



Media Plurality Assessment as a Public Interest concern in Merger Control in the UK

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Abstract:	<p>In the UK, after the enactment of the Communications Act 2003, amending the Enterprise Act 2002, the assessment of mergers involving broadcaster and/or newspaper enterprises is subject to a public interest standard. Under this standard, the review does not aim to determine whether a transaction could provoke a "substantial lessening of competition." Instead, certain media mergers need to be assessed pursuant to the following considerations: media plurality, broadcasting standard objectives and free expression of opinion grounds. While the statute defines these terms ambiguously, it does provide guidance to the Secretary of State, the competition authority and the courts to decide how the statute was meant to be applied consistently. Nonetheless, this approach carries the risk of giving unfettered discretion to these authorities, and little room for the merging parties to argue against. Also, the application of this standard poses a high risk of politically biased decision making.</p>

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In the UK, after the enactment of the Communications Act 2003, amending the Enterprise Act 2002, the assessment of mergers involving broadcaster and/or newspaper enterprises is subject to a public interest standard. Under this standard, the review does not aim to determine whether a transaction could provoke a “substantial lessening of competition.” Instead, certain media mergers need to be assessed pursuant to the following considerations: media plurality, broadcasting standard objectives and free expression of opinion grounds. While the statute defines these terms ambiguously, it does provide guidance to the Secretary of State, the competition authority and the courts to decide how the statute was meant to be applied consistently. Nonetheless, this approach carries the risk of giving unfettered discretion to these authorities, and little room for the merging parties to argue against. Also, the application of this standard poses a high risk of politically biased decision making.

Keywords: merger control, public interest standard, media plurality, broadcasting standard objectives, free expression of opinion grounds, political intervention

Introduction

Many countries have exclusive merger control rules for specific sectors of the economy. The rules vary in terms of sector, scope of intervention, levels of jurisdictional thresholds, and application of tailored substantive tests to assess the transactions in these sectors. At the EU level, for example, Member States are entitled to retain jurisdiction over concentrations that raise public interest concerns *inter alia* in relation to the media sector, under standards that allow their prohibition based on broad concerns different from just competition ones (EUMR, Art. 21(4)).

The concept of public interest itself varies considerably from one jurisdiction to the other. There is wide diversity of what jurisdictions consider to be public interest, starting from total welfare criteria to economic and non-economic (e.g. plurality of media, national security) considerations.

In the UK, prior to the entry into force of the Enterprise Act 2002 (EA 2002), mergers were officially reviewed under the broad public interest test of the Fair Trading Act 1973, which included competition considerations. With the enforcement of EA 2002 in 2003, two significant changes took place. Firstly, the primacy of a competition-based test was made explicit. Secondly, considerations of national security or considerations modified by the Secretary of State through an order that could be taken into account in merger assessment were included in the Act. The UK merger control regime allowed for intervention in mergers by the Secretary of State (SoS) on national security and media plurality grounds. Also, there is a safeguard procedure, under which ministers can give notice of an additional public interest ground, if it happens to arise in a particular case, and seek the approval of the parliament to use it. The SoS

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3 can also intervene in a very limited number of cases on public interest grounds where the
4 jurisdictional thresholds are not met. In case of a media merger suspected to raise public interest
5 concerns, following a public interest intervention notice (PIIN), the Office of Communications
6 (OFCOM) should provide a report to the SoS on “the effect of the consideration or
7 considerations concerned on the case” (EA 2002, s. 44A; CMA, 2022, para 16.6).
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17 The public interest regime created by EA 2002 represents a shift in several respects. Firstly, the
18 notion of public interest under EA 2002 formalized practice that was existent since the Tebbit
19 doctrine in 1984, and excluded the competition law-based ‘substantial lessening of competition’
20 (SLC) test from its scope. In other words, the Act draws a clear distinction between competition
21 law considerations and other ‘public interest considerations’ in merger control, instead of an
22 overarching notion of public interest. Secondly, from an institutional point of view, while the
23 Act leaves no room for political intervention with respect to SLC-based merger assessments, it
24 mainly preserves the former institutional approach regarding public interest mergers. Arguably,
25 the earlier institutional setting had the risk of the competition law regime being subject to
26 political interventions (Mor & Browning, 2018, p. 11; Fingleton, 2018, pp. 3-4; Stephan, 2011,
27 p. 541; Reader, 2015, p. 93).¹ However, it also strengthens the idea that public interest
28 interventions are mainly political, thereby not objective (Reader, 2015, p. 106). Finally, the Act
29 sets public interest criteria as an exceptional intervention mechanism. The latter is two-folded.
30 Firstly, the Act limits its public interest considerations to particular concerns specifically listed
31 under the Act. Secondly, it confers an exceptional power to SoS to add a new public interest,
32 subject to subsequent parliamentary approval.
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60 ¹ The Fair Trading Act regime still afforded ministers the opportunity to depart from the Monopolies and Mergers
Commission’s advice in order to pursue public interest goals, if they so wished.

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3 Substantive public interest considerations are listed *numerus clausus* in s. 58 of EA 2002.
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5 However, section 58(3) provides for an exceptional mechanism that allows for introducing new
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7 public interest concerns by the SoS. Section 58(3) states that: “The Secretary of State may by
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9 order modify this section for the purpose of specifying in this section a new consideration or
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11 removing or amending any consideration which is for the time being specified in this section.”
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14 The newly added public interest consideration then has to be approved by both Houses of
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16 Parliament (Reader, 2015, p. 96).
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22 Considerations specified by s. 58 of EA 2002 currently consist of media plurality,² the stability
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24 of the UK financial system (inserted in 2008)³ and as recently as 2020, in the wake of the Covid
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26 pandemic, the capability of UK to respond to public health emergencies.⁴ Originally, national
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28 security was the only public interest consideration in EA 2002 which was repealed by the
29
30 National Security and Investment Act 2021.⁵ Subsequently, media plurality was added as a
31
32 public interest consideration by the Communications Act 2003 (CA 2003) and the stability of
33
34 the financial system has been added by order as a public interest concern during *Lloyds/HBOs*
35
36 merger in 2008 (Lloyds TSB plc / HBOS plc, 2008). Finally, the ability of UK to combat and
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38 mitigate the effects of public health emergencies was inserted through the Enterprise Act 2002
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40 (Specification of Additional Section 58 Consideration) Order in 2020.
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48 **Media Plurality, Broadcasting Standards Objectives and Free Expression of Opinion**

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54 ² Inserted (December 29, 2003) by Communications Act 2003 (c. 21), ss. 375(1), 411(2)(3) (with transitional
55 provisions in Sch. 18); S.I. 2003/3142, art. 3(1), Sch. 1 (subject to arts. 3(3), 11).

