

News Corp/BskyB: How Ofcom's New Test for Assessing Impact of Media Mergers on Broadcast News Protects BBC's Dominance

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The first lessons that competition lawyers and economists ever learn is that it is governments that restrict the operation of free markets most effectively. The second is that outcomes of regulatory processes can make matters even worse.

These lessons come very much to mind in looking at how Ofcom treated the News Corp/Sky proposed merger which has now been abandoned temporarily at least.

"Unacknowledged partiality" the key to the regulatory maze

In his McTaggart lecture in 2009, the Sky Chairman, Mr James Murdoch made an interesting statement about the impartiality regulations to which all broadcasters are subject in the United Kingdom:

"The system is concerned with imposing what it calls impartiality in broadcast news. It should hardly be necessary to point out that mere selection of stories and their place in the running order is itself a process full of unacknowledged partiality."

James Murdoch will know by now that Chairmen shouldn't be so candid in McTaggart lectures because this statement about "unacknowledged partiality" was quoted on several occasions by Ofcom in support of its view that the proposed acquisition by News Corporation of the shares in Sky that it did not already own (the proposed full merger) gave rise to public interest concerns requiring investigation by the Competition Commission. These concerns arise under what we shall call the media plurality provisions (although, as we shall see, this is actually a misnomer as far as broadcast news is concerned).

Rather than letting the selection of materials and running order here give rise to some kind of "unacknowledged partiality", an explicit statement of the views to be expressed here should be made:

- The media plurality provisions set out in s.58 of the Enterprise Act 2002 which deal with control of media mergers are woefully thin. They require regulators and judges to fill in the gaps under severe time pressure; such gaps ought to have been filled by Parliament after wide ranging consultation.
- As interpreted by Ofcom, the Competition Commission and the courts, there is a clear conflict between the need for plurality of views in the broadcast news on the one hand and the impartiality requirements of the Broadcasting Code on the other, both of which sit uneasily together in s.58.
- If the existing provision of broadcast news is currently lacking in plurality, even allowing for the fact there is a low threshold for an Ofcom recommendation that a proposed merger be examined by the Competition Commission, the case for such a referral was weak in this case. Thanks to compliance with the Broadcasting Code, nothing in substance would change as a result of News acquiring total control of Sky.
- If, on the other hand, despite the Broadcasting Code, all broadcast news is actually full of "unacknowledged partiality" that cannot be proscribed and of which all broadcasters are "guilty", the outcome in News/Sky may actually restrict plurality in the provision of news in the United Kingdom. This outcome, which is based on an untested and controversial belief that a public sector broadcaster is inherently less likely to have a news agenda, could serve to protect the dominant left-of-centre voice of the BBC and thus be anti-competitive.
- There is a need for the legislation to be fundamentally re-examined by Parliament. The outcome of such a fundamental re-examination may mean that the requirement of impartiality for broadcast news needs to be abandoned. Such an outcome would at least give primacy to the expression of a plurality of views in broadcast news that is currently enjoyed by newspapers. It could also more accurately reflect the views of society than the BBC's current dominance permits—a dominance that Ofcom's positioning actually reinforces.

What the media plurality provisions actually provide

Section 58 of the Enterprise Acts sets out “specified considerations” that need to be taken into account by Ofcom and the Competition Commission in making its recommendations on plurality issues raised by media mergers (which can be ignored by the Secretary of State in contrast to their findings on competition issues).

Section 58(2A) defines a “specified consideration” as the need for:

- “(a) Accurate presentation of news; and
- (b) Free expression of opinion in newspapers.”

Section 58(2B) provides the need for:

“to the extent that it is reasonable and practical, 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.”(emphasis added)

In s.58(2C), the following are specified considerations:

- “(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 be 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.”(emphasis added)

These tests are much narrower than those contained in previous legislation.¹ Moreover, plurality is not defined in this section. Nor is there an explicit requirement for plurality of views (emphasis added) in broadcasting as s.(2C)(b) ostensibly relates to the range of programme types. This gives rise to serious difficulties for the regulators and for the courts. In mergers which give rise to acute public interest and concern, it is up to these unelected bodies to fill in the gaps and eliminate inconsistencies under very tight time schedules. Whatever view one takes about media plurality there must surely be agreement that this is undesirable.

