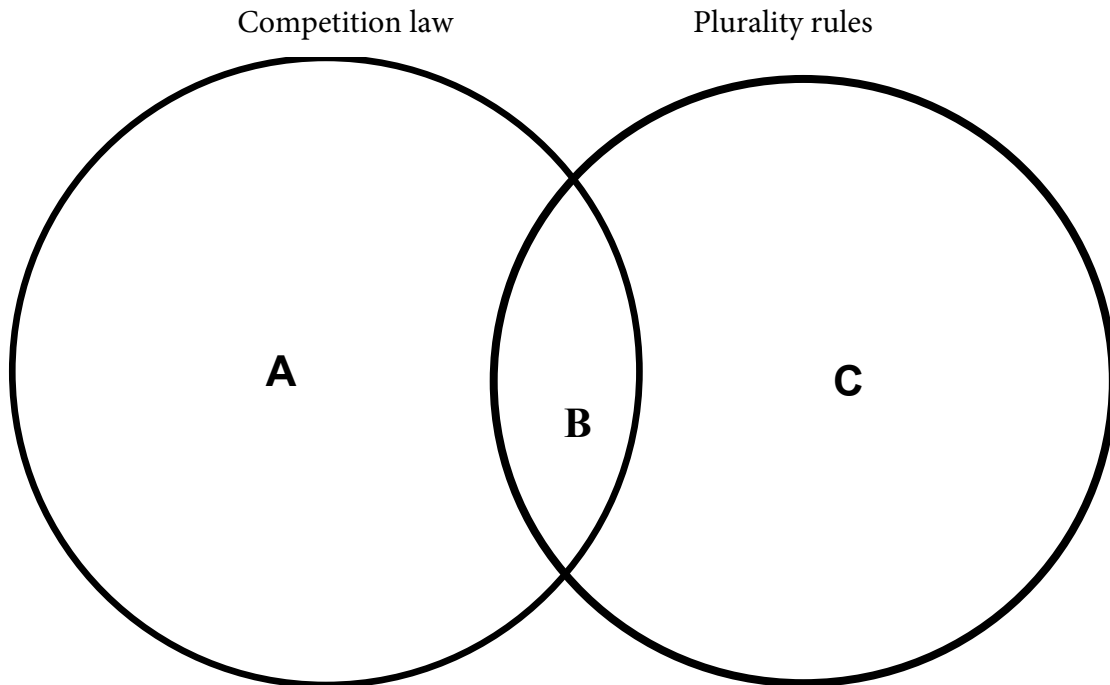
¹¹ This provides a weak economic justification of the formula. See P. BELLEFLAMME & M. PEITZ, *INDUSTRIAL ORGANIZATION: MARKETS AND STRATEGY* 58-59 (2010).

¹² As discussed in *op. cit.*, *supra* note 3.

¹³ As a famous illustration of the tendency for (spatial) convergence, consider two ice cream sellers offering the identical product to a group of customers sun-bathing on a beach, with each person buying one ice cream from the nearest seller. The two competitors will end up back to back in the middle of the beach. (This is the only stable outcome as otherwise one of the sellers could take business from the other by moving to face the majority of bathers.) Similar arguments are used to explain why two political parties may both end up in the middle ground. Proliferation of offerings in the product space seems to be popular in some context, such as detergents, pet food, and mobile phone tariffs.

comfortably be investigated under their relevant statutes. But what about area B, where both arise?

Figure 1:



The general principle governing policy interventions is that if there are two objectives—the maintenance of competition and of plurality—then two instruments are needed;¹⁴ only by a fluke, where the same intervention happened to work with equal success on both objectives, would one instrument be enough. Is that situation likely to arise?

Consider the following possibilities:

1. A media firm dominates the sector and behaves in an anticompetitive fashion to exploit consumers and exclude rivals; its proprietor enforces a single ideology on all outlets: this case sits in area B in figure 1;
2. As in 1) above, but the strong position of the successful firm has been won “on the merits”: area C in figure 1;
3. As in 1) above, but the firm does not impose a uniform ideology, practicing internal pluralism: this case sits in area B in figure 1, unless internal as well as external pluralism is counted in the pluralism assessment;
4. There are two media firms, each enforcing the identical ideology on its outlets, but they compete vigorously in commercial terms: area C in figure 1, unless separate ownership is considered enough by itself to avoid the charge of lack of pluralism.¹⁵

¹⁴ J. TINBERGEN, ON THE THEORY OF ECONOMIC POLICY (1952).

