

# Media plurality (déjà vu)

## The DCMS consultation

### Media ownership and plurality consultation

DCMS published its media ownership and plurality consultation on 31 July 2013. The document follows a stream of publicly available written submissions and oral evidence gathered during several years of vigorous debate: the public interest test for the News Corporation/BSkyB transaction, the seven month extensive Ofcom consultation on media plurality measurement, the Leveson Inquiry and the House of Lords Inquiry into media plurality. There is a real sense of déjà vu. Should the scope of media plurality cover news and current affairs alone? Should the BBC be included in any assessment of media plurality? Should online be included? Such questions have been posed several times before and answered as many times. Stakeholders will be able to trot out their well-rehearsed responses with ease. However, answering all of the questions is not quite straightforward; some require much more careful consideration (the types of organisations that media plurality applies to and media plurality in communities are the prime examples). Moreover, there are a number of worrying statements in the document that must be challenged. The one that gives rise to the most concern is DCMS's reference to the development of a clear measurement framework that will yield a 'state of the nation' view of the true extent of plurality in the UK today. Responses to the consultation need to go beyond the questions posed. Otherwise there may be a real danger that future media mergers in any specific 'market' are blocked.

**Owing to the lack of time to consider media plurality matters in detail during his Inquiry, Lord Leveson made a number of recommendations for DCMS to consider.**

DCMS has taken these as the starting point for its consultation and focuses on the possible scope of a media plurality measurement framework:

- the types of media it should include;
- the genres it should cover;
- the types of organisation and services to which it should apply;
- the inclusion of the BBC; and,
- the audiences with which it should be concerned.

What is striking is that Lord Leveson affirmed many of Ofcom’s proposals in its advice to government following its extensive consultation on measuring media plurality.<sup>1</sup> (And subsequently discussed again at the House of Lords (‘HoL’) Inquiry.)

Yet DCMS is re-consulting on a number of the ‘old chestnuts’ that we considered to have been dealt with and a consensus reached, namely:

- the scope of media plurality should comprise news and current affairs only;<sup>2</sup>
- online (of course) should be included in any assessment of media plurality;<sup>3</sup> and
- the BBC (of course) should be included in any assessment of media plurality.

We reproduce DCMS’s questions below.

	Question
①	Do you agree that online should be included within the scope of any new measurement framework?
②	What type of content is relevant to media plurality?
③	Do you believe that scope should be limited to news and current affairs, or be widened to consider a wider cultural context?
④	If so, how might a wider context be defined?
⑤	What sorts of organisations and services are relevant to media plurality?
⑥	Do you believe that scope should be limited to publishers or include services that affect discoverability and accessibility?
⑦	Do you agree that the BBC’s impact on plurality should be assessed as part of a plurality review?
⑧	Are there specific factors that you think a measurement framework needs to capture in order to provide a picture of plurality in local communities?
⑨	Do you agree that a measurement framework should also seek to assess the plurality of media serving other audiences or communities of interest? If so, which ones?

Source: DCMS

We are not minded to discuss (again) the areas of consensus (although no doubt some

<sup>1</sup> <http://stakeholders.ofcom.org.uk/consultations/measuring-plurality/>  
<sup>2</sup> Other genres are best considered under the term ‘diversity’ which may be achieved by the market or via content obligations in licences or other interventions.  
<sup>3</sup> We acknowledge that DCMS concurs with this.

stakeholders may aim to change views) and therefore focus on the thorny issues raised by questions 5, 6, 8 and 9.

**Q5: what sorts of organisations and services are relevant to media plurality?**

This clearly stems from the debates held, inter alia, during Ofcom’s PIT in relation to the wholesale vs. retail distinction. As the law currently stands, as DCMS points out:

*“the definition of a ‘media enterprise’ in the public interest test does not include providers of internet content, or wholesalers of broadcast content who do not broadcast themselves; and, the 20/20 rule is concerned with the circulation of national newspapers – despite the fact that we increasingly access their content online.”<sup>4</sup>*

It is clear that the current statutory basis requires augmenting to incorporate online. However, it would appear that there is a danger that DCMS is embarking on a potentially complex route to assess plurality:

*“we need to identify the organisations and services - from production to point of access - that should be within scope of a measurement framework”*

DCMS tables a list of possible types of organisation that could come within the ambit of a media plurality assessment: originator, wholesaler, retailer (broadcaster/publisher), aggregator, search engine, and social media. Based on the various types of organisations identified, DCMS posits an example news media supply chain as follows.