Perhaps embarrassed by this statutory reticence (or buck passing) the DTI published some detailed consideration of media merger public interest issues in its Guidance 2003. This Guidance discusses the cases that have been decided under this type of legislation which was first introduced many years ago. In particular, the DTI refers to cases where mergers have not been allowed through in the newspaper segment of the media market. As we shall see, Ofcom took into account the Guidance in examining the proposed full merger of News Corp and Sky.

The Broadcasting Code

Before looking at one of these precedents, it is necessary to quote in relevant provisions of s.319 of the Communications Act 2003. Although plurality is not defined in the Enterprise Act, there is much more guidance on the impartiality requirement which has been incorporated into the media plurality provisions of the Enterprise Act dealing with mergers.

The relevant standards objectives are to be found in s.319(2)(c) and (d) which require that:

- “(c) ... news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with; and
- (d) ... news included in television and radio services is reported with due accuracy;”

These sections are fleshed out in s.5 of the Ofcom Broadcasting Code which was passed pursuant to s.320 of the Act.

Section 5 contains both principles and rules. The principles provide that news, in whatever form, is reported with due accuracy and presented with due impartiality—a concept which is subject to a detailed definition in the rules. Accordingly, current public policy must be presented in a balanced way and an appropriately wide range of significant views must be included and given due weight in each programme.

In light of this clear commitment to the principle of impartiality that is matched by detailed prescriptive rules, the sort of “unacknowledged partiality” described by James Murdoch ought not to be permitted. However, the Competition Commission in the Sky/ITV merger enquiry accepted that this kind of partiality (which can arise from omitting newsworthy material) is something that it may be impossible to control. The BBC made the same point to Ofcom in its submissions on the proposed full merger. This has important consequences which we will come on to.

¹ Under the Fair Trading Act 1973 the Monopolies and Mergers Commission enjoyed an unlimited discretion enabling it to find that a merger would be likely to operate against the “public interest”. This would allow an effective “fit and proper person” assessment to be employed in assessing a merger.

Newspapers: the primacy of plurality of views

There is no equivalent provision to s.58(2C)(c) for newspapers that explicitly requires compliance with a detailed impartiality code. As the Competition Commission noted at para.5.58 in the Sky/ITV report:

“there are fewer regulatory restrictions on newspapers than on television news and, in particular, newspapers are able to take an explicit editorial position in relation to topical issues.”

The absence of any provision for impartiality and the precedence therefore given in newspaper merger cases to plurality of views is illustrated by the Monopolies and Merger Commission examination of the proposed merger of Century Newspapers and Thompson in 1989.

In that case, which is discussed in para.5.13 of the DTI Guidelines, Thompson Newspapers, owners of the *Belfast Telegraph*, a middle of the road publication read by both Protestants and Roman Catholics in Northern Ireland proposed to buy the *Newsletter*, a publication with a very strong “Orange” persuasion. As a result of a campaign spearheaded by David Montgomery of the *Daily Mirror* and the late Airey Neeve MP, the proposed acquisition was referred to the Monopolies and Mergers Commission which in record time recommended that it not be allowed to proceed.

It cannot be said that the *Newsletter* was particularly accurate in its presentation of the news as required by law—so biased was it towards the Orange convictions of its readership (see now s.58(2A)(a)). Despite arguments by Thompson that accuracy would be improved and editorial independence respected, the Monopolies and Mergers panel, led by Simon Jenkins, took the view that the loss of a voice for the Orange Order in the press would be disastrous and that there would be reduction in plurality of views (see now s.58(2B)). The Government accepted the recommendation that the merger should be blocked.

In this case, the absence of any impartiality requirement in considering newspapers mergers meant that the need to maintain plurality of views determined the outcome.

Is the plurality of views in broadcast news compatible with impartiality under the Broadcasting Code?

If we turn to the legal situation in relation to broadcast news, the relationship between the three distinct statutory provisions dealing with plurality of persons with control of media enterprises, the range of broadcasting and compliance with impartiality requirements needs to be unravelled.

In the Sky/ITV merger investigation, the Competition Commission had to examine media plurality issues arising from Sky's acquisition of a minority stake in ITV. The

Competition Commission (supported by the Court of Appeal) took the view that an assessment of the sufficiency of the plurality of persons with the control of media enterprises should take place having regard to the implications of the acquisition for the range of information and views made available to audiences for news as well as the number of providers.² It is not simply a question of counting heads as s.58(2C)(a) would seem to indicate: a qualitative assessment is required. As a result of this gloss, plurality of views is now relevant for broadcasting mergers in respect of news as it is for newspaper mergers.

