Puttnam amendments: further specified grounds for referral & Leveson 2 definition of Fit & Proper

- Lord Puttnam

229ZA: After Clause 84, insert the following new Clause—

“Mergers: specified considerations for mergers involving broadcasting media enterprises

- Lord Puttnam (Lab)

My Lords, in speaking to the two amendments that stand in my name, I should first declare my interest both as a content owner and as president of the Film Distributors’ Association. A number of factors encourage me to take up what is in effect the unfinished business of 15 years ago, when I was closely involved in the 2003 Communications Bill. The most recent was something that the noble Baroness, Lady Warsi, said on the “Today” programme 10 days ago. In response to a question regarding the ramifications of the immigration controversy raging across the Atlantic, she said:

“It all comes down to the type of country we want to live in”.

Of course, the noble Baroness was right. Pretty well every decision we make in this House sooner or later comes down to the type of country we want to live in. What we have just heard from the noble Baroness, Lady Benjamin, is about precisely that. What kind of country do we want to live in, and how far are we prepared to push ourselves to get there?

As I am sure the noble Baroness, Lady Buscombe, will confirm, this was repeatedly discussed during the passage of what became the Communications Act 2003. At that time we were by turns both amused and concerned by the antics of the then Italian Prime Minister Silvio Berlusconi and his attempts to muzzle, or better still own, the Italian media. This House was at one in agreeing that the provision of a free, fair and plural media ecology, in all its many and varied forms, was fundamental to the health of any democracy worthy of the name.

As a result, and after a great deal of debate, the general duties of Ofcom in carrying out its functions were finally legislated in this way:

“It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

The wording of those two general duties, and the order in which they fall, along with the public interest test that accompanied them, were hard fought for, and they were won by an
overwhelming vote on the Floor of this House—two-thirds to one-third—against the wishes of both Front Benches.

Fifteen years later, we find ourselves looking anxiously across the Atlantic at a new and democratically elected kind of Berlusconi on stilts—and we are jolted into reminding ourselves how very much ownership of both the media and the message matters. The true architect of the public interest test was the noble Lord, Lord Crickhowell, and the engineer who created the double lock that gave it teeth was the now noble Lord, Lord Lansley.

As the House may know, a public interest intervention notice is issued by the Secretary of State, and specifies a media interest. The grounds for referral are listed in Section 58 of the Enterprise Act 2002: the media interest grounds for referral are listed in Section 58 (2A) to (2C). The Secretary of State may specify further grounds for referral by laying an order before Parliament. Ofcom then carries out a report based on the grounds specified by the Secretary of State.

That is what is supposed to happen—but, as we discovered during the misadventures of the then Secretary of State, Jeremy Hunt, there is far too much wriggle room, and a lack of clarity as to the precise grounds on which a referral is based. In this respect, I supplied the Minister with a copy of the five-page letter I sent to Jeremy Hunt on 11 March 2011, setting out the reasons why I believe that the UILs he proposed to set in place prior to waving through the then News Corp—now 21st Century Fox—bid for what was then called BskyB were hopelessly inadequate. Milly Dowler’s death made any response to that letter wholly unnecessary.

Following a meeting that the present Secretary of State kindly agreed to, I recently sent her a copy of that letter, for the consideration of her officials. In my note to her I included a few additional reasons why I felt reference to Ofcom was the only sensible way in which any new bid for Sky could be transparently dealt with. Given that the Government have the world’s most highly regarded media regulator at their service, it is extremely hard to see why they would not be eager to distance themselves from the well-documented suspicions of favours given and favours returned that now, sadly, dog their predecessors.

The purpose of my amendments is to buttress the referral process by adding further and easily understood grounds directly to the Bill. Specifically, they would add a fit and proper persons test, which, somewhat bizarrely, exists only as an ongoing test for licence holders, not bidders, and is thus to be conducted only after the fact of any merger. I say “bizarrely” because I ask: how sensible does it seem to judge the ongoing fitness and propriety of a licence to a higher standard than the one sought at entry? Possibly when she comes to answer the Minister might help me understand what I see as an extraordinary anomaly.
The amendments also suggest an additional test to underpin the safeguards of editorial independence to ensure against the slow “Foxification” of the at present altogether excellent Sky News service. Anyone who has ever read Sir Harold Evans’ chilling book *Good Times, Bad Times* will know only too well what can happen to the overeager and gullible politician who seeks a simple answer to a complex issue. Fox News may have been a significant success in the United States, but I am certain that few in this House would wish to see the results of that particular success replicated in this country.