56 ³ Inserted (October 24, 2008) (with application in accordance with art. 1(2) of the amending S.I.) by Enterprise
57 Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (S.I. 2008/2645), arts. 1(1), 2.

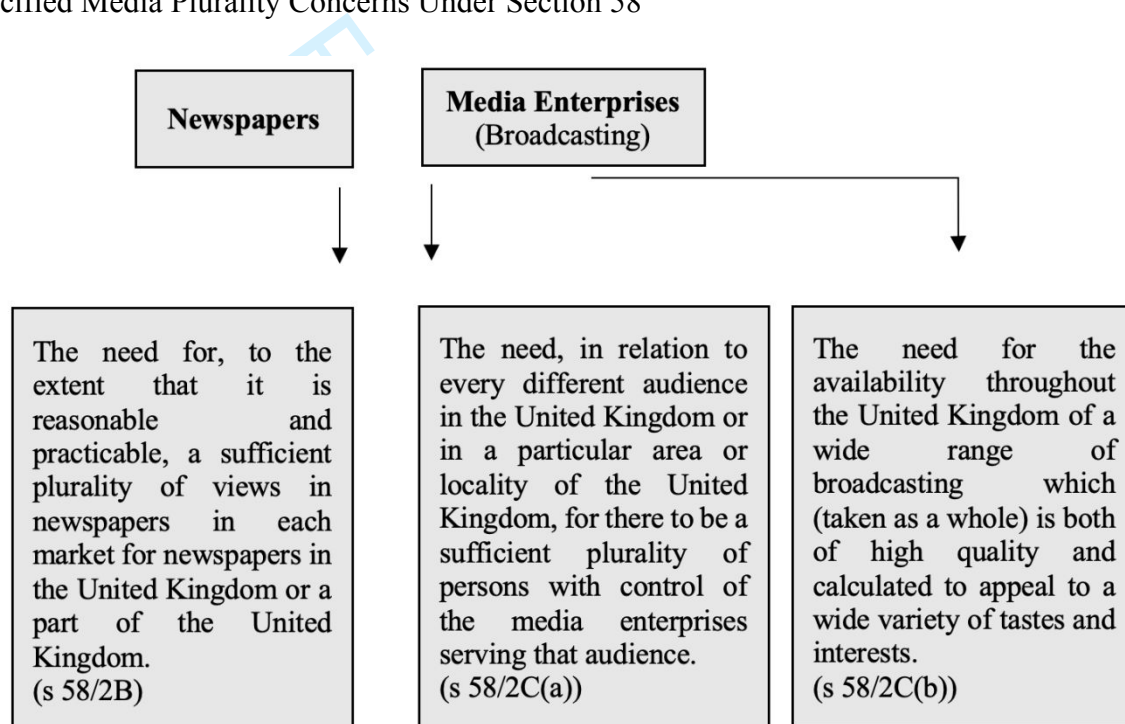
58 ⁴ Inserted (June 23, 2020) by Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order
59 2020 (S.I. 2020/627), arts. 1(1), 2.

60 ⁵ Repealed (January 4, 2022) by virtue of National Security and Investment Act 2021 (c. 25), s. 66(3), Sch. 2 para.
7 (with s. 62); S.I. 2021/1465, regs. 2, 3 (with regs. 4, 5).

EA 2002 specifies three categories of public interest grounds with respect to media mergers: (i) media plurality, (ii) broadcasting standards objectives (BSOs) and (iii) free expression of opinion grounds (FEGs). The specified media plurality concerns under section 58 are shown in Figure 1.

Figure 1

Specified Media Plurality Concerns Under Section 58



As could be followed from the diagram, the Act essentially lays down its public interest considerations for only two business models: newspapers and media enterprises (broadcasting). Significantly, though, it does not cover online media enterprises.⁶ As will be further explored

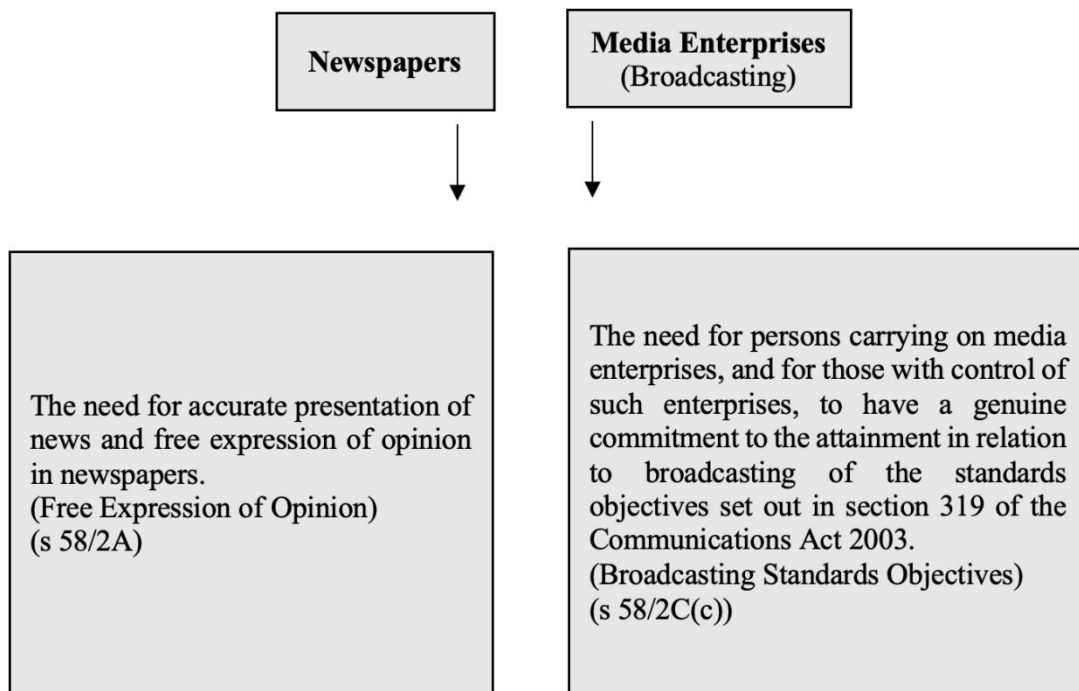
⁶ It should be stressed at this point that while the 2002 Act does not cover online media undertakings, OFCOM and CMA's media plurality assessment framework includes all the print, TV, radio and online media.

below, the issue is particularly notable as online platforms become more and more powerful in terms of influencing the public opinion.