Whilst there was a reduction in the number of persons as a result of the acquisition of a minority stake in ITV, Sky argued that this was not significant as the Broadcasting Code ensured sufficient plurality of views in news provision. The Competition Commission disagreed at para.5.38 stating that:

“there is a difference between the Broadcasting Code, which is designed to ensure impartiality in terms of news presentation and the statutory need for there to be a sufficient plurality of persons with control of media enterprises. We found that the regulatory framework while relevant to the plurality of news and hence the statutory public interest assessment does not on its own ensure a sufficiency of plurality of news.”

Whilst this passage is fine as far as it goes it does not go far enough. It does not articulate the very real tensions between the statutory public interest tests of plurality of views on the one hand and impartiality on the other. Thus if all broadcasters of news are acting strictly in accordance with the Code, then it is difficult to see how the news reflects a plurality of views or range of information as they are all going to be impartial and balanced (and maybe even rather boring).

Let us now look at some evidence. Elsewhere in the Sky/ITV report, the Competition Commission quotes an Ofcom survey in 2007 which found that television is the most trusted platform for news. This research, cited by the Competition Commission at para.5.45, suggests that diversity of news content was limited in 2007. Ofcom found that stories tended to be treated with a similar degree of prominence by all channels. Moreover, news stories often shared a limited range of ultimate sources (such as other broadcasters, newspapers or news agency). The Competition Commission then quotes a highly significant passage from the research:

“news outlets of all kinds often tell the same stories from the same perspective using much the same material.”(emphasis added)

In this case, the existence of the Broadcasting Code was one of the factors that led the Competition Commission to conclude that the acquisition by Sky of a minority interest in ITV did not give rise to plurality

² See Competition Commission Sky/ITV at para.5.61; Court of Appeal at [91].

concerns under the statutory test. In the light of Ofcom's survey which showed that there was very little plurality of views expressed by the different broadcasters, the conclusion is hardly surprising. The acquisition of shares made no difference to the range and type of views; even though the number of persons was reduced, plurality of views was not liable to be reduced as a result.

It seems therefore that we have two views on the broadcasting of news; on the one hand there is the Murdoch/BBC narrative (supported by Ofcom in News/Sky) according to which running orders etc can demonstrate a degree of "unacknowledged partiality". On the other hand, there is Ofcom's evidence quoted above that the news is largely reported from the same perspective. Surely, they can't both be right? Let us now see how Ofcom dealt with the issue of plurality in its recommendations in News Corp/Sky.

Ofcom's defective analysis of News/Sky

The test that Ofcom has to satisfy for a recommendation that a proposed acquisition warrants fuller consideration by the Competition Commission is that it has a:

"reasonable belief on the basis of the evidence available that the proposed acquisition may operate, or may be expected to operate against the public interest."

The Competition Commission has a stricter test: it needs to be satisfied that on the balance of probabilities that it is more likely than not that a proposed merger will operate against the public interest as now more narrowly defined.

That deals with the burden and standard of proof. As far as causation is concerned, Ofcom looks at current levels of plurality and must have regard to any change in plurality that arises as a result of the acquisition.³

In reaching its recommendations in this case, Ofcom took into account the DTI Guidance, the *Sky/ITV* case and the Court of Appeal's judgment as well as the impartiality requirements of Ofcom's Broadcasting Code. Ofcom also took evidence from a number of parties including a raft of Sky's bitter commercial rivals and a number of (largely hostile) academics and commentators.

As we have made clear above, "bare numbers may not tell the whole story".⁴ Qualitative analysis is required. Ofcom used a number of indices in reaching its conclusion. First, it looked at external plurality on a static basis, that is, the total number and range of media enterprises that would be available if the full proposed merger were allowed to proceed. Although, to the astonishment of many, this involved leaving important quasi-national newspapers such as the *Scotsman* and the *Yorkshire Post* out of account, this is in line with the Court of Appeal's approach.

But at this point Ofcom slipped in an even more qualitative test which was the *relative ability of the merged enterprises to influence and inform public opinion*. As we shall see, according to Ofcom some animals have more ability to do this than others.

Before we come to this key (and highly contestable) finding, let's look at Ofcom's findings on external plurality. According to Ofcom, a consequence of the full merger would be apparently that News Corp would consolidate its second place in terms of news consumption by increasing its market share from 14 per cent to 24 per cent, but still dwarfed by the BBC which has a 44 per cent share of news minutes.