¹⁵ To simplify, this situation characterized the U.K. newspaper industry in 1931, leading the then Conservative leader, Stanley Baldwin, to rail against the two proprietors of the leading newspapers in the following way: “The

Outcome #1 fails under both heads, leading to a situation in which correction of both defects may be amenable to the same divestiture remedy (discussed below). In Outcome #2 the competition test is passed but the plurality test is failed. Moreover, a divestment measure to achieve pluralism would deprive the firm in question of rewards to which, under the competition regime, it would be entitled. In Outcomes #3 and #4, the key question is whether the two limbs of the plurality test (diversity of viewpoints and no excessive control by one firm) are both required, or whether the first or the second alone will suffice to satisfy the plurality rule. The same issues arises in Outcome # 4; there is no excessive control but also uniformity of viewpoint.

It is thus clear that competition law goals and plurality rules can be congruent, but can equally be opposed. Thus there is no single silver bullet that can, in all cases, solve both problems.

VI. ARE THERE ANALOGIES IN REMEDIES?

In the United Kingdom, the repertoire of competition law interventions has three components.¹⁶ The first, antitrust, deals with anticompetitive conduct, such as abuse of dominance or illegal agreements. The second deals with mergers, using the standard of whether a proposed merger will lead to a substantial lessening of competition.

The third, which is confined to the United Kingdom and a small number of other countries, permits market investigations, which seek to establish if there are features in a market that have an adverse effect on competition. If so, the authority can remedy them. Here the focus is not on the behavior of one firm but on the overall functioning of the market under investigation. This mechanism gives the authority a purchase on a situation where there may be no merger and no abuse under antitrust law, but a situation in which the market is not operating to the benefit of end users.

Antitrust remedies include fines. In the case of mergers, remedies range from prohibition to acceptance of undertakings. These remedies quite often involve divestment and may also include behavioral commitments. The firms involved presumably want the deal to go ahead, so tend to co-operate once their other legal options have been exhausted. Remedies available in market investigations can also be either behavioral or structural, including divestments.

A key issue for plurality legislation (not considered here) is whether it kicks in only in the case of a merger, or whether an examination of plurality, with application of possible remedies, can occur even in the absence of a proposed combination—say at regular intervals, or triggered by another event.

In either case, it is not fanciful to imagine a similar range of remedies being employed in pursuit of plurality goals as are now employed in the case of competition law. In the case of

newspapers attacking me are not newspapers in the ordinary sense,” Baldwin said. “They are engines of propaganda for the constantly changing policies, desires, personal vices, personal likes and dislikes of the two men. What are their methods? Their methods are direct falsehoods, misrepresentation, half-truths, the alteration of the speaker's meaning by publishing a sentence apart from the context...What the proprietorship of these papers is aiming at is power, and **power without responsibility – the prerogative of the harlot throughout the ages.**” (emphasis added).

¹⁶ There is a fourth, enforced by the European Commission—State aids. It is worth noting that public subsidy or enforced cross-subsidy is an additional measure which can promote plurality. This is discussed in Collins & Cave, *supra* note 3.

mergers, this might include an outright prohibition of the merger, or the acceptance of undertakings to maintain plurality in the place of prohibition—both of which have been used in the U.K. media pluralism context.

Such undertakings might include partial divestment or a behavioral remedy. While in competition law such a behavioral remedy sometimes includes control over prices, in a plurality context it might involve arrangements to prevent the owner from imposing a particular editorial policy on the media outlet. Thus, in 1981, as a condition for not referring the acquisition by Mr. Murdoch's News International of the *Times* and the *Sunday Times* to the then U.K. competition authority (the Monopolies and Mergers Commission), the Government imposed conditions on the acquirer relating to the maintenance of editorial independence by the newspapers' editors.¹⁷ (It is a separate question whether such measures are effective.)

