REGULATING MEDIA OWNERS IN DIGITAL TELEVISION: LESSONS FROM UK POLICY FORMATION

CHRISTOPHER T. MARSDEN*

CONTENTS

"But anti-trust policy is not, at bottom, merely about economics and law: it is also about politics and symbolism"[1]

I. PRINCIPLES OF MEDIA-SPECIFIC REGULATION

Media regulation addresses stricter definitions of abuse than does general law. The Broadcasting Acts in the United Kingdom are concerned with the maintenance of pluralism in electronic media sources.[2] Diversity is maintained through fairness doctrine

* Lecturer in European Law, University of Warwick, Director of the European Media Regulation Group sponsored by the United Kingdom Economic and Social Research Council. This Article is expanded upon in the forthcoming thesis and monograph *Multimedia Multinationals and U.K. Digital TV Regulation.* I am grateful to Stefaan Verhulst for helpful comments on earlier drafts. All errors remain the author's. The author can be contacted at: chris.marsden@warwick.ac.uk

1 *Why Bill Gates Should Worry,* ECONOMIST, Dec. 20, 1997, at 125.

2 *See generally,* THOMAS GIBBONS, REGULATING THE MEDIA (1990).

standards of impartiality in content. These are imposed on compulsorily licensed broadcasting services. Pluralism of ownership in the public interest is protected beyond general competition law, at least in theory and by statute. While excessive cross-media concentrations are proscribed in Schedule 2 of the 1990 Broadcasting Act,[3] as amended by Schedule 2 of the 1996 Broadcasting Act,[4] newspaper concentrations are subject to an economic political test.[5] Broadcasters wishing to merge must satisfy the requirements of the Independent Television Commission ("ITC") or Radio Authority in a statutorily governed Public Interest Test ("PIT").[6]

The proposed merger must be shown to maintain: (1) competition in the market; (2) diversity of sources and other license obligations; and (3) economic advantage to the industry. In contrast to this potentially contradictory combination of factors upon which the independent regulator adjudicates, newspaper mergers are subjected to a more limited range of factors, upon which the Secretary of State for Trade and Industry adjudicates. There is both greater administrative simplicity and lesser transparency.

Eric Barendt regards the duality of the system as "from the point of general media regulation . . . [making] no sense at all." In his view, "the absence of any content control over newspapers makes the case for their structural regulation a particularly strong one," thus strengthening monomedia regulation rather than liberalizing cross-media controls.[7] He views structural regulation as a substitute for content regulation, which is prone to political failure, as "the ITC will come under considerable pressure to give weight to arguments that a merger will result in economic benefits,"[8] in similar fashion to newspaper mergers. Structural regulation is so intertwined with content regulation in broadcasting, that attempts to govern newspaper acquisitions of broadcast licenses must present "every good reason to extend [PIT] to newspaper acquisitions [of other newspapers]."[9] It should be noted that newspaper markets

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[3] Broadcasting Act, 1990, sched. 2 (Eng.).

[4] Broadcasting Act, 1996, sched. 2 (Eng.).

[5] *See* DEPARTMENT OF NATIONAL HERITAGE, A GUIDE TO THE PROVISIONS OF THE ACT AND MAIN CHANGES SINCE PUBLICATION (Press Release No. 220 July 25, 1996) [hereinafter DEPARTMENT OF NATIONAL HERITAGE].

[6] *See* Radio Authority, *Guidance Notes: Part IV of Schedule 2 to the Broadcasting Act 1990 (as substituted* by the Broadcasting Act 1996) *as applied to radio,* as revised November 1997.

[7] Eric Barendt, *Structural and Content Regulation of the Media: United Kingdom Law and Some American Comparisons,* Y.B. ENT. & MEDIA L. (1997).

[8] *Id.*

[9] *Id.*

have been largely unregulated since the 1850s,[10] in content and control terms. As a result, these markets have been vociferously independent throughout the twentieth century, whether defending free speech or proselytizing on behalf of their commercial interests and those of their advertisers.

Under the 1973 Fair Trading Act,[11] reformed by the 1998 Competition Bill, newspaper mergers must be referred to the competition authorities unless the target is "uneconomic as a going concern." Politicians are adept at locating distress when required, as seen in the workings of the 1970 Newspaper Preservation Act in the United States,[12] an analysis supported by former Secretary of State Roy Hattersley.[13] A doctrine known as "Biffen's Law", coined by the Secretary of State (John Biffen) at the time of *Times Newspapers* purchase by News Corporation in 1981, holds that "a newspaper is uneconomic when Mr. Murdoch deems it to be so." This statement was made in the House of Commons on the occasion of Murdoch's 1987 acquisition of *Today*, his third daily national newspaper. Richard Whish states:

> Newspaper mergers . . . are subject to a stricter form of control [than other mergers] requiring prior approval . . . control of the media is a matter of particular political sensitivity and importance. . . . There would be much to be said for removing the element of political discretion in this area by [referring] all newspaper mergers subject to a de minimis exception.[14]

Both the closure of *Today* by News Corporation in 1995, and the 1994 loss of independence of Newspaper Publishing, owners of *The Independent*, were held to be "distressed." Such an adjudication was made by John Biffen, in the purchase of *Times Newspapers* by News Corporation. Robertson and Nicol consider that the decision of Biffen to refuse referral "was plainly unlawful dereliction."[15]

The Secretary of State on her own judgment can then make an immediate decision (competition inquiries take three to six months) on the public interest in pluralism, in such a pressing case. Biffen imposed an amendment of the articles of association of *Times Newspapers*. His assessment of the public interest required in-

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10 *See generally*, MONOPOLIES AND MERGERS COMMITTEE, THE SUPPLY OF NATIONAL NEWSPAPERS, 1993, Cm. 2422.

11 Fair Trading Act, 1973, ch. 41, §§ 57-58 (Eng.)

12 15 U.S.C. § 1801 (1994).

13 *See* generally, CHRISTOPHER MARSDEN, EGREGIOUS CASES. A STUDY OF MEDIA OWNERSHIP CONCENTRATION THROUGH THE RECENT HISTORY OF NEWS CORPORATION (1994).

14 RICHARD WHISH, COMPETITION LAW 701 (2d ed. 1989).

15 GEOFFREY ROBERTSON & ANDREW NICOL, MEDIA LAW: THE RIGHTS OF JOURNALISTS AND REPORTERS 504 (3d ed. 1992).

dependent national directors to be appointed to the board, to ensure proprietorial propriety.[16] Such directors have proven to be so sympathetic to the proprietor's interests, that they have vocally supported the management of *Times Newspapers* in the House of Lords, as recently as February 9, 1998.[17] For the vast majority of the national press, editorial independence is anathema to proprietors.[18] Such a suggestion could expect to be resisted and, if implemented, subverted, as were the controls on News Corporation's acquisition of *Times Newspapers*. Editorial independence of *The Independent* in 1994 (*The Independent*'s owners) was "defined contractually in the light of the publisher's appraisal of the market opportunity,"[19] in the words of Secretary of State Michael Heseltine. The public interest in diversity was judged unaffected by the company's absorption into Mirror Group Newspapers.