Assessed on a cross-platform basis, News Corp's potential ability to influence would increase from 12 per cent to 22 per cent. Ofcom then assumed that the merged parties' ability to influence would go hand in hand with this increased share of voice. Again, however, the BBC was well ahead.

In a key passage in which the evidence of Dr Freeman seems to have been taken on board without any critical examination, Ofcom sought to distinguish the position of the BBC from that of News Corp. According to Ofcom:

"the governance of the BBC is different from other broadcasters in that it has a Royal Charter that requires it to be 'independent in all matters concerning the content of its output ... and the management of its affairs'. Its strategic direction is set by the BBC Trust which is held publicly accountable for the performance of its role in meeting the 'public interest, particularly the interest of licence fee payers.' The Trust must also maintain the independence of the executive, which oversees output. This is fundamentally different from other media enterprises including News Corp which typically have a controlling proprietor."

We need to pause here. What Ofcom is saying is that although all broadcasters are bound by the Code, the BBC is different: its structure guarantees that it can't be manipulated and that therefore its views are impartial. It therefore does not have the same ability to influence as others. This critical finding is reached without discussion.

This is the critical finding and it is reached without discussion by Ofcom. However, the issue of whether the BBC is objective or in reality has an agenda is highly contestable. Peter Sissons' book *When One Door Closes*,⁵ (summarised with evident relish by the *Daily Mail* on January 22, 2011) demonstrates that the BBC appears to exhibit left-of-centre bias irrespective of the governance factors on which Ofcom places such weight.

The 60-page report entitled "From Seesaw to Wagon Wheel", issued in June 2007 by the BBC Trust contains more interesting evidence. It was written by a producer

³ See Competition Commission in *Sky/ITV* at para.5.15 and Ofcom *News/Sky* at para.1.14.

⁴ See DTI Guidance at 7.10.

⁵ Peter Sissons, *When One Door Closes* (Biteback, 2011).

(John Bridcut) but approved and adopted by the BBC Trust and Executive after it was endorsed by a (then) Trust member, Richard Tait, chairman of the Impartiality Steering Group.⁶

The report quoted extensively from internal and external seminars and sessions, including the most widely reported comment from Andrew Marr that the very make-up of the BBC's staff "creates an innate liberal bias inside the BBC." Likewise, former BBC business editor Jeff Randall described the experience of working at the BBC "with my right-of-centre views" as "like walking into a Sunday meeting of the Flat Earth Society."

The report notes that the obligation to observe "due impartiality and accuracy", which was part of the 1954 Act creating ITV, was not imposed on the BBC until 1996. It also cites a 2000-person survey from Ipsos-MORI, where 44 per cent thought it was impossible to be impartial (only 33 per cent disagreed). 61 per cent agreed that broadcasters may think they give a fair and informed view, but a lot of the time they don't (17 per cent disagreed).

Whether the BBC Trust's Survey and Sissons are right and Ofcom's 2007 report is therefore wrong is a matter of debate; what is not a matter of debate though is that the lack of plurality in the overall provision of news found in Ofcom's 2007 report is not mentioned in its News/Sky recommendation. This is a serious omission. Instead, it seems to be assumed that the "views" currently put forward by Sky in its news provision could be changed as a result of the full merger despite the existence of the Broadcasting Code which Rupert Murdoch himself told the House of Lords acts as a constraint. We can only assume that what Ofcom is really saying is that the scope for "unacknowledged partiality" may increase as a result of the full merger because Murdoch (unlike the BBC) is an interfering proprietor. Or put another way, that Sky could become less impartial as a result of the merger.

Ofcom then went on to discuss internal plurality which again focuses on the actual extent of control that would be exercised by News Corp. Here, News Corp's submitted that the Broadcasting Code safeguarded against the over-representation of one point of view. In practice the impartiality rules helped to ensure that the owner of a television station could not intervene to require news items on their own television news service to receive lesser or greater prominence for political reasons. Ofcom rejected this argument in the following way:

"In any event, there is difference between the Broadcasting Code which provides the regulator with the ability to intervene on a case by case basis to ensure impartiality in terms of news presentation and a statutory need for there to be sufficient plurality of persons with control of media enterprises."

Ofcom then goes on to say that:

"the regulatory framework, while relevant to the plurality of news, and hence, the statutory public interest assessment, does not on its own ensure a sufficiency of plurality of news."

This paragraph is not very clear: it refers both to persons and by implication to views expressed by those persons. However, in the main body of the report, this paragraph is prefaced by James Murdoch's statement about "unacknowledged partiality." This supports the assumption made above that Ofcom's real objection was that the proposed full merger would reduce Sky's impartiality and that the Broadcasting Code could not prevent such a reduction.

