Measuring media plurality

Supplementary advice to the Secretary of State for Culture, Media and Sport and the Leveson Inquiry

Submission date: 28 September 2012

Publication date: 05 October 2012

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Section 1

Introduction

Context

1.1 In October 2011, Jeremy Hunt MP, the Secretary of State for Culture, Olympics, Media and Sport, asked Ofcom to answer five questions relating to media plurality.

1.2 This request followed Ofcom's consideration of plurality in relation to the proposed NewsCorp/BSkyB transaction (the Public Interest Test) published in December 2010[1]. Our report on that proposed transaction suggested that the existing framework for considering plurality might no longer be equipped to achieve Parliament's policy objective.

1.3 Ofcom responded to the Secretary of State's questions on the 6th June 2012, in a report entitled "Measuring media plurality', (our 'June report') which we provided both to him and the Leveson Inquiry. The report was published on the 19th June[2].

1.4 On the 18th June, the Secretary of State asked Ofcom for further advice, in the form of answers to seven supplementary questions, to be provided by the end of September 2012[3]. This report provides our responses to these questions.

Key recommendations from our June report

1.5 We noted that plurality matters because it makes an important contribution to a well-functioning democratic society, through informed citizens, and by preventing too much influence over the political process.

1.6 We defined plurality as:

- ensuring there is a diversity of viewpoints available, and consumed, across and within media enterprises; and
- preventing any one media owner or voice having too much influence over public opinion and the political agenda.

1.7 We said that plurality needs to be considered both within media enterprises (i.e. internal plurality) and between media enterprises (i.e. external plurality).

1.8 We noted that an effective framework for measuring media plurality is likely to be based on quantitative evidence and analysis wherever practical. However, there are also areas where a high degree of judgement is required. The appropriate approach to exercising such judgement is ultimately for Parliament to determine.

1.9 We recommended that there should be a new periodic review of plurality every four or five years, looking across the market as a whole. This would be in addition to merger reviews triggered, as at present, by specific individual transactions. The

[1] http://stakeholders.ofcom.org.uk/binaries/consultations/public-interest-test-nov2010/statement/public-interest-test-report.pdf
[2] http://stakeholders.ofcom.org.uk/consultations/measuring-plurality/?a=0
[3] http://www.culture.gov.uk/images/publications/SoS_letter-to-Ofcom-18-June-2012.pdf

periodic review would make it possible to consider the impact on plurality of factors other than mergers, such as organic growth and wider market developments.

1.10 We said that further consideration was required to determine whether reviews of plurality concerns raised by mergers should sit within a new proposed plurality regime or continue in parallel with it.

1.11 We recommended that plurality reviews should not be triggered by metrics such as market share, due to the impact this would have on market certainty. We said that there *may* be merit in additional reviews triggered by certain forms of market exit, but only if a mechanism can be designed that avoids subjecting the market to continuous review, and avoids too heavy a reliance on discretion.

1.12 We recommended that the scope of any plurality review should be limited to news and current affairs, but that these genres should be considered across television, radio, the press and online.

1.13 Our report considered plurality primarily in the context of a UK-wide news media market. However, we acknowledged that the conclusions may vary at the level of the devolved nations and further work may be required to consider how a new framework would apply to these geographies.

1.14 We recommended that the BBC should be included within the scope of any plurality review. Given the BBC's significant presence in news, and the pressures it faces to consolidate its newsgathering operations in order to deliver savings, we further recommended that the BBC Trust assesses the BBC's contribution to plurality, both internal and external, and considers establishing a framework for measuring and evaluating this periodically.

1.15 We considered the analytic framework for measuring media plurality, and noted that there are three categories of metrics - availability, consumption and impact. We recommended that consumption metrics (in particular; share, reach and multi-sourcing) form the foundation of a plurality assessment. In addition to metrics, we noted the importance of contextual factors; for example, governance and regulatory frameworks such as those which ensure impartiality. Given the dynamic nature of the news market, the analytic framework used for measuring media plurality should itself be assessed during each periodic review to ensure its continuing efficacy and relevance.

1.16 We did not recommend introducing a prohibition on news market share. We noted that the only currently prohibited transactions are those subject to the "20/20" rule[4]. The case for retaining or removing that rule in the context of a new proposed plurality regime (including the existing merger framework) needs to balance the benefits of clarity and certainty on the one hand versus flexibility on the other. We said it is for Parliament to decide where this balance should be set.

1.17 Finally, we said that a review of plurality needs to consider what level of plurality is sufficient. An assessment of sufficiency at any point in time is challenging, as it requires a subjective judgement. We noted that it will be for Parliament to consider whether it can provide any further guidance on how sufficiency should be defined. In the absence of such guidance, this may have to be left to the discretion of the body empowered by Parliament to undertake any plurality reviews.

[4] This prevents an organisation with more than 20% of national newspaper circulation from holding a Channel 3 licence or a share of 20% or more in a Channel 3 licensee.

Our approach to the supplementary questions

1.18 For convenience, we have paraphrased and re-ordered the supplementary questions as set out below. The questions fall into three broad categories:

1. **Questions relating to policy implementation.** We consider under this heading four questions associated with the practical implementation of the recommendations in our June report - supplementary questions a), b.i), f) and g).
    - What is the scope and timescale of a plurality review? Could the review be done in no longer than 12 months? What might be an appropriate timescale for the implementation of any remedies?
    - Can a plurality review work effectively with existing provisions concerning mergers and avoid any risk of double jeopardy?
    - Which body or bodies should have responsibility for making the final decision regarding the application of any remedies?
    - What criteria should be used to define which online news providers should be included in a plurality review?
2. **Questions relating to new policy areas.** We consider one area on which we were not asked to provide advice in our June report - supplementary question e).
    - What are the benefits, risks and other considerations associated with possible remedies?
3. **Further thinking on questions answered in our June report.** We consider under this heading three questions on which we provided advice in our June report, on which we have now been asked to develop this advice further - supplementary questions c), d) and b.ii).
    - What are the advantages and disadvantages of additional guidance on levels of sufficiency and how might these be made to work?
    - What circumstances would provide sufficient certainty to merit the removal of the 20/20 rule?
    - What are the circumstances under which a market exit might trigger a review?

1.19 This report contains Ofcom's independent advice on these supplementary questions. The time available to consider these questions has been significantly shorter than was the case for our June report, and it has not been practical to commission new research, or seek input from stakeholders.

1.20 Some of the Secretary of State's questions ask us either to undertake further thinking in areas we have already advised on, or to progress the thinking on such areas towards implementation. In responding to these new questions, we have had regard to the advice and recommendations of our June report.

1.21 As noted in our June report, we believe that a number of these questions are ultimately a matter for the Government and/or Parliament. In responding to these questions our aim has therefore been to set out some of the considerations that we believe are relevant to the debate, rather than to reach a firm conclusion.

Question a)

Review timescales

The Secretary of State's question

> *"The report proposes a regular review of plurality every 4 or 5 years, the precise timescale to be determined by Parliament. While I accept the logic of this proposal, I would be grateful to understand better the scope and timescales for the review itself. A fixed timescale from start to finish is important to give certainly to industry. I am concerned that, if the reviews themselves took 18 months or longer to conduct, then such an approach could subject the industry to a very long period during which it was under review and therefore have a chilling effect on investment and innovation. How could such a system be designed to mitigate this risk but still deliver the right level of market analysis and recommendations on any remedies required in as short a timescale as possible?*
>
> *In particular, can Ofcom, if it was the body carrying out the reviews, guarantee that they would take no longer than 12 months from announcement to completion of such a report?*
>
> *Related to this, I would be grateful for any indication you can provide as to the timescales required for implementation of any remedies that the report might propose."*

Introduction

2.1 Our June report recommended that the regulatory framework should be revised to include a periodic review of media plurality (undertaken every four or five years), operating alongside the provisions of the existing merger-based public interest test.

2.2 We set out below the possible steps and time involved in conducting a periodic review, and how these compare to the merger-based plurality test. We have structured our advice in this area as follows:

1. Considerations related to the scope and timescale of merger-based reviews.
2. Considerations related to the periodic review.
3. The end-to-end process and appropriate timescale to implement remedies.

Ofcom answer

2.3 There is clearly benefit in a periodic review process that is time-bound, given the market certainty that this would bring. Once the review process is established, and if Ofcom were the reviewing body, we would expect to be able to complete the analysis of the sector within a 12-month period, including carrying out a public consultation on that analysis.

2.4 It is possible that the first periodic review might need to take longer than 12 months, due to the need to establish an analytic framework for such reviews, taking account of the specific statutory framework put in place by Parliament. The amount of

additional time required would depend on the degree of certainty provided by the statutory framework, and any associated guidance, provided by the Government.

2.5 During the course of a review, if the analysis of the sector identified a potential concern, then we would expect within the 12-month period to be able to consider the range of potential remedies. However, a further consultation would probably be required before a final decision could be made to impose specific remedies. This would probably need to fall outside the initial 12 months, especially if any remedies proposed were particularly new or intrusive.

2.6 The timescales required for implementation of remedies are difficult to comment on in any detail, since they depend both on the technical complexity of the remedy, and on the associated appeals process. We note that there are a number of stages within the end-to-end process, each with different characteristics, and that elements of their design will affect overall timescales. In summary:

- **Timescales for the periodic review, decision and implementation stages could be fixed in statute.** This clearly reduces flexibility but gives a degree of certainty to industry, regulatory and political stakeholders alike. However, the first periodic review is likely to take longer, for the reasons noted above, and therefore a longer statutory deadline may be more appropriate.

- **Timescales for appeals are likely to be more open-ended and cannot easily be capped.** However, Parliament could ensure that there is an appropriate balance between the desire for certainty and timeliness with the importance of ensuring there is sufficient time for an effective right of appeal.

- **The compliance stage may be inherently open-ended.** Where the regulator imposes a remedy which requires the affected party to take action by a particular date, failure to do so is a breach. However, some remedies – such as behavioural based ones - involve no deadlines because the obligation is ongoing.

1. Considerations related to merger-based reviews

2.7 Before considering the scope and timings of a periodic review of plurality, it is helpful first to consider those of the existing merger regime. We summarise the key points below and include further details in **Annex 1.**

Scope of a merger review

2.8 There are a number of possible public interest grounds for intervention[5]. They include non-media issues such as national security. The "media public interest considerations" are currently:

- Section 58(2A): The need for accurate presentation of news and free expression of opinion in newspapers;

[5] We note that the existing list of public interest considerations can be changed at any time, including after a merger has happened, and in relation to which the Secretary of State considers a new public interest consideration is relevant . Where this is the case, the Secretary of State issues the intervention notice specifying the new public interest consideration, but must then confirm it by a statutory instrument which requires Parliament's affirmative approval. If the merger concerned is an EC merger, the UK must notify the proposed new public interest consideration to the European Commission before taking measures to protect the relevant consideration. The European Commission then has 25 working days to say whether it is permissible.

- Section 58(2B): The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK;

- Section 58(2C)(a): The need, in relation to every different audience in the UK in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

- Section 58(2C)(b): The need for the availability throughout the UK 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

- Section 58(2C)(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.

2.9 A media merger could trigger more than one of these considerations. However, interventions to date have specified only one: section 58(2C)(a) (plurality of persons with control of media enterprises).

2.10 Intervention in a merger is at the discretion of the Secretary of State. She needs reasonable grounds to suspect that the merger meets jurisdictional thresholds and must believe that the public interest ground specified may be "relevant" to the merger.

2.11 Where an intervention notice specifies a media public interest consideration, Ofcom is required to advise the Secretary of State on whether, having regard only to the public interest consideration specified in the intervention notice, it is or may be the case that the merger may be expected to operate against the public interest.