The divestment remedy is quite widely utilized in U.K. competition law, and guidelines have been prepared for its use.¹⁸ These identify various risks to the attainment of the divestiture objectives that should be avoided—notably (i) the risk of choosing a divestiture package that would not create an effective competitor, (ii) the risk of sale to a weak or ineffective purchaser, and (iii) the risk of deterioration of the assets to be divested before the sale. In relation to the purchaser, broad criteria are set out: the purchaser should be independent of the seller, be capable and committed to the relevant market, and not be subject to competitive or regulatory concerns.

These concerns are likely to be as pertinent in the case of divestment imposed as a remedy to maintain plurality as they are in the case of a remedy to restore or enhance competition.

VII. WHAT IS THE RELATIONSHIP BETWEEN COMPETITION AND PLURALITY LEGISLATION AND ENFORCEMENT?

Competition law developed gradually in the United Kingdom in the post-war period. There are legislative landmarks such as the U.K. Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, the Fair Trading Act 1973, the U.K. Competition Act 1998, the Enterprise Act 2002, and the Employment and Regulatory Reform Act 2013. Membership of the European Union from 1973 brought with it the competition articles of the Treaty of Rome. There have also been vital U.K. and European Court judgments such as the 1977 definition of dominance by the European Court of Justice, and important changes in administrative practice. A recent development applicable to plurality discussions is using behavioral economics to better understand customer choice and craft remedies.¹⁹

There have also been innovation failures, including attempts to define a “bright line” market share standard for dominance. The development process is Darwinian in nature, with

¹⁷ HAROLD EVANS, *GOOD TIMES, BAD TIMES* Chs. 7-10 (1983).

¹⁸ Merger Remedies: Competition Commission Guidelines, 17-23 (November 2008); Competition Commission, Guidelines for market investigations: their role, procedures, assessment and remedies, 91-97 (April 2013).

¹⁹ See BEHAVIOURAL ECONOMICS IN COMPETITION AND CONSUMER POLICY, (Judith Mehta, ed., 2013) available at <http://competitionpolicy.ac.uk/documents/107435/4503876/CCP+economics+book+Final+digital+version+-+colour.pdf/fca104c5-1248-4e7f-87b7-c9ac57f575b0>. It is worth noting, however, that some of the concepts envisaged in such analyses (such as “nudging” consumers) may have a worryingly Orwellian ring in application to media consumption.

powerful interests (firms involved in competition law proceedings, their advisers, competition authorities themselves) seeking to test or displace certain precedents and practices or to change legislation. Despite this, there is a fair degree of consensus among practitioners as to how competition law should be constructed at a high level, co-existing with disagreement as to how it should be applied in an individual case.

There seems ground for hope that a similar process can begin, and that a similar outcome can be achieved, in relation to plurality. It is reasonable to assume that any major conclusion or remedy would be subject to appeal in the courts or judicial review, so that precedents would be established. Ideally the process would take account of concurrent international work. For this process of “learning by doing” to take effect, there would need to be persistent interest in monitoring and promoting plurality.

In relation to substance rather than process, the above-noted difference in the objectives of competition and plurality policy (respectively, consumer welfare and the consumption of different viewpoints) defines the different arenas within which the analyses take place (respectively, a set of goods which are close substitutes and a range of media services determined by the investigator) as well as the different desirable outcomes. This limits the usefulness of applying one mode of analysis for both situations. Thus, the difference between objectives of the two activities produces an unavoidable disjunction between the design and application of the relevant instruments. The notion that one legal instrument can generally substitute for the absence of another seems illusory.

It has become apparent from the previous discussion, however, that at the level of measurement, and, particularly, in the choice of remedies, there are lessons to be learned from competition law which can be applied to the regulation of plurality.

Equally, the processes of birth, infancy, and increasing maturity of competition law—which has involved learning from experience, trial and error, and an expanding area of application and growing prestige (despite the occasional waning of influence)—plot a course which exponents of pluralism legislation may wish to copy.