Even when the Secretary of State refers to the competition authority, she is not obliged to follow its advice. In an infamous case in 1994, as in earlier cases, the Secretary of State overruled the authority.[20] *Daily Mail* and *General Trust* sought dominance in the East Midlands regional newspaper market through acquisition of the *Nottingham Evening Post* Group. The Monopolies and Mergers Commission[21] ("MMC") declared that a regional newspaper takeover tended against the public interest on October 31, 1994, only to be over-ruled by the President of the Board of Trade. Confidence in competition authority independence is misplaced.

A. *Policy Paradigm of Competitiveness 1993-1994*

The "Information Superhighway" cliche which dominated digital media debate in 1993-1994 led both television and newspaper interests to lobby for deregulation of ownership limits, in both the United Kingdom and the United States. Though U.S. proposals resulted in legislative paralysis in the Communications Bills of Senate and Congress in 1994,[22] U.S. government proposals, unlimited

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16 *See* ROY HATTERSLEY, PRESS GANG 61-66 (1983) (analyzing Item 4(b)(i) of the Terms of Consent to the purchase).

17 *See* 585 PARL. DEB., H.L. (5th ser.) 920-30 (1998).

18 Lord Rothermere, Chair of Daily Mail and General Trust, insisted in the wake [sic] of the August 1997 death of the Princess of Wales that he would refuse to purchase "paparazzi" photographs of public figures in private, thus instituting his judgement of the public interest above that of his editors.

19 EVENING STANDARD MARKET REP., Mar. 18, 1994.

20 *See Daily Mail Group to Bid Again for Midlands Titles*, FIN. TIMES, (Eng.), Nov. 1, 1994; *Midland Independent Asks MMC to Block Bid by Rival*, FIN. TIMES (Eng.), Nov. 23, 1994, at 29.

21 *See* MONOPOLIES AND MERGERS COMMITTEE, supra note 10.

22 *See* Jonathan D. Blake & Lee J. Tiedrich, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 FED. COMM. L.J. 397 (1994).

by separation of powers, were published in May 1995. These proposals followed delegated legislation in late 1993, under which television companies had been allowed to double in size. The United Kingdom proposals foreran those PIT[23] introduced in the 1996 Broadcasting Act. In similar language, the proposals evidenced concern regarding diversity, competition, and international economic competitiveness. Given the increasingly monopolistic position of both television and newspaper owners, and the cavalier approach to the public interest displayed above by Secretary Heseltine in 1994, it was clear that the 1995 *Green Paper*[24] would approach digital possibilities with economic competitiveness as the priority.[25]

Two irreconcilable truths are evident in this debate. First, diversity is opposed to concentration: the *Green Paper* describes "the balance between the needs of consumers and the industry."[26] Government decided that "critical mass" was desirable in the international competitiveness of television exports. Diversity for viewers thus suffers at the expense of consolidation for larger corporations. Lord Annan, chair of the 1977 Committee on Broadcasting whose recommendation led to the founding of Channel 4, questioned the government's corporatist "big is beautiful" argument in the House of Lords, at the Second Reading of the Broadcasting Bill:

> Not a shred of evidence is cited to substantiate this obsession with size. Indeed, these days large entrepreneurial projects are usually undertaken by consortia, joint ventures or alliances. . . . If Carlton, Granada and Meridien (now UN&M) were really so keen to break into world markets, why has there been no sign of it? What is their international strategy? If the government believes that past legislation has stifled expansion, how does anyone explain the rise of Mr. Murdoch's satellite empire in Britain? Did he not reach for the sky entirely within the law? . . .
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> Such anomalies make me suspicious of the whole argument. Building larger media companies in order to fight the world brings no guarantee of success, and may hamper the entry and growth of small innovative companies into that domestic mar-

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[23] *See* Hazel Fleming, *Media Ownership: In the Public Interest? The Broadcasting Act 1996*, 60 MOD. L. REV. 378, 384-87 (1997).

[24] DEPARTMENT OF NATIONAL HERITAGE, MEDIA OWNERSHIP: THE GOVERNMENT'S PROPOSALS, 1995 [hereinafter MEDIA OWNERSHIP].

[25] Christopher Marsden, *The European Digital Convergence Paradigm*, 1997(3) J. INFO. L. & TECH. (Apr. 9, 1998) <http://elj.warwick.ac.uk/jilt/commsreg/97_3mars/default.htm>; Christopher Marsden, *"Convergence or Coexistence? Television and Telecommunications Policies Diverge in the Convergence Debate,* 1997(3) J. INFO. L. & TECH. (Apr. 9, 1998) <http://elj.warwick.ac.uk/jilt/wip/97_3mars/default.htm>.

[26] MEDIA OWNERSHIP, *supra* note 24, § 1.11.

> ket. It is an old-fashioned policy that is very unlikely to work. Indeed, if you let the big get too big at home, why should they bother competing abroad at all?[27]

Austin Mitchell MP concurred: "The argument that bigger-scale companies are needed to compete in the world market is fallacious."[28] He believed that newspaper groups "want to buy a slice of a monopoly to cushion themselves from the inevitable decline of print and the rise of television." He advised that "they could easily buy a production house and put money into it"[29] to compete in international markets, rather than extracting a rent from the domestic audience.

The second truth is that democratic accountability through plurality invokes the myth of equality. Thus, while competition law will examine market power in revenue terms, media ownership must examine consumption, despite the clearly absurd result that 300,000 *Sun* readers will equate to 300,000 *Financial Times* readers. As Lord Inglewood stated for the government: "Audience share relates directly to the principle of plurality. That makes it appropriate in this context. Revenue share reflects the market power of a media enterprise, rather than its ability to influence opinion and endanger debate - and market power is primarily controlled through competition legislation."[30]

He did not mention the disastrous cronyism which afflicts market-specific regulation; media ownership is perhaps the ultimate example of agency capture. It simply does not work. Liberal Democrat spokesman Bob MacLennan was concerned that New Labour "does not put itself in hock to substantial newspaper interests if it is entrusted with government,"[31] as its policy by 1996, had proved even more deregulatory than the conservative administration. Chris Mullin believed that no regulator, "even if they were beefed up, is necessarily capable of facing up to the mighty and enormous vested interests we face"[32] in the media. He further argued that "those who brought us junk journalism will bring us junk television if we let them, and we should not."[33] He explained that Sir Bryan Carsberg, when he was Competition Director-General,

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27 568 PARL. DEB., H.L. (5th ser.) 497-98 (1996).
28 276 PARL. DEB., H.C. (5th ser.) 791 (1996).
29 *Id.* at 837.
30 568 PARL. DEB., H.L. (5th ser.) 473 (1996).
31 276 PARL. DEB., H.C. (5th ser.) 832 (1996).
32 *Id.* at 833.
33 *Id.* at 834.

was firmly of the view that media ownership limits were a matter for politicians.