This raises at least two important issues:

- is it possible to ‘typecast’ organisations with precision? For example, in the DCMS example above, ITN is defined

<sup>4</sup> <https://www.gov.uk/government/consultations/media-ownership-and-plurality>

as a wholesaler. ITN is also active in news origination but does not qualify as an originator as its news origination is not 'independent'. To identify all of the organisations involved will require a detailed assessment of the news media supply chain from origination to consumer. Moreover, how each organisation is classified may not be straightforward; and

- even if issues are identified – e.g. an insufficient number of providers at the origination stage of the chain – what can government do?

We are reminded of Ofcom's comments in its Media Ownership Rules Review:

*"Under the assumption that ownership is a proxy for viewpoints then the point of influence in the supply chain lies at the 'consumer interface'. That is, where media providers interact directly with consumers through newspapers, websites or broadcast transmissions."*

This clearly points to the consumer interface as being the important point of assessment. Indeed, the Competition Commission stated in the case of television (Sky/ITV) that:

*"The channel operator remains ultimately accountable (including to the regulator) for the news that is presented on its channels. The presentation of individual news stories may on some occasions be discussed between the programme provider and the channel operator either before or after transmission".<sup>5</sup>*

We question whether it is legitimate to view the provision of wholesale news to a broadcaster in the same way as the provision of news directly to an audience. Notably such supply contracts may be lost as well as won. Additionally we note that news agencies provide news to broadcasters, press and online providers.

<sup>5</sup> *Acquisition by British Sky Broadcasting PLC of 17.9 per cent of the shares in ITV PLC*, Competition Commission Report sent to Secretary of State (BERR) 14 December 2007, at paragraph 5.55(d).

In our view the focus of media plurality assessment should focus firmly at the consumer interface, where demand meets supply. This recognises that a consumer may have access to various sources of news and current affairs, whether in traditional print, online or on TV/radio.

The originators of the underlying content may distribute across various different media and platforms, but the plurality question ultimately comes down to whether, having regard to the different sources of relevant content, there remains sufficient plurality of persons with control over the various sources. The fact the supply chain may (or may not) involve a wholesaler or other intermediary would seem irrelevant to the issue of whether the "relevant audience" (i.e. the consumer) has access to a sufficiently wide and diverse range of views emanating from different media controllers.

**Q6: do you believe that scope should be limited to publishers or include services that affect discoverability and availability?**

There are two facets to this question: first, as DCMS puts it, should other media organisations in the news value chain be included, for example wholesalers such as ITN news? Should 'aggregators', search engines, social media or forums and 'sharing' websites such as YouTube be considered in scope?

This dovetails to the previous discussion, the best place to look is at the consumer interface.

Of course it would seem relevant to consider aggregators in the plurality mix if, through their involvement in the supply chain, they provide a different point of entry or access for the consumer. It seems that the situation of aggregators who pull together different sources and make them accessible to the consumer is different from the wholesaler who may be largely invisible to the consumer so does not add to the consumer experience.

The second facet of the question relates to non-content services that may affect the availability and discoverability of news. Should search engines be included in the plurality assessment?

Thus if my search engine increasingly personalises my news services such that I end up only ever reading two sources of online news, should there be concerns?

Our view is that consumers should be free to choose what they consume. If a search engine makes the search easier then so be it. There's numerous TV channels, radio stations, local, regional and national newspapers and online news services available for consumption.

Restrictions on search outcomes would surely fall under the ambit of competition law should the provider be favouring its own services over others.