EA 2002 does not only deal with media plurality with regard to media mergers. It also tackles the issues of protecting BSOs within the broadcasting enterprises and FEGs within the newspapers. This is interesting because one would normally expect those to fall under the ongoing regulatory duties of OFCOM, which is also the case. The said specified considerations are shown in Figure 2.

Figure 2

Free Expression of Opinion and Broadcasting Standards Objectives Considerations Under Section 58



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3 It is important to note that media plurality, FEGs, and BSOs are complementary factors in the
4 sense that all of them serve to the objectives of protecting diversity within and amongst media
5 enterprises, preventing too few media owners from exercising too much influence on public
6 opinion and political agenda and ultimately preserving the democratic process. However, the
7 above-said factors are considered separately on a case-by-case basis, as FEGs or BSOs must
8 still be examined even if there is no concentration as a result of a merger and *vice versa* (DTI,
9 2004, para 3.5).
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21 **Media Plurality in the UK context**

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26 Media plurality is not a pre-defined concept under EA 2002. The term is mostly described in
27 statutory texts, court decisions, reports and policy papers with reference to its attributes and
28 functions. In its lexical meaning, it is simply the state of being “more than one” (Cambridge
29 Dictionary, n.d.). However, in the context of media plurality, the term also resonates with
30 ‘pluralism’ which is defined as “the existence of different types of people, who have different
31 beliefs and opinions, within the same society” (Cambridge Dictionary, n.d.). In that sense, it
32 can be said that media pluralism is more than just counting number of media owners but is also
33 about a variety of other factors which come into play such as diversity of sources and range of
34 contents available to society (European Commission, 2007, p. 5; Peruško, 2013, para 17; Smith
35 & Tambini, 2012, p. 39).
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51 Media plurality assessment in the UK is essentially equivalent to what is meant by ‘media
52 pluralism’ (Arnott, 2010, p. 263). Nevertheless, surprisingly, the distinction between the
53 terminology (namely between ‘pluralism’ and ‘plurality’) has never been a debated topic in the
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3 decisions of UK courts and enforcement authorities.⁷ Instead, media plurality has been
4 understood as a very broad concept since the enactment of the amendments to EA 2002 by CA
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7 2003. For example, Lord McIntosh,⁸ during the parliamentary debates of the Communications
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9 Bill in 2003, interpreted the term as follows:

14 Plurality is a very subjective notion. It is not susceptible to the same kind of
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16 economic analysis as competition issues. It is very much a matter of judgment of
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18 what “feels” right. For this Bill, our approach has been to examine each media
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20 audience, including cross-media audiences, and to judge the level of plurality that
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22 we consider necessary. It is important to recogni[z]e that setting artificial limits on
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24 markets can make them economically less efficient. But we need to protect plurality
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26 and recogni[z]e that there is a minimum level of plurality below which we must
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28 never go (Hansard, 2003, col. 913).
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35 Protecting media plurality is clearly associated with preserving the democratic process
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37 (Hansard, 2015, col. 849; see also *British Sky Broadcasting Group plc / ITV plc, 2007*, para
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39 5.9), including protecting and promoting diversity within and amongst media enterprises and
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41 well-functioning of political institutions.⁹ In its 2015 Framework, OFCOM stated that
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43 “plurality is not a goal in itself, but a means to an end” (OFCOM, 2015, para. 1.1). These points
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45 taken together, media plurality in legal context can be defined as the existence of a sufficient
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47 number of different types of people who have different beliefs and opinions in control of media
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56 ⁷ The debate mostly revolved around the meaning of plurality, rather than a comparison. In the *BSkyB/ITV*
57 judgment, the Court of Appeal confirmed that the Competition Commission’s assessment of plurality could not
58 depend on a mere quantitative criterion or a simple headcount (*British Sky Broadcasting Group Plc v The*
59 *Competition Commission*, 2010).

⁸ The then Parliamentary Under-Secretary for the Department for Culture, Media and Sport.

⁹ See, for a definition of media plurality, OFCOM (2015, para. 1.2).

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3 enterprises with a view to ensure diversity within and amongst media enterprises and to prevent
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5 too much influence of a person on public opinion and political agenda.
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10 **Control of Media**

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15 The question on the definition of control is central to the substantial assessment of plurality as
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17 well as to the establishment of jurisdiction on the relevant merger concerned. Drawing from the
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19 case-law, it can be said that the ultimate question on control is about finding the person with
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21 the ability to at least ‘influence’ the media enterprise concerned. In that regard, concepts of
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23 ‘degree of control’ and ‘control exercised and exercisable’ are at the core of the inquiry
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25 conducted by the relevant authorities.
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31 Defining the degree of control mainly relates to section 26 of EA 2002. On jurisdictional
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33 grounds, it is not much different from a competition law assessment where the degree of control
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35 can vary between material influence and full control. However, as for the substantial
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37 assessment, the concept can be quite unique. Because, internal plurality issues are also relevant
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39 when deciding on the degree of control. In that regard, the case-law takes into account whether
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41 there are reliable internal mechanisms to prevent the owner from influencing the editorial
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43 matters.
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50 The issue was at the heart of the debate in the *BSkyB/ITV* decision (British Sky Broadcasting
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52 Group plc / ITV plc, 2007). In that decision, upon taking into consideration the internal plurality
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54 aspects, the Competition Commission (CC) had concluded that the proposed merger would not
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56 lead to an adverse public interest. However, the decision was challenged by *Virgin Media* with
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3 the claim that internal plurality could not be a factor in media plurality assessment. The
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5 argument was mainly based on section 58A(5) of EA 2002, which is as follows:
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10 “For the purposes of section 58, where two or more media enterprises—

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14 (a) would fall to be treated as under common ownership or common control for
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16 the purposes of section 26, or
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18 (b) are otherwise in the same ownership or under the same control, they shall
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20 be treated (subject to subsection (4)) as all under the control of only one
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22 person.”
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28 In that regard, one of most critical issues in *BSkyB/ITV* was the question on whether “common
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30 ownership” could have been understood as having the same meaning as “control”. The debate
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32 was of importance because if common ownership amounted to a control by the acquirer, then
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34 arguably there would have been no need for investigating internal plurality factors.¹⁰
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40 On that matter, CC reached to the conclusion that section 58A(5) was only applicable to media
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42 undertakings other than the merging parties, attributing a particular emphasis on the word
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44 “would” (*British Sky Broadcasting Group plc / ITV plc, 2007*, para. 5.24). However,
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46 Competition Appeal Tribunal (CAT) did not approve the CC’s argument in that regard (*British*
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48 *Sky Broadcasting Group Plc v The Competition Commission, 2008*, para. 255). The Tribunal
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50 asked the following question in its analysis: “If the degree and nature of control exercised over
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52 media enterprises can be taken into account when conducting an analysis of the sufficiency of
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58 ¹⁰ The Authority did not accept that argument in its decision by stating that even if s. 58A(5) was applicable to
59 merging parties, it would assess the real “degree of control” (*British Sky Broadcasting Group plc / ITV plc, 2007*,
60 para. 5.26).

