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David Reader[1]

I. INTRODUCTION

In the wake of a high-profile public inquiry into media culture and an on-going court case regarding phone-hacking, the state of the U.K. media has rarely featured so prominently on the political agenda. One of the key debates to have emerged regards the ownership of the British media and, in particular, how ownership can be regulated in a way that facilitates diversity and media plurality.

On February 4, 2014, the Communications Committee of the House of Lords—the Second Chamber of the U.K. Parliament—published a report, *Media plurality* ("Media Report"), in which it proposes a number of changes to the regulation of media ownership in the United Kingdom.[2] Among the most notable of these is the proposal to grant decision-making powers to the national media regulator, Ofcom, in respect of mergers that raise potential media plurality concerns. At present, this power is conferred on a government minister—the Secretary of State for Culture, Media and Sport.

However, owing to some recent controversies, the ability of politicians to undertake this role impartially has been called into question.[3] The *NewsCorp/BSkyB* case, in particular, is a testament to the potential for politicians to be exposed to undue influence and bias in the media sector. Re-allocating the decision-making role to Ofcom could overcome this risk of capture,[4] but it could equally amount to substituting one problem for another. This article therefore explores the current assessment relating to media mergers in the United Kingdom and proceeds to scrutinize the House of Lords' proposals to amend this procedure.

II. MEDIA MERGERS IN THE UNITED KINGDOM

As a default position, media mergers in the United Kingdom are assessed on the same basis as any other merger transaction that meets or exceeds the specified turnover thresholds.[5]

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[2] Communications Committee, *Media plurality* (HL 2013–14, 120–I), *available at* www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf (accessed February 5, 2014).

[3] *See*, for example, Andreas Stephan, *The Hunt/Murdoch Affair: Why a Secretary of State should have no role in merger control*, COMPETITION POLICY BLOG (April 2012), *available at* *www.competitionpolicy.wordpress.com/2012/04/30/the-huntmurdoch-affair-why-a-secretary-of-state-should-have-no-role-in-merger-control* (accessed February 7, 2014).

[4] For these purposes, "capture" is afforded its political science definition, broadly referring to an instance where policy-makers and regulators are, in one way or another, influenced to apply their policies in a way that serves their own private interests or the interests of the firms they regulate.

[5] *See* Enterprise Act 2002, section 23 for the turnover thresholds required for a relevant merger situation.

The merger control regime established under the Enterprise Act 2002 requires a merger to be assessed according to whether or not it "has resulted, or may be expected to result, in a substantial lessening of competition" within the relevant market.[6] This "substantial lessening of competition" ("SLC") test provides the foundations for the strict economic effects-based approach to merger control that the 2002 Act envisaged.[7] As a consequence, mergers will almost always be assessed according to their likely impact on competition and not in relation to wider social and non-economic interests. The SLC test itself is applied as part of a two-stage assessment by the Competition and Markets Authority ("CMA"), the U.K.'s new independent competition agency.[8]

However, a departure from this default economics-based approach is possible if the merger in question raises certain "public interest" concerns relating to national security, financial stability, or media-specific conditions.[9] Of these media-specific conditions, the most important to this discussion is "the need for a sufficient plurality of media owners."[10] Where such concerns arise, the Secretary of State has the power to intervene in the merger assessment process and assume the decision-making powers of the CMA.[11]

This is not to say, however, that the CMA's competition assessment is halted. Indeed, under the current regime, if the Secretary of State decides to make a public interest intervention on—for example—media plurality grounds, he or she will receive advice from the CMA Board and Ofcom on issues relating to competition and media plurality, respectively.[12] The minister is under a statutory duty to accept the CMA's competition findings, but is under no such obligation with regards to Ofcom's findings on plurality.[13] The minister will then balance the competition and plurality concerns before deciding whether to refer the merger to the CMA Panel for a more detailed assessment on competition grounds or, alternatively, to permit or block the merger on media plurality grounds in lieu of a reference. It is this chain of intervention, balancing, and decision-making that embodies the quasi-judicial role undertaken by the Secretary of State.

It is not altogether clear what is expected of the Secretary of State when he or she performs this quasi-judicial role. According to *The Leveson Inquiry: Report into the culture, practices and ethics of the press* ("Leveson Report")—a document recording the findings of a major public inquiry into the culture and ethics of the British press, headed by Lord Justice Leveson—a number of expectations are placed on ministers who undertake this type of role.[14] In among these expectations, the Leveson Report clarifies that the Secretary of State's decision must

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[6] *Id.*, §22(1)(b) for completed mergers and section 33(1)(b) for anticipated mergers.