We also suggest a slightly wider plurality test—one that takes account of and acknowledges the impact of rapidly changing market power in the acquisition of content and its consequential distorting effect on the advertising marketplace. The second of these amendments would add greater clarity to Ofcom’s existing and ongoing “fit and proper” test for licence holders. It does so by using the language of the terms of reference of Leveson 2, drafted by the previous Prime Minister. Such an amendment would make clear that, for the bid to go through and for Ofcom effectively to carry out its scrutiny of the fitness and propriety of the ownership of Sky, Leveson 2 should go ahead without delay.

As we have all discovered to our cost, these are very serious issues, which, in their impact on every aspect of public life, could have enormous and unexpected consequences. I cannot have been the only person on these Benches who experienced a brief flutter of hope when, following the nightmarish divisions of Brexit, on the morning of 13 July I heard the newly installed Prime Minister say:

“The Government I lead will be driven not by the interests of the privileged few, but by yours … When we take the big calls, we’ll think not of the powerful, but you. When we pass new laws, we’ll listen not to the mighty but to you. When it comes to taxes, we’ll prioritise not the wealthy, but you. When it comes to opportunity, we won’t entrench the advantages of the fortunate few”.

Her Government’s first pledge to this nation was not to be at the beck and call of the powerful, the mighty or the wealthy, or to entrench the advantages of the fortunate.

I want with all my heart to believe that the Prime Minister believed what she said that day and that she and her colleagues in government are prepared to live by it. When she used the words “you” and “yours”, I assumed that she meant the public—those citizens referred to on the very first line of Ofcom’s duties. By accepting these amendments—or, far better still, coming back with wording that clarifies while offering the same intent—the Government will prove that, where media ownership is concerned, they have no intention of following the dismal example of so many of their predecessors, including, I am sad to say, the Government
of which I played a very small part, who entrenched the advantages of the fortunate few. Should they fail to do so, they will have fallen at the very first hurdle they set themselves, and possibly never recover the public’s trust. I beg to move.

Baroness Bonham-Carter of Yarnbury

My Lords, my name is also attached to these amendments, and I support the noble Lord, Lord Puttnam. They add the necessary extra scrutiny needed for media mergers and ensure that Ofcom’s fit and proper test is effectively applied.

These amendments specify further grounds for the Secretary of State to refer media mergers to Ofcom. As the noble Lord, Lord Puttnam, mentioned, the existing plurality safeguards are no longer adequate. They do not deal with market dominance and they are not sufficient for protecting editorial independence of media outlets. It is vital for the media environment that no company possesses disproportionate power to influence public opinion or the political and policy-making process. Plurality safeguards are an essential part of protecting the public and decision-makers from media organisations which are allowed to expand without proper scrutiny.

Then there is the matter of Ofcom’s fit and proper test. As many noble Lords will know, Ofcom must supply a test of fitness and propriety to owners of broadcast licences. At the moment, this test is not spelled out. What we propose would add definition to the test, using the recommendations of Leveson 2. Taking the current Sky-Fox bid as an example, I believe that this would ensure that the present chief executive of 21st Century Fox, James Murdoch, would undergo proper scrutiny if he were to retain a senior position at Sky.

I echo the noble Lord, Lord Puttnam, in one of the letters to which he referred. How we deal with the concentration of power decides the kind of country we are. I, too, understood that that is what Theresa May said when she became Prime Minister. Now it is for her Government to follow the logic, evidence and facts, and accept these amendments. They do not bind the Government; they simply strengthen the merger and plurality regime already in place. They put appropriate and proportionate power in the hands of an independent regulator, Ofcom, in order to protect the interests of citizens and consumers.

To quote my friend, Sir Vince Cable:

“The public interest centres on plurality and fitness”.

These are beneficial proposals which have been carefully agreed through cross-party consideration. I hope that the Minister will recognise this and respond positively.