II. Media Ownership: The Government's Proposals

The government's proposals were threefold: it only sought real debate and consultation on the long term proposals. As will be seen, newspaper owners had already ensured that their agenda would be enacted in the 1996 Broadcasting Act.[34] The immediate proposals for legislative action were enacted by secondary legislation in July 1995. In this sense the proposals were a *fait accompli.* Medium term market measurement proposals were announced as in a *White Paper,* any delay in enactment was merely to permit primary legislative timetabling. The 1995 Broadcasting Bill was published in December. The medium term proposals can be seen as an example of "soft law," upon which corporations acted prior to the passing of the Broadcasting Act. This explains in doctrinal terms the fact that the third largest television group (Meridien) and fourth largest newspaper group (Express) merged to form United News and Media ("UN&M") in reliance upon this document. The merger was announced during the "quasi-consultation" of Broadcasting Bill debates in February 1996. The United Kingdom Parliament rarely disobeys government in any matter of policy. Given that the proposals were the subject of heated political debate at the highest levels of cabinet prior to their publication, any intra or extra-parliamentary consultation could only be cursory and formal.

Longer term proposals for merging the vertical segments of the media markets, particularly national newspapers and television licensees, were the subject of invitations to consult. The longer term proposals could only be enacted with some form of Media Exchange Rate ("MER") to equate newspaper readership with television viewing. This section of the discussion paper indicated a far more speculative and genuinely participatory discourse between government and interested parties.

The vertically separated regimes for newspaper and television gave rise to fundamental difficulties in the *Green Paper.* First, it sought to desegregate the effects of content and ownership regulation: diversity and plurality. Given that the two are interdependent, there is a paradox in the approach. It was somewhat mitigated by government's decision to produce primary legislation in the Broadcasting Act which encompassed both content and ownership.[35] The

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[34] Broadcasting Act, 1996, ch. 55 (Eng.).

[35] *See supra* note 5.

greater difficulty lay in measures of dominance: televisual plurality would measure either consumption (circulation in newspapers) or reach (readership). Competition law measures newspaper revenues, from advertising, subscription, and sponsorship. The government decision to employ the citizen usage approach in the MER, as opposed to corporate revenue, was both controversial and methodologically inexact. The approximate nature of these "product" markets for a democratic pluralistic test is recognized in the proposals by excluding magazines and journals, ostensibly because they largely cater to apolitical minority interests. The apoliticisation of *Angler's Weekly* is a consequence of audience preference. The apoliticisation of broadcast journalism, the political fact underwriting the public law regulation of broadcasting, appears arbitrarily separated from such consideration. British Broadcasting Corporation ("BBC") is included in calculations which measure commercial media concentration.

A. *1995 Green Paper*

The government's MER proposals are set out in six sections: "Introduction," "The Policy Framework,""The International Dimension," "The Results of Consultation," "Key Issues," and "The Government's Proposals." It first establishes that independent Internet narrowcasters and program producers are operating in emerging and competitive sectors (the latter "vibrant and growing"), and will therefore be excluded from analysis.[36] Diversity of voice "promotes the culture of dissent which any healthy democracy must have . . . they contribute to the cultural fabric of the nation and help define our sense of identity and purpose."[37] It explains the growth of new media, and the varied investment opportunities available without legislative change. In section 2, the *Paper* heralds the success of the 1990 Act, claiming that it: (1) enabled greater competition by the formation of the Channel 3 Network Centre;[38] (2) permitted growth in cable and satellite; and (3) boosted independent production. The first claim is dubious as the Act resulted in the institutionalization of the dominant Channel 3 companies in 1993-1994. The second is at least misleading, as cable build was spurred by the 1991 telecom duopoly review, which banned national telecom operators (BT and Cable & Wireless) from unveiling national cable networks. It is equally mislead-

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[36] *See* MEDIA OWNERSHIP, *supra* note 24, §.1.2.
[37] *Id.* § 1.4.
[38] *See* MONOPOLIES AND MERGERS COMMITTEE, *supra* note 10.

ing in that deliberate misapplication of *Television Without Frontiers* articles on quotas[39] and establishment[40] produced a policy enclave for satellite broadcasters such as BSkyB and Turner. The third government claim for the 1990 Act emphasizes independent production in terrestrial broadcasting, but fails to acknowledge nonenforcement of local programming obligations in cable franchises, and the delay from 1992 to 1996 in licensing Channel 5. It explains that the 1994 doubling of Channel 3 television concentration "was designed to allow Channel 3 companies to compete more effectively in the international marketplace."[41]

Section 3.2 dissembles, in announcing the United Kingdom review as part of wider international deregulation, naming the United States as its example, but failing to notify the reader that the other reviews mentioned, in Australia, Sweden, Italy, and France proved reregulatory. For instance, the Swedish government established a Council on Media Pluralism in 1995. In section 3.4, the *Green Paper* claims that "Australia, Canada and the USA make no attempt to limit ownership of the press, or to impose equity ceilings." In truth, all three legislatures have allowed regulation to lapse as a result of political corruption of the regulatory process. The *Green Paper* then describes European legislative proposals. It does not acknowledge any competitive deregulation in the single market which a unilateral United Kingdom deregulation may cause: "The government will continue to play an active part in discussions in these areas."[42]

Section 4.2. details the undoubtedly wide consultation undertaken in January to May 1994. It details three basic responses: (1) abolish media-specific rules; (2) liberalize gradually; and (3) continue to protect diversity. Response to number one was favored by "the larger newspaper and media companies"; response to number two was by "medium-sized and smaller companies [which] generally valued their independence;" and response to number three was by "consumer groups, advertisers, academics and trade unions," which counselled against "what they considered to be exaggeration in much of the current multimedia excitement."[43] Newspaper companies wished to acquire terrestrial commercial television monopolies; those monopolies wished to enter satellite; ra-

39 *See* MEDIA OWNERSHIP, *supra* note 24, at art. 4.

40 *Id.* art. 2.

41 *Id.* § 2.9.

42 *Id.* § 3.12.

