

# Competition Law Association

## Can the Concept of Media Plurality be made to work in UK Competition Law?

Antonio Bavasso

Allen & Overy LLP

Visiting Professor, University College London

22 March 2012



## A primer

- Competition and Plurality are complementary concepts: implications
- Is this a correct definition: *“the fair, balanced and unbiased representation of a wide range of political opinions and views”?* (Michele Polo in *"The Economic regulation of broadcasting Markets, Seabright and Von Hagen eds, Cambridge 2007)*
- Plurality and Impartiality are different concepts, often confused

## The Enterprise Act

- *“the need, in relation to every audience in the UK....for there to be a sufficient plurality of persons with control of media enterprises serving that audience” (s58(2C)(a) EA 02).*

---

## The concept of plurality

- In BSkyB/ ITV the CC described its process as follows:

“We took the concept of plurality of persons with control of media enterprises to refer both to the range and number of persons with control of media enterprises. ***We concluded that a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences.*** We thought it important to draw a distinction between the plurality of persons with control of media enterprises and the implications of that plurality for the range of information and views made available to **audiences**. We also thought that it was appropriate to distinguish between the range of information, and views that are provided across separate independent media groups (external plurality) and the range that are provided within individual media groups (internal plurality)” (para. 5.32)

- The Court of Appeal confirmed that a plurality analysis involves consideration of more than just number and must encompass both internal and external plurality

## Actual extent of control matters

"when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the Commission may, and should, take into account the ***actual extent of the control exercised and exercisable over a relevant enterprise by another***, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control"

(Court of Appeal Judgment, BSkyB/ ITV, para. 121)

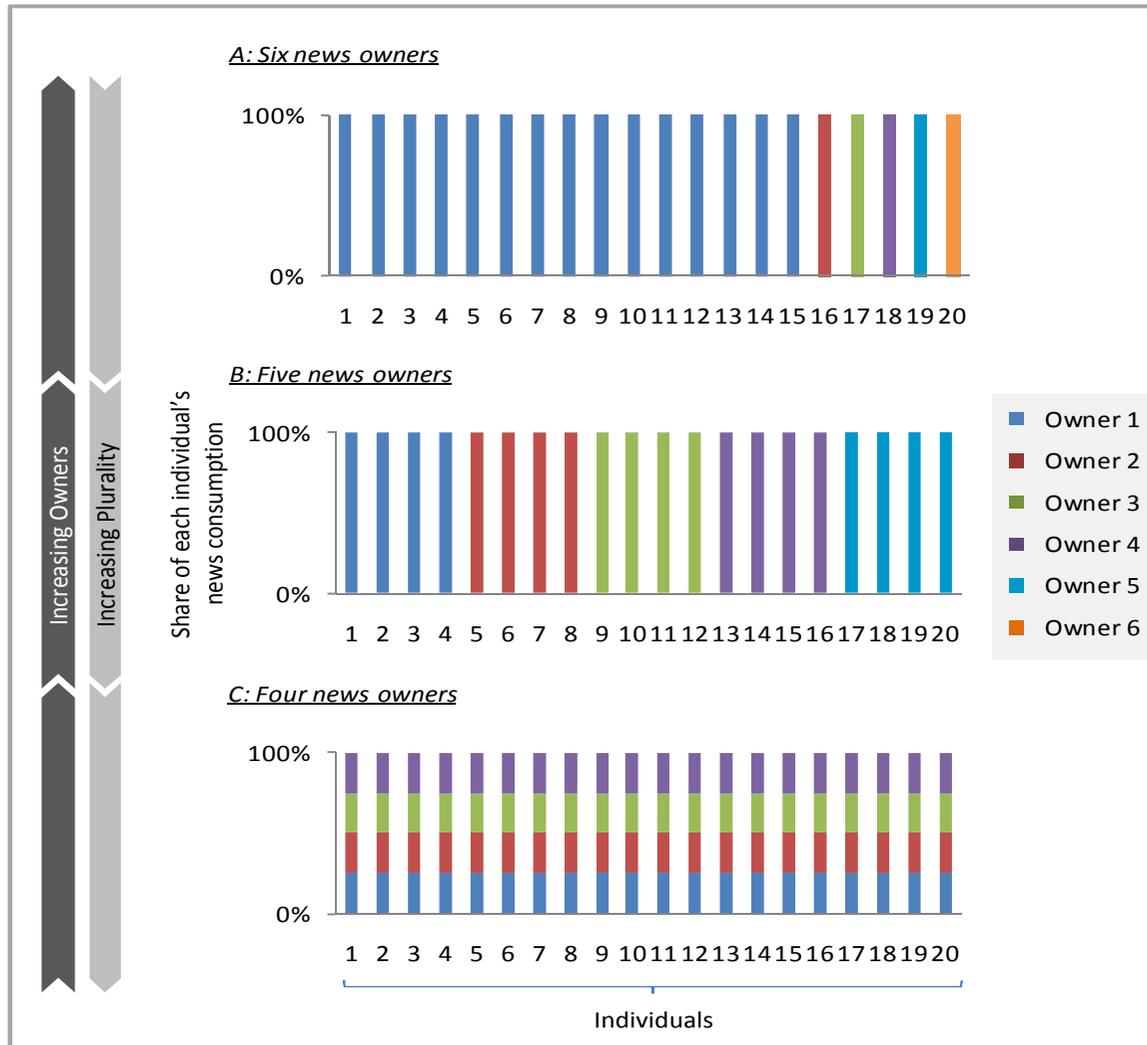
## Internal Plurality

- "[W]e concluded that **the regulatory mechanisms, combined with a strong culture of editorial independence within television news production**, were likely to be effective in preventing any prejudice to the independence of ITV news" (emphasis added). (para. 41)
- "In television news, existing regulatory mechanisms—including quality controls (eg in the Broadcasting Code), requirements for impartiality and quotas for television news and current affairs programming—reduce the scope for influence over editorial decisions by owners of television channels which broadcast news". (para. 5.54)

## The meaning of “sufficient plurality” is not developed in the Enterprise Act

- The Explanatory Notes to the Communications Act state in relation to section 58(2C)(a) that “[t]he first limb of this subsection is concerned primarily with ensuring that ownership of media enterprises is not overly concentrated in the hands of a limited number of persons.” (Explanatory Note 802)
- The CC described its process as follows in Sky/ ITV:  
*"We have considered sufficiency by reference to the current levels of plurality, having regard to any change in plurality that arises as a result of the acquisition. Moreover, in considering the sufficiency of persons with control of media enterprises, we have regard to the implications of the level of control exercised for the range of information and views available. We considered this in relation to both internal and external plurality."*  
(para. 5.15)

## Measuring plurality: importance of patterns of news consumption



Source: Perspective

**antonio.bavasso@allenoverly.com**

**These are presentation slides only. The information within these slides does not constitute definitive advice and should not be used as the basis for giving definitive advice without checking the primary sources.**

**Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings.**