Timings of a merger review

2.12 Under the current process for merger-based plurality reviews, it is conventional for the first-phase report by Ofcom to be required by the Secretary of State within 40 working days. There is however no statutory deadline either for the report or for the subsequent decision of the Secretary of State.

2.13 The second-phase review by the Competition Commission must be completed in 24 weeks. This can be extended by no more than 8 weeks in exceptional circumstances, and there is a provision to 'stop the clock' if information requested is not provided.

2.14 The Secretary of State then has 30 days to decide whether the merger may be expected to operate against the public interest. There is no deadline for determining remedies.

2.15 It is important to note that a review of the plurality issues associated with a specific merger will be narrower in scope than a review of the entire market. As a general rule, a merger review should therefore be completed in less time.

2. Considerations related to the periodic review

Scope of the periodic review

Grounds for intervention

2.16 In our June report, we defined a plural market as one meeting the following goals:

- ensuring there is a **diversity of viewpoints** available and consumed across and within media enterprises; and
- preventing any one media owner or voice having **too much influence** over public opinion and the political agenda.

2.17 We said that a diversity of viewpoints can be formed within an organisation and between organisations. Both are relevant to the question of plurality; and we referred to these mechanisms as internal and external plurality respectively.

2.18 The periodic review should therefore consider both these goals and mechanisms**.** Furthermore, we believe it is important that the public interest in relation to media plurality is defined in a consistent manner between mergers and periodic reviews.

2.19 We note that the existing public interest grounds for interventions in mergers are different for newspaper mergers and cross-media mergers. In particular, the media public interest considerations in sections 58(2B) and 58(2C)(a) refer to a sufficient plurality of *views in newspapers* and of *persons with control of media enterprises* respectively. Moreover, if these grounds were applied to periodic reviews, they would overlap but not align precisely with the goals and mechanisms set out above and in our June report.

2.20 If Parliament chose to update the legislation surrounding the public interest, we would recommend new grounds based on the policy goals and mechanisms set out in our June report. Such new grounds should be cross-media, and be applicable to mergers and periodic reviews alike.

Genres

2.21 In our June report, we said that news and current affairs play the primary role in delivering the public policy goals we have identified. We recommended that the scope of any plurality review should be limited to these. We said that other forms of content and broader definitions may be relevant in certain contexts, but we did not propose to consider these at that stage.

Geographic scope

2.22 Our June report considered plurality primarily in the context of a UK-wide news media market. We acknowledged that plurality may vary at the level of the devolved nations, and in relation to local media.

2.23 The supplementary questions we have been asked by the Secretary of State remain focused on how to design and implement a UK-wide framework. We have not been directed to undertake a local, regional, or nations-specific review of how the framework would be applied.

2.24 However, our view is that there is merit in undertaking specific analysis for the nations as part of the periodic review. The devolved nations represent distinct democratic units within the UK, with their own democratic institutions. Media plurality in news and current affairs provision is likely to play a vital role in ensuring a well-functioning democratic society in these nations, as well as across the UK as a whole.

2.25 For local areas (below the level of a nation), we believe the issues facing local media are more about sustainability than plurality. In our June report, we said there was a tension between plurality and commercial sustainability that was exacerbated at smaller geographic units. The same may be true of the English regions. In this context, we would not recommend that a periodic review of plurality considered local or regional media, except insofar as they contribute to plurality at the level either of the UK or of one or more of the devolved nations.

2.26 In making this recommendation we note that the existing regime to deal with the competition issues raised by local media mergers is widely perceived as being too onerous. This is not the place to address that concern, but we do believe it is important that it is not exacerbated by the plurality framework. We therefore recommend that the Government considers whether the public interest grounds associated with mergers should be modified so as to have the same focus as the periodic review; namely, on those mergers which might affect plurality at the level either of the UK or the devolved nations.

Could the periodic review be completed in no more than 12 months?

Steps involved in a periodic review

2.27 The periodic review might consist of the following steps:

- publication of the review's terms of reference;
- issuing an invitation to comment, and analysis of responses;
- commissioning new research, and analysing results;
- gathering information from industry players;
- an analysis of the market, including an identification of potential concerns;
- an analysis of the range of remedies available to address potential concerns;
- a public consultation setting out this analysis, and associated evidence; and
- publication of a final statement.

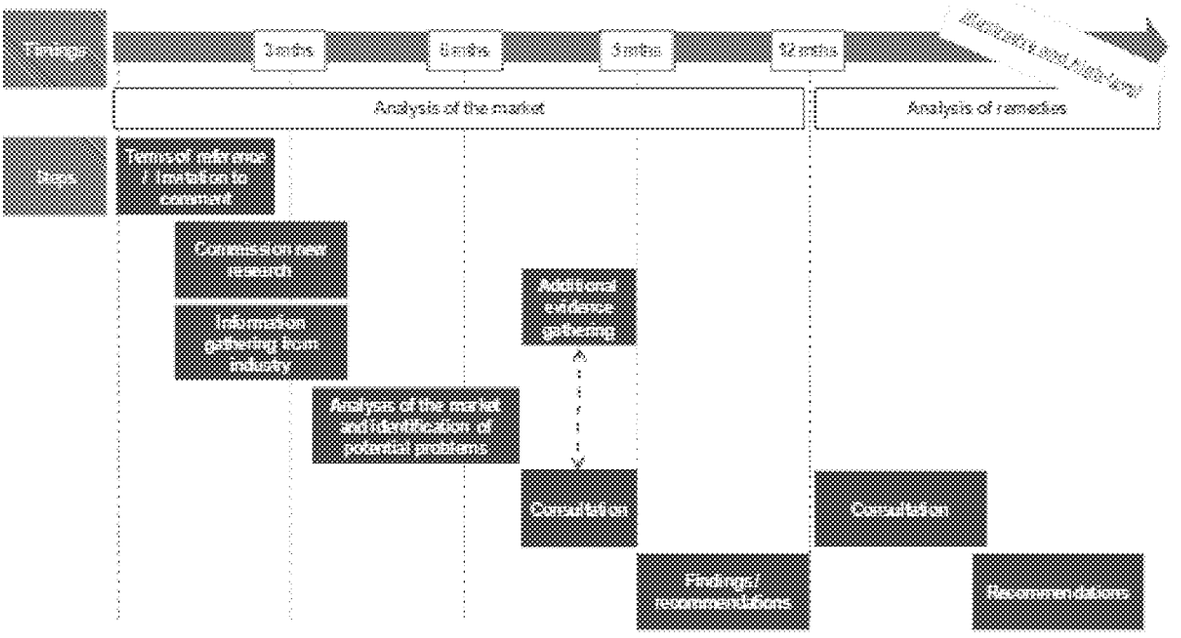
2.28 If Ofcom were the reviewing body, then as the sectoral regulator we would expect to have an existing body of research to draw on at the start of each periodic review. This would reduce the research time-lag that would otherwise be encountered. However, given the dynamic nature of the news market, there would still be a need to ensure that any research was up to date, and some time would therefore be required during the period review for the commissioning of new research.

2.29 Information gathered from industry players is likely to be an important part of the evidence base for any review. In order to carry out the review in a timely and effective manner, it is likely that the reviewing body will require additional information-

gathering powers. Ofcom does not have such powers in relation to merger-control cases, but this is not normally problematic, since merging parties are incentivised to co-operate in order to avoid a reference to the Competition Commission. The same argument cannot be applied to the circumstances surrounding a periodic review.

2.30 If Ofcom were the reviewing body, we would expect to be able to complete the analysis of the market and of the range of potential remedies within a 12-month period, as set out below in Figure 1.

Figure 1: Proposed steps and timeline for a periodic plurality review



2.31 If the analysis of the market identified a concern, then it might be necessary to consider imposing remedies. As noted above, we believe that it would be possible within the initial analysis to identify the range of remedies likely to be available, and also identify which of these would be most relevant.

2.32 However, as illustrated in Figure 1, it is possible that a further consultation would be required on the specifics of any remedies before a final decision could be made to impose them. This is particularly likely if a new proposed remedy were either novel or particularly intrusive. It might not be possible to carry out that further consultation and reach a final decision on remedies during the 12-month period of the initial review.

2.33 Clearly, if the periodic review concluded that the current state of plurality was acceptable, then it could be concluded within 12 months. The same might also be true if only minor changes to existing remedies were required.

Considerations for the first periodic review vs. subsequent reviews

2.34 There are several reasons why the first periodic review might need to take longer than 12 months:

- As of today, there is uncertainty as to the recommendations of the Leveson Inquiry, and any new statutory framework that may follow. Therefore, it is not possible to determine now how a future plurality review would be undertaken.

- In any event, working under untested legislation brings inherent uncertainty. It may be that Parliament can minimise this risk with good design, but any new framework will inevitably require a degree of bedding down.

- Irrespective of the design of the statutory framework, the reviewing body would need to establish and test its own analytical framework. The reviewing body might also need to issue guidance on the operation of this framework.

Fixing the length of the periodic review in statue

2.35 Notwithstanding the above considerations relating to the first periodic review, there may be other factors outside the reviewing body's control (such as late submissions of evidence) that might give rise to the risk of delay.

Figure 2: Pros and cons of setting the length of the periodic review in statute

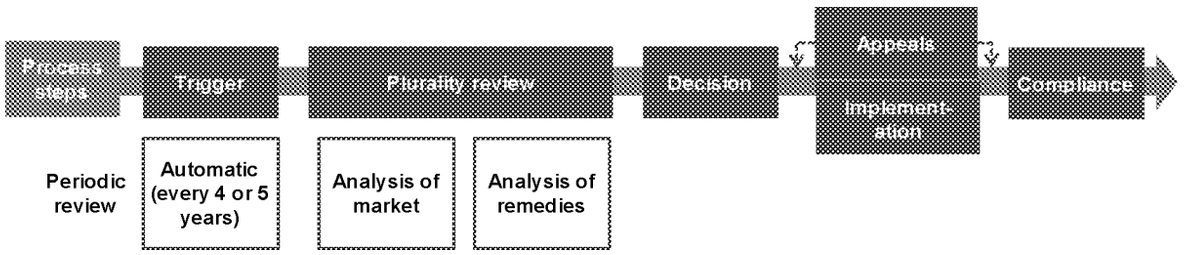
Pros	Cons
• The reviewing body can set out a defined process to industry and stakeholders that gives **market certainty** over when the review will be completed.	• The process may be **inflexible**, making it difficult to deal properly with major events occurring late in the day or to re-consult fully where thinking changes.
• A fixed timeline gives the reviewing body justification to set **deadlines for when input from industry is required**. Ofcom's experience is that late submissions can add significant time and resource to a delivery plan.	• By creating an artificial deadline for industry to comment and input, the reviewing body may **miss vital evidence**.
• A fixed timeline imposes a healthy **constraint on the internal governance** processes of the reviewing body, ensuring that decisions are sufficiently prioritised and made in the most efficient and timely manner.	• A fixed timeline may result in a **premium being placed on delivering an output** rather than reaching a potentially better and more robust view.

2.36 Therefore, a time period set out in statute might provide additional certainty, since it would require the reviewing body and involved parties to adhere to a fixed timeline (akin to the fixed deadlines for merger-control public interest tests). We recommend that a statutory deadline is adopted for the periodic review, albeit a longer one for the first review, and with provision for exceptional circumstances.

3. The end-to-end process and appropriate timescales to implement remedies

2.37 We have been asked to advise on the timescales to implement remedies. This requires consideration not just of the plurality review, but also of the decision-making process, the time required for technical implementation of any remedies, and the time required for any appeal against the imposition of remedies. The resulting end-to-end process is summarised in Figure 3 below.