43 *Id.* § 4.2.

dio companies "wanted simplification" of the rules (which one assumes to be consolidation).[44]

The five arguments for change were: (1) digital convergence; (2) market entrants; (3) critical mass; (4) under-investment in broadcasting and production; and (5) inequity for newspaper proprietors. Convergence and entry form the "digital paradigm;" critical mass, and under-investment are the "competitiveness" argument; inequity is the self-serving national newspaper argument.[45] In section 4.8, competition law exponents acknowledge the need for continuing broadcasting content requirements, rigorous enforcement, geographical market definition, and conditional access regulation.[46] The remainder of section 4 details various elements of special pleading in specific media sectors.

Section 5.8 explains the deficiencies of general competition law, which is "reactive, [and] gives the authorities wide discretion and can involve lengthy procedures."[47] This statement appears ironic in view of the lobbying which preceded this *Green Paper*, the huge government discretion under the 1990 Act, and the delay of almost three years from announcement of the review (January 1994) to implementation of the 1996 Act (November 1996). It then counters its analysis of the deficiencies of competition law by explaining competition regulation of pay-Television conditional access with great attention to the efficacy of general competition law. It is in section 5.20 that the entire document is summarized: "Alliances between television and newspaper companies are a logical and natural product of the economic and technological dynamics of the industry and will allow a healthy interchange of skills and creativity for the benefit of the consumer."[48] It then explains that this "natural," "healthy," "logical" synergy will provide international competitiveness. This ends the debate: section 6 details the government's dismantling of television and cross-media controls.

B. *Longer Term Proposals (Sections 6.4-6.22)*

The longer term government proposals were to limit cross-media ownership at 20% of sectoral markets, or a regional market, and 10% of the overall market.[49] It should be noted that 20% would apply to the sector termed "the press," which presumably

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[44] *Id.*
[45] *Id.* § 4.4.
[46] *Id.* § 4.8.
[47] *Id.* § 5.8.
[48] *Id.* § 5.20.
[49] *Id.* § 6.16.

amalgamated national and regional newspapers. Mergers which exceeded these limits would trigger a Public Interest Test ("PIT").[50] Furthermore, the government suggested appointing an "independent" regulator to oversee these PITs: the existing competition authorities which were charged with enforcing the tarnished newspaper provisions of the 1973 Fair Trading Act.[51] It invited comment on (1) the threshold; (2) the MER, especially measures of audience and revenue; (3) the regulator's accountability; and (4) the regulator's identity.[52]

Government enthusiasm for this proposal can be explained by several factors. First, it ardently wished to avoid continuous delegated legislation with attendant lobbying. Secondly, there was a genuine desire to foster whatever benefits convergent multimedia corporations might produce. Thirdly, officials expressed an intellectual aversion to the political capture which had characterized policy formation in both newspapers and television ownership to 1994. Finally, there was the earnest hope that a workable plan would provide a model for regulatory action at the European level, thus producing "first mover" compliance benefits for British corporations, and much-needed kudos for the media policy team. They commissioned National Economic Research Associates ("NERA") to produce econometric models of concentration and MER,[53] on which its proposals were based. The deadline for responses to the *Peppermint Paper* was set at August 31, inexplicably only a few days after the publication of the *NERA Report.* The timing may have been simply unfortunate, or alternatively a ruse to bounce media owners into support, given that the Bill would be drafted within weeks.

C. *"Methods of Media Market Measurement" (NERA 1995)*

The *NERA Paper's*[54] appearance in late August 1995, a delay during which its proposals had become virtually irrelevant, was largely ignored. It lists various caveats regarding its brief, explaining that it is "background research,"[55] that "all the measures are of necessity rather crude,"[56] and that "a key element of our work has been the construction of a media market share spreadsheet

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50 *Id.* § 6.17.
51 *Id.* § 6.18-6.20.
52 *Id.* § 6.21.
53 *Id.* § 6.10-6.14.
54 NATIONAL ECONOMIC RESEARCH ASSOCIATES, METHODS OF MEDIA MARKET MEASUREMENT, ROYAL COMMISSION ON THE PRESS, 1995, Cm. 6810.
55 *Id.* at iii.
56 *Id.*

model."[57] Clearly, this paper did not carry forward policy, nor could one expect econometric consultants to do so. It does, however, establish that time-use is the most accurate measure of electronic media consumption, and that reach is the best measure of newspaper influence.[58] NERA explains that its preferred measures produce results "seemingly underestimating the influence of the press,"[59] which accords with News Corporation's commissioning of Bill Shew to produce such a measure. Therefore "we [NERA] suggest that [revenue weighting] based on advertising and consumer expenditure is preferable."[60] It further recommends that regulation apply on change of control (merger, franchise transfer), in order to avoid a further News Corporation criticism that organic growth in media may trigger share thresholds. Government did not brief NERA to consider new services, or to disregard BBC and other "public service" type media.[61] NERA considered a November 1994 *European Institute for the Media Report* on media control,[62] which produced so many variables that NERA considered its significance to lie in proving "how complex a task it would be to define an exhaustive list of measures."[63] Throughout the NERA study, the continuous refrain is that government must impose a policy: ownership and control are political matters which require leadership in their implementation.

D. *"Summary of Responses to the Consultation Exercise" (1995)*

Government had proposed using an objectively quantifiable MER, rather than an administratively and arbitrarily fixed weighting, as proposed by newspaper owners. What clearly emerged was that "broadcasters tended to be more cautious [about convergence] . . . to emphasise the differences between [media]," whereas newspapers were "more bullish."[64] Though consumption and reach would reflect media use, the paradox that impartiality and diversity were excluded from the equation forced most commentators to examine revenue weighting in order to "protect" television share from newspaper groups. The inanity of such an

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57 *Id.* at iv.
58 *Id.* at v.
59 *Id.* at vi.
60 *Id.* at vi.
61 *Id.* at 1.
62 EUROPEAN INSTITUTE FOR THE MEDIA, TRANSPARENCY OF MEDIA CONTROL 1 (1994) (comissioned by DG XV for the proposed Directive on Media Pluralism).
63 *Id.* at 6.
64 DEPARTMENT OF NATIONAL HERITAGE, BROADCASTING BILL UNIT, SUMMARY OF RESPONSES TO THE CONSULTATION EXERCISE, ¶ 26 (1995).

approach became apparent. With regard to the operation of a discretion-based test, instead of the 1990 Act's rigid rules, respondents objected to the enforcement of such discretion by a single authority, suggesting a balance of regulation between ITC, competition authorities, and the Secretary of State. The difference between broadcasters' confidence in ITC as content and control regulator, and newspaper hostility to any regulation other than competition law, became apparent.[65]

ITC published its response on August 29, broadly welcoming the shorter-term proposals. Its final nine paragraphs relate to the MER, in which ITC favored the unitary approach of measuring "reach" in electronic media and readership in newspapers as a direct, simple, and established method. It commended European Commission adoption of this approach,[66] which may not have enamored it to the Eurosceptic government. The Commission had responded to BBC submissions in 1992-1994 by excluding public service broadcasters from its proposed directive. This resulted in near-total monopoly reach measurements for regional ITelevision companies. The ITC view of the media regulator was that, even were this to be governed by a Commission (explaining that ITC's terms of appointment are more accountable than single regulators such as DGFT),[67] "the concentration of regulatory power . . . would be very considerable."[68] It also indicated that diversity and pluralism should be regulated by the same body in a unitary manner, i.e., by ITC. Its view that diversity and plurality be regulated by a single body is complemented by the view that plurality and competition law are ill-suited to unitary consideration, as it "would risk an undue concentration of regulatory power."[69] The objection is justified by the width of discretion required in judgment of pluralism, which requires "direct and continuing knowledge of broadcasting matters . . . beyond a purely arithmetical test of acceptability."[70] ITC's case was that public law and policy issues of diversity and pluralism require separate skills, than economic law and policy issues of competition.

