

Seminar two, session two

The mechanics: how would a new policy framework work in practice, and in particular how would it deal with issues of organic growth? Regulatory versus political oversight: who should have the power to trigger a review, who should be undertaking the assessment exercise, and what regulatory interventions might be appropriate and/or realistic? Who should be taking the ultimate decisions on permissible growth, mergers, acquisitions etc. and on what statutory or regulatory basis?

General discussion

Need to address the decision-making process as well as plurality threshold principles. It is currently highly politicised, with the Secretary of State making the referral and final decisions. Both Jeremy Hunt and the Lords Communication select committee in 2008 have queried this. What should the process be and how can it be future-proofed?

Enders research on media ownership

Specific recommendations on plurality thresholds have come from Enders Analysis, with recommendations based on revenue caps and a broad definition of plurality: it does not have to be limited to news and current affairs. If a single company controls too many of the “choke points” that prevent content from reaching consumers, one company can potentially influence the entire cultural environment in which we live.

The 2001 DCMS consultation defined plurality in much wider terms than news.¹ It was the statutory obligations that forced the regulatory authorities - Ofcom and Competition Commission - into a narrow view that plurality is only about news.

There are acute problems with all measurements because the market is changing so quickly. Enders has attempted to find measures some robustness and put in place a “bright white line” – a clear limit over which no one could step. The principle objective was to ensure that a big company could not “game” the system.

There is evidence that the biggest companies can exert extraordinary influence over the regulatory process and the outcome of regulatory decisions. Expenditure by News Corp and its operating subsidiaries have been enormous in their attempts to restrict control over pay TV operations and BSkyB over the past 20 years. This is profoundly undemocratic, but has nothing to do with news – it is about the risk of one company being able to control the regulatory system.

Enders has come up with a brief definition of the media market, in attempting to identify relevant “choke-points”:

¹ Consultation on Media Ownership Rules, DCMS, November 2001

An organisation (or individual) is in the UK media market if it produces or selects audio, visual or text-based content that is conveyed in physical, analogue or digital format to an audience of multiple consumers not present at the moment of initial creation of that material and who are not consuming the content principally for professional or business reasons. To be included in the market a company (or individual) must produce or select content that: (1) a reasonable person would consider to be targeted at the UK public; and (2) does not consist solely of advertising.

That market in total is valued at about £30 billion, and Enders proposes that no one company should be able to control more than 15%. Any company which moves over the 15% point should be required at certain decision points (end/middle of year) to dispose of assets that took a company's share of revenue above the threshold.

That decision should be non-negotiable (i.e. not subject to regulatory or political discretion), hence the need for "bright white lines" to avoid a process that can be subverted by large companies.

The 15 per cent limit is no accident. It would stop News Corporation buying BSkyB and Google or Facebook buying ITV within the next couple of years. It is designed to ensure that no single company can exert the degree of control over the regulatory process in the way that News Corp and BSkyB have done over the past 20 years. The numbers are arguable, and Enders has been seeking responses.

The idea raises questions about how "choke-points" can be operationalized, and how the mechanics will work. Google is in the media market because it selectively produces results for the consumer and therefore acts as a "choke-point". Facebook is included because there is a curation process, even if it does not produce content.

Response to Enders proposals

In the new political environment, mandatory restrictions without discretion are plausible in a way that might have been unthinkable a year ago. But there are definitional issues: are Facebook or Twitter or games producers media companies?

There have been similar attempts to make this distinction in Europe – the Audiovisual Media Services directive and the E-Commerce directive have made a distinction between a mere conduit and a content provider/ISP that has liability. Enders' intent was to copy that.

15% of total revenue derived from the media market is a very high threshold, but there are definitional and market issues. Some of Sky's revenue comes from elsewhere (eg. from EPGs). It is theoretically possible to own a newspaper which

eliminates all others but might still earn a fraction of the £30 billion because revenues are dominated by Google and Facebook.

One might want subsidiary competition regulation, so that the Competition Commission could, for example, intervene on a merger between *The Sun* and *Daily Mail*. In the current world, that would be stopped.

This comes back to thinking about plurality from a wider cultural perspective. If policy is too focused on news and current affairs, does revenue offer an adequate measure for the ability of an enterprise to make a significant impact on political debate? While it allows you to look across different media - where it is very difficult to find a common currency - revenue doesn't necessarily provide an accurate indicator of ability to influence political debate. For example, BSkyB's revenue comes from providing a distribution platform and from subscriptions based on buying up rights to sports/films.

On the other hand, the BSkyB has developed over 20 years into a monopoly over almost all forms of premium television, hence the economic success and ability to spend £100 million a year 'gaming' the regulatory system [this figure is cited anecdotally, from industry insiders].

This monopolistic position over pay TV, which also extends to buying up new drama from the US for Sky Atlantic, involves changing the dynamic between content provider and consumer. It bestows a form of "cultural power" which is not necessarily news and public opinion but can influence, for example, the way sports are conducted in this country.

This is a twin-track discussion: one is about the struggle to find a definition of the news market, the other is about a measure for the broader market. A company could reach the market threshold by offering a product that is so successful that it creates an enormous share of revenue without necessarily "choking" or restricting access to a diversity of information.