Baroness O'Neill of Bengarve (CB)
My Lords, I support this amendment. I remember well—and the noble Lord, Lord Puttnam has reminded us of it—that, in 2003, we had quite dramatic discussions in your Lordships’ House about the dual duties of Ofcom to the citizen and to the consumer. There was a bit of a wobble after Ofcom was set up, but since then it has properly seen itself as defending these two separate interests and not, as was initially suggested, merging them into the interests of a fictitious character called the citizen-consumer. That was an unfortunate, but brief, episode.

I believe the noble Lord, Lord Puttnam, hit the nail on the head when he said that this pair of amendments is highly congruent with the Government’s policy. Not merely has the Prime Minister spoken about acting in the interests of “you rather than the few”, she has also started to refer to “issues of corporate governance”. This is basically what this is about—the standards that we think are relevant in corporate governance.

This has been a very unhappy decade in which there have been failures of corporate governance in many sectors. I am a member of the Banking Standards Board, looking at the culture of the banks. I read every day about this culture and realise how vital is the requirement that only those who have passed fit and proper person tests come into positions of leadership and influence in the banking sector. I realise how important this also is for the media sector—indeed, it is perhaps more important.

As we have seen clearly in the last few weeks, with the presidential campaign in the United States, the media have changed hugely in this decade. We can get spiralling misinformation that is extremely difficult to stem once it gets a hold in social media; once it spreads with the rapidity which the greediest of proprietors could never have imagined. In this world, more than ever, serious corporate governance has to take account of the ethics, as well as the law, of the fitness and propriety of leadership, as well as the adequacy of regulation. I support the proposal that Ofcom get a clear grip on the fitness and propriety of those who lead the broadcasting industries.

Lord Stevenson of Balmacara (Lab)

My Lords, this has been a very important debate on a very big issue. Its sharpness has been reinforced by the fact that we are currently in a process involving all the issues that have been referred to. Obviously, this will be reflected in the fact that the response will not be made by a Minister in the department which might have to deal with some of the results of the current proposals for a merger, and we respect that and understand the reasons for that.

The wonderful speech by my noble friend Lord Puttnam, which took us back to the origins of the Ofcom regime that we now have and reflected on points along the way, including the dark shadows cast by the events of 2011, gave a texture to this that makes it much more important. The noble Baroness, Lady O’Neill, spoke about the need to think about how all this interfaces into descriptions of the sort of country we want to live in and the sort of society that we can
enjoy. The necessary handles on both policy and the implementation of that policy are very important.

At heart, the amendments are simple. They draw out in more detail and focus on issues which have been live ever since they were first introduced. Indeed, I recall discussions in your Lordships’ House on two Bills which dealt with issues that bore on this and for which we had debates of this type. That does not mean to say that this is ground that no longer needs to be tilled. It does, because in thinking about this we have to recognise some of the issues that have already surfaced in Committee today and throughout the Bill—that when we are talking about the media, particularly but not restricted to the digital media, we have to think very carefully about the pace of change and the adjustments that have to be made to the policy framework in order to achieve what will be proportionate and appropriate regulatory functions later on down the line.

The good thing about the amendments is that they make us think about the words that were used, which seemed appropriate at the time, in relation to the twin requirements: that we look at plurality in relation to media but also at control. If this were a simple case of looking at how a monopoly might influence outcomes and how consumers are treated, it would not be necessary, perhaps, to delve so deeply. The issues that are currently addressed by the CMA, for instance, are largely economic. They deal with prices. They deal with the way in which consumers are treated, but they are basically around whether or not the price has been artificially moved in order to favour the producer against the citizen. In that sense, we do not need to think too hard about some of the issues, although we can regret them, as we did in the debate in the dinner hour, which I was able to participate in, which focused almost exclusively on why consumers have disappeared from government, consumer interests are rarely referred to and there are not even consumer panels on the CMA. But that debate can be read in Hansard, and I am sure it will be of much interest to those who are interested in this point.