Figure 3: End-to-end process for a periodic review of plurality review



2.38 Once the plurality review is completed, the first stage in implementing remedies is the decision-making process. The nature of this process is for Parliament to determine, but we discuss some relevant considerations as part of our response to question f). At this point, we note only that, as with the plurality review itself, there may be merit in applying a statutory deadline to the decision-making process.

2.39 Once the decision has been made, the decision-maker will be required to implement any remedies. The time required will depend on the nature of the remedy, but there may again be merit in applying a statutory deadline. We note for example that the Enterprise and Regulatory Reform Bill, if enacted in its current form, will introduce a six-month statutory time limit for the Competition and Markets Authority ("CMA") to implement phase 2 remedies in market investigations.

2.40 Given the impact and sensitivities of any remedies, it is likely that they would face legal challenge. The timing of any such challenge would depend on the nature of the decision-making process. The effect of the challenge could be to delay implementation of remedies or, even if implementation proceeds before, or in parallel with, any legal challenge, delay the point in time at which there is market certainty as to the final outcome of the plurality review.

2.41 Timescales for appeals are likely to be more open-ended and cannot easily be capped. For example, the process relating to the divestment remedy for competition issues raised by Sky's acquisition of a stake in ITV took 2 years to complete; the initial (two-stage) review of the proposed acquisition was completed in around 10 months, of which Ofcom's first-stage review took 40 days.

2.42 However, Parliament could design a new appeals regime in a way that balances its desire for certainty and timeliness with ensuring there is sufficient time for the right of appeal. Parliament may also wish to consider the appropriate type of legal challenge to plurality decisions in the context of the design of the broader regulatory regime. We assume that plurality review decisions would remain subject to challenge on judicial review principles.

2.43 The final stage – 'compliance' - is inherently open-ended. A remedy is a binding legal obligation at the point that an order is made or undertakings are accepted, so the market has a reasonable degree of certainty at that point (i.e. it knows the remedy is in place and can plan accordingly). The level of certainty is also dependent on any outstanding legal challenge.

2.44 Where the regulator imposes a remedy which requires the affected party to take action by a particular date, failure to do so is a breach. However, some remedies – such as behaviour-based ones - involve no deadlines because the obligation is ongoing. Therefore, it is not meaningful to impose a cap on the period for compliance.

Question b.i)

Effective working between periodic plurality reviews and existing merger provisions

The Secretary of State's question

> *"Following on from the above point [question a] regarding timings of a review], I note the report suggests that consideration would need to be given to how these periodic reviews and the existing provisions concerning mergers can be made to work effectively together and avoid the risk of double jeopardy. I would be grateful if you could provide further advice on this."*

Introduction

3.1 This question examines two dimensions of the recommended plurality review framework:

- double jeopardy; and
- the fit between the existing merger-based and plurality reviews.

3.2 To consider this question, it is necessary to consider the existing process for merger control, which is summarised in **Annex 1**. Note that the regime for plurality review of mergers is best seen as part of a wider and more frequently used regime for examining the impact of mergers on competition.

Ofcom answer

3.3 In our June report, we said that further consideration was required to determine whether the existing merger process sits within a new plurality regime or continues in parallel with it. Either scenario may be desirable, but in any case, the regulatory framework needs to be consistent and avoid a double jeopardy outcome such that more than one plurality review is triggered by the same cause.

3.4 We believe that these matters are fundamentally a matter for Parliament and the Government. However, we have set out below a number of factors that they might wish to consider.

Considerations for Government/Parliament

3.5 "Double jeopardy" loosely refers to the risk that a review brought about by merger control, and periodic reviews, would lead to inconsistent outcomes for a merged entity. The outcome which is likely to be of greatest practical concern is that a merger is cleared at the merger-review stage, but remedies involving the merged entity are required after a subsequent periodic review due to the strength of the merged firm.

3.6 Formally, double jeopardy would be a risk to the extent that the questions being considered by periodic review and merger control overlapped. It is important to bear

in mind in this context that a merger review considers different questions to those considered by the periodic review, for the following reasons:

- Merger control considers the specific impact of the merger on plurality. In other words, the focus is on the change in plurality brought about by the merger, and on whether this results in a position where plurality is not sufficient, rather than on the absolute level of plurality prior to the merger. This is of course qualified; if plurality was insufficient to begin with and a merger worsened the position, it is difficult to see a merger being approved.

- Merger analysis is limited in scope to those parts of the market which are directly affected by the merger, in terms of geography, platform, content type and point in the supply chain. A periodic review of the market as a whole would of necessity be broader in nature.

- A merger-based plurality review, except in "special public interest cases"[6], takes place in parallel with competition analysis. However, there is no parallel competition process in a periodic review. This means that some 'competition'-type questions about the dynamic development of a market may need to be considered in a periodic plurality review in order fully to understand the market.

3.7 We have considered a range of different scenarios, in which mergers happen both between periodic reviews and during them; and in which mergers do and do not trigger review. We set out these scenarios in Annex 3. From these, we can draw several general conclusions.

3.8 Firstly, it is difficult to see how "double jeopardy" could be completely ruled out, except by providing a grace period post-merger, during which no remedy could be imposed. Such a bar on remedies is likely to be inappropriate, since it would make it impossible to address any concerns that arose from the pre-merger position of the merging companies, or from market developments since the merger.

3.9 Secondly, any review would need to have regard to (but not be bound by) the findings of any previous one, and should not deviate from those findings unless new material evidence had become available.

3.10 Finally, there is a risk of incompatible decision-making if different bodies carry out the periodic review of plurality and reviews of plurality triggered by mergers. This might be a particular concern if an entity whose pre-merger position was potentially problematic triggered a merger review overlapping with a periodic review.

3.11 The issue of consistency might be addressed by ensuring that different reviewing bodies adopt a common approach, based on published guidance. We note that this is the approach taken within the competition framework, where those regulators with concurrent competition powers are bound by guidance issued by the Office of Fair Trading (OFT). This approach may, however, be more difficult in relation to reviews of plurality, given that the analytic framework is less well developed, and the greater requirement for judgement and the exercise of discretion.

3.12 Therefore, in designing a regulatory process for plurality reviews, there are two main options for Parliament and the Government to consider:

[6] See Annex 1.

- that different bodies undertake the periodic and merger-based plurality reviews, coordinated by guidance; or

- that a single body undertakes the periodic and merger-based plurality reviews.

3.13 We note that it is properly for Parliament and the Government to determine the appropriate framework.

Question f)

Decision makers

The Secretary of State's question

> *"As you will know, there has been considerable debate about the role of the Secretary of State in decisions on plurality. I have indicated publicly that I am interested to explore alternative options that would remove politicians from the decision-making process.*
>
> *Taking into account your views on [remedies – question e)], I would welcome your assessment of what alternatives might exist and the risks and issues associated with these. For example, should the body conducting the review take the decision or should the final decision be for, say, Ministers or another independent individual or organisation especially appointed for the purpose?"*

Introduction

4.1 In our June report, we did not advise on who should take the ultimate decision on plurality matters.

4.2 While this question is a new area, the issues it raises flow naturally from questions a) and b) and we have therefore included the question in sequence as part of the implementation section. We have also addressed some of the issues relating to decision-making between periodic and merger reviews in response to question b).

Ofcom answer

4.3 We believe it is properly for Parliament and the Government to determine the most appropriate decision-maker(s) for reviews of plurality, and to describe the role of politicians versus regulatory bodies.

4.4 However, to illustrate the trade-offs inherent in the choice of decision maker we set out below some matters Parliament and the Government might wish to consider.

Considerations for Government/Parliament

1. Decision-making in the existing merger review process

4.5 Our starting point is the existing merger process. We provide further details in our answer to question a) and in Annex 1 as to the operation of the existing merger review process.

4.6 This process involves a number of decision points for the Secretary of State:

- **Trigger:** The Secretary of State decides whether to intervene in a merger and, if so, which public interest consideration(s) to ask Ofcom to explore.
- **Reference:** The Secretary of State, having received advice from Ofcom as to whether the threshold for a reference is met (i.e. whether or not the merger might be expected to, or does, operate against the public interest), decides whether or

not to refer the merger to the Competition Commission for a second-stage review.

- **Finding:** The Secretary of State, having received advice from the Competition Commission, decides whether or not to make a finding that the merger operates, or may be expected to operate, against the public interest.

- **Remedies**: The Secretary of State, having received advice from the Competition Commission, decides whether or not to impose remedies, and what those remedies should be.

4.7 Overall, this process has well-versed pros and cons. In summary:

- **Pros:** Discretion not to carry out a review of mergers which are unlikely to have a material impact on the public interest. Checks and balances provided by two review stages and the involvement of two different and independent regulators.

- **Cons:** In practice, because of the low thresholds for both trigger and referral, discretion is limited, and the first stage does not act as much of a filter. Therefore, the involvement of multiple regulatory bodies risks elongating the process and creating some duplication of effort. For small mergers, this regulatory burden can act as a deterrent to mergers which might otherwise be beneficial.

4.8 As noted in our June report, we believe that it is important to maintain a discretionary trigger for public interest merger reviews, in order to minimise the burden on industry.

4.9 Thus far, intervention notices have been issued only in relation to three media mergers. Where the Secretary of State has considered intervening, she has received or invited representations from interested parties – in other words, there has been some evidence gathering. However, she is not required to publish reasons for deciding not to intervene, or to explain why the particular public interest consideration specified has been chosen. The reasons given for deciding to intervene have been limited to stating that the test for intervention has been met.

4.10 In only one case (Sky/ITV) has a decision to refer a media merger to the Competition Commission on public interest grounds led to a completed review[7]. Ofcom undertook the first-stage review in 40 days. As per our recommendation, the Secretary of State referred the case to the Competition Commission. Following this two-stage review (completed in approximately 10 months), the subsequent judicial review process relating to the divestment remedy for competition issues took 2 years to complete.

2. Decision-making in the new periodic review process

4.11 The proposed periodic review is rather different in character from the existing merger process.

- The initiation of the periodic review would be automatic. There would therefore be no need for discretion at this point of the process.

- There would also be no need for a stage 1 review to act as a filter before a full stage 2 review.

[7] In News Corporation/Sky, a reference was made to the Competition Commission but the parties dropped their plans to merge shortly after.

- The proposed periodic review of plurality is therefore broadly equivalent to a stage 2 merger review.

- The only point at which political discretion might be exercised in this process is in relation to the final decision.

3. Decision-making and the exercise of discretion

4.12 As summarised above, there will continue to be a requirement for a degree of discretion in considering which mergers are subject to a plurality review. Furthermore, the final decisions, in both merger reviews and periodic reviews, will require a significant degree of judgement, due to the subjective nature of any assessment of plurality. This amounts to a further exercise of discretion.

4.13 We noted in our June report that discretion comes in two forms: from politicians or from the reviewing (or another regulatory) body. We acknowledged that both forms of discretion have advantages and disadvantages; political discretion can bring perceived politicisation of the process, while regulatory discretion can risk confirmation bias.

4.14 The supplementary question we have been asked focuses specifically on the risk of politicisation. It acknowledges the recent debate about the role of the Secretary of State in decisions on plurality, and expresses an interest in exploring alternative options.

4.15 Our view is that the arguments remain finely balanced. One the one hand, we recognise the risks associated with politicisation. On the other hand, where a decision requires a high degree of judgement, it may still be more appropriate for a democratically-elected decision-maker to exercise the resulting discretion, rather than an independent regulatory body. We remain of the view that this choice is for Parliament to make.