This also suggests that the distinction for plurality purposes is between (1) separate channels or access points by the consumer (relevant to plurality) and (2) indirect service providers who facilitate distribution of content to consumers (not relevant to plurality). Or to put in another way the 'buck stops here' providers such as news aggregators would seem to be relevant to plurality assessment and not wholesalers or search engines who do not provide the consumer with a separate source of content or news/ current affairs experience.

DCMS statement below may not be entirely consistent with this element of the consultation.

*"...it is clear that neither Government nor any other body can compel people to consume a range of media voices, or control the impact that these voices have on public opinion..."*

Hopefully the direction of travel potentially implicit in Q6 is not akin to forcing Amazon always to include the bible in "you might like" recommendations when people search for new books.

**Q8: Are there specific factors that you think a measurement framework needs to capture in order to provide a picture of plurality in local communities?**

Plurality embraces the need for a range and diversity of views available to a relevant

audience. It is quite possible to envisage a situation where local views or viewpoints, including religious opinion could be marginalised.

Certainly under the old Fair Trading Act public interest test plurality type assessments got into the nitty-gritty of localised views. A case in point is the proposed merger of Century Newspapers and TRN (April 1989). The merged entity would have owned both the News Letter (a publication with a strong Unionist focus) and the Belfast Telegraph which was considered to be a more 'middle of the road publication' (read by both Protestants and Roman Catholics). Consent was refused by the then Secretary of State on the basis that the merger would lead to a loss of a distinctive viewpoint in representing Unionist opinion in Northern Ireland.

**Q9: do you agree that a measurement framework should also seek to assess the plurality of media serving other audiences or communities of interest? If so, which ones?**

This builds on the previous question regarding more local or community viewpoints. Clearly there is a need to take account of local communities or viewpoints.

However, the historic experience suggests that such cases tend to be immediately recognisable. The frame of reference that Ofcom has developed should be sufficiently malleable to take account of community idiosyncrasies and deal with potential cases. We should not rule out that future cases may indeed require an inquiry into whether there is a sufficient plurality of views expressed in the Welsh language for example. How far such inquiry should go (cheese making in Cheddar?) should be sanity checked through a healthy dose of pragmatism.

**Beyond the questions raised in the consultation, DCMS makes a number of statements that are concerning**

Based on the responses to the consultation, DCMS is to commission the development of a 'clear measurement framework' which will lead to:

*“the completion of the first ever market analysis of plurality in the UK. This will provide a ‘state of the nation’ view of the true extent of plurality in the UK today.”*

This is a heroic objective. Is the ‘true extent’ a fact or a judgement? DCMS also states that its market review:

*“will inform views on the level of plurality that is sufficient...”*

We ask, in isolation, how will the review inform the thorny issue of ‘sufficiency’? Once the results of this ‘first ever market analysis of plurality in the UK’ are published, some observers will consider that media plurality is ample (especially when compared to 2003). Others may say that it is just about right and some may argue that media plurality is insufficient. What then to do?

Numerous other studies have demonstrated the huge increase in media plurality since 2003. DCMS’s proposed ‘state of the nation’ review surely needs to compare today to 2003. Indeed, why isn’t 2003 the benchmark? A snapshot of today in isolation leaves too much room for ill-conceived opinion to sway the outcome and thus potentially putting the brakes on all future merger(s) in the relevant market(s).

Another issue raised by Lord Leveson was in respect of (perceived) changes in media plurality as a result of organic growth. DCMS states that its ‘state of the nation’ review will:

*“...provide a means of securing timely warning of plurality concerns arising from organic change, and how best these might be addressed.”*

This comment raises the issue about whether plurality is an issue to be addressed following a relevant trigger such as in merger control or whether regulators or the SoS should take the temperature of plurality on an ongoing basis to see if there is anything wrong.

The ongoing reforms to UK competition law

have decided this question by allowing for plurality issues to be considered on a market investigation independently of a relevant merger.

However, as with an ex ante inquiry or intervention it needs to be balanced and justified. In other words we should ask whether the status quo is problematic, i.e. there is a likelihood of harm to the public interest if the market is left to its own devices. This is a high threshold.

We must not overlook the extensive research programme that Ofcom undertook in respect of measuring media plurality as it demonstrates that there are significant challenges and no easy answers.