The Radio Authority view was more damning of the proposals.[71] It viewed the MER as reliant on "subjective judgment" which

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65 *Id.* ¶ 53.
66 *Id.* ¶ 46.
67 *Id.* ¶ 44.
68 *Id.*
69 *Id.*
70 *Id.* ¶ 51.
71 RADIO AUTHORITY GUIDANCE NOTES: PART IV OF SCHEDULE 2 TO THE BROADCASTING ACT 1990 (AS SUBSTITUTED BY THE BROADCASTING ACT OF 1996) AS APPLIED TO RADIO, 1997.

"will create inconsistencies and anomalies." It questioned the exclusion of magazines and newer electronic media, regarded revenue as "inappropriate" for pluralistic concerns, explained that "licensing and ownership are inextricably linked," and concluded that "[t]he Authority doubts the need for a new regulator on ownership."[72] It is the strength of this verdict upon which the media reported. The Radio Authority explained that "it is difficult to have confidence in a theoretical model if the methodology is capable of such variable interpretation."[73] In conclusion, "it questions therefore whether government should not give a firmer lead in support of that principle [media pluralism]."[74]

The consultation exercise appears to have identified chalk and cheese, to use Andrew Graham's analogy.[75] Shew for News Corporation suggested a consumption figure which would obviate the need for an MER at all; Bill Robinson's alternative revenue figure would do the same.[76] In addition to Hooper's paper considered below, Graham and Robinson, publicly disseminated responses to the proposals were published by Shew for News Corporation, by News Corporation itself (1995), by BSkyB (September 1995), by BBC (1995 undated, September; it continues Robinson's attack on audience-only measures), and by the regulators ITC and Radio Authority.

E. *Political and Policy Failure*

The meritworthy attempt to define a cross-media market by instituting a MER was doomed to failure by its ambition, statistical inaccuracy, and the flaws in monomedia markets—whether instituted by newspaper market failure or forty years of commercial television regulation. *The Guardian* explained that the proposals were "savaged."[77] For the Radio Authority, CEO Tony Stoller commented that it was "like comparing apples to oranges and pears"[78] to compare radio with national newspapers and television with regionals.[79] The problem was not the comparison, but the failure to

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72 *Id.* at 2-3.

73 *Id.* at 19.

74 *Id.* at 17.

75 Andrew Graham, *Exchange Rates and Gatekeepers in the Cross Media Revolution, in* JOHN LIBBEY, OWNERSHIP AND CONTROL 44 (1995).

76 Bill Robinson, *Market Share as a Measure of Media Concentration in the Cross Media Revolution, in* JOHN LIBBEY, OWNERSHIP AND CONTROL (1995).

77 Maggie Brown, *Nice Idea, Shame About Reality,* THE GUARDIAN, Sept. 4, 1995, at 15.

78 *Id.*

79 *Id.* In view of his analogy, it is interesting to note that possibly the most influential decision in European competition law compared bananas with other fruit. Case 27/76, United Brands v. EC Commission, 1978 E.C.R. 207, 1 C.M.L.R. 429 (1978).

establish a definitive methodology, as comprehensively shown by Robinson. In its absence, any MER would appear arbitrary. This compounded the government's problem in banning national newspaper groups with over 20% market share from expanding into terrestrial television: News Corporation and Mirror Group. The NERA study had demonstrated that 20% national newspaper share would create dominance in regional ITelevision markets. In Broadcasting Bill debates, the Ministers appeared to ignore the brief, under challenge from Labor. Labor had set a radical and hugely controversial policy of abandoning all limits, except for competition law, which would help both Mirror Group and News Corporation. Ian Sproat, for the government, asserted that 20% was an arbitrary figure, but as good as any other![80] "The French have set it at 20% . . . 20% seemed to be a decent level—there was a precedent for it."[81]

If government had not previously realized, it now knew that the will to create a long-term MER-based test had dissipated. In the period after the *Green Paper* was published, the proposals' methodological inadequacy was criticized so completely, the NERA study was so delayed, and short-termism so overwhelmed the policy process, that the MER was deemed an irredeemable mess. Government had set an October 31, 1995 deadline for responses to the *NERA Report*, which lobbyists appreciated would be after the drafting of the Broadcasting Bill. It admitted that "the outcome was disappointing as only 10 respondents chose to comment,"[82] in contrast to seventy replying in August to the *Green Paper*. The expectation was that government would change—that the MER was a proposal upon which there could be no legislation before the next general election in 1997, and would then be low on the list of priorities for an incoming secretary of state. The MER proposal was therefore unlikely to be discussed before 1998. Such a scenario has resulted.

III. Actors and Policy Capture

A. *"A New Approach to Cross-Media Ownership" (BMIG 1995)*

To find a true defense of deregulation, it may be more satisfactory to examine the February 1995 *British Media Industry Group*

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80 In Commons Committee as elsewhere, civil servants suggest that this is because government knew that it would win the vote, and hence responded arrogantly in debate.