Ofcom only concluded that the proposed full merger be referred on the basis of a reduction of external plurality. This it stated at para. I.39 that:

"we do not consider that we can reach a view that internal plurality will ensure sufficient plurality in the provision of news and current affairs" so as to distinguish the BBC from an owner proprietor."

The cause for referral therefore rests on external plurality (as now defined). But if the evidence in the BBC Trust report is right, surely any increase in "unacknowledged partiality" resulting from the full merger is good for pluralism of views and not bad for it? Moreover, any increase as a result of the merger would aid competition in broadcast news with the dominant BBC. Clearly, the two statutory public interest tests of plurality and impartiality clash; it is this issue that now needs to be addressed.

The future: the need for a fundamental (rather than piecemeal) review of the provision of broadcast news

In essence, we have two opposing views on the facts; there is Ofcom's report of 2007 which emphasised the similar way in which the news is reported which is passed over in silence in News/Sky. On the other hand, there is a belief, expressed by James Murdoch supported by evidence before the BBC Trust and Peter Sissons' book and to some extent, by the Competition Commission, and now Ofcom in News/Sky, that the running order and selection in broadcast news is full of "unconscious partiality" which is difficult to control. Which is right?

In assessing this merger, Ofcom gives considerable weight to a very contestable finding that the BBC which dominates news is characterised by "internal pluralism". Ofcom views the publicly funded and public service nature as an extra guarantee of impartiality lacking in Murdoch's empire which as a result of his interference is more likely to influence opinion. This is a highly contentious assertion for which no evidence is provided in Ofcom's report other than the opinion of one man.

⁶ It can be found at http://www.bbc.co.uk/1/bbctrust/assets/files/pdf/review_report_research/impartiality. The author is indebted to David Elstein for drawing his attention to this report.

If the BBC can actually run a political agenda despite its structure and can do so whilst still complying with the Broadcasting Code, it seems unfair to stop News Corp buying Sky which is very much smaller than the BBC in terms of market share of news. In fact, on this analysis of the facts, the merger could promote increased plurality of views through an increase in "unacknowledged partiality". Any action to block the proposed full merger would be wrong and anti-competitive. Such intervention would also violate the principle of competitive neutrality, which provides that no firm should have a competitive advantage in a mixed market purely as a result of its ownership and control.

If on the other hand, the BBC, like Sky, is objective in its presentation of news in genuine compliance with the Broadcasting Code, even though this means that news is lacking in diversity, then there are no grounds for fearing that "plurality" (meaning impartiality) may be compromised as a result of the takeover of Sky by News Corp. If this is so, the merger should have been waved through because there would have been no reduction in current levels of plurality.

Now that News Corp has abandoned its merger proposal there seems to be general agreement that the legislation on media mergers need to be reviewed. Work must be done on whether news reflects a diversity of views through "unacknowledged plurality" or whether it is uniform. There must be a public debate on the BBC's apparent bias.

There must also be a debate about whether the impartiality provisions for news contained in the Broadcasting Code should be abolished together. This

issue has been raised by Jon Gaunt's unsuccessful litigation that is described in some detail in John Lloyd's excellent discussion of this issue.⁷

Ofcom appears to believe that it does not have enough powers to deal with Sky's internal growth driven by its so far untrammelled grip over sports rights. But if what we are describing is correct, the issue is much more fundamental than that.

The advantage of a parliamentary debate about the plurality provisions is that we would avoid the situation where BSkyB's commercial rivals have an opportunity to score commercial points in the tight timetable of a merger enquiry. British Telecom as a company ought to have no locus standi on issues of plurality; its real concern is not plurality at all, but loosening of Sky's grip on sports rights.

In this wider debate we should be examining whether impartiality is important in the provision of news. Is it a value that society now needs? Fox News (which can be viewed in the United Kingdom without apparently causing problems under the Broadcasting Code) may be distasteful to many, but the thrust of Lloyd's article is that the views that it advocates are not currently represented by the major UK based broadcasting media in the United Kingdom.

If this is right, we have the absurd position that plurality legislation as applied by Ofcom is not only restricting plurality but restricting competition as well and a textbook example of the phenomenon is described in the first paragraph of this article. It will therefore be fascinating to see how this debate plays out.

⁷ See the *Financial Times Weekend Magazine*, April 30/May 1, 2011.