Question g)

Online

The Secretary of State's question

> *"Finally, your report recommends that legislation is amended to include online providers in the definition of 'media enterprises'. I would be grateful for further advice on what criteria Ofcom recommends should be used to assess which online news providers should be included in any plurality review."*

Introduction

5.1 Ofcom's original recommendation was to amend the definition of "media enterprises" or to create a new public interest consideration, in order to include online news providers.

5.2 The new question assumes that in order to carry out a review, it is first necessary to determine which persons may be subject to it. Having considered it carefully, we do not think this is necessarily the case for a periodic review - the test could be drafted so as to identify issues rather than persons. It is not necessarily the case for mergers either.

5.3 The trade-off to be made is certainty (of precisely whom a review could cover) against failure to attain the policy goal.

Ofcom answer

5.4 In terms of the criteria used to assess which online news providers should be included in any plurality assessment (merger tests and periodic reviews), we recommend that the framework should catch those online companies that have material influence over the news presented to the public, because they either:

- control the titles which are made available to the public (i.e. they are gatekeepers);
- control the prominence of those titles online (e.g. because they control search engines or social network recommendations); or
- control the content of those titles (i.e. they have editorial control over important content).

5.5 Given the dynamic nature of the market, we believe it is not possible reliably to determine now those online players which should be included in the scope of a future plurality review.

5.6 In our June report, we recommended that Government and Parliament give consideration to a redefinition of media enterprises or to a new public interest consideration that would include relevant online organisations. We note that there are pros and cons to the existing use of "media enterprise" in the current regulatory framework. In any case, of the existing public interest considerations, only the "media public interest considerations" are defined in a way which specifies the types of enterprise they can apply to.

5.7 Having been asked to consider the matter further, we recommend that no definition of "media enterprise" for periodic reviews or mergers be attempted. Practically, such a definition is unlikely to be workable because it cannot be both sufficiently targeted and flexible at the same time. To be targeted the definition would need to be narrowly defined to avoid capturing all online providers irrespective of their role in wholesaling/aggregating/providing news content. However, this would limit much-needed flexibility in a dynamic and converging market.

Considerations for Government/Parliament

1. Criteria to determine the relevance of online in a review

5.8 In our June report, we said that flexibility is required to consider at which points in the value chain editorial control is most likely to be exercised, and therefore how best to measure diversity and influence. A wide variety of online enterprises could be relevant, including websites operated by traditional media enterprises as part of a multi-platform strategy, websites operated on a standalone basis by new media enterprises, news aggregators and distributors, social media and search engines.

5.9 We therefore recommend that the new framework be able to include within its scope those online companies that have material influence over the news presented to the public, either because they:

- control the titles which are made available to the public (i.e. they are gatekeepers);
- control the prominence of those titles online (e.g. because they control search engines or social network recommendations); or
- control the content of those titles (i.e. they have editorial control over important content).

2. The definition of online in the existing framework

5.10 The only place "media enterprise" is used in the current framework is in relation to mergers. For there to be a public interest intervention, there must be (a) jurisdiction and (b) a ground for intervention. It is important to consider both.

Grounds for intervention

5.11 Taking (b) first: the relevant consideration is "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"[8].

5.12 The main advantage of this use of "media enterprise" is that it provides certainty as to which mergers are likely to be subject to a public interest intervention. This 'certainty' is qualified by the fact that the Secretary of State can change the existing public

[8] There is a further consideration: "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". This is irrelevant to the question of online, since section 319 of the Communications Act only applies to broadcast licensees.

interest considerations at any time, but it is how the regime has worked to date and how it is understood by the sector.

5.13 If a similar approach were to be adopted in relation to periodic reviews, it might similarly provide certainty as to which companies were contained within the scope of such reviews.

5.14 Therefore, one option for including online - in order to maintain these advantages and ensure a level playing field - is to extend the definition of "media enterprise" to include online, and use the same definition of "media enterprise" to determine the scope of periodic reviews.

5.15 However, a future regime which attempted to define the enterprises captured definitively, including online enterprises, would create two major disadvantages:

- lack of precision: even today, it is very difficult, if not impossible, to define the enterprises which control the news and current affairs ultimately available to, and consumed by, the public; and

- inflexibility: it is impossible to predict with any certainty which online enterprises may have such control in future. As noted above, such control might be held by a wide variety of media enterprises. The question of which will have control at some point in the future cannot be determined now.

5.16 It is in any case worth noting that of the existing public interest considerations, only the "media public interest considerations" are currently defined in a way which specifies the types of enterprises they can apply to. There is no limit on the types of enterprises whose mergers may trigger concerns about "national security" or "maintaining the stability of the UK financial system".

5.17 We recommend that no definition of "media enterprise" for periodic or plurality merger tests should be attempted. Such a definition is neither necessary, nor workable in practice. Regularly updated guidance is likely to be a more effective means of providing a degree of certainty about which online entities would be relevant.

Jurisdiction

5.18 Turning to (a) (jurisdiction), the only time the nature of the enterprise matters is in a "special public interest case", where a newspaper or a broadcaster may be caught if it has a 25% share of supply, regardless of whether an increment to market shares has been caused by the merger, or whether it meets any turnover threshold. In the absence of this provision, a merger of (for example) a major newspaper and an oil company would trigger a plurality review only if the newspaper had UK turnover of £70m.

5.19 There is a question whether a "special public interest case" test would be needed to cater for mergers involving one online news provider. If it did not, then non-incremental mergers involving a provider with less than £70m UK turnover (whether they be newspapers, broadcasters, or online providers) would not be captured.

5.20 For plurality merger tests, we recommend there be no extension of the special public interest cases to include online players – in order to ensure that the new framework does not catch 'small' online media companies in a manner that might stifle innovation.

Question e)

Remedies

The Secretary of State's question

> *"I would like to extend the scope of this work to look at possible remedies in the event that a review concluded that there was insufficient plurality. In a converged, digital world, the markets themselves are more complex and fast-moving and therefore serious consideration is needed as to what remedies might be appropriate.*
>
> *The report refers to both positive and defensive levers that might be deployed to encourage or protect plurality respectively, and I am interested to understand what the benefits risks, issues and factors may be in intervening in markets through these means".*

Introduction

6.1 This is a new area of advice, as we did not explicitly consider remedies in our June report.

6.2 Our response to this question examines various considerations relating to remedies:

1. Categories of remedy and their suitability to address plurality concerns.
2. Examples of past remedies to address plurality concerns.
3. Assessment of remedies.

Ofcom answer

6.3 In summary, a range of remedies might be relevant to address plurality concerns identified as part of a review process. They can be grouped into five broad categories:

- structural remedies that raise levels of external plurality;
- behavioural rules that may help to increase levels of internal plurality;
- behavioural rules that impose standards on providers of news;
- behavioural remedies that improve access by citizens to providers of news; and
- positive interventions to encourage more news provision.

6.4 There is unlikely to be a 'one size fits all' approach. It is firstly for Parliament to consider the set of remedies which should be available in principle within a new framework, and it is then for the decision-maker tasked with selecting and implementing remedies to determine which of these is best suited to a specific set of circumstances.

Considerations for Government/Parliament

1. Categories of remedy and their suitability to address plurality concerns

6.5 We defined a plural market in our June report as one with the following outcomes:

- ensuring there is a **diversity of viewpoints** available and consumed across and within media enterprises; and
- preventing any one media owner or voice having **too much influence** over public opinion and the political agenda.

6.6 A plurality review might conclude that there are sufficient plurality concerns to justify imposing remedies on a whole industry, or on one or more specific entities. A range of remedies might be relevant.

6.7 The possible remedies have been grouped below into five broad categories. However, we note that these categories are not mutually exclusive, and that the distinctions between their boundaries are blurred.

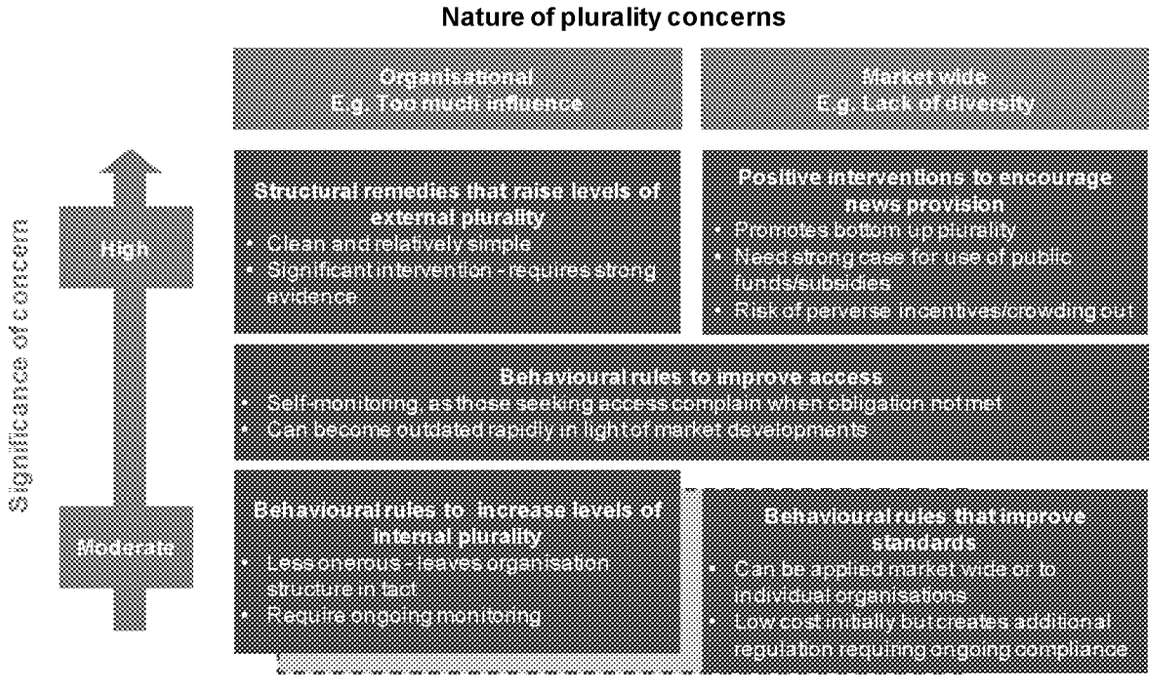
- **Structural remedies that raise levels of external plurality:** These remedies require the divestment of all or part of an enterprise, typically in order to mitigate plurality concerns from one media owner having too much influence. In some cases, they aim to deliver long-term change by altering the underlying incentives within an organisation. They are best suited to situations where there are substantial plurality concerns stemming from too much influence by one organisation.
- **Behavioural rules that may help to increase levels of internal plurality:** Such remedies leave the organisational structure in place and aim to create rules that create conditions for internal plurality, typically by ensuring that individual titles or programmes have editorial independence, despite being under common ownership. Their effectiveness depends on there being incentives for the regulated entity to comply, as well as robust and effective monitoring and enforcement. They are best suited to circumstances where there is too much influence by one organisation, but where it is disproportionate or otherwise inappropriate to impose structural remedies.
- **Behavioural rules that improve standards**: Such remedies aim to improve standards of practice within news providers. They might mitigate potential concerns around too much influence being exerted by any one media organisation, typically by securing fairness (in terms of how news providers report issues) and accuracy (in terms of the completeness of what is reported). They may be suited to market-wide issues, to improve levels of trust in news provision and help secure a diversity of viewpoints that met minimum safeguards and standards – although their introduction would need to balance the risk that they bring uniformity to news provision. Alternatively, they could be targeted to particular providers to address specific plurality concerns.
- **Behavioural rules to improve access.** Must-carry obligations could require a distribution platform to distribute the content of news providers meeting specific criteria. Must-offer obligations could be used to ensure that news providers distribute their content via any platform meeting specified criteria. The general aim of such obligations is to ensure that news content is widely distributed. They can be effective in reducing the influence of a particular distribution network if it is

using its position as a gatekeeper to discriminate against particular content providers.