81 House of Commons Standing Committee D 20 April 1996; 276 Parl. Deb., H.C. (5th Ser.) 841 (1996).

82 National Economic Research Associates, *supra* note 54, at 11.

("BMIG") Paper, written by economic consultant and former Radio Authority board member Richard Hooper.[83] Respondents to the government had noted the government's similarities with Hooper methodology.[84] BMIG was a lobby of the national newspaper owners, with the exception of UN&M, News Corporation, and Mirror Group Newspapers. The dominance of the latter pair, and the legally dubious merger of the former, made all three unsuitable members of a lobby which represented the "respectable" side of the former Fleet Street. Hooper's paper is the father of the *Green Paper*, providing more intellectual coherence than the *Green Paper* itself, which appears to have been written in committee. In contrast to an earlier February 1994 *BMIG Paper*[85] (1994, a polemical anti-regulation piece according to its anonymous author), Hooper's 1995 paper adopts an intellectually consistent methodology, in an evolutionary approach to existing media. It explains: "Our first paper demonstrated *why* the current rules should be changed. This paper sets out *how* new rules might work." It further asserts the export value of its approach: "We further believe that if this approach is adopted, the United Kingdom would be seen to be at the leading edge of regulatory innovation worldwide." This would be appealing to media policy-makers, in that their lack of prestige compared to telecom's regulators is explained by the United Kingdom position as "telecommunications deregulatory laboratory" for the world.[86]

Hooper[87] characterized the system of monomedia regulation as "pigeonholing," in that it limits each company to one exclusive media sector. He identified three critiques of pigeonholing: convergence, critical mass, and arbitrariness. The Channel 3 companies used these same critiques. Hooper therefore began by seeking the "least bad" solution, from the premise that media markets require regulation in addition to competition law, an approach which differentiated his February 1994 paper from the BMIG and News Corporation submissions, both of which proposed integration of media into the competition law regime.[88] Hooper envisaged a holistic media sector, based on national, regional, and local

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83 Richard Hooper, ch. 16, *in* MEDIA OWNERSHIP AND CONTROL IN THE AGE OF CONVERGENCE (Vicki Macleod ed., 1996).

84 BRITISH MEDIA INDUSTRY GROUP, THE FUTURE OF THE BRITISH MEDIA INDUSTRY ¶ 29 (1994).

85 *Id.*

86 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (1992) (emphasis in original).

87 *See* Hooper, *supra* note 83, at 230.

88 *Id.* at 233.

geographical markets, the smallest of which would be those which supported a local paid newspaper. A regional market would typically encompass the catchment area of a regional Channel 3 franchise. Hooper would measure newspaper, television, and radio *audience* share, rather than *revenue.* This difference between individual consumption and overall audience methods would require an explicit MER in order to convert the figures into tradeable commodities for regulatory purposes. Hooper's medium term proposals do acknowledge consumption rather than revenue as the basis for regulation. Employing existing measures, Hooper proposes to weight media such that television and national and regional newspapers[89] would carry equal share, with radio somewhat arbitrarily allocated 50% of that weighting. Thus, television carries 2/7 of the total share. Fifty percent of the Television market, an approximation of ITV audience share, would result in a 14% (1/7) share of the total media market.[90] Hooper's product market is based on monomedia, the existing classification used in the 1990 Act; it is an evolutionary proposal. It carries the advantage of using recognized industry-regulated measures of share.

Product market definition is genuinely misleading here, as in the *Green Paper.* Plurality for individuals is not the same as competition in a market. Eliminating pre-recorded music and film products consumed individually (recorded music and video) does not answer this criticism. The United Kingdom and European Commission accept different product markets within sectors, while Hooper and the government attempt to institute what competition lawyers would consider a ludicrously wide market of almost all media. As the United Kingdom competition authority explained: "we take television/radio more as a complement to newspapers than a substitute product, at least for the majority of consumers."[91] The European Commission and United Kingdom accept separate markets for pay-Television and free-to-air Television.[92] Competition in a *product* market is not the same as a *business strategy* market, as Scholes and Wood explain.[93] Strategists analyze an industry sector for market entry opportunity and prospective market entrants from other sectors. The holistic Hooper view is cross-sectoral, encompassing several distinct markets. Scholes and Wood state:

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89 *See supra* note 5.

90 See BRITISH MEDIA INDUSTRY GROUP, A NEW APPROACH TO CROSS-MEDIA OWNERSHIP (1995).

91 *See* MONOPOLIES AND MERGERS COMMITTEE, *supra* note 10, at 3.5.

92 Case IV/M.110, Merger Task Force, 1991 O.J. (C 244) 5.

93 Jeremy Scholes & Lorna Woods, *Media Ownership: The UK Government's Proposals,* 1 ENT. L. REV. 11 (1996).

> Market share in the strategic market is not a meaningful concept in the context of competition policy nor in the context of the Policy Document. . . . The Government appears as a result, no doubt, of heavy lobbying from the various businesses involved in the media, to have adopted the "strategic market" idea of the media being a single product market . . . this does not accord with economic principle and is not the right way to tackle the issues of plurality and diversity with which the government is trying to deal.[94]

Nevertheless, Hooper's long term measures were effectively swallowed whole by the government in the *Green Paper.* He stated six general criteria to be employed: flexibility; technological-neutrality; market entry; formal transparency; simplicity of operation and drafting; and quantitative measurement.[95] These criteria meet the primary concerns of regulators. In reading the *Paper,* one is reminded that Hooper is an "insider;" a Radio Authority member until 1994. The *Paper* is written with the regulators' concerns foremost, rather than corporate considerations, though his proposals carry convenient implications for BMIG. This *Paper* proved to be a remarkably accurate foretaste of both the *Green Paper* and the Broadcasting Bill. Its logic was seductive in 1995: it would be surprising if that logicality had been eroded by three years' distance. The incoming government shares the outgoing administration's concern for competitiveness; its pluralism credentials in the media were severely criticized by the House of Lords as recently as the February 9, 1998 debate;[96] the British tradition of conservatism will ensure that some elements of plurality and diversity protection remain on the statute book.

B. *Hybrid Approach: Robinson*

Hooper asserted a case for BBC and Channel 4 inclusion in media measurement, in that their role is to encourage diversity.[97] Why these strictly content-regulated public corporations sit well with corporations run for profit is not apparent, nor is it explained. BBC supporters Bill Robinson and Andrew Graham fundamentally disagreed. Bill Robinson[98] identifies five elements which combine to form an explanation of pluralism. These are: (1) restraining mo-

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94 *Id.* at 13.

95 *See* BRITISH MEDIA INDUSTRY GROUP, *supra* note 90, § 3, at 4.

96 585 PARL. DEB., H.L. (5th ser.) 920-30 (1998); *see* Bagehot, *Lordly Virtues,* The Economist, Feb. 14, 1998, at 59.

97 *See* BRITISH MEDIA INDUSTRY GROUP, *supra* note 90, § 1.6.

98 *See* Robinson, *supra* note 76, at 51-53.

nopolists in individual markets; (2) balancing politically influential product ownership; (3) restricting monopolists in the cross-media market; (4) providing universal access to media; and (5) providing diversity of media products. He places the first two in a category of political influence, the third with commercial influence, the fourth access, and the fifth content diversity. He believes that the aim of the *Peppermint Paper* is to regulate cross-media commercial influence (factor three) as a supplement to monomedia ownership limits (factor one), because content regulation and the provision of public service broadcasting provide the other elements.