[7] Manifestations of the SLC test are also present in the merger regimes of, *inter alia*, the United States and Canada, as well as in EU Member States such as France, Malta, and the Republic of Ireland.

[8] The CMA replaces the previous institutional arrangement in U.K. merger control, with the CMA Board performing the Phase 1 assessment previously undertaken by the Office of Fair Trading ("OFT") and the CMA Panel replacing the Competition Commission (CC) at Phase 2.

[9] Enterprise Act 2001, §58.

[10] *Id.*, §58(2C).

[11] The Secretary of State derives this power under section 42(2) of the 2002 Act.

[12] *Id.*, §§44(1) and 44A.

[13] *Id.*, §54(7).

[14] L.J. Leveson, *The Leveson Inquiry: Report into the culture, practices and ethics of the press* (2012), *available at* www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp (accessed February 7, 2014).

be his or her own rather than that of the collective Ministerial Cabinet,[15] and confirmed that any decision would be subject to an objective test for bias.[16] Significantly, it was also noted that the Secretary of State is entitled to have a prior opinion on the proposed merger, so long as he or she is able to put this opinion to one side during the decision-making process.[17] This requirement is of particular relevance to the events of the proposed *NewsCorp/BSkyB* merger in 2010, which posed many questions on the potential for ministerial bias within the quasi-judicial decision-making process.

In the early stages of the *NewsCorp/BSkyB* assessment, Vince Cable MP—the Business Secretary initially tasked with assessing the merger—was stripped of his decision-making role upon having his intentions to "declare war on Rupert Murdoch" recorded by undercover journalists.[18] His replacement, the then Culture Secretary Jeremy Hunt MP, was known to have expressed sympathy towards the merger which, of course, was perfectly permissible, provided he did not allow this opinion to influence his final decision. Controversially, however, a special advisor to Mr. Hunt was also in direct private contact with Frédéric Michel—News Corp's Director of Public Affairs and a chief lobbyist on the takeover bid—throughout the assessment process. Ultimately, although the Leveson Report praises Mr. Hunt for his scrutiny of the evidence in the case, it was concluded that, by allowing himself to become too close to Mr. Michel, Mr. Hunt had exposed himself to objective bias and had thereby compromised the quasi-judicial procedure.[19]

The *NewsCorp/BSkyB* case certainly exposes some of the pitfalls and sensitivities of undertaking the quasi-judicial role within the media sector. The distinctive characteristics of the media industry, including its reliance on communication and journalistic sources, make it an ideal environment in which to lobby decision-makers and expose them to undue influence. The saga prompted Lord Leveson to recommend that Parliament revisit the role of politicians in such cases; a call that was duly answered by the House of Lords.

III. PROPOSALS TO ASSIGN DECISION-MAKING POWERS TO OFCOM

Under the House of Lords' proposals, the institutional arrangement would vary considerably.[20] According to the Media Report, the quasi-judicial decision-making role would be removed from the Secretary of State and reassigned to Ofcom. By virtue of this, Ofcom would have the discretion to make interventions in mergers raising media plurality concerns, which would—in turn—trigger two separate assessments of competition and media plurality running in parallel (the former undertaken by the CMA and the latter by Ofcom itself). Should a conflict arise between the findings of the CMA and Ofcom on whether or not to permit the merger, the

[15] *Id.* at 2.16.

[16] *Id.* at 2.14. The objective test is that adopted in *Porter v Magill* [2002] 2 AC 357, ¶103.

[17] *Id.* at 2.15.

[18] Robert Winnett, Andrew Porter, & Holly Watt, *Vince Cable stripped of responsibility for media competition after Rupert Murdoch comments*, THE TELEGRAPH (London, 21 December 2010), *available at* www.telegraph.co.uk/news/politics/liberaldemocrats/8218006/Vince-Cable-stripped-of-responsibility-for-media-competition-after-Rupert-Murdoch-comments.html (accessed March 7, 2014).

[19] Leveson Report, *supra* note 14, volume 3, chapter 6, [at 5.197].

[20] A helpful illustration of the proposed procedure features on page 65 of the Lords' Report, *supra* note 2.

Ofcom Board—quite literally Ofcom's Board of Directors—would be tasked with balancing the conflicting interests and reaching a final decision. This is where the integrity of the proposed new regime begins to unravel.

