

What can BSkyB offer to get the deal through?

By Damian Tambini

Jeremy Hunt has indicated that he plans to refer the merger to the Competition Commission. But News Corporation have a few days to persuade him not to, by offering undertakings— i.e. ‘sweeteners’ to alleviate concern that the merger will lessen media plurality.

There are a small number of things News Corp and Sky could offer to do to address the plurality concerns raised by Ofcom’s report. Behavioural remedies – such as guarantees of editorial independence, new internal editorial boards, clauses of conscience in journalists’ contracts, or separation of newsrooms, are among the standard measures. Or there could be structural remedies – including selling off Sky News.

One option open to Hunt is to take a more radical and constructive approach to the accountability and impartiality of news providers. The minister could play a masterstroke by persuading News Corp to accept a new regulatory settlement that would not only raise a higher impartiality bar for Sky – addressing agenda setting concerns, but would act decisively to change what is clearly a problematic regime at the newspaper titles and the PCC. Given the timetable however, it seems unlikely that such a route will be taken.

Whilst Ofcom do not propose undertakings –they weren’t asked to do so- a closer reading of the report can help outline Jeremy Hunt’s room for manoeuvre, because he will need to show that undertakings address Ofcom’s concerns. In this post I give a summary of some of the key issues in the report and then go on to examine what this means in terms of what News and Hunt might come up with in their negotiations over the coming weeks.

Change of control

On the issue of whether the merger would actually change control of Sky, Ofcom are quite clear. Against those (including, allegedly, the Secretary of State) that have argued that the merger would not in fact change control of the company, they argue that Sky should be considered as currently separate from News International. (5.58)

‘Full control would allow News Corp to take decisions involving Sky which are in the exclusive commercial interests of News Corp. In light of the fact that the proposed transaction would give News Corp total control of Sky, we consider it would result in a reduction in the number of persons with control of media enterprises and that Sky would cease to be a distinct media enterprise’. (1.17).

Crucially (at 5.65) they conclude that

‘overall, we consider that some level of operational integration is likely to follow as a result of the transaction. Even if this does not result in newsroom integration, it may still result in an enhanced ability to co-ordinate the news gathering and distribution activities of different distribution channels, and therefore an enhanced ability for the News Corp to exercise influence.’

Because this is not only, or even mainly about commercial interests, the crucial test is whether it is likely that editorial control might be concentrated as a result of the purchase.

In previous mergers, and notably when News Corp bought the Sunday Times 30 years ago, reassurances were given that safeguards would be put in place to safeguard editorial independence. In other cases, companies have undertaken to maintain separate newsrooms. Most in the industry are quite sceptical about boards to protect editorial integrity – the board set up after the Sunday Times merger is supposed to be an independent place editors and journalists can go if they feel their independence is compromised. They have not been queuing at the door, despite editors such as Andrew Neil being quite open about editorial pressure. Journalists are well aware of the power of proprietors, and the merger will only make this worse. If News Corp control access to their next job as well as the one after that, they are not likely to report to internal boards. It is difficult to see how such a board structure could be made to work, but it is theoretically possible. A radically different structure, with independence from News Corp, might convince the minister, and more importantly, the public.

Measuring Media Power

Ofcom take a pragmatic approach to an issue that has long dumbfounded academics: the measurement of media power. The regulator measures ‘ability to influence and inform opinion’ in relation to:

‘Audience share and reach within individual platforms; Analysis of consumers’ consumption of news – based on minutes of use by a typical consumer in a day. And finally market research on consumers’ claimed use of different media.’ (1.21).

Bringing these various sources together, Ofcom find that the merger would result in a significant lessening of plurality. In particular, though the merged entity would not compete on the level of the BBC’s dominance, it would no longer operate on a similar level to ITN, and would not operate under the same tough governance arrangements as the BBC. An undertaking that would logically follow from this would be to make Sky’s governance more like the BBC’s, or find some way to apply a higher standard to Sky’s services.

Internal Pluralism and External Pluralism

The Ofcom report adopts the distinction, originally found in German constitutional law, between internal pluralism and external pluralism. This is basically the idea that where there are rules and codes on fairness, balance or impartiality (internal pluralism), we can be more relaxed about protecting plurality of ownership in the market (external pluralism). This was a point made by Sky’s submission. Ofcom rightly argue however that impartiality rules cannot guarantee internal pluralism to such an extent that we should be completely relaxed about external pluralism. Ofcom are clear that impartiality regulation does little to deal with agenda setting by news media. Whilst news bulletins may not always be able to tell us what to think, they are effective in telling us what to think about, which can be just as effective.