What is the UK media market? Off-shoring is a problem, e.g. pornography. But perhaps this is an exception and not the rule. And there might be issues with revenue calculation: lots of potential for accounting practices that obscure real revenue. One might need to create a new regulatory process for getting access to the relevant information. How is the market valued at £30 billion? Numbers are clearly open to question, but need to concentrate on the principle and agreed criteria for calculation.

Assuming there is agreement on the 15%, how do you make it a criterion that has durability? It will be difficult to get automaticity of decision making – it is not within tradition and will attract challenges. Perhaps it would need to work in conjunction with something like the CCMR proposals² (see Seminar Two, Part One)? Perhaps the ceiling should be set at a lower level specifically for the news

² Coordinating Committee for Media Reform, 'Briefing paper on Plurality and the Public Interest' <http://www.mediareform.org.uk/policy-research/plurality/briefing-paper-on-plurality-and-the-public-interest>

market (say 10%) but exceeding the limit would trigger a menu of (positive) undertakings rather than (negative) penalties or disposals.

How would these criteria work in a territory like Scotland or Wales? A pro-rata calculus may not work, and there are problems of reach in rural area. We might accept this formulation for UK, but not necessarily for its constituent parts. Less of an issue if Scotland stays in the UK, but would need to exclude Scotland-specific revenue if it leaves. Media regulation issues take different forms in different parts of the union. There is a small country problem: small countries need to encourage concentration to ensure economic sustainability.

Relevance of company size

The underlying assumption of the Enders report is that it wants to promote easy access to market, healthy competition and prevention of capture of regulatory power. Key idea is to ensure there is no economically dominant entity stopping ideas moving from one point to another.

Important principle integral to the plurality argument is that a company's ability to dominate the regulator is against the public interest. It is a competition/monopoly issue rather than a news issue. If you haven't introduced a "bright white line", the size of the company does make it more difficult to regulate because they exercise both economic and political power.

Rather than setting limits on revenue, in terms of market power and anti-competitive behaviour, perhaps should look at strengthening tools for the regulator. Should be wary of assumptions that size per se is bad.

On the other hand, there is an argument that size can be dangerous. There is a considerable potential for loss of citizen welfare if one company is allowed to dominate.

Measuring consumption

There is something to be said for the "share of references" cross-media currency that Ofcom has started to develop, though it is relatively crude at the moment. Where do people get their main source of news from? Is this the same as share of voice? But it measures perception of news sources rather than actual quantity of consumption.

No-one has yet found a valid and reliable measure of television viewing, newspaper readership, and online usage which are comparable. It is worth exploring how we could get a better survey of cross-media news consumption.

Ofcom's results suggested that very few news suppliers other than the BBC had much share of the market (over 15%). Could the survey be more sophisticated and ask about the nature of news, or which news sources have influence on political views? Self-reporting tends to be contradicted by behavioural evidence.

The idea of defining a news market across media is a good one, but needs a sophisticated tool that is not simply reliant on self assessment.

Perhaps news media can be weighted in terms of their perceived importance (this is done in Germany). One problem is that we have different methodologies across the platforms. RAJAR is not measured in the same way as BARB, and newspapers have the problem of secondary readership. Some measurement problems can be fixed, but audience measures are too unreliable to be used as an absolute threshold.

Is better measurement possible? One example worth following is the Pew Research Centre's *State of the News Media* reports³ which track changes over time. They have found that some measurements work better than others. Their work takes into account economics, consumption, provision and helps to inform policy-making.

There is also the news and agenda-setting issue. We have an editorialising press but impartial broadcasters which arguably have less effect on people's opinions and attitudes. How do we incorporate measurement of news flow and agenda-setting?

Defining limits and setting triggers

How many players in the market should we aspire to? The 15% model says eight, which seems high. Maybe in the current environment four is sufficient. The likelihood of new entrants into the newspaper market is remote, so one solution may be to impose obligations on any group which exceeds 15% share of national newspaper market.

Is there a single measure or a bundle of measures that could act as a trigger for a review? Subjective assessments take us back to the problem of politicisation. Simplicity doesn't really work, but media companies can't be left wandering through a minefield of triggers.

Research might offer some insight into impact, news flow and influence, but raises difficult questions about the nature of the "news" market. And the notion of triggers or ceilings in individual media markets feels inconsistent with the way news consumption is likely to carry on changing. Capping newspaper consumption, for example, would be odd when readership is moving to other platforms.

In principle, a number of different research approaches are possible: looking at exchange rates (relative impacts of different media); news flow; opinion formation; agenda-setting. Would be feasible, for example to follow broadcast agendas through the day and ask what is driving them. News flows in particular are under-studied given the volume of debate and legislation on plurality and

³ See: <http://stateofthemedias.org/>

ownership in the last 15 years. Or look at media "experience" rather than make assumptions about impact.

Other problems with measures/triggers

Discussions about Google and Facebook show problems of subjectivity and looseness in definition of the market. The problem being addressed is control of political/regulatory agenda as much as control over media consumption. Company size may not be the only issue. More information is needed about consumption.