The amendments would go back over the grounds on which a PIIN is issued and make it clearer than it is currently that simple questions of plurality, which are readily gamed in terms of corporate structures these days—this issue was perhaps not so resonant at the time that the legislation was drafted—need to have a little bit more bite if they are to look at some of the detail that we want in this area. We have to look not just at the question of ownership and control in relation to a market-facing issue but at the way in which such an agglomeration can distort and change that market, which is not in the public interest. It is very important that we do that. There may well be a way of dealing with this under the existing legislation, but it would be so much easier if the amendment was accepted because it would take us down a line that was more focused on the particularity of the media arrangements.
Then there is the question of the fit and proper person test for those who have broadcast licences. The basic structure is there. Again, on reflection, it could be argued—and I think it has been demonstrated today—that without more concern about the issues which arise out of the merger, without more concern about how the operation will work in terms of who activates it, what exactly the issues are that will be looked at, what the proprieties are that we are concerned about, and where the ethical concerns are and all that, then it will not be as effective. I look forward to hearing from the Minister.

Baroness Buscombe (Con)

My Lords, I thank all noble Lords who have taken part in this important debate. It is good to have this debate.

This group of amendments seeks to make extensive changes to the broadcast media public interest considerations that may be relied upon to intervene in certain media merger situations and the fit and proper test that Ofcom has a duty to apply to all those who hold a broadcasting licence in the UK.

These are at best extensive changes to the public interest considerations that may be relied upon to intervene in certain media merger situations that are specified on the face of the bill. We understand that the Sec of State already has the power to specify these grounds by order should she choose to do so.

Before I get into the detail, the debate has included views from across the House about the parties to the Fox/Sky merger. There is a proposed merger currently in train, which it is very likely the Secretary of State will need to consider under her existing powers. As the Secretary of State noted in her written statement of 10 January, any decision will be a quasi-judicial one. It is important that she is able to act independently and that the process is scrupulously fair and impartial. As a result, neither I nor any Minister can comment on the merits of this specific case. I will have to restrict my comments to the substance of the amendments themselves.

I have noted carefully the views of noble Lords, and of the noble Lord, Lord Puttnam, in particular. I have a transcript here of some of the debate of the then Communications Bill, in 2003. Of course, the noble Baroness, Lady O’Neill, remembered the key issue about citizen and consumer. Indeed, Lord Puttnam and I met outside this Chamber to try to come to terms with our approach to this issue—I was part of her Majesty’s Opposition in those days. A lot was achieved. Of course, it was a government amendment on Third Reading which created
the plurality and public interest test. It was my noble friend Lord Lansley, who is unfortunately unable to be in his place tonight, who sat on the draft legislative committee on that Bill, and who retains that interest.

Drawing all the contributions together brings us to a single question: do the Government believe they have the necessary powers to allow them to deal with complex media mergers and a concentration of ownership that would be damaging to media plurality?

No that is the wrong question. The right question is does Parliament believe that the Government has the necessary powers to allow them to deal with complex media mergers and a concentration of ownership or a change in ownership that would be damaging to the public interest beyond merely the grounds of media plurality.

In our view, the tests introduced in 2003 are wide-ranging and provide the Secretary of State for Culture, Media and Sport, who is responsible for media mergers, with a wide discretion to intervene.

This discretion only exists through the order-making power (to specify new grounds for intervention), in section 58 (3) and (4); it does not exist on the face of the bill.

(2C) The following are specified in this section—

(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

For example, in cases where there are concerns about media plurality (that is already covered by s58 2C (a)), or where a bidder does not have a genuine commitment to the UK’s well-established rules on content standards (that is already covered by s58 2C (b) and (c)) and cross-promotion (that is not – it appears - set out in s58 but is merely covered by the Code), which are overseen by Ofcom, the Secretary of State can consider those concerns as part of her deliberations as to whether to intervene in the proposed merger. But what about the question of whether she can consider any of the matters listed in the amendment as part of her deliberations as to whether to intervene in the proposed merger?

Turning to the amendments themselves, given the discretion to intervene based on the existing media public interest considerations, we do not believe it is necessary to add the additional requirements set out in Amendment 229ZA and would argue that these are matters that can already be considered under the existing tests.
This isn’t true; these grounds cannot be considered under the existing grounds in s58(2A-C). They can only be considered by first laying an order before Parliament specifying them as in s58 (3) and (4). The minister never admits she can specify the grounds by order. Why not?