Robinson's approach is to investigate the specific plurality issue which the government seeks to address. His product market is defined through competition law analysis of substitutability, which provides interesting evidence of the "media differences" concept and the insubstitutability of electronic media. While newspapers' political influences are relatively easily substitutable, in that their coverage can be replicated in other daily and weekly print and electronic media, electronic news is non-substitutable, as it produces news in near real-time direct to the viewer. That establishes a case for specific regulation of electronic media. It also establishes the case for regulation of Internet delivery, representing the substitute for television and radio. In another essay in the same collection, Andrew Graham states that "the new media *must* be included"[99] in order to ensure that the regulatory regime functions effectively, and in order to avoid the regulatory asymmetry of the domestic/non-domestic (BSB/Sky) satellite regimes of the 1990 Act, under which the protected alien will succeed.

Robinson extends his analysis to specific products. In his view, protection of political plurality involves the analysis of markets for news, for current affairs and political analysis, and other far less important markets (game show, light entertainment, soap opera, and others). This is reflected in the specific provisions in the 1990 Act relating to ownership of ITN, the network news provider to ITV, and Channel 4. Dominance of political analysis would be the market, whatever the means of distribution.

C. *Impartiality and Waiver from Ownership Rules*

As the public service broadcaster is designed to protect microdiversity and impartiality, it is logically and explicitly excluded from MER analysis. Impartiality is suggested by Robinson and Gra-

99 *See* Graham, *supra* note 75, at 49 (emphasis added).

ham[100] (joined by Kay in 1995) to serve as an instrument of diversity which companies could voluntarily concede in order to attract a different regulatory regime. If a company agrees to be monitored, presumably by ITC, for content-diversity and impartiality as a public service broadcaster would, the company should be entitled to waiver or exclusion from cross-media ownership rules, in the same way as the BBC. BBC Radio 4, "Today," and BBC2's "Newsnight" may be influential and highly valued, but the quantitiative MER does not reveal a value. Excluding BBC from MER calculations removes close to 50% of broadcasting consumption from the figures.

This suggestion identifies the crucial anomaly in existing ownership regulation. The most scandalously partisan media, tabloid national newspapers, are least regulated; television, legally bound to ensure impartiality and diversity, is most regulated. The justification for unregulated content and ownership in newspapers, while content and ownership regulation exists for television, appears increasingly untenable. Government's response is not to regulate newspapers, but to deregulate both content and ownership in television—truly a race to the bottom.

IV. Competition Law Approach

Given the difficulties of weighting MER, it is suggested that the commercial operators' own measure, revenue, be employed as the best market substitute. It has the added advantage of including new media, which would remain unaffected in that its revenue sources are currently negligible, and excluding the public service broadcaster whose "internal democracy"[101] ensures its impartiality, while still measuring its commercial joint ventures. The danger of asymmetrical regulation is thus avoided. Thus it is submitted that revenue, a measure of advertising/sponsorship plus sales/subscriptions, is the true measure of influence, combining direct influence over consumer choice with the imperfections of advertising value. This would of course affect the valuation of media products. Consumers express their preference via expenditure. Subscription revenues reveal those preferences. To provide a concrete example, BSkyB established a £10 billion business at mid-1996 valuations based on 4% of U.S. viewing. The advertising-driven media pro-

100 *See* Robinson, *supra* note 76, at 49; *see also* Graham, *supra* note 75, at 55; John Kay, *News Liked Baked Beans Better for Choice,* Daily Telegraph, May 15, 1995.

101 Richard Collins & Christina Murroni, New Media, New Policies: Media and Communications Strategies for the Future 74 (1996).

vide a consumer substitute, which the equity market values far less highly on an individual consumer basis than the reality of subscription. If News Corporation generates revenues in the billions, while radio companies produce tens of millions, that reflects the fact that consumers are perceived to value *The Sun* and *Sky Sports* as exponentially more important than Capital Radio. The central problem with established measures is that they assume advertisers are the target, rather than viewer choice. *The Daily Telegraph*, for instance, distributes 365,000 newspapers at marginal cost, in order to ensure sales figures above 1,000,000. It is unlikely to be read as closely as *The Guardian*, which is 50% more expensive and offers very few bulk sales. Advertisers take account of this in their negotiations; any MER should do the same.

This methodology produces huge problems for dominant commercial operators. The real value of BSkyB, News International, Pearson, and The Telegraph Group, familiar to the City, becomes a stark reality to the government and the public. Based on revenue rather than audience, the government's 10% overall market share figure becomes a real ceiling on the ambitions of conglomerates. This reveals media markets for the cartelized imperfections, with massive barriers to entry, and entrants and providers of capital understand this. Government plans to allow 20% concentration in a region, 15% in television and radio, and 10% overall, become approximately 40%, 30%, and 20% in the absence of the BBC. Multinationals would be required to abandon plans to acquire similar mature advertising media, in favor of developing new electronic media markets, ostensibly both theirs and the government's policy.

In this more competitive environment, the opportunity for a regulatory structure based on competition rather than market failure may present itself, without jeopardizing the position of current market actors. Following this methodology could provide a medium-term solution within a competition law framework. This would carry the following benefits: it would work with the dynamic competitive restructuring of the industry; it would not require wholesale divestment by any market actor; it would provide a framework which is compatible with European law and policy; and it would remove the scope for political interference in the commercial environment.

V. INTERNAL PLURALISM

The arguments in this article have been dominated by the analysis of external control of media corporations through ownership. Both this analysis, and the public debate, have been somewhat artificially separated from internal corporate governance and editorial independence issues. Collins, Murroni, and Purnell[102] seek a radical solution to media ownership, suggesting that the minimum acceptable number of media players should be seven, thus creating a maximum cross-media market share of 15%. Within the four sectors regulated by the 1996 Act[103] (television, radio, regional, and national press), companies could control 40% of one, 30% of two, 20% of three, or 15% of the total.[104] Circulation and audience are the measures chosen.[105] This approach is refreshing in that it states explicit goals; yet it is worrisome for the reasons demonstrated throughout this thesis. Political uncertainty could undermine the process, though the authors suggest the formation of an "OFCOM" super-regulator with powers comparable to the FCC in the U.S. They suggest that this institution may be less malleable than current regulatory institutions.