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3 plurality of ownership under subsection 58(2C)(a) then what, if any, purpose does subsection
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5 58A(5) serve?” (British Sky Broadcasting Group Plc v The Competition Commission, 2008,
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7 para. 256). The CAT also went further to say that the effect of the aforementioned provision
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9 would not limit itself only to an initial headcount of media enterprises but expands to the
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11 analysis for sufficiency (British Sky Broadcasting Group Plc v The Competition Commission,
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13 2008, para. 259). That essentially meant that the CC was prevented from conducting a “degree
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15 of control” analysis in such cases. The CAT presented three reasons for that conclusion. Firstly,
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17 it said, the legislation had a limiting effect (British Sky Broadcasting Group Plc v The
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19 Competition Commission, 2008, para. 261). Secondly, it had recourse to legislative process,
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21 emphasizing the sensitive nature of plurality and the importance of protecting it (British Sky
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23 Broadcasting Group Plc v The Competition Commission, 2008, para. 262). Thirdly, it argued
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25 that at least some of the “creeping” increases in influence from one level of control to another
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27 would have been hard to catch post-merger (British Sky Broadcasting Group Plc v The
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29 Competition Commission, 2008, para. 263).

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37 In the further proceedings, however, the Court of Appeal (CA) did not hold the same opinion.
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39 It said that section 58(2C)(a) suggests looking at the actual position of persons in control as it
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41 requires an assessment of plurality of persons in the control of relevant enterprises (British Sky
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43 Broadcasting Group Plc v The Competition Commission, 2010, para. 82). The court went on to
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45 say that because of the 20/20 rule, in the case before it, the real risk of change in the degree of
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47 internal plurality short of an increase in the level of control was not clear (British Sky
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49 Broadcasting Group Plc v The Competition Commission, 2010, para. 104). Furthermore, the
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51 Court said, if such a possibility existed, CC was entitled to take that into account following the
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53 relevant merger situation (British Sky Broadcasting Group Plc v The Competition Commission,
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55 2010, para. 122). Lastly, CA pointed out that 58A(5) could not be designed to shut the
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3 regulator's eyes to the reality. It particularly asked the following question in reaching its
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5 conclusion: "How much of the real world is excluded by the statutory deeming effect of section
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7 58A(5)?" (*British Sky Broadcasting Group Plc v The Competition Commission*, 2010, para.
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9 114). In that regard, the court concluded that the effect of the provision is limited to an initial
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11 headcount of the media enterprises (*British Sky Broadcasting Group Plc v The Competition*
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13 *Commission*, 2010, para. 123).

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19 Following up on the CA's decision, in the *Fox/Sky* merger, the CMA stated that "merging
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21 enterprises cannot argue that the added level of control makes no difference on the basis that
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23 there has been no change to the number of media enterprises serving a particular audience"
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25 (*21st Century Fox, Inc / Sky Plc*, 2018, para. 6.15). It also went on to say that a reduction in
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27 plurality is not presumed by the reduced number of media enterprises serving to the same
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29 audience" (*21st Century Fox, Inc / Sky Plc*, 2018, para. 6.16). This approach seems sensible
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31 because in almost every case presumably there would be a decrease in the number of the media
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33 enterprises serving the same audience because of the deeming effect of section 58A(5).
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35 Therefore, there would be no need for further inquiry in order to establish a reduction of
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37 plurality if such presumption were to be accepted.
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45 On the other hand, taking internal plurality factors into account as a determinative factor in
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47 substantive control analysis also seems to dilute its formulation in EA 2002 (Arnott, 2010, p.
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49 253). The Act is more concerned about "ownership", rather than "editorial independence"
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51 across the media enterprises in its provisions relating to media plurality. Furthermore, this
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53 interpretation makes more sense since the issues of internal plurality are dealt with under BSO
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55 and FEG provisions of the Act. As Arnott rightly points out, "taken to its extreme, this approach
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57 could justify a single controller of all media sources so long as there was 'internal plurality'"
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3 (Arnott, 2010, p. 266). While this is not to say that internal plurality should not be taken into
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5 account in the assessment of plurality, it seems sensible not to give prominence to that to allow
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7 a merger to proceed. The point is also relevant from the perspective of the nature of regulatory
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9 scrutiny. The CMA stated in *Fox/Sky* that:

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14 The fact that the MFT states that, as has been its past practice, it does not intend to
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16 exercise control after the Transaction, is not conclusive. We must assess the MFT's
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18 ability, rather than its current declared intentions, to exercise a greater degree of
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20 control in the future, bearing in mind that the regulatory scrutiny is now, rather than
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22 an ongoing assessment (21st Century Fox, Inc / Sky Plc, 2018, para. 6.31).
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28 We consider that the statute, as construed by the Court of Appeal in *BSkyB/ITV*,
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30 takes account of the fact that it would not be possible to review the implications for
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32 media plurality arising from any such increase in the control actually exercised (as
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34 it would not be subject to regulatory scrutiny) (21st Century Fox, Inc / Sky Plc,
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36 2018, para. 6.33).
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42 Moving on from the concept of the degree of control to “control exercised and exercisable”,
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44 CMA, in *Fox/Sky* took into account of ‘exercised and exercisable control’ in two different
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46 stages. Firstly, it carried out an assessment of the actual extent of control exercised and
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48 exercisable by the acquiring persons. Secondly, it went through an analysis of “internal
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50 plurality” (21st Century Fox, Inc / Sky Plc, 2018, para. 6.26).
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56 In assessing MFT's exercised control over *Fox*, *NewsCorp* and *Sky*, CMA took account of the
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58 formal and informal means such as its shareholding, positions held within the company and
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3 relationships between directors and Murdoch family. As for exercisable control, the parties
4 sought to draw attention to Mr. *Rupert Murdoch's* past conduct and motivations as a
5 determinative factor. However, CMA stated that 'exercisable' essentially meant the "real and
6 likely effect of the Transaction in terms of the MFT's ability to exercise control'. Therefore, it
7 pointed out that parties' motivations were not relevant to the assessment. CMA concluded that
8 'on the balance of probabilities', the determination on how such control was likely to be
9 exercised after the transaction was important for the plurality assessment. It also emphasized
10 that the determination on the likely exercise of control would not necessarily be similar to that
11 of a competition law assessment (21st Century Fox, Inc / Sky Plc, 2018, para. 6.34), which for
12 example would require an incentive to foreclose the market in the event of a vertical merger.
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28 In *Fox/Sky*, CMA emphasized that exercisable control does not refer to a "hypothetically
29 exercisable control" (21st Century Fox, Inc / Sky Plc, 2018, para. 6.34). However it does not
30 seem clear from the decision how that would be possible without examining the incentives of
31 the parties post-merger. One possible explanation could be that the Authority does not take into
32 account the incentives of the parties to the relevant transaction, but instead takes into account a
33 reasonable person's incentives in that regard. This point could be further strengthened by
34 CMA's statement in the decision that CMA took "account of the fact that the level of control
35 currently exercised by the MFT over Sky and Sky News may be less than the level of control
36 that is currently exercisable" (21st Century Fox, Inc / Sky Plc, 2018, para. 6.35).
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51 **Relevant Audience and Relevant Content**

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56 In general, defining relevant audience serves to understand the relative impact of a transaction
57 on any specified social classes. The analysis is therefore similar to a relevant market analysis
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under competition law regime. In *BSkyB/ITV*, CC used a social grading system based on occupations which could be basically shown as in Table 1.

Table 1

NRS Social Grading System

Grade	Definition
A	Higher managerial, administrative and professional
B	Intermediate managerial, administrative and professional
C1	Supervisory, clerical and junior managerial, administrative and professional
C2	Skilled manual workers
D	Semi-skilled and unskilled manual workers

Note: From National Readership Survey (n.d.)

CC's analysis on relevant audience was mainly crucial in assessing the relative importance of merger parties for each of these categories (British Sky Broadcasting Group plc / ITV plc, 2007, para. 5.49). However, as the difference between the percentage of any particular audience and total audience ranged between 4 to 8 per cent, CC did not find any fundamental difference as regards possibly distinct relevant audiences.

In *Fox/Sky*, a similar analysis was conducted under the "influence" section (21st Century Fox, Inc / Sky Plc, 2018, fig. 11.6). In doing that the Authority relied on surveys. It particularly focused on a group called the "opinion formers", described as leaders in their field such as business, politics, media, public sector, charities, academia and beyond (21st Century Fox, Inc / Sky Plc, 2018, para. 11.55). CMA's analysis seems fundamentally different from the analysis done by the CC because it puts 'influence' in its center rather than social class approach. Indeed,

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3 in the age of social media, influencing the social media influencers seems to be one of the best
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5 ways to shape public opinion and political agenda.
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10 Apart from relevant audience, relevant content also plays a role in measuring plurality. Both in
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12 *BSkyB/ITV* and in *Fox/Sky* decisions, the concept of plurality was understood as ‘plurality of
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14 news’ (British Sky Broadcasting Group plc / ITV plc, 2007, para. 5.32). By way of an analogy
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16 to competition law, it can be said that the limitation serves as a relevant product market. Taking
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18 into consideration the objectives of the Act, that limitation makes sense especially from a
19
20 practical point of view. In particular, it is understandable that practical constraints exist in
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22 measuring and comparing the influence of all kinds of TV shows across a whole range (21st
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24 Century Fox, Inc / Sky Plc, 2018, para. 6.47).¹¹ However, in a progressive manner, it is
25
26 advisable to take into account a broader set of both news and non-news data since there is not
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28 a clear-cut distinction between these types of content with respect to their influence on relevant
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30 audiences.
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38 **Theory of Harm**

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42 In *Fox/Sky*, CMA developed for the first time two different theories of harm resulting from the
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44 reduction of plurality (21st Century Fox, Inc / Sky Plc, 2018, para. 6.47). It stated firstly that
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46 the first potential effect of the reduction of plurality was “that the Transaction reduce[d] the
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48 diversity of viewpoints available to and consumed by members of the public.” (‘Editorial
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50 Alignment Risk’; 21st Century Fox, Inc / Sky Plc, 2018, para. 6.48). Secondly, CMA
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52 considered that a potential harm as result of merger could be that MFT would have “too much
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59 ¹¹ According to Arnott (2010, p. 270), however, selecting only one type of audience would be privileging one
60 type of audience over another, which would be against the legislation’s framework.

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3 influence over public opinion and the political agenda” (‘Excessive Influence Risk’; 21st
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5 Century Fox, Inc / Sky Plc, 2018, para. 6.51).
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10 The said theory of harm has a double function. Firstly, it serves to establish a framework for
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12 measuring plurality. In other words, contextual external plurality and internal plurality factors
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14 are shaped according to the theory of harm. Secondly, it serves to interpret the “sufficiency” of
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16 plurality because the theory discloses the substantial value of media plurality. In that regard,
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18 while not provided in EA 2002, the stated theories of harm provide a context for the whole
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20 discussion on protecting media plurality.
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26 As for the content of the theories of harm, it is apparent that they are closely interlinked. This
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28 is mainly because Editorial Alignment Risk is most likely to be translated into Excessive
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30 Influence Risk. On this point CMA stated in *Fox/Sky* that:
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35 These two potential effects are closely linked. For example, if the Transaction were
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37 to increase the MFT’s control over Sky News, this could translate into a reduction
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39 in the diversity of viewpoints consumed by the public as a result of the MFT’s
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41 increased control of Sky News and its existing control over News Corp. Equally,
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43 the increased consumption might be expected to increase the ability of the MFT to
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45 influence public opinion and the political agenda.
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49 Using both of these theories of harm as a basis for framing our analysis, we
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51 considered in the round whether the evidence obtained during our Inquiry indicates
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53 that the Transaction is likely to lead to a material reduction in the plurality of
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55 persons with control of media enterprises ((21st Century Fox, Inc / Sky Plc, 2018,
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57 paras. 6.53-6.54).
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5 It is apparent from the passage that CMA considers that an Editorial Alignment Risk might not
6 translate into a reduction in the diversity of viewpoints consumed by the public. This point is
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8 in line with the reasoning that protecting media plurality is not only about a simple head-count.
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10 Even if Editorial Alignment Risk occurs, there is a possibility that it *might not* lead to Excessive
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12 Influence Risk. Therefore, it might be inferred from the foregoing that these two theories of
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14 harm must be material at the same time in order for a media merger to have adverse public
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16 interest effect. However, it remains to be seen whether the Authority will continue to use the
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18 same framework in future cases.
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26 **Measuring Plurality**