In addition, the matters set out are considered by Ofcom on an ongoing basis in its regulatory role.

Again, they are not. Only the fit and proper test can be considered by Ofcom in its ongoing role. Even if they are, they only apply (“on-going basis”) to existing licence-holders.

There are three existing broadcast media public interest considerations that the Secretary of State can take into account in deciding whether or not to intervene in a merger. The first is the need for a sufficient plurality of persons with control of media enterprises—I stress, plurality of persons. The second is the need for a wide range of broadcasting which is both high quality and appeals to a wide variety of interests. In other words, the focus must be on content and plurality of content. The third is the need for persons carrying on media enterprises to have a genuine commitment to broadcasting standards.

Together, these powers give the Secretary of State discretion to consider a wide range of matters in deciding whether the specified public interests may be relevant, and whether or not to intervene in a particular merger.

The range of matters set out in s58 (2A) – (2C) do not cover the grounds set out in the amendment. Those grounds can only be considered by first laying an order before Parliament specifying them under s58 (3) and (4).

The amendments wouldn’t have been tabled if they just repeated the existing grounds.

Amendment 229ZA, which inserts new Section 58(2D) into the Enterprise Act, would allow the Secretary of State to intervene in a media merger based on the need for those holding broadcasting licences to be a fit and proper person, as noble Lords have said today. The issue of who is a fit and proper person to hold a broadcasting licence is a regulatory matter for Ofcom. Ofcom is under an ongoing duty to remain satisfied that those holding broadcasting licences are fit and proper to do so, under Section 3 of the Broadcast Act 1990 and Section 3 of the Broadcast Act 1996. Ofcom’s assessment of these matters will consider the conduct of those who have material influence or control over broadcast licensees and will consider a wide range of factors in assessing who is fit and proper, including the matters set out in the amendment.

The amendment gives the power to the Secretary of State to refer a bid to OfCom to check fitness and propriety of bidders (ie prospective license-holders). It would not give the power to the Secretary of State to make the determination – only the referral. It would be Ofcom’s determination as they would produce the report.
The existing power of Ofcom to check the fitness and propriety of existing license-holders (without referral from the Secretary of State) is unaffected.

The amendment also proposes a new Section 58(2E), which is aimed at allowing intervention on the basis that the governance of broadcast media enterprises providing news needs to include sufficient safeguards for editorial freedom in the provision of full and accurate news services. I entirely accept—and the Government entirely agree with noble Lords on this—that the issue of governance is crucial, although we discussed in earlier debates today that the issue of accurate news is becoming a very difficult one and will exercise all our minds in the coming months.

It is a long-established condition of broadcast licences in the UK that news is reported with due accuracy and impartiality, as set out in Ofcom’s broadcasting code. Ofcom, as the regulator, governs compliance with this requirement of the code.

1. Editorial independence is different from a standard of due impartiality and accuracy. Editorial independence covers a far wider range of matters including the allocation of journalistic resource and deciding which stories to run (the latter having as much potential to bias news coverage as inaccuracy or partiality).

2. In any event, even if the OfCom regulatory powers do cover editorial independence (through accuracy and due impartiality rules) this would only apply to existing licence-holders not to bidders.

3. Ultimately, without safeguards, the owner can fire the editor until he gets one that is complaint. There is nothing that OfCom can do about that while the Code is unbreached.

The matters set out in the amendment at proposed new subsection 58(2F) would be dealt with by licence conditions and Ofcom’s broadcasting code, including provisions on fair and effective competition and the cross-promotion code, as well as matters that would be considered as part of the fit and proper person test.

(2F) The need to prevent a media enterprise (excluding a newspaper enterprise) from—
(a) exercising undue influence over distribution of, and access to, rights, talent and other forms of cultural expression;
(b) promoting its own business interests through its editorial outlets, to the detriment of competitors where this is against the wider public interest;
(c) exercising undue pressure in the regulatory and political environment, to the detriment of competitors where this is against the wider public interest.”

We do not believe that any or at least all of these matters are all dealt with by licence conditions and the Broadcasting Code.

What is certainly the case is that the fit and proper test which is “ongoing” and therefore comes too late to impact on the merger, does not appear to cover any of these matters. In any event if someone is not a fit and proper (based on past record), desisting from doing any of the items above does not then somehow make them fit and proper.