Ofcom spent some 7 months on its public consultation which involved stakeholder engagement (including written submissions), academic seminars, international benchmarking, extensive consumer research, an in-depth study of the provision of news and a review of the academic literature.

Phrases such as no perfect measurement system, a pragmatic approach, a basket of indicators are in Ofcom’s conclusions. Perhaps ‘state of the nation’ is overly optimistic.

### **The rest of the world looks on – media plurality in a global context ...**

Internationally plurality debates are ongoing - for example in Australia and in India.<sup>6</sup> The rest of the world tends to look to the UK - not to follow best practices, but to set them. There may be a real danger of sending mixed messages that we cannot set our own house in order or we are just confused? The consultation should be an opportunity to send a strong back to basics message that there are some settled principles even though there is merit in refining them.

<sup>6</sup> Discussed in: “The March of Media Reform: A UK perspective on Australia” A paper on the Australian proposals for reform of its media sector by Alison Sprague and Suzanne Rab, March 2013. The authors also submitted a critique of proposed changes to media ownership and plurality rules in India to the regulator TRAI on behalf of CASBAA.

---

## CONCLUSION

Stakeholders may find it challenging to garner the energy to respond (again) to several of the consultation questions posed by DCMS.

However, we consider that it is imperative that stakeholders respond directly to all questions and also to ensure that their responses are extensive so as to address the broader and thorny issues raised in the paper.

---

## NEXT STEPS

If you would like to discuss the issues raised in this note and how we may assist you in responding to the consultation, do not hesitate to contact Alison Sprague at CEG (contact details below). The author's other papers of relevance to the debate include the following.

Sprague, Alison (2010), "*Measuring Plurality in News*." A report prepared for News Corporation. [http://www.culture.gov.uk/images/publications/Annexes-NewsCorps-submission-to-SoS\\_14JAN2011.pdf](http://www.culture.gov.uk/images/publications/Annexes-NewsCorps-submission-to-SoS_14JAN2011.pdf)

Sprague, Alison (2012), "*The importance of the internet in how news is obtained in the UK today*", a report submitted to the Leveson Inquiry on behalf of News International Group Limited. <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Annex-B-to-Plurality-submission-from-NI.pdf>

Sprague, Alison (2012), "*Ofcom: Measuring Media Plurality (Take Two)*." An FTI Consulting Whitepaper. <http://www.fticonsulting.co.uk/global2/critical-thinking/white-papers/measuring-media-plurality.aspx>

Sprague, Alison (2012), "*Trends in media plurality since the Communications Act 2003*." [http://cdn.lbresearch.com/files/events/1407-alison\\_sprague\\_-\\_presentation-26042012120218.pdf](http://cdn.lbresearch.com/files/events/1407-alison_sprague_-_presentation-26042012120218.pdf)

"*Power and Influence - The real issues behind Media Plurality: Ofcom to determine the future structure of the media landscape?*" An FTI

business briefing.

<http://www.fticonsulting.co.uk/global2/critical-thinking/featured-perspectives/media-plurality/index.aspx>

Select Committee on Communications. Inquiry into media plurality. Written evidence by Dr Alison Sprague and Suzanne Rab <http://www.parliament.uk/documents/lords-committees/communications/Mediaplurality/MediaPluralityEvidence.pdf>

Media plurality and the UK agenda: the House of Lords call for evidence. CEG client note. <http://www.ceg-global.com/uploads/PDFs/Client%20notes/CEG%20client%20notes%20-%20Hol%20submission%20June%202013.pdf>

---

## AUTHORS

This briefing has been prepared by Dr. Alison Sprague of CEG and competition lawyer Suzanne Rab.

---

## Contact

Dr. Alison Sprague  
M / +44 (0)7876 217 131  
E / [asprague@ceg-europe.com](mailto:asprague@ceg-europe.com)

Suzanne Rab  
M / +44 (0)7557 046 522  
E / [suzanne.rab@gmail.com](mailto:suzanne.rab@gmail.com)

Any opinions expressed in this communication are personal and are not attributable to Competition Economists Group