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30 In *BSkyB/ITV*, CC took the concept of ‘plurality’ as referring to both the range and the number
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32 of the persons in control of media enterprises (British Sky Broadcasting Group plc / ITV plc,
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34 2007, para. 5.7). Significantly, as stated above, CC made a distinction between ‘internal’ and
35
36 ‘external’ plurality (British Sky Broadcasting Group plc / ITV plc, 2007, para. 5.11). ‘Internal
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38 plurality’ was defined as plurality which could be described by the range of information and
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40 views across different media groups, while ‘external plurality’ was defined as plurality which
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42 could be described by the range within individual media groups.
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49 CC measured plurality of news in three steps. Firstly, it attempted to analyze the existing level
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51 of plurality by using certain indicators such as market shares and surveys (British Sky
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53 Broadcasting Group plc / ITV plc, 2007, para. 5.45). Secondly, it tried to identify the
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55 contribution of merging parties (as distinct entities) to that level of plurality. In its analysis, the
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57 Authority gave particular regard to the combined market shares of the parties in the market for
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3 ‘television news viewing’ and cross-media ownership. Finally, it accounted for the degree of
4 internal plurality, particularly editorial independence in media enterprises under common
5 ownership (British Sky Broadcasting Group plc / ITV plc, 2007, para. 5.39).
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12 In *Fox/Sky*, OFCOM’s 2015 Framework was used as the main framework to define substantial
13 quantitative and qualitative criteria. Quantitative criteria was listed as availability, consumption
14 and impact (21st Century Fox, Inc / Sky Plc, 2018, para. 6.57). In its decision, the Authority
15 referred to availability to show “the number of providers at the relevant consumption point.”
16 Consumption was used in reference to the “frequency with which these sources are used and
17 the time spent using them”. Lastly, impact referred to the way the content of the news impacted
18 on the “formation of people’s opinions” (e.g. trust). As stated in *Fox/Sky*, the problem with
19 quantitative metrics is that they are not sufficient in themselves to establish a theory of harm
20 (21st Century Fox, Inc / Sky Plc, 2018, para. 6.58). CMA, in that regard, made a distinction
21 between the “contextual factors that provide background to inform the availability,
22 consumption and impact metrics” and “qualitative evidence, being evidence that is relevant to
23 our assessment and is not easily quantifiable” (21st Century Fox, Inc / Sky Plc, 2018, para.
24 6.63).
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45 CMA’s detailed analysis on the assessment of diversity in the viewpoints that are available and
46 consumed basically takes account of availability, reach, consumption and multi-sourcing pre-
47 and post-transaction (21st Century Fox, Inc / Sky Plc, 2018, para. 10.6). As for availability,
48 CMA decided that there were a significant range of news sources available. However, it also
49 pointed out that merely counting numbers would not give any insight on influence (21st Century
50 Fox, Inc / Sky Plc, 2018, para. 10.14). As for reach, CMA concluded that *Sky* reached 9 percent
51 of the population in the UK. Its primary competitors were *BBC* (62%) and *ITN* (43%).
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3 Significantly, the Authority employed a cross-platform reach metric, allowing it to measure the
4 total *Fox, News Corp* and *Sky* reach of 31 percent of the UK population (21st Century Fox, Inc
5 / Sky Plc, 2018, para. 10.25). According to that metric, the combined entity would be the third
6 biggest in terms of reach, coming after BBC (77%) and *ITV* (39%) (21st Century Fox, Inc / Sky
7 Plc, 2018, fig. 10.5). CMA defined consumption as “frequency with which they access [a
8 particular media source] and the length of time [viewers] spend reading or viewing it” (21st
9 Century Fox, Inc / Sky Plc, 2018, para. 10.27). In terms of consumption criteria, CMA stated
10 that *Sky* was only slightly less consumed than *ITV*. The Authority said that it noted “Sky News
11 has been seen by third parties as a positive competitive force in the provision of news” (21st
12 Century Fox, Inc / Sky Plc, 2018, para. 10.31). According to share of reference for consumption
13 criteria, *BBC* accounted for 42 percent of the population, followed by *ITN* (11%) and *Sky* (6%)
14 in 2016.
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33 Internal plurality issues were also discussed in much detail for the first time in *Fox/Sky*. The
34 discussion in the decision provided an in-depth information on the content of internal plurality.
35 In its analysis, CMA firstly discussed a board resolution adopted by *Fox* that aimed to prevent
36 editorial influence on *Sky News* by the former (21st Century Fox, Inc / Sky Plc, 2018, para.
37 8.6). CMA stated that such board resolution would be insufficient to prevent a reduction of
38 internal plurality because the board resolution could be easily revoked, there were unclear
39 procedures on appointing the Head of Sky News and body which would have enforced such
40 rules was inexperienced (21st Century Fox, Inc / Sky Plc, 2018, para. 8.5). In the second place,
41 CMA looked into culture of editorial independence in Sky News (21st Century Fox, Inc / Sky
42 Plc, 2018, para. 8.13). The Authority, while admitting the existence of such culture, pointed out
43 that as the appointment of the senior staff could be influenced by MFT, the said culture could
44 be changed over time (21st Century Fox, Inc / Sky Plc, 2018, para. 8.20). Thirdly, CMA
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3 assessed audience expectations and commercial incentives. The parties put forward the idea
4 that a change in editorial matters did not make sense from an economical point of view because
5 customers would switch upon such change (21st Century Fox, Inc / Sky Plc, 2018, para. 8.24).
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12 However, CMA concluded that influence as such may be subtly exercised in a way that it would
13 not change viewers' perception of channel's impartiality. Because, it asserted, the channel could
14 attract other viewers following a change in editorial matters (21st Century Fox, Inc / Sky Plc,
15 2018, para. 8.25). Finally, the Authority considered regulatory restrictions which would
16 preserve internal plurality within the organization. However, it found that protection against
17 editorial alignment was limited as the Broadcasting Code allowed for a significant margin of
18 discretion in editorial matters (21st Century Fox, Inc / Sky Plc, 2018, para. 8.41). The Authority,
19 in particular, underlined the indirect ways of influence on editorial matters (21st Century Fox,
20 Inc / Sky Plc, 2018, para. 8.46).
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35 **Sufficiency**