- Lord Stevenson of Balmacara
I thank the Minister for going through this in so much detail. The issue raised in the first part of the amendment on the fit and proper person test was not whether the powers exist but how they would be triggered. The worry is that they would be triggered post hoc rather than anticipatorily with regard to a merger. Do the Government accept that there is a difficulty here?

Baroness Buscombe

The Government do not accept that there is a difficulty in this. The important issue is that the powers remain broad in their application.

Waffle

To the best of my understanding, though, there is no difficulty regarding when they are triggered.

Ex cathedra statement not reasoned argument

Lord Puttnam

What I believe the noble Lord, Lord Stevenson, is saying, and it is very important, is that there is an accidental anomaly in the Bill. As someone who, like the Minister, pored over every word of it, I take some responsibility for this, but it is extraordinary—I even referred to it as bizarre—that the bar that is set for an ongoing licensee is higher than the bar for a bidder. Surely common sense requires that someone bidding has to reach the same standards of honesty and probity that are required of an ongoing licensee. There is an anomaly, and I am trying to help the Government to get rid of it because it should not be there. Obviously there should be a bar, but it should apply to anyone applying for a licence just as it does to anyone who has an ongoing licence that is being looked at.

Baroness Buscombe

I am going to wait for a reply on that. I would like to be able to respond tonight, rather than saying that I will write to noble Lords; if the Committee will bear with me, let us just wait and see.

I understand what the noble Lord is saying about bidders meeting the same standards as those who already have a licence.

This is never finally dealt with.

It is a long-established condition of broadcast licences in the UK that news be reported with due accuracy and impartiality, as set out in Ofcom’s broadcasting code. Ofcom, as the regulator, governs compliance with this requirement of the code. The matters set out in the amendment at proposed new subsection 58(2F) would be dealt with by licence conditions and Ofcom’s broadcasting code, including provisions on fair and effective competition and the
cross-promotion code, as well as matters that would be considered as part of the fit and proper person test.

This is all repetition of her speech before the interventions.

I have been informed that the fit and proper test can be looked at by Ofcom only once they hold a licence,

This is confirmation of the problem

but we believe that the provisions on genuine commitment to broadcasting standards give the Secretary of State the powers she needs in this regard.

She is saying that the power, if exercised, to refer a bid to OfCom under this specified ground in 58 (2C), would cover in respect of a bidder, all the matters that could and would be later covered by a “fit and proper” test on the licence holder.

- (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.]

This is patently not the case.

- Lord Puttnam

I think that we all deserve to be very clear about this: can we be sure that the Secretary of State will apply exactly the same standards to a bidder as she would require of an ongoing licensee?

- Baroness Buscombe

There is nothing coming from the Box—I think that I will have to come back to this point.

There was no answer.

Ofcom’s role as a regulator is to have ongoing oversight of these matters. The important point, however, is that the Secretary of State’s power to intervene in media mergers provides an additional layer of protection for media plurality in the UK.

The amendments are about more than plurality. That is the point.

In the case of Amendment 229ZA, the very fact that these matters are part of the regulatory broadcasting framework with which licence holders must comply means that they can be taken into account by the Secretary of State in deciding whether or not to intervene, particularly in terms of the impact that such matters have on the need for persons holding broadcast licences to have a commitment to broadcasting standards.

(2C) The following are specified in this section—

(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the
Australia, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(b) the need for the availability throughout the Australia of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

Again, she is saying that the power, if exercised, to refer a bid to OfCom under the specified grounds set out in 58 (2C) and “particularly” 58 (2C) (c), would ensure sufficient scrutiny of these matters by OfCom in advance of a merger. But that does not appear to be right. It does not help (and may not be lawful) if concerns about things that OfCom can not consider are used to trigger a referral on separate grounds that OfCom can consider and then does so, ignoring the concerns that contributed to the referral.

In addition, any merger must also be judged on competition grounds by the relevant competition authority, and the existing competition law. The Government believe that the existing provisions in the Enterprise Act 2002 already give the Secretary of State wide and proportionate powers in relation to proposed media mergers. While we understand the intent behind this amendment, we do not judge that it is necessary. The competition grounds in the Enterprise Act are not relevant to these public interest matters.