- **Positive interventions to encourage more news provision:** These aim to help fill the gaps left by the market, typically in circumstances where the desired level of plurality is not commercially sustainable. They can take two primary forms: direct funding (e.g. grants, journalist funds) for news provision; and news and current affairs obligations (either required outright, or in return for implicit subsidies - ranging from gifted/reserved multiplex capacity to prominence for news content on electronic programme guides (EPGs) . Such interventions are best suited to situations where there are substantial plurality concerns due to commercial provision of multiple sources of news content being unsustainable.

6.8 The suitability of different types of remedy will depend on the nature and significance of the concerns, and whether they are caused by a single organisation or a more general feature of the market (see Figure 4 below). In addition, for some of these remedies it may be hard to ensure effective implementation and compliance. These factors need to be taken into account on a case-by-case basis in deciding which remedies might be appropriate.

Figure 4: Suitability of remedies, by nature and significance of plurality concerns



2. Examples of past remedies to address plurality concerns

6.9 We set out a number of past or proposed remedies in the UK, which might be relevant in addressing plurality issues, in Annex 2. These include:

- BSkyB/ITV plc (2007 – related to competition issues).
- NewsCorp/BSkyB (2011 – proposed but not implemented).
- Supply of national newspapers (1993).
- Times / Sunday Times (1981).

- Public service broadcasting obligations on Channel 3 and 5 licensees (ongoing).
- S4C (ongoing).

3. Assessment of remedies

6.10 All remedies have their advantages and disadvantages, and trade-offs are inherent in any decision process. As illustration, we set out pros and cons of the different types of remedy below.

Figure 5: Pros and cons of remedies and interventions

Remedy category	Pros	Cons
1. Structural remedies that raise levels of external plurality	• Offer clarity and certainty. • Simple and clean solutions. • Can deliver long-run benefits. • Do not require ongoing monitoring.	• May be ineffective if divested interests are commercially unsustainable. • The risk that a structural remedy may be imposed can act as a disincentive to investment and innovation, and can create perverse incentives (e.g. collusive behaviour on the part of a stronger provider to avoid threatening the existence of a weaker one). • Represent significant regulatory intervention. They are usually irreversible and can involve significant transition and transaction costs.
2. Behavioural rules that may help to increase levels of internal plurality	• May be less intrusive. • More proportionate.	• Require potentially complex and costly ongoing monitoring/enforcement. • Experience suggests that they are often perceived to be lacking in credibility.
3. Behavioural rules that enforce standards	• Clear set of rules. • Objective. • Gives market certainty of standards expected.	• Require ongoing monitoring/enforcement. • Risk that rigid enforcement of some standards could reduce diversity.
4. Behavioural remedies to secure access	• Targeted remedy to address concerns re discrimination by gatekeepers. • Self-monitoring, as those seeking access complain when obligation not met.	• Susceptible to gaming. • Can become outdated in light of market developments.
5. Positive interventions to encourage more news provision	• Can target specific concern. • Positive incentives can be used to promote plurality across the market. • Do not penalise success in the way that rules and structural remedies might.	• Require public funds/subsidies. • Careful design required to minimise effect of subsidies on market-based provision.

6.11 There is unlikely to be a 'one size fits all' approach, as the nature of the remedies necessary will differ depending on a range of factors, including the specific plurality issues identified, and the structure of the market sector in question, noting in particular issues of commercial sustainability.

6.12 It will be for the decision-maker tasked with selecting (and implementing) remedies to address the specific plurality concerns identified, on a case-by-case basis.

Question c)

Sufficiency

The Secretary of State's question

> "*Your report favours periodic reviews over absolute limits on market share on the grounds that the latter does not take into account the wider factors affecting plurality. The report suggest that periodic reviews could be supplemented with guidance and/or indicative levels so that business have a reasonable understanding of the factors and levels of concentration which will be taken into account during a periodic review. The first review should provide a useful yardstick against which to measure future developments, but I would be grateful to understand in more detail your views on (i) the advantages and disadvantages of such additional guidance or indicative levels; and (ii) how they might be made to work.*"

Introduction

7.1 In our June report, we said that the existing public interest considerations for merger control are based on the concept of "sufficiency" of plurality, yet what constitutes a sufficiently plural environment is left to the decision-making body's discretion. Ultimately, to date, there has been no determination of what is "sufficient".

7.2 We said that an assessment of sufficiency at *any point in time* is challenging, as it requires a subjective judgement. Looking ahead, we said it was unrealistic to seek an absolute statutory definition of sufficiency, as the market is dynamic and unpredictable. What is considered sufficient or not will vary with time and needs to be considered in reference to the broad market and the political context of the times.

7.3 We said, however, that it may be possible to develop a view as to what levels of the key consumption metrics provide an indication of a potential plurality concern, so that these levels are taken into consideration as part of a plurality review, without being regarded as absolute limits.

7.4 We have now been asked for: (i) the advantages and disadvantages of such additional guidance or indicative levels; and (ii) how they might be made to work.

7.5 Guidance in this context means a statement of policy to which a public authority must have regard, but from which it can deviate if appropriate according to the circumstances of a case.

Ofcom answer

7.6 An advantage of guidance on levels of sufficiency would be that both the reviewing body and the industry sector might gain from it clarity about whether a particular plurality situation is acceptable, marginal, or unacceptable.

7.7 Our position in our June report was that it would be for Parliament to consider whether it can provide any further guidance on how sufficiency should be defined. However, without guidance, we said that it may have to be left to the discretion of the reviewing body to consider sufficiency as part of the first periodic review of plurality.

7.8 At this stage we have been asked about the advantages and disadvantages of additional guidance:

- An approach based on **indicative ranges or thresholds** may have some attractions, although there are difficulties in agreeing the relevant measures, and in setting their level, as well as a risk that these come to be perceived as absolute limits.

- **Qualitative guidance**, setting out the features of a well-functioning plural market, may play a role in helping the reviewing body make objective decisions and setting the market's expectations concerning the factors taken into account in conducting plurality reviews.

7.9 In summary, some form of guidance is likely to be desirable. This is most likely to take the form of indicative ranges, with additional qualitative guidance as to how those ranges should be interpreted.

7.10 There are several opportunities for the publication of such guidance:

- Parliament might debate the merits of the respective forms of guidance and the Government could issue it in the most appropriate form.

- Parliament, by statute, could require Ofcom or another regulatory body to issue guidance. We would recommend that this be done as a formal output of the first periodic review, and not before.

- Parliament and the Government could leave the matter to the reviewing body, in which case an output of the first periodic review would in any case be greater certainty as to quantitative and qualitative levels of plurality – whether expressed in formal guidance or not.

Guidance on sufficiency

7.11 Any guidance should take account of the following to ensure that it helps to establish a well-functioning framework:

- It must acknowledge the possible trade-off between plurality on the one hand, and economic sustainability on the other. An idealised view of levels of plurality might not be achievable in practice if that level of provision is not commercially viable.

- Ideally, it should account for the views of those who are subject to it – which might be best achieved through a process of consultation in the course of formulating the guidance.

- It should recognise the dynamic nature of the news media market, in particular the growing popularity of online and the gradual decline in the popularity of print media. Notions of sufficiency today are likely to be somewhat different from those of ten years ago, or ten years hence. As testimony to the pace of change, in 2002 Google News and Facebook had yet to launch, and now they are two of the three most-used online sources for news.

7.12 Turning to the practicalities of making guidance work, this could be in one of two forms:

Indicative levels

7.13 Indicative levels take the form of numeric limits or 'warning' levels that would indicate to the market the level of market concentration held by one organisation that might suggest that it commands too great a capacity to influence public opinion.

7.14 These indicative levels could take the form either of indicative thresholds, or indicative ranges. These could apply either to individual platforms, or on a cross-platform basis. The range of possible options is summarised in the table below, by reference to some specific illustrative examples.

Figure 6: Indicative thresholds and ranges

	Indicative threshold	Indicative range
Platform-specific guidance	• Share of consumption greater than x% creates a rebuttable presumption of concern. • Share lower than x% is unlikely to cause concern.	• Share of consumption greater than y% creates a rebuttable presumption of concern. • Share between x% and y% may be a concern. • Share below x% is unlikely to cause concern.
Cross-platform guidance	• Share of cross-platform references greater than x% creates a rebuttable presumption of concern. • Share lower than x% is unlikely to cause concern.	• Share of cross-platform references greater than y% creates a rebuttable presumption of concern. • Share between x% and y% may be a concern. • Share below x% is unlikely to cause concern.

7.15 **The benefit of this approach** is that it would provide the market with an understanding of what level of external plurality the reviewing body regarded as acceptable. Furthermore, the approach would be familiar to industry as it is used in other fields of analysis (e.g. competition analysis). It would also provide organisations with a clear sense of how the conclusions of future plurality reviews would be arrived at.

7.16 **The drawbacks** would include the challenges in identifying the measure, or measures, that could be drawn on to provide the basis of the indicative levels. For the same reasons that Ofcom rejected a metrics-based plurality trigger in its June report, it would be challenging to agree a single metric that could provide an indicative level, let alone the threshold above which a reviewing body might have concerns. If the guidance were based on multiple metrics, it may become so complex as to provide little benefit.

7.17 There is also a risk that quantitative guidance would underplay the importance of qualitative contextual factors, which we highlighted in our June report as being an important part of any analysis of plurality. Examples of these factors include regulation and oversight, the potential power or editorial control exercised by owners/proprietors within commercial organisations, governance models, and internal plurality.

7.18 Furthermore, it may be difficult to set indicative levels without them becoming perceived as de-facto absolute limits. This could have the same disadvantage as absolute limits, namely an inability to take into account contextual factors such as sustainability. It could therefore have the same knock-on effect as absolute limits on

investment and innovation – in particular, on commercial entities' willingness to provide news at all.

7.19 An approach based on indicative ranges may be the best compromise, providing a degree of certainty, while mitigating the concerns set out above. There would still be difficulties in agreeing the relevant measures, in setting their level, and in the risk that these are perceived as absolute limits. But it might be possible to address these risks by using supplementary qualitative guidance to aid interpretation of the indicative ranges.

Qualitative guidance

7.20 Qualitative guidance could draw on the features set out in paragraph 5.119 of our June report - which indicated the characteristics of a well-functioning plural market – in structural and behavioural terms.

7.21 This guidance would provide industry with an indication of how the reviewing body would go about undertaking its market analysis – the features of the market that it would examine, and what characteristics the body would look for in each of these features to satisfy itself that the market was sufficiently plural.

7.22 A particularly important function of this guidance might be to explain how the reviewing body would take into account those contextual factors which are important for plurality, but are not readily quantifiable.

7.23 The qualitative guidance could be provided either on a standalone basis, or be associated with indicative levels. If it were associated with indicative levels, it might set out those qualitative factors which might mitigate any concerns, in circumstances where the quantitative metrics create a rebuttable presumption of a concern. Where the indicative levels are set out in the form of ranges, the qualitative guidance might set out those factors that are likely to be determinative in circumstances where the metrics by themselves are not, because they lie within the range.

7.24 Qualitative guidance could be designed around whether the news media market in the UK displays the following characteristics:

- There is a diverse range of independent news media voices across all platforms, providing citizens with access to a breadth of views on matters of industrial controversy and public policy, ensuring a vibrant democratic debate.

- Among consumers, the reach and consumption of many news sources is relatively high, across all demographic groups and across all parts of the English regions and the devolved nations.