In the light of recent comments from government spokesmen in favour of relaxing impartiality rules, we might in any case wonder how long these rules will continue to be applied to commercial PSBs.

Ofcom is sceptical about the balance between internal and external pluralism. Impartiality regulation does not deal with agenda setting, they argue. The implications of this for pluralism might be that BSkyB might accept a tighter and higher level of impartiality regulation and accountability to audiences. Sky could find a way of reassuring Hunt that the merged entity – or at least its broadcasting wing- will respect a higher standard in the long term. Whilst this is theoretically possible, the government might not have the imagination to run with such a radical proposal.

‘Multi-sourcing’, Source Pluralism and Exposure Pluralism

The Ofcom report refers to 'multi-sourcing' of news, arguing that individuals increasingly have access to multiple sources of news. They report that only 18% of media users rely on news from a single media owner. (Though they are not clear whether this is News Corp, nor whether these figures separate out Sky from the overall figure for the News Corp titles).

Whilst Ofcom skate over this hugely significant number, we might ask whether they should have made more of this. When Parliament passed this legislation the Broadcasting minister said:

'[media] plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda' (Hansard/ Ofcom p3).

According to Ofcom, the loss of Sky as a distinct media enterprise would not materially change the average number of news providers used by individual consumers. From the point of view of plurality however, the average number of news providers used by individual consumers is not the only variable of concern. A crucial point is the number of media users that rely on news from a single media owner. The figure of 18% is already extremely high, and we can assume that the merger would only increase that. If the merged entity is allowed to bundle services this figure could increase.

In UK democracy, shifts in perspective of less than 5% of voters can have huge political consequences. If there are just 5% of voters that get all their political information from one source. This is concerning for democracy. If a merger results in an increase in those numbers, there are good reasons to question whether it is in the public interest.

Ofcom recommends that, in the event of a Competition Commission referral, more evidence should be gathered on multi-sourcing. See section 4.6. If I can humbly add my own recommendation, I would add that more research be carried out on the nature of exposure pluralism, and the reasons why it should be a concern.

This may have some direct impact on what undertakings will safeguard it. In particular, whilst the Ofcom report plays down the implications of bundling, a focus on exposure pluralism underlines the importance of undertakings that would prevent aggressive bundling strategies. From the point of view of democracy, an increase in the number of people accessing news mainly or wholly from one source is not good news.

News Flow analysis: Ofcom's use of News Corp-Commissioned research.

Ofcom perceptively acknowledge that:

'A source may be influential in that it "breaks" stories, for example, by carrying out its own investigation. Alternatively, a source may be important because it is capable of bringing a story wide publicity. A story broken by a regional news outlet may be picked up by a national one. A story given enough coverage by an outlet with enough influence may become so important that all news outlets must cover it or lose credibility. All these roles matter in any consideration of plurality.' (4.7)

So much for the theory: in examining these questions Ofcom rely heavily on analysis of news flow done by Perspective for News Corporation. However the citation analysis raises a lot of questions. How was this research done? Were items double coded? Are we measuring only acknowledged sources or are stories followed to find their originators. Is each story deemed to have a 'scoop' journalist? Citations could of course be cross promotion: "As the minister stated on the Today Programme this morning" on BBC TV for example. Ofcom said they did not have time to examine

in detail the claims in this News International commissioned research, but it is presented selectively. Why are the News Corp titles so underrepresented? Does this mean they are just not doing any decent journalism? The figures as presented show that for every story that the Times breaks, Reuters breaks between five and ten stories which is not something to brag about.

This is probably the weakest part of the report. Media watchers generally agree that the press tend to break more stories, but that the broadcasters get them audiences. There is no metric that adequately captures the relative power in this process, and the Perspective/Ofcom analysis begs more questions than it answers.

Summary: What Undertakings Would address Ofcom's Concerns?

In order to convincingly address the concerns raised by the Ofcom report, News International would have to be quite radical. The logic is simple: if behavioural remedies are to be considered there would have to be cast iron guarantees of impartiality, including editorial independence guarantees to safeguard agenda setting autonomy. This would have to establish a higher bar than is currently enforced by Ofcom. Self regulatory bodies, such as the shadowy board News Corp set up to push through the Sunday Times purchase would not convince. Guarantees of editorial independence would have to be genuinely independent from News Corp, with a majority lay membership, published codes of conduct, complaints data and minutes. That might be too much for the Murdochs to bear. The only alternative, as Ofcom points out, would be to sell Sky News, or block the merger.

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