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40 As outlined above, it is stated in EA 2002 that there shall be “a sufficient plurality of persons
41 with control of the media enterprises” post-merger for a finding that the proposed merger does
42 not run counter to the public interest. However, the Act does not clearly define what is meant
43 by ‘sufficient’ plurality. In the *Fox/Sky* case, it was proposed by the parties that a historical
44 benchmark could be used when assessing whether there is sufficient plurality in a given time.
45 The rationale behind the submission was that media plurality had to be existent at the time when
46 the legislation was adopted. However, CMA rejected that argument on the premise that plurality
47 “assessment needs to be undertaken by reference to the current market and political context,
48 particularly given the developments in media and communications over recent years” (21st
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3 Century Fox, Inc / Sky Plc, 2018, para. 6.80). In parallel to that assessment, in its 2012 Report
4 on “Measuring Media Plurality” OFCOM stated that:
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10 it is unrealistic to seek an absolute statutory definition of sufficiency, as the market
11 is dynamic and unpredictable. What is considered sufficient or not will vary with
12 time and needs to be considered in reference to the broad market and political
13 context of the times. Notions of sufficiency today are likely to be somewhat
14 different from those of ten years ago, or ten years hence (21st Century Fox, Inc /
15 Sky Plc, 2018, para. 6.79).
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26 In that regard, it can be said that market structure and existing regulatory frameworks are central
27 to the assessment of sufficiency. As for the market structure, changing roles of TV, newspapers,
28 radio and the Internet are highly relevant. The substantial assessment of plurality is mostly
29 about the availability, reach and influence of these channels. Therefore, it is sound to use these
30 metrics in order to analyze market context. In *Fox/Sky*, it was reported that TV had been used
31 as a source of news by 69 percent of the population in 2016 (21st Century Fox, Inc / Sky Plc,
32 2018, para. 9.7). The figure was slightly higher than about 65% in 2006 (British Sky
33 Broadcasting Group plc / ITV plc, 2007, appendix I, fig. 1). Online media took the second place
34 in 2016 by reaching 48% of the population (21st Century Fox, Inc / Sky Plc, 2018, fig. 9.1) up
35 from just above 20% in 2006. In contrast, printed newspaper consumption declined through the
36 years to a level of 29% of the population (21st Century Fox, Inc / Sky Plc, 2018, fig. 9.1) from
37 close to 80% in 2006.
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56 Following on these statistics, the rise of online media is particularly note-worthy. One extreme
57 possibility flowing from the mentioned trend could be that the online media could reduce the
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3 significance of traditional media platforms in a way that would render public interest scrutiny
4 for traditional media redundant in the future. Whilst CC did not see that possibility in the
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7 'foreseeable future' in 2007 (British Sky Broadcasting Group plc / ITV plc, 2007, para. 5.42),
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10 it now seems more likely that online media will be taking over the priority on public agenda in
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12 the near future. On that point, CMA did not comment on the said possibility, leaving that
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14 assessment to be made in the future cases.
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19 Setting aside the markets context, it is conceivable that sectoral regulation can safeguard
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21 sufficient plurality without further public interest intervention. For example, the 20/20 rule,
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23 which is set out in section 350 and schedule 14 of CA 2003, limits the cross-media ownerships
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25 to an upper limit of 20 per cent. The rule essentially prohibits a proprietor of a newspaper which
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27 has a market share more than 20 per cent to hold more than 20 per cent of the shares of a
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29 company which provide broadcasting services and *vice versa*. CC, in *BSkyB/ITV*, held that
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31 public interest scrutiny was a supplement for the existing regulatory rules. It held the view that
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33 the existence of regulatory rules on media ownership did not negate the application of the public
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35 interest criteria (British Sky Broadcasting Group plc / ITV plc, 2007, para. 5.30).
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42 Overall, taking into consideration of market and regulatory contexts, CMA sets the bar for an
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44 insufficiency finding to a low level compared to SLC test (21st Century Fox, Inc / Sky Plc,
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46 2018, para. 6.69). The policy on legal threshold as such is reasonable since media plurality
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48 concern was introduced to merger control legislation because competition law rules may not be
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50 sufficient to protect it (21st Century Fox, Inc / Sky Plc, 2018, para. 6.70). In *Fox/Sky*, only 3%
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52 of additional reach was seen sufficient in the presence of two more influential media enterprises
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54 (21st Century Fox, Inc / Sky Plc, 2018, para. 10.73). However, it remains to be seen how the
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56 Authority will interpret sufficiency in the future cases.
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Freedom of Expression Grounds and Broadcasting Standards Objectives

FEGs were examined for the first time in *Trinity/Shell* case by OFCOM (Trinity Mirror plc / Northern & Shell Media Group Limited, 2018, para. 1.12). The Authority defined freedom of expression as referring to “editor’s ability to determine the position of a newspaper without interference from the proprietor” (Trinity Mirror plc / Northern & Shell Media Group Limited, 2018, para. 5.1). On the other hand, BSOs consideration was examined in *Fox/Sky* for the first time by the CMA. The Authority noted in that case that BSOs referred to “the need for a genuine commitment to the broadcasting standards objectives, which are in the nature of general principles, rather than to the detailed rules of the Broadcasting Code (and other broadcasting regulation that gives effect to the broadcasting standards objectives)” (21st Century Fox, Inc / Sky Plc, 2018, para. 13.4).

It must be underlined from the outset that the regulatory landscape for newspapers and broadcasting are quite different. Broadcasting licenses are subject to heavy regulation and ongoing monitoring by OFCOM whereas newspapers mostly remain self-regulated (21st Century Fox, Inc / Sky Plc, 2018, para. 5.3.1). In that respect, FEGs assessment is much more relaxed than a BSOs evaluation. For example, OFCOM states in that regard that the editor’s ability to determine the position of a newspaper without interference from the proprietor does not mean that a newspaper cannot change its view (Trinity Mirror plc / Northern & Shell Media Group Limited, 2018, para. 5.1). Holding the same premise true for a BSOs assessment would be quite extreme as BSOs are more vigilant in that regard.