By arranging the assessment procedure in this way, the final decision of the Ofcom Board is essentially a straight choice between the advice of the CMA and the advice of the Board's fellow personnel within Ofcom. The House of Lords has itself recognized this potential conflict of interest, suggesting that it may be alleviated by (a) preventing the Ofcom Board members from taking part in the initial plurality assessment, and (b) ensuring the Board is mindful of the potential for judicial review. Whether these conditions would provide an effective safeguard is debatable but, in any case, it is somewhat contradictory that such a recognizable risk of bias should exist within a proposal that seeks to overcome the perceived subjectivity of ministerial decision-making.

This is not to say that Ofcom is necessarily as prone to bias as the Secretary of State. For example, the multi-member nature of the Ofcom Board allows for group decision-making, meaning that direct lobbying—such as that observed in *NewsCorp/BskyB*—becomes much less workable. Equally, the Board would feel under no pressure to pursue personal ambition or short-term political goals, such as re-election.[21]

Yet it would be naïve to assume that Ofcom is immune to regulatory capture. A significant proportion of its staff have experienced working within the media industry, which potentially leaves Ofcom prone to the "revolving door" dilemma, whereby its former industry workers (who appreciate the unique attributes of the market) may be biased in favor of making decisions that benefit the media industry, rather than the public at large. Indeed, at the time of writing, six of the eight sitting members of the Ofcom Board had previously held a private position within the media sector. On this basis, even if the Ofcom Board were to conduct itself in accordance with the requirements of the quasi-judicial role, there nonetheless exists an inherent perception of bias owing to the membership of the Board. To an extent, this has the effect of negating the procedural transparency that the House of Lords envisioned in its proposals.

IV. CONCLUSION

Taken as a whole, the House of Lords' Media Report establishes some solid foundations for further Parliamentary discussion. Indeed, this article does not allude to the Media Report's proposals for a periodic review of media plurality, which warrants praise for addressing some of the key questions raised by media law scholars.[22] There is a fear, however, that the Media Report underplays the risk of regulatory capture that Ofcom would face during the decision-making process. The type of influence may not be as observable or newsworthy as that which is associated with ministerial decision-making, but it may nonetheless have the effect of preventing a thorough balancing of the competition and plurality aspects in a case. Rather than seeking to

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[21] For a useful overview *see* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. L. ECON. ORG. 167 (1990).

[22] *See*, for example, Michael Harker, *Ofcom's Report on Measuring Media Plurality—The Outstanding Questions*, COMPETITION POLICY BLOG (July 2012), *available at* www.competitionpolicy.wordpress.com/2012/07/02/ofcoms-report-on-measuring-media-plurality-the-outstanding-questions (accessed February 8, 2014).

replace the Secretary of State as a decision-maker, there may be value in considering further ways to protect ministers from capture in the future. Certainly, given the inherent role of the media in facilitating a democratic society, the constitutional significance of elected representatives should not be understated.

Moreover, although the House of Lords' proposals refer solely to mergers in the media sector, one cannot help but feel that they have the symbolic potential to alter perceptions of the role of political decision-making in U.K. public interest mergers more generally. If these proposals were to be enacted by Parliament, it would surely mark a retreat from the idea that politicians are best placed to rule on matters affecting the public interest.

Indeed, if there exists an inherent lack of confidence in the ability of ministers to remain impartial during the assessment process, would the House of Lords not also champion an agency-based approach to public interest mergers in other industries? To analogize with the U.K. banking sector, for example, should the Prudential Regulatory Authority—the regulator tasked with ensuring the stability of financial services firms—be given the final decision over banking mergers in cases where financial stability concerns are raised? It is an interesting proposition, but not one that is likely to be realized. Rather, it is more likely that the Lords' proposals are a reflection of the potential for undue influence that is ingrained in media markets and which, in turn, would appear to warrant special measures.

Fundamentally, the House of Lords' proposals add another voice to the on-going debate regarding "politician *versus* agency" in the context of public interest mergers. On the one hand, there continues to be a widespread appreciation for the democratic and constitutional legitimacy of allowing elected politicians to have the final say on matters involving the public interest. On the other hand, there is a strong case for delegating a role to regulatory agencies who—by means of their openness, consistency, and expertise—should bring greater transparency and credibility to the decision-making process.[23] But regardless of whether the United Kingdom ultimately assigns decision-making powers to a politician, an agency, or a combination of the two, the continuing risk of regulatory capture must be appreciated in any instance.

[23] Mark Thatcher, *Regulation after delegation: independent regulatory agencies in Europe*, 9(6) J. EUR. PUBLIC POL'Y 954, 958 (2002).