Collins and Murroni[106] set out editorial independence objectives in the internal management of media corporations, explaining that "[d]iversity is a matter for competition policy and content regulation" while concentration rules "are narrowly targeted at pluralism." They express the opinion that "surprisingly little attention has been given to policies that further diversity and reliability of information."[107] Their proposition of 40%/30%/20%/15% limits is therefore *conditional* upon "an entrenched independence for the editors and journalists concerned."[108] Without this latter condition, the thrust of the statistical proposal appears deregulatory. When one adds this condition, in a true reading of their proposals, the difference between Collins and Murroni and public lawyers such as Barendt is less apparent. Barendt's insistence that content and structural rules are inseparable is thus shared by Collins and Murroni. The internal pluralism sought is not quixotic: it is the regula-

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102 *Id.*
103 *See* Broadcasting Act, 1996, ch. 55 (Eng.).
104 *See* COLLINS & MURRONI, *supra* note 101, at 72.
105 *Id.* at 71.
106 *Id.* at 70.
107 *Id.* at 73.
108 *Id.* at 74.

tory model pursued in smaller oligopolistic media markets, especially those in Scandinavia.[109]

There is a difference between those commentators' views and this thesis' proposal, of competition law performing the task of ensuring competitive markets. This difference is the documentation of the failure of media-specific pluralism and diversity controls, together with acknowledgement of the fact that "editorial and management decisions are inseparable,"[110] in the words of the last, and perhaps final, Royal Commission on the Press of 1977. Such practices are employed in the Scott Trust governance of *The Guardian.*

Graham proposes proactive competition regulation of both horizontal concentration in "pluralism," and vertical integration in "interconnection" within a regulator whose ambit extends to the consideration of "internal democracy" or diversity. This would address his three concerns: (1) content-regulated broadcasting should be distinguished from solely commercial operations; (2) media concentration should be effectively regulated; and (3) control of gateways should be strictly regulated. He makes three proposals. First, he proposes that ownership control be based on monomedia concentration accumulating towards "a variety of trigger points,"[111] as suggested by Collins and Murroni.[112] Second, "internal democracy" should replace the public/private sector distinction, with rights and obligations of impartiality enabling organizations to seek exclusion from ownership controls.[113] Third, "there should be at least three bodies looking across the media as a whole." These would be: competition authorities, a decency and privacy commission, and a public interest regulator. However, the final regulator would be differentiated from the government's Green Paper plan, and the Collins/Murroni Ofcom. This would be due to its specialization, by a power to refer defined markets to the competition authorities for investigation, and by impartiality measures potentially excluding dominant players such as BBC and Channel 4. Market definition could be as limited as "*individual* consumers." He concludes that "the new media *must* be included" to avoid the BSB/Sky market asymmetry.

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109 DANISH MEDIA COMMITTEE, MEDIA CONCENTRATION: TRANSPARENCY, PLURALISM AND ACCESS, THE REPORT OF THE DANISH MEDIA COMMITTEE'S INTERNATIONAL HEARING ON MEDIA CONCENTRATION 12-13 (1995).

110 COLLINS & MURRONI, *supra* note 101, at 74.

111 *See* Graham, *supra* note 75, at 48.

112 He refers to James Purnell and Collins, as Purnell was co-author of a proposed pamphlet by IPPR which was due for publication. Purnell became advisor to John Birt at the BBC, then Deputy Director of the Prime Minister's Policy Unit.

113 *Id.* at 49.

A. *Diversity: Impartiality and Dominant Market Actors*

In view of government complicity in *Times Newspapers* (1981), *Today* (1987), BSB/Sky (1990), *Independent Newspapers* (1994), and other cases, the Secretary of State should relinquish her present quasi-judicial role, in order to remove her from the temptation to interfere in media pluralism. This abdication of political control has been rejected in general in her foreword to the *Competition Bill White Paper.* Whether she would concede the loss of political control in the narrower field of media mergers is moot. Former Labor Deputy Leader Roy Hattersley continually threatened News Corporation with a full and politically supported investigation by the competition authorities. His radicalism was to support openly competitive media markets.[114] If the new New Labor government is to confront media ownership reform, it is this direction which it would be advised to take. This is consistent with stated New Labor policy:

> to employ competition law analysis of media markets;
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> to reform U.S. competition law;
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> to reform U.S. regulation by adopting transparent, independent commissions; and
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> to remove political discretion through the adoption of independent PIT;
>
> to support public service broadcasting, in the Protocol to the Treaty of Amsterdam (which provides limited exemption from the article 92(4) illegal state aid provision of the Treaty of Rome).

B. *Impartiality and Dominant Political Actors*

Automatic investigation by competition authorities would not amount to automatic divestment. Measuring abuse of a dominant position would fail to meet democratic objectives in the media market. More suitable would be a requirement for interest in excess of market share limits to be under duty of impartiality, to avoid abuse of pluralism whatever a separate investigation of competitive conduct might reveal. This is not without precedent: the 1996 Federal Broadcasting Law in Germany requires television companies exceeding 10% of market share to provide access to independent broadcasters in peak-time.[115] The Canal+ broadcasting license in

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114 ROY HATTERSLEY, PRESS GANG (1983).

115 PETER HUMPHREYS, RECENT TRENDS IN THE GERMAN MEDIA: BROADCASTING PLURALISM IN THE BALANCE 25-27 (Univ. of Central Lancashire 1997).

France requires minimal returns to the public interest, in terms of investing a share of turnover in French film production.

A Media Panel of the proposed new Competition Commission would be expected to display greater consistency and independence than the existing authorities with veto by Secretary of State. The result would be the ringfencing of public service broadcasting, in that impartial content-regulated services would be exempt from Media Panel enforcement of divestment. The concept of a multimedia market share of 10%, a spirited if facile attempt on the parts of NERA and the government in 1995, can be abandoned as irrelevant to competition law. There is no market for "news consumption": it is in any case recognized that news analysis is received through BBC television and radio, broadsheet newspapers, and weekly journals, such as *Private Eye, The Economist, The New Statesman,* and *The Spectator.*

VI. Conclusion

Failed media markets provide no basis for successful entrepreneurs; they are a breeding ground for special interests. Similarly, poor competition law enforcement is no basis for improving competition in markets; it is a breeding ground for abusive cartelisation. Jonathan Davis questions the need for "the equivalent of what British Telecom has called a "hostile and destructive" OFTEL to give U.S. television the enema it may need if competition is to run smooth."[116] It may be that OFTEL itself will be the government's chosen solution to convergent communications regulation, renamed OFCOM. It is clear that any future United Kingdom communications regulator must adopt an equally vigorous approach, in order to successfully create the conditions for market entry and competition. Despite this broadly pessimistic analysis of regulatory capture by multimedia multinationals, there has only been one successful merger of television and newspaper interests since the Broadcasting Act came into force. This was the formation of Scottish Media Group from Scottish Television and Caledonian Press.

Media concentration has taken place in vertical sectoral markets, with competition reduced by massive barriers to entry caused by Channel 3 mergers and newspaper price wars. Though deregulation by regulatory capture was described by lobbyists as "pushing at an open door," it served only to retrench producer vested interests. Monomedia monopolists appear content to so remain,

[116] Jonathan Davis, *Is Competition in Television a Fair Game?*, Broadcast, June 16, 1995, at 14.

whatever opportunities compliant governments may offer. Regulatory reformist zeal has preempted any possible digital market convergence. The lesson for regulators and academics is that the media corporate predator's eyes may be bigger than his stomach.