- No one source of news commands too high a share of consumption, thereby ensuring that consumers are not exposed to too narrow a range of viewpoints.

- People multi-source from a number of independent news sources to help inform their opinions, ensuring that the process of opinion-forming draws on a diversity of viewpoints.

- The market conditions are such that there is comparatively free entry into the news media market, as evidenced by the emergence and establishment over time of new news providers.

- News media organisations are well-funded and commercial returns are high enough to ensure their long-term economic sustainability.

7.25 This approach would have the benefit of maintaining the flexibility and relevance of the assessment framework. While the characteristics of the market might change over time, the broad features of a well-functioning plural market would remain constant.

7.26 Qualitative guidance on sufficiency might also help articulate the types of behaviour that any reviewing body might welcome from a news media organisation, for example in support of internal plurality. It could also inform the market how its conduct may be taken into account in any plurality review.

7.27 The main risk associated with a proposal to provide qualitative guidance is that it creates an expectation of greater certainty than can be delivered in practice. Elements of the guidance could be prone to disagreements over interpretation, and it is possible that the practical application of such guidance would only become clear over the course of the periodic reviews themselves.

7.28 Overall, while we recognise the limits of qualitative guidance, our view is that it may play a role in setting expectations as to what factors would be taken into account. The value is likely to be greater if it is provided in association with some form of quantitative guidance, as described above.

Question d)

The 20/20 rule

The Secretary of State's question

> *"Related to this, the only absolute limit that currently remains in statute is the so-called 20/20 rule that governs ownership of a national newspaper and Channel 3 licences. I note Ofcom's recommendation that any consideration of removal of this rule should properly be a matter for Parliament. While of course this is right, I would be grateful if Ofcom could provide me with further advice as to whether there are circumstances in which the periodic reviews could provide sufficient certainty to remove the restriction."*

Introduction

8.1 The only cross-media limit on ownership is the "20/20 rule". This prohibits a newspaper group with more than 20% of national newspaper share from holding a Channel 3 licence or a stake in a Channel 3 licensee that is greater than 20%[9].

8.2 The rule was first put in place in 2003 to prevent an unacceptable concentration of influence among newspaper groups and Channel 3 licensees[10].

8.3 In 2009, as part of the review of media ownership rules, we recommended retaining the rule, because it was reasonable to conclude that Parliament's rationale for putting the rules in place was still applicable[11].

8.4 We noted that the evidence available at the time suggested that the way people consumed national news had not yet changed significantly. The two key pieces of evidence we cited were that:

- national free-to-air television and newspapers were still important sources of national news; and
- ITV1 remained the second most significant free-to-air national news provider after the BBC. This remained the case despite a decline in ITV1's share of total national news viewing hours, from 25.9% in 2006 to 21.7% in 2008.

Ofcom answer

8.5 The advice we gave in our June report was that first and foremost, it is for Parliament to decide if and when the rule should now be modified or removed.

8.6 We have now been asked what, if anything, could provide greater certainty to this decision. We set some considerations for Parliament and Government below.

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[9] Section 350/schedule 14 of the Communications Act 2003 Part I. The restrictions apply to both licensees/newspaper owners and persons controlling licensees/newspaper owners, the participation threshold being 20%.

[10] A broader version of the rule existed in the Broadcasting Act 1990.

[11] http://stakeholders.ofcom.org.uk/binaries/consultations/morr/statement/morrstatement.pdf

8.7 Our recommendation is that there are two forms certainty can take, relating either to the underlying source of concern, or to the choice of remedy. In both cases, the conclusion of the first periodic review is likely to provide greater certainty than is currently available.

Considerations for Government/Parliament

8.8 Parliament may wish to ask two distinct questions:

- Is the underlying concern that the 20/20 rule was designed to address (an unacceptable concentration of influence) still relevant?
- To the extent that the underlying concern is still relevant, is the 20/20 rule the most effective way of addressing it?

8.9 The factors that might inform the first of these questions might include: (i) the relative importance of the national newspaper and TV news markets (and ITV's news bulletins in particular) compared to online sources of news; and (ii) the commercial sustainability of news media providers (particularly newspaper groups).

8.10 Parliament may wish to consider how communications markets and the news media industry have evolved since the rule was first set. In particular, since 2003**:**

- **Multi-channel digital television** (including rolling news channels) is now available in nearly 100% of homes (96.2%) compared to 48% in 2003[12].
- **Share of national and international news.** The BBC's share has increased from 59% in 2003 to 74% in 2011. ITV's share continues to decline, falling from 27% to 14% over the same time period. Sky's share has increased slightly from 6% to 8%[13].
- **Circulation of print-based news media.** Over the past ten years, the average net circulation of national newspapers has decreased by 37%[14]. Tabloid newspapers, which accounted for 47% of total circulation in 2011, have seen the largest decrease, with average net circulation falling by 49% between 2001 and 2011. Broadsheets have experienced a fall of 32% and mid-market newspapers have lost 21% of net average circulation.
- **Take-up of fixed broadband** has risen from 31% of households in 2005 to 76% in 2012[15].
- **Smartphone access**, providing access to the internet on the move, is now at 39% of all adults in comparison to little or no take-up in 2003[16].

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[12] See Figure 2.4. Ofcom Communications Market Report 2012: http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr12/

[13] Source: BARB, All Adults 16+, National/International News genre. See paragraph A4.84 of Annex 4 to our June 2012 report on measuring media plurality: http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/Annex4.pdf

[14] ABC figures - total average net circulation for all national newspapers, including national and Sunday titles.

[15] See Figure 1.3. Ofcom Communications Market Report 2012.

[16] See Figure 1.4. Ofcom Communications Market Report 2012.

- **Online news** is steadily growing, with 41% of UK adults using the internet for news 'nowadays'[17], representing a broad upward trend from 27%[18] who 'ever used' it in 2007 and 15% who 'ever used' it in 2002. Of online sources of news[19], the BBC has the highest reach, with 11.0 million people aged 2+ using its news 'channels'[20] in December 2011. DMGT and Yahoo have the next highest reach, with 6.6 million and 4.1 million reach respectively. News Corp has the fourth highest reach, with 3.4 million people.

8.11 The main factor that might inform the second of the two questions – i.e. whether the 20/20 rule is the most effective way of addressing the original policy aims - is the extent to which a new regulatory regime, based on periodic reviews, might address these same aims. This can only be decided with any certainty once the first periodic review is complete.

[17] See paragraph 5.40 of our June 2012 report on measuring media plurality.
[18] See http://stakeholders.ofcom.org.uk/binaries/research/tv-research/newnewsannexes.pdf.
[19] Source: ABC / Mediatel. Aggregate newspaper circulation, daily national newspapers only, excluding regional newspapers. See paragraph A4.89 of Annex 4 to our June 2012 report on measuring media plurality.
[20] The system used by UKOM classifies parts of websites as 'channels' and assigns these channels a genre. It is the use of these channels which is monitored and recorded.

Question b.ii)

Market exit

The Secretary of State's question

> *"I would be grateful if you could provide advice on the circumstances under which a significant example of market exit might trigger a review"*

Introduction

9.1 The key recommendation in our June report was the introduction of a periodic review of plurality, in addition to the existing public interest test for media mergers. This was designed to address a gap in the current plurality assessment framework (no provision to trigger a review due to organic growth), without removing the certainty that the market needs in order to invest for the future.

9.2 We acknowledged that this proposal did not cater for the specific circumstances surrounding news media market exit. We said that exit might also present grounds for a plurality review, on the basis that there would be a reduction (by one) in the availability of news media players and an increase in the concentration of the remaining news media providers. This in turn could prompt concerns that news consumption was concentrated in the hands of fewer providers, increasing the capacity of each to influence opinion and the democratic debate.

9.3 We concluded that an exit trigger might be desirable if a mechanism could be designed that avoided subjecting the market to continuous review, and avoided too heavy a reliance on discretion. We said that the need for such a trigger would also depend on the frequency of any periodic reviews.

Considerations for Government/Parliament

9.4 In response to the Secretary of State's question, we have further examined the challenges associated with creating a market exit trigger, and the mitigations that could be put in place if Parliament wanted to proceed.

9.5 To inform our thinking we have considered a number of historic examples of news media market exits and events. For example:

- **ITV news channel closure (2005):** Having attracted a small share of viewing, the channel was closed on the grounds that its transmission capacity was required for other service launches. The plurality effect was the permanent loss of a rolling news channel (provided by an existing wholesaler of news ITN), with no other market entrant taking its place. An exit review would probably have concluded that economic arguments (its capacity was better used for other services) were the underlying cause for the channel's closure and it is unclear what remedies could have been applicable.

- **News of the World closure (2011):** The paper closed on 10th July 2011. Other Sunday titles picked up market share, although it is likely that some readers were lost from the Sunday market completely. The Sun on Sunday launched on 26th February 2012. An exit review would not have been able to assess properly the steady-state effects of the closure until a year after the event – when it would

have been likely that no plurality concerns would have been identified, given the presence of a replacement title.

9.6 We have identified three main challenges associated with an exit trigger.

1. It is difficult precisely to define the trigger for a market exit review

9.7 In looking to develop a market exit trigger, it has become apparent that the potential concern is broader than pure market 'exits', encompassing a range of market 'events'. These might include:

- the market exit of a major news supplier;
- the closure of a major newspaper title or TV channel; or
- a change in commercial strategy, which has a material impact on consumption.

2. The effects of a market exit cannot be forecast with certainty

9.8 The effects of a merger are targeted and specific, in contrast to the more dispersed impact of exit. Specifically, the concentration resulting from a merger is predictable, since the resulting market share, at least in the short term, is the sum of the market shares of the merging entities. The concentration resulting from market exit is less predictable, since it is unclear at the point of exit what will happen to the customers of the firm that exits the market.

9.9 At the time of a merger there is usually additional documentary evidence from the merging parties setting out the rationale of the merger, and how this is likely to influence the shape of the market over the medium term. The same level of documentary evidence is not usually available in cases of market exit.

9.10 It would be possible at the point of market exit for a reviewing body to model the likely effects, based on forecasts of how the market is likely to evolve, and the likely destination of the customers of the firm that exits the market. Such forecasts may be sufficiently accurate to identify potential concerns arising from market exit. Whether this is sufficient to justify a specific intervention will depend on the specific facts.

9.11 Firm evidence on the effects of market exit would of course become available over time. The optimum time to review a market exit is likely to be when there is a reasonable level of evidence as to its effects, but before the effects become irreversible. This would be difficult to pinpoint, but our judgement is that the optimum time is probably about a year after market exit.

3. It is unlikely to be possible to prevent market exit

9.12 As a general rule it is unlikely to be possible to prevent market exit of commercial entities, unless the Government is willing to provide some form of subsidy to the failing firm. Therefore the case for some form of review at the point of exit depends to some extent on the appetite for such subsidies, and the ability to address any associated state aid concerns. This is a matter for Government.

9.13 It may be possible to take action to prevent market exit in circumstances where this is a direct consequence of regulation (for example, unsustainable PSB quotas) but we would normally expect the need for such action to have been identified and acted on well before the actual market exit.

9.14 If it is not possible to prevent exit, then any remedies resulting from exit would have to apply to the remaining firms in the sector. However, interventions of this nature do not have to take place precisely at the point of exit.

Ofcom answer

9.15 There may be exceptional circumstances under which market events other than mergers could have a material impact on plurality, and where there is benefit in examining any implications ahead of the next periodic review.

9.16 The need for such a review could be reduced by shortening the time between periodic reviews from five to four years. However, this would not remove the risk that a market event occurs immediately after the conclusion of one periodic review, so that the reviewing body cannot examine any potential plurality implications for another three to four years. We would not recommend shortening the time between periodic reviews to less than four years.