Amendment 229ZB would similarly seek to add unlawful acts or corporate governance failures as specific matters that Ofcom could take account of when determining, on an ongoing basis, whether an individual or a corporate body satisfies the fit and proper person test, which will include an assessment of those with material influence or control over such bodies. Ofcom can and does take into account such matters and this amendment is therefore unnecessary.

It is necessary to ensure that the terms of reference of the second Part of the Leveson Inquiry is made relevant by their reference in statute to this OfCom duty.

There is also a risk that this amendment may potentially narrow Ofcom’s discretion here, although I acknowledge that that is not the noble Lord’s intention.

The amendment would obviously not do that.

For the purposes of this section the determination of “fit and proper” includes having specific regard to—

(a) the extent of any unlawful or improper conduct within such companies and other organisations for which a person holding the licence has or had responsibility for management or corporate governance; and

(b) the extent of any corporate governance and management failures at such companies and other organisations for which a person holding the licence has or had responsibility for management or corporate governance

The word “includes” is not capable of narrowing the scope of inquiry.

From a legal standpoint, there is always a danger in seeking narrowly to define the parameters of the law. Indeed, I sought to do just that during our debates on this issue back in 2003. I was seeking to limit the scope—the boundaries—of the Government’s intended
plurality test; I wanted the law to be narrowly defined and to target specific circumstances in which the plurality and public interest test could apply. The noble Lord, Lord Puttnam, disagreed with me, saying that breadth is very important. Of course, it was he who won the day. So I do think it important to take care when trying to narrowly define what does and does not apply, thus narrowing the scope, as that can constrain the whole approach. It is important to take this into account when considering these amendments overall.

Again this is spurious. The word “includes” is not capable of narrowing the scope of inquiry.

The Government therefore believe that the powers introduced in 2003 are sufficiently wide to deal with complex media merger cases which raise public interest concerns and, for this reason, we ask the noble Lord to withdraw his amendments.

- Lord Puttnam

I thank the noble Baroness for an extremely full response. Perhaps I may say several things. First—I probably should have made it clearer—the noble Baroness was extraordinarily helpful and generous to me during the very painful passage of that Bill. On every occasion when I sought some form of compromise, she always came up with a constructive solution. She knows I feel this, because we have discussed it, but I am very happy to pay public tribute to her.

I think that some mistakes were made in 2003. We could not look into the future, and there were things that we were not even allowed to do under our terms of reference. However, it is worth recalling that, yes, it was a government amendment that was passed at Third Reading, but it was passed, as the noble Baroness will remember, because of a crushing defeat on Report.

I have no desire whatever to go through that process again, I promise you. On the other hand, I think I have a sufficient understanding of this House to know that when it comes to the issue of media ownership and any suspicion of undue pressure, this House will again vote overwhelmingly in favour should I press these amendments. I do not think that my amendments as they stand are good enough. The noble Lord, Lord Stevenson, has already hinted at that.

We will seek clarification and send to Parly Counsel.

I would infinitely prefer the Government to come back and offer the sense of security that I seek. I very much liked the Secretary of State on the one occasion I met her. She is clearly an honourable, decent woman. It would be very helpful for her to be able to say that the standards that she would require of a licensee are exactly the same, and as exacting, as those of a bidder. I think it would be good for the Government.
I was not being silly when I discussed Theresa May’s speech. I found it a very remarkable speech from an incoming Prime Minister. I think she did lay out her stall. I think we have every reason to have expectations that are higher than we had of recent predecessor Governments. I am quite ashamed of some of the things that my own Government did in respect of cosying up to and colluding with media owners. That has got to stop.

There is a wonderful line of Mark Twain’s: “A lie can run around the world while the truth is still trying to put its boots on”. We are living in that world. We are living in a post-truth society. We can no longer afford an over-cosy relationship between the Government of the day and media owners whose job is simply to tell the truth as they see it. That is all I am seeking.

I am very grateful to the Committee. I will happily withdraw this amendment, but I am certain that we will be returning to this subject in the hope that the amendments put forward by the Government will be acceptable to the entire House. I beg leave to withdraw.