

Rachael Craufurd Smith: Lords' Media Plurality Report is Potential Road Map



*In another response to the report on media plurality just published by the House of Lords Communications Committee, University of Edinburgh's **Rachael Craufurd Smith** finds it offers a useful road map, but with some caveats.*

The House of Lords Select Committee on Communications' **Report Media Plurality** puts forward an innovative, multi-faceted approach to tackling excessive concentrations of media ownership in the UK. The shortcomings of the existing media plurality provisions in the **Enterprise Act 2002** are well known and include the fact that: they apply solely to media mergers, preclude consideration of situations where a company grows 'organically'; focus on traditional newspapers and broadcast services; involve complex procedures; and have failed to establish agreed procedures for measuring media plurality in practice. The system has also been criticised for the involvement, for different reasons, of the Competition Commission and Secretary of State in individual plurality decisions.

In an attempt to address these problems, some commentators, myself included, proposed the re-introduction of fixed caps and/or a system of lower thresholds at which a range of behavioural obligations would kick-in. Twentieth century fixed limits, have, unsurprisingly, been rejected by the Committee on the grounds that they narrow review to a limited range of pre-determined considerations, such as share of revenue, and thus prevent a more rounded exploration of relevant factors, such as audience share, impact, or consumer behaviour (para. 121). The Committee also rejected a hybrid system of caps and thresholds, expressing reservations as to the likely effectiveness of behavioural remedies (para. 147). Does the alternative solution proposed by the Committee manage to square the circle and combine depth of analysis, flexibility, certainty and streamlined procedures while also engaging the appropriate (in constitutional terms) bodies in the process? To a large extent it does, though there remain a number of important caveats discussed at the end of this note.

Two kinds of reviews

The motor and integrating component behind the new regime is a system of four/five yearly market reviews to be carried out by Ofcom. If backed by sufficient resources, these independent reviews should enable citizens to assess the health of media pluralism in the UK and follow key market trends. Guidance as to what constitutes 'sufficient plurality' would be set out in statute so that the latitude left to Ofcom to develop and implement particular forms of measurement would depend on how prescriptive this guidance proved to be. Importantly, the Report envisages that plurality is to be assessed within and across all relevant media markets, with scope to consider both wholesale and retail sectors (para. 63). The system can easily be refined over time in discussion with 'stakeholders' and modified in response to technical or market changes

These regular reviews are not, however, simply mapping exercises and it is envisaged that they will also be used to alert companies that they are close to, or have reached, a scale that raises moderate/high/severe plurality concerns. Where a company, as a result of organic growth, falls into the 'severe concern' category, Ofcom would, exceptionally, be empowered to recommend divestiture of certain assets (para. 210). Companies identified in the first two categories would also know that if they engaged in further transactions leading to market consolidation this could, or would be likely to, trigger a 'transactional review'. The Report proposes that the existing system for reviewing media mergers on plurality grounds under the Enterprise Act 2002 should be replaced with a simplified, streamlined procedure (**Figure 2**, page 65). Ofcom, rather than the Competition Commission, would be given power to decide whether to initiate a review and

whether the transaction at issue would lead to an 'unacceptable lessening of plurality', paying particular regard to the interests of citizens as opposed to consumers (paras. 233, 240). Given the Committee's emphasis on the distinction to be drawn between competition and plurality considerations (para. 101) it is perhaps surprising that the Ofcom Board would be given power to 'resolve any conflicts' between the competition findings of the Competition Commission and its own plurality conclusions in relation to a specific transaction (para.236). This requires further consideration in that there is much to be said for keeping such considerations distinct, even when to allow an anti-competitive agreement could result in (possibly short term gains) for media plurality.

The role of Government

The Committee's thoughtful proposals thus go a long way to addressing the failings of the present regime but a number of troubling elements remain, two of which are mentioned here. Firstly, although the Report closes the door to government influence in the context of transactional reviews by removing the Secretary of State from the process, it proceeds to open a new, potentially more problematic, avenue for influence in the context of plurality reviews. The Secretary of State is required to approve Ofcom's plurality reports and can even *revise them* before publication where agreement cannot be reached on the findings (para. 219). Such a system would give the government unprecedented leverage over the press, with media organisations lobbying or tailoring their content in order to remain off the 'at risk' register or avoid divestiture. It would thus be preferable and more coherent if the proposed system for transactional review were to be extended to divestiture cases involving organic growth. Secondly, the focus solely on news and current affairs content is disappointing given the social and political importance of other genres such as music or education (paras. 22-27). This focus could discourage major operators from producing their own news services or lead to the divestiture of established services.

Finally, further thought needs to be given to how such a system might fit with possible developments at the European level (paras. 29-35). The EU has gradually shifted its focus away from harmonising ownership limits to benchmarking and monitoring procedures and is under considerable pressure to respond to concentration concerns in certain Member States. There is thus real scope for a productive exchange of ideas between the Member States, interest groups, regulators and the EU as to how such procedures can be taken forward, preventing unnecessary duplication while expanding protection for citizens in the future.

This article gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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