9.17 The market events which might appropriately trigger a review are difficult to define and inherently unpredictable. Therefore, if Parliament is minded to include provisions for an event-based trigger, a degree of discretion is likely to be required.

9.18 However, too heavy a reliance on discretion is clearly undesirable, due to the uncertainty it creates. If there is an event-based trigger, then a high threshold is required to ensure that only the most significant market events are captured. This could be via an affirmative order (requiring a positive vote in Parliament), or by the issuing of a Ministerial direction.

9.19 Such a discretionary trigger might also be accompanied by a time delay, so that the review would not start until sufficient time had elapsed for the effects of the event on the market to be properly assessed.

Annex 1

The existing process for merger control

Introduction

A1.1 The regime for plurality review of mergers is best seen as a 'bolt-on' to a wider and more frequently-used regime for examining the impact of mergers on competition.

A1.2 In order to be capable of triggering a public interest review, a transaction must

- involve two enterprises[21] "ceasing to be distinct"[22]; and
- meet a jurisdictional threshold – based on either turnover (£70m) or share of supply/demand (25%).

Mergers that are subject to intervention on public interest grounds

A1.3 Three different but mutually exclusive kinds of merger may be subject to intervention on public interest grounds. The distinction between the three types is nothing to do with plurality – it is simply whether or not the merger is also subject to competition review and, if it is, by what body.

- European mergers are subject to competition review. The EU process applies: mergers must be notified in advance to the European Commission and it has jurisdiction for competition purposes except in defined circumstances.
- UK "relevant mergers", which are typically smaller than European mergers, are subject to competition review. The UK process applies: the merger may be notified in advance or may be looked at *ex post* by the OFT for competition purposes. If the turnover threshold is not met, then the share of supply/demand threshold to be a UK relevant merger requires the merger to cause a change in the share of supply/demand (i.e. both parties must be active in the market).
- Finally, "special public interest cases" are not subject to competition merger control but plurality review is still possible if just one party supplies at least 25% of newspapers of any description, or broadcasting of any description, in the UK or a substantial part of the UK. (The logic of this is that there is hardly any risk that a merger which is small and causes no changes to market shares in a relevant market will represent a competition problem, but it might for example affect the plurality of views in newspapers).

Public interest grounds for intervention

A1.4 There are a number of possible public interest grounds for intervention. They include non-media issues such as national security. It is not impossible that a merger might raise e.g. both national security and media public interest concerns and the current framework allows for this. The existing list of public interest considerations can be changed at any time, including after a merger has happened

[21] An "enterprise" is the activities, or part of the activities, of a business.
[22] There is however, provision to capture both gradual and partial changes of control, including control by means other than acquisition of shares, (e.g. contract).

in relation to which the Secretary of State considers a new public interest consideration is relevant[23].

A1.5 The "media public interest considerations" are currently:

- Section 58(2A): The need for accurate presentation of news and free expression of opinion in newspapers;
- Section 58(2B): The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK;
- Section 58(2C)(a): The need, in relation to every different audience in the UK in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;
- Section 58(2C)(b): The need for the availability throughout the UK 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
- S.58(2C)(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.

A1.6 A media merger could trigger more than one of these considerations. However, interventions to date have specified only one: section 58(2C)(a) - plurality of persons with control of media enterprises.

Process for conducting competition and plurality reviews

A1.7 Both EC and UK merger control for competition purposes involve two phases. The first stage is a filter: it is there to ensure that only cases which may raise competition concerns go through the onerous phase-two process, and there is a chance for merging parties to avert that (usually by offering divestments).

A1.8 The process for plurality review is most closely aligned with the process for competition review of a UK "relevant merger", except that competition review is automatic and plurality review is not. Intervention in any type of merger is at the discretion of the Secretary of State. She needs reasonable grounds to suspect that the merger meets jurisdictional thresholds and must believe that the public interest ground she specifies may be "relevant" to the merger. The issue – or not - of an intervention notice therefore acts as a first filtering stage.

A1.9 Where an intervention notice specifies a media public interest consideration, Ofcom is required to report to the Secretary of State on whether, having regard only to the public interest consideration specified in the intervention notice, it is or may be the case that the merger may be expected to operate against the public interest. If it is

[23] Where this is the case, the Secretary of State issues the intervention notice specifying the new public interest consideration, but must then confirm it by a statutory instrument which requires Parliament's affirmative approval. If the merger concerned is an EC merger, the UK must notify the proposed new public interest consideration to the European Commission before taking measures to protect the relevant consideration. The European Commission then has 25 working days to say whether it is permissible.

a UK-relevant merger, the OFT simultaneously considers whether a reference to the CC is required for competition. It may also comment on any public interest consideration. If it is an EC merger, the European Commission's competition process is completely separate. If it is a "special case" there is no parallel competition process.

A1.10 Once Ofcom and the OFT have reported in accordance with the intervention notice, it is for the Secretary of State to determine at her discretion whether or not the merger should be referred to the CC for further review of plurality concerns and, if necessary, consideration of remedies. This acts as a second filtering stage. If she decides not to refer on public interest grounds, the process reverts to the normal competition process and she has no further say[24].

A1.11 On receipt of the CC's report the Secretary of State must decide within 30 days whether or not to make an adverse public interest finding. She must have regard to the CC's findings on this but is not bound by them. If she does not make an adverse public interest finding, the process reverts to the usual competition process in which she has no say. If she makes an adverse public interest finding, the decision as to remedies overall is up to him/her. There is no duty for him/her to remedy competition issues if this would have an adverse effect on plurality. On the other hand, in considering plurality issues, it is at her discretion to give weight to any relevant customer benefits arising from the merger[25].

A1.12 When the merger is a European merger, competition review and plurality review take place in parallel, but separately. The EU considers the competition issues and the UK considers the plurality issues. It has never happened that an EU case has led to a need for competition remedies and plurality remedies simultaneously, but it is clearly a possibility within the current framework. The European Commission has no power to take into account plurality matters when making decisions on a merger. In practice, a later decision-maker simply has to factor-in the decisions of the earlier decision maker to its own thinking. It is for the parties (who wish to proceed with the merger) to come up with a way of satisfying them both.

[24] S.56(2).
[25] S.55 Enterprise Act 2002. Relevant customer benefits are price, choice, quality or innovation.

Annex 2

Examples of remedies

Past remedies to address plurality concerns

Figure 7: Examples of past remedies to address plurality concerns

Remedy (date)	Aim	Outcome	Regulators
Structural remedies			
BSkyB/ITV plc (2007/08) The completed acquisition by BSkyB of a 17.9% stake in ITV was a UK merger.	Ofcom considered the plurality public interest consideration of the merger and recommended a reference to the Competition Commission (CC)[26]. The OFT advised it was, or may be, the case that the merger may be expected to result in a substantial lessening of competition[27].	The Secretary of State (SoS) referred the case to the CC. The CC[28] considered that the transaction raised competition issues but not plurality issues On its recommendation, the SoS required BSkyB to sell shares so as to reduce its holding to below 7.5%[29].	Ofcom OFT CC
Hybrid remedies (Structural/behavioural)			
NewsCorp/BSkyB (2010/11) Proposed transaction by News Corporation of the shares in BSkyB that it did not own.	Ofcom concluded that it may be the case that the proposed transaction may have been expected to operate against the public interest, and that it should be referred to the CC. The basis for the Ofcom concerns as to media plurality was the loss of Sky News as an independent broadcast news voice. In response, NewsCorp offered undertakings in lieu (UILs)[30] of a reference to CC, including a commitment that Sky News would be spun off as a UK public limited	The SoS asked Ofcom to advise him on whether the proposed UILs met the plurality concerns identified in the PIT report[31] and asked the OFT to advise him on their practicability. After a period of negotiation and consultation, Ofcom and the OFT recommended that a revised set of UILs be accepted[32]. Before the SoS came to a decision on them, News Corporation withdrew the UILs and offer to acquire the BSkyB	Ofcom OFT

[26] http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file39607.pdf.

[27] http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file39606.pdf.

[28] http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2007/fulltext/535

[29] http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file44136.pdf.

[30] http://www.culture.gov.uk/images/publications/News_Corp_to_SoS_undertakings_in_lieu_roposal_18_Jan_11.pdf

[31] http://stakeholders.ofcom.org.uk/binaries/consultations/public-interest-test-nov2010/statement/public-interest-test-report.pdf

[32] http://www.culture.gov.uk/images/publications/Ofcom_to_SoS-_further-advice-UIL_220611.pdf

	company, with shareholdings distributed as per the existing shareholdings in BSkyB.	shares.	
Behavioural rules that may help to increase levels of internal plurality			
Supply of National Newspapers **(1993)**	Following a reference from the Director General of Fair Trading, the Monopolies and Mergers Commission (MMC) reported on the supply of national newspapers in England and Wales[33]. In its report, it identified practices by newspaper wholesalers which may be expected to have operated against the public interest. To remedy these adverse effects, each of the newspaper wholesalers in England and Wales gave a statutory undertaking under the Fair Trading Act to comply with a National Newspapers Code of Practice.	The remedy was reviewed periodically by the OFT. On the 3rd review in 2008[34], the OFT recommended that those parties which gave undertakings to comply with the Code could be released from them and the Code in its entirety.	MMC OFT
Times / Sunday Times **(1981)**	In 1981, The Times and The Sunday Times were bought from Thomson by Rupert Murdoch's News International. The Times and The Sunday Times positions on news coverage, editorial stance and appointment of editors are governed by the terms of the consent from the Department of Trade and Industry (DTI) relating to the transfer of these titles to their current ownership. These arrangements provided for the creation of 'independent national directors' (INDs) in the holding company of Times Newspapers Holdings Limited. The articles of association of that holding company include provisions aimed at maintaining the editorial independence of the titles, such as the requirement that the majority of the INDs must consent to the appointment or dismissal of the editor of either newspaper title.		DTI
Behavioural rules that enforce standards			
Behavioural rules that are already in place are not remedies *per se* as they apply sector-wide and on an *ex ante* basis. However, elements of their design could be used to create a new code applicable to one firm or all of the market. For example, the Broadcasting Code delivers behavioural rules for licensed broadcasters, and while we would not propose that this is extended to other media, there may be elements of it that could mitigate concerns about news organisations judged to represent a threat to plurality, in much the same way that impartiality rules do so to providers of TV news. E.g. an accuracy requirement on newspapers that goes beyond the current requirements of the Press Complaints Commission.		
Behavioural remedies to secure access			

[33] http://webarchive.nationalarchives.gov.uk/+/http://www.competition-commission.org.uk/rep_pub/reports/1993/345natnewspapers.htm
[34] http://www.bis.gov.uk/files/file48636.pdf

Must Offer	A must-offer obligation could require a news provider to provide its content to any entity meeting specified criteria, for free or at a price (which might be regulated).	Existing obligations are set out in Sections 272 and 273 of the Communications Act. We note that as drafted they enhance the negotiation power of the platforms vis-a-vis the PSB channels.	Ofcom
Must Carry	A must-carry obligation could require a distribution platform or services to distribute the content of news providers meeting specified criteria, for free or at a price (which might be regulated).	The Communications Act contains a provision to introduce must-carry obligations on electronic communications networks[35], although we note that this definition does not capture satellite platforms. The Act enables Ofcom to set general conditions to secure the transmission of the PSB channels (and ancillary services) on a given network (platform) when it is used by a significant number of end-users as their principal means of receiving TV programmes. We note that these rules were designed to secure and maintain widespread distribution of PSB channels, at a time when digital platforms were still new. To date it has not been necessary to use this clause to mandate a platform to broadcast a PSB channel.	Ofcom
Positive interventions			
PSB obligations on Channel 3 and 5 licencees **(Ongoing)**	The holders of the Channel 3 and Channel 5 licences are subject to a number of licence conditions not placed on other television licensees (e.g. nations and regions news, out-of-London and independent production commissioning quotas). In return for fulfilling obligations, they receive a range of benefits including prominence on electronic programme guides (EPGs) and reserved/gifted multiplex capacity.	The Channel 3 and Channel Five broadcast licences are due to expire on 31 December 2014. Ofcom has a duty under the Communications Act 2003 to report to the Secretary of State about matters which are relevant to the question of renewal. We published our advice to the SoS in May 2012[36].	Ofcom