Goldsmiths / CCMR idea of regulatory redress is appealing because it doesn't have simple cut-offs but involves compensatory mechanisms. But prompts a question about defining the problem: is it undue influence, or diminution of total amount of journalism?

Much discussion about the press has failed to address this issue of decline, and therefore the prospect of thresholds not being reached. In a sub-state or national context such as Scotland, perhaps the question is a different one and plurality needs to be bolstered. But newspaper groups are generally not in favour of subsidies. Plurality versus sustainability: these can be contradictory objectives, a problem when trying to come up with clear policy solutions.

Plurality generation ideas

A different perspective is how to generate plurality rather than limit concentration, e.g. levies that might redistribute resources to create plurality. Local journalism is in crisis but new technologies might help to facilitate a renaissance, given some financial encouragement. A levy on content aggregators, or on search advertising, could generate a pool of money to invest in online local news ventures.

There have been new entrants. The Newspaper Preservation Act in the US wasn't a great success, but we might look at allowing a degree of consolidation with mechanisms which guarantee editorial independence and offer incentives such as tax breaks, benefits, or indirect subsidies other than the only one currently employed (VAT exemption). This was partly the thinking behind the previous government's proposals for Independently Funded News Consortia (IFNCs) which were lost when a new government was elected in 2010.

Ofcom reviews

There is a risk that "triggers" might involve a constant review process because the market fluctuates. Clearly, structural changes such as mergers and acquisitions should trigger an enquiry process, but there needs to be a framework for periodic reviews or "health-checks" on whether there is sufficient plurality in the market (rather than whether one company is becoming too dominant). The M&A model alone has not worked.

An annual or biennial review, perhaps similar to the Pew Centre's *State of the News Media* reports, would help to demonstrate any significant shifts in the market and would therefore enable more informed policy intervention. Ofcom could be mandated to collect that information – and other measurement information that connects with issues of plurality – and make recommendations in accordance with its statutory duty to promote the interests of both citizens and consumers.

This clearly requires a statutory mechanism (as with the PSB reviews) which does not involve waiting for a trigger. It could involve some facility for enterprises to take the initiative and approach Ofcom if their analysis of the market suggests they have reached a trigger point, and ask about presumptive requirements - a commercial decision to take a "hit".

Key problems and a role for Ofcom?

Rules were in place based on the EA02 and CA03 but were overridden, or at least finessed because of their political delicacy. Decisions/process should be divorced from politicians.

A major problem is lack of clarity in the objectives and criteria of the Public Interest Test, and how Ofcom should interpret plurality. For Ofcom to undertake reviews and investigate issues such as the BSkyB case requires a politically agreed starting point both about plurality and about "sufficient" plurality. Thus, the legislation must go further to give Ofcom the remit and the power to deal robustly with media companies which will (self-evidently) be large and powerful.

Is it satisfactory if ultimate decisions were to be taken away from politicians and left with the regulator? The House of Lords select committee in its 2008 report decided after some deliberation that in a democracy it was appropriate for the final decision to rest with the Secretary of State. It did however recognise that there might be a "conflict of interest", and the political tide has probably turned as a result of recent events.⁴

It would now be more appropriate for the decision to rest with the regulator. The regulatory system has developed and can be relied upon against a background of a statutory mandate. It will also allow for more transparency. But the regulator will need the power to inquire into accounts and media holdings in order to come to conclusions about where corporate power lies within individual enterprises. There might be some scope for a cross-parliamentary committee if there was concern about democratic legitimacy.

⁴ House of Lords select committee "The Ownership of the News", pars 262-4.

Concluding thoughts

A crucial issue is the tools which the regulator is given by Parliament. The process must be rigorous, perhaps based on a Pew type project. If those tools and teeth are provided, that provides the context for effective decision-making. Once empowered by Parliament, Ofcom has sufficient independence and expertise to monitor media plurality and prescribe remedies when required.

Perhaps there is a comparison with NICE: decisions on bringing drugs to market are based on clear criteria and an accepted system. It is sometimes heavily criticised, but they have a methodology for making decisions.

We need to be careful about putting our faith in Parliament and the risk of legislation being too general (in particular around plurality). Key issues need to get pinned down. If Parliament omits crucial areas on which it wishes to legislate, or gets it wrong, it leaves the regulator in a vulnerable position.

We need better transparency, better information on companies (the EC is subsidising a database through EPRA which is providing a lot of information) and better company law.

There needs to be clarity about the remedies available to the regulator, and a process which is flexible enough to be adjustable on a case-by-case basis. There may be different objectives in different cases.

In the flight from politics we should avoid “technocracy” which brings its own dangers. There is an increasingly variable political geography. Outside London there will be much more co-determination; a regulator may not, and possibly should not, stand apart from the political process everywhere. There will be different kinds of negotiation.

On the other hand, however much we might wish to acknowledge Parliament as the essence of democracy and therefore the sovereign decision-maker in such matters, ministers have shown over last 30 years they cannot be trusted with media plurality decisions. This power must therefore be delegated or at least diffused.