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3 Attainment of the BSO is closely related to the notion of “compliance by design” (21st Century
4 Fox, Inc / Sky Plc, 2018, para. 13.25). In that regard, CMA is interested in the evidence relating
5 to compliance mechanisms (e.g. policies) rather than a mere positive compliance record when
6 assessing BSOs (21st Century Fox, Inc / Sky Plc, 2018, para. 13.22). Taking into consideration
7 the risk-based approach in the evaluation of BSOs, CMA’s perspective is reasonable.
8 Comparably, similar assessment criteria are relevant in some other areas which involve a risk-
9 based evaluation (e.g. GDPR).

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21 BSOs are also different from OFCOM’s “Fit and Proper Person” (FPP) test. FPP is set out in
22 the Section 3 of the Broadcasting Act 1996 (“BA 1996”). The test is relevant when determining
23 whether a person is qualified to hold a broadcasting license. In determining the conditions for
24 the FPP, OFCOM has a broad discretionary margin. These conditions, however, may overlap
25 with that of Broadcasting Considerations, as OFCOM takes into account “any relevant
26 misconduct of those who manage and control the licensee” (OFCOM, 2012). In that regard, as
27 occurred in *Fox/BSkyB* merger, these two investigations might go hand in hand in one process.
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40 It is also important to underline that FPP and Broadcasting Standards have different legal
41 characteristics. Firstly, FPP relates to an assessment of whether a person qualifies for obtaining
42 a broadcasting license, while Broadcasting Standards are the criteria for public interest
43 assessment of proposed merger activity. In that regard, secondly, whereas failing FPP leads to
44 the annulment of the broadcasting license, failure to meet Broadcasting Standards could lead to
45 a prohibition of a proposed merger, but not necessarily to the annulment of the relevant license.
46 Thirdly, the threshold for determining that a person is not fit and proper is a particularly high
47 one (OFCOM, 2017b, p. 1). Fourthly, OFCOM, in addition to FPP, also took into account the
48 broadcast compliance records of parties in order to determine whether “merged entity would
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3 lack a genuine commitment to the attainment of broadcasting standards” (OFCOM, 2017a, p.
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5 5). Therefore, it can be inferred that the net for the Broadcasting Standards test is wider in
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7 scope.
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12 Assessment of BSOs and FEGs remain highly subjective and controversial for two reasons.
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14 First of all, there is still a limited guidance on what constitutes a compliance by design.
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16 Therefore, it is hard to predict the determining factors in each case by the parties to an
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18 acquisition. Secondly, the Authorities have a broad margin in construing the criteria on a case-
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20 by-case basis. In that regard, parties have little room for arguing against the regulator’s
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22 approach. Besides those, BSOs and FEGs are closely related to internal plurality assessment.
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24 Authorities reaching to a different conclusion on internal plurality issues and BSOs/FEGs
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26 would be somewhat contradictory. Therefore, the spill-over effect must also be taken into
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28 account.
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35 **Concluding Remarks**

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40 The institutional setting of the public interest regime provided in the Act is not without
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42 criticisms. The common criticism for the assignment of the CMA on public interest cases is
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44 that the CMA does not have extensive expertise in media plurality cases (Lyons, Reader &
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46 Stephan, 2016). It must also be borne in mind that the CMA builds its expertise through the
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48 detailed assessment of Phase-2 cases. CMA’s media merger inquiries are perfect examples for
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50 that argument. The 411-page *Fox/Sky* final report, in particular, illustrates CMA’s maturity in
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52 conducting a Phase-2 public interest inquiry as well as its ability to build upon insights from
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54 the previous case-law in media mergers.
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3 A concern arises whether the CMA's role in public interest regime contradicts its statutory duty
4 to promote competition (Lyons et al., 2016, p. 11). The balancing act of competition concerns
5 and other public interest considerations is not a straightforward task.¹² However, it must be
6 emphasized that the CMA does not make the final decision on the public interest considerations.
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8 It is for the Secretary of the State to balance the various public interests at stake. Furthermore,
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10 setting aside financial stability grounds, media plurality grounds and national security grounds
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12 do not necessitate a balancing exercise (White, 2017).
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21 The SoS's decision making role in public interest mergers is criticized on multiple grounds.
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23 The first and the most obvious problem is the high risk of politically biased decision making.
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25 *NewsCorp's* bid to acquire the full control of *BSkyB* in 2010 was highly illustrative of that point.
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27 The immediate comments after the announcement of the *NewsCorp's* bid to acquire 60.9% of
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29 *BSkyB* shares¹³ suggested that the bid was problematic, at least on political grounds (BBC
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31 News, 2010a; Ebrahimi, H., Reece D., Osborne A. & Mason R., 2010; Mail Online, 2010).¹⁴
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33 The initial concern for the regulators was on cross-media ownership issues. This was mainly
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35 because *NewsCorp* was then the biggest newspaper company in the UK, accounting for one
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37 third of the whole market, and *Sky* was the biggest broadcaster. However, eventually, two other
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39 incidents determined the fate of the case. Firstly, the then SoS Vincent Cable stepped down
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41 because of a statement to some reporters, indicating that he had "declared war on Rupert
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43 Murdoch" just after he issued an EIN on 4 November 2010 (BBC News, 2010b). Secondly, a
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45 phone-hacking scandal within the *News of the World*, a subsidiary of *NewsCorp*, was uncovered
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55 ¹² The *Lloyds/HBOs* case illustrates the difficulties associated with the mentioned balancing exercise.

56 ¹³ At the time of the bid, R. Murdoch had already owned 39.1 percent of the *BSkyB* shares and 40 percent of the
57 *NewsCorp* shares.

58 ¹⁴ For example, BBC editor's opinion on the bid was as following: "...any agreed deal between News Corporation
59 and BSKyB may cause problems for the UK's coalition government. ...because while the Conservatives had
60 benefited from the support of News Corporation's newspapers during the general election, the Liberal Democrats
were far more hostile to Mr Murdoch's media empire."

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3 during the investigation which eventually led to the withdrawal of the bid (BBC News, 2011).
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5 The latter also provoked a public inquiry led by the Lord Justice Leveson (Leveson Inquiry,
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7 n.d.).
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12 Secondly it can be argued to a certain degree that the appointment of the CMA to assess public
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14 interest cases creates a certain amount of consistency and continuity (Reader, 2016, p. 45),
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16 therefore alleviates concerns of unpredictability in political decision making to a degree.
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18 However, predictability is still imperfect because of political decision making itself (Reader,
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20 2015, p. 105). Moreover, the lack of extensive precedents on national security mitigates the
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22 required degree of consistency that would be very welcome for the legal and business
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24 community.
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