[35] Section 64 transposes Article 31 of the Universal Service Directive, which sets out the basis on which Member States may impose must-carry obligations on universal service and users' rights relating to electronic communications networks and services (since amended by Order).
[36] http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/c3_c5_licensing.pdf

S4C Public funding of an Welsh language channel **(Ongoing)**	S4C is the only Welsh language public service broadcaster. Historically, S4C's primary source of funding was the UK Department for Culture, Media and Sport (DCMS).	In 2010, DCMS announced that the majority of S4C's funding would be from the TV licence fee from 2013. The BBC Trust and the S4C Authority have developed a draft Operating Agreement for the new funding and accountability arrangements. They are now consulting publicly[37].	DCMS BBC Trust
Behavioural remedies to secure access			
Must Offer	A must-offer obligation could require a news provider to provide its content to any entity meeting specified criteria, for free or at a price (which might be regulated).	Existing obligations are set out in Sections 272 and 273 of the Communications Act. We note that as drafted they enhance the negotiation power of the platforms vis-a-vis the PSB channels.	Ofcom
Must Carry	A must-carry obligation could require a distribution platform or services to distribute the content of news providers meeting specified criteria, for free or at a price (which might be regulated).	The Communications Act contains a provision to introduce must-carry obligations on electronic communications networks[38], although we note that this definition does not capture satellite platforms. The Act enables Ofcom to set general conditions to secure the transmission of the PSB channels (and ancillary services) on a given network (platform) when it is used by a significant number of end-users as their principal means of receiving TV programmes. We note that these rules were designed to secure and maintain widespread distribution of PSB channels, at a time when digital platforms were still new. To date it has not been necessary to use this clause to mandate a platform to broadcast a PSB channel.	Ofcom

[37] http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/09_08_12_bbc-s4c.pdf

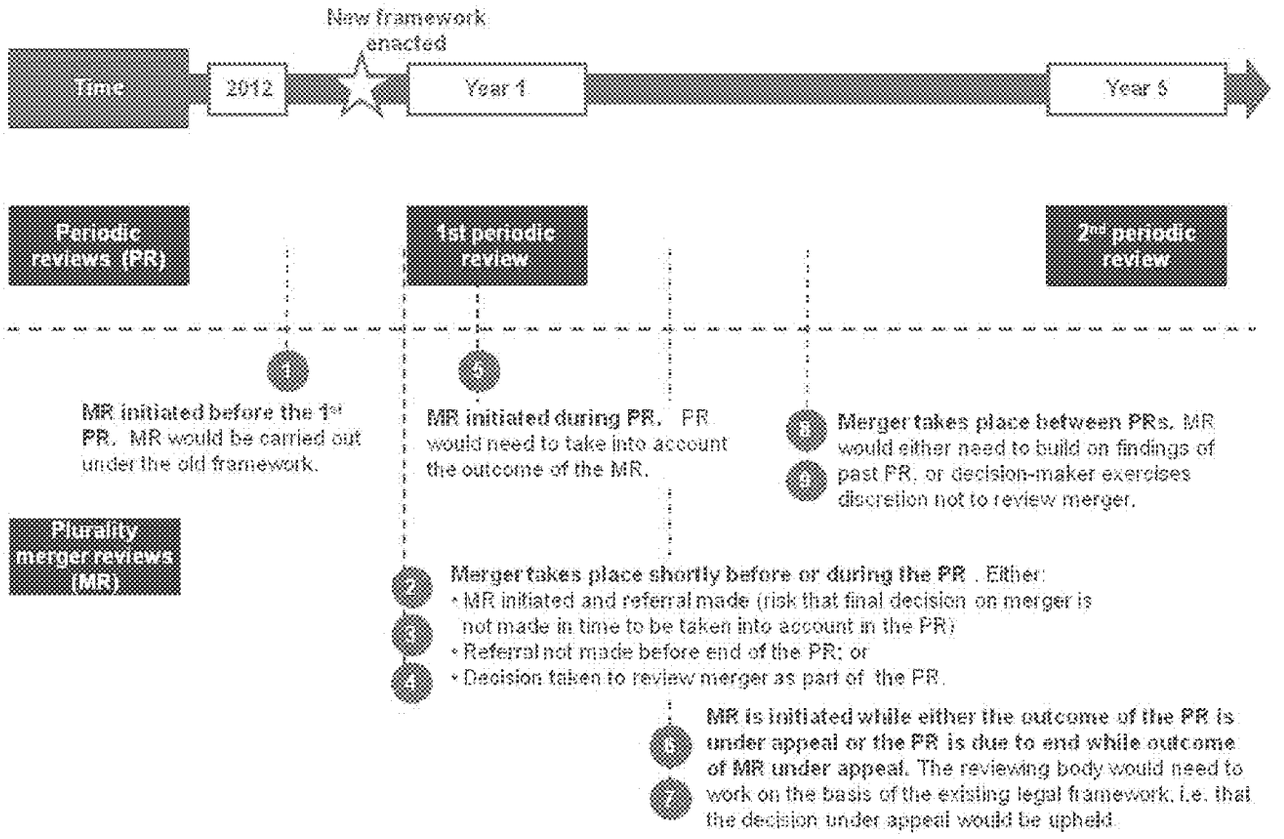
[38] Section 64 transposes Article 31 of the Universal Service Directive, which sets out the basis on which Member States may impose must-carry obligations on universal service and users' rights relating to electronic communications networks and services (since amended by Order).

Annex 3

Scenarios for the concurrent operation of merger and periodic reviews

Summary

Figure 8: Timeline of scenarios for operation of merger and periodic reviews



Scenarios

Scenario 1: Merger review is initiated prior to completion of the first review.

A3.1 Ofcom has proposed that the first periodic review set out a substantial analysis of plurality in the UK and that it form the bedrock for subsequent thinking. This creates the difficulty that it is entirely possible that a merger will fall to be reviewed before the first review has been carried out.

A3.2 That is, of course, essentially the position now. To draw a bright line between the two regimes, one option would be a transitional regime: prior to completion of the first review, merger review would be carried out under the old framework.

Scenario 2/3/4: Merger takes place shortly before or during the periodic review

- 2: Merger takes place shortly before or during the periodic review, a decision is required on whether or not a merger review should take place;

- 3: Merger review is initiated shortly before or during the periodic review, a decision on whether the merger should be referred to the Competition Commission is taken before the end of the periodic review but a final decision on the merger is made either after the end of the periodic review, or too short a time before the deadline for the periodic review to be taken into account;

- 4: Merger review is initiated during the periodic review, a decision on whether the merger should be referred to the Competition Commission is taken after the end of the periodic review.

A3.3 Assuming there was discretion over whether or not to trigger plurality reviews of mergers, some understanding would be needed of how that discretion should be exercised in circumstances where a periodic review was either about to start, or was ongoing.

A3.4 Where the merger concerned had already been completed, and assuming the tests involved in assessing plurality on a merger and on periodic review were sufficiently similar, it may be proportionate to carry out only the periodic review. However, this could leave the merged entity and industry generally in uncertainty for longer than would otherwise be the case. Under current laws, lack of an intervention notice would mean there was no power for the regulator to ask for/order "hold-separate" provisions pending merger review.

A3.5 Assuming intervention would be appropriate, an option would be to say that timetables for the merger review and the periodic review should automatically be rolled into one. However, this would potentially delay clearance for mergers for a very long time and could have a chilling effect on M&A activity in the year prior to the start of a periodic review.

A3.6 It may not be necessary to delay review of such mergers. For scenarios in which an intervention had taken place, the periodic review would have to assume that any *additional* plurality issues created by the merger would be dealt with by the merger review process, so the decision must be based on the pre-merger position. There would, however, be significant challenges in taking a forward view of the market more generally, where the merger was both large and important.

A3.7 A possibility exists that the pre-merger position of one of the merging parties could be taken to be problematic. It is difficult to see a merger which exacerbated such a position being approved. However, it may be desirable to have a power (but not a duty) to defer a decision in relation to the periodic review, until after the merger review process had completed.

<u>Scenario 5: Merger review is initiated during periodic review, decision on reference and final decision take place before end of periodic review</u>

A3.8 The periodic review would take into account the outcome of the merger review. If two different bodies were carrying out the analysis, they would need to work very closely together. There may be a need for a grace period at the end of the periodic review, either providing for an extension in circumstances when a merger was decided near to the deadline, or to ensure that a decision could be based on pre-merger data. However, if the same body were carrying out both merger and periodic review, this would be less likely to be necessary.

Scenarios 6 and 7: Merger review is initiated while the outcome of the periodic review is under appeal/periodic review due to end while outcome of merger review under appeal

A3.9 In the absence of special provision, the reviewing body would need to work on the basis of the existing legal framework, i.e. that the decision under appeal would be upheld. The alternative would be to create a power to stay a decision on the merger until the appeal was decided. This would avoid the risk that a merger would be approved on the basis that a remedy was in place, which would not have been approved were the remedy not in place.

Scenario 8 - Merger review is initiated in the period between periodic reviews.

A3.10 The merger review would need to build on the findings of the most recent periodic review. A periodic review would take the findings of any recent merger review into account. Any variance from those findings would need to be based on new material evidence.

A3.11 The main challenge in this scenario is as follows. The merger control process is currently a two-stage process involving three entities: the Secretary of State (who does not carry out the substantive work but is informed by it in making decisions); Ofcom, and the Competition Commission (both of which carry out the substantive work). The entities involved in periodic reviews are yet to be determined and because the review is automatic there is no obvious need for the work to be phased. However, particularly given that a plurality review involves judgements and the exercise of discretion, there is a clear risk of incompatible decision-making if different bodies carry out the periodic review and second-phase merger control. This tends to suggest that the same body should carry out these functions.

A3.12 One option, in relation to double jeopardy, is simply to acknowledge that divestment remedies are likely to be rare as the outcome of a periodic review, and that a regulator is unlikely to impose such a remedy without a clear and compelling concern.

A3.13 If this were not acceptable, it is difficult to see how "double jeopardy" could be ruled out, except by providing a post-merger grace period during which no remedy could be imposed. Such a bar on remedies might do more harm than good since it (a) would suggest that, even if all other providers in the sector exited between merger clearance and periodic review, no divestment remedy could be considered; and (b) if a merger clearance found "no change" to plurality – e.g. as the Competition Commission did in Sky/ITV - this may block future remedies relating to the pre-merger position.

Scenario 9: Merger takes place between periodic reviews, but merger review is not initiated

A3.14 This scenario assumes that some discretion would remain for a decision-maker to choose that a merger not be reviewed.

A3.15 The periodic review would need to look at the existing market position. This could lead to parties actively lobbying for intervention in their merger at the time it took place, in order to reduce the risk that a periodic review in a few years' time would unwind it or lead to unforeseen remedies. There would be a possible administrative burden/cost to the UK as a whole of reviewing more mergers than would otherwise be the case.