

BBC Response

Consultation on Media Ownership Rules

January 2002

EXECUTIVE SUMMARY

Overview

- Light touch media ownership rules can support plurality and diversity for citizens, provide certainty for investors, and foster the success of the UK media sector
- Regulation should extend no further than is necessary to achieve these goals.
- Ownership controls on television and radio should be relaxed
- Forward-looking legislation must also address threats to plurality posed by leverage between platforms and content.

General Prohibitions

- We would retain the ban on religious organisations holding multiplex licences.

Television

- Rules preventing ITV consolidation should be removed.
- Joint ownership of ITV and Channel 5 is a matter for the competition authorities.
- Channel 3 licences should require adequate financing for high quality news provision by the nominated news provider.
- ITV licensees should be able to own 100% of the nominated news provider.

Radio

- The radio points system should be abandoned.
- The Radio Authority scheme for at least 3 providers in addition to the BBC in each area will safeguard plurality.
- The ban on single ownership of more than one national licence should be ended.
- A scheme similar to the RA/CRCA proposal should be introduced for digital programme and digital multiplex licences.
- The regulator must effectively enforce licence conditions on service remit to prevent changes when licences are sold on.
- Access radio will require some form of ownership regulation.

Cross-Media Rules

- A new market in platforms should be created and regulated under the cross-media rules, alongside the markets in radio, television and newspapers.
- A system of competition law combined with single media rules would not effectively safeguard plurality.
- A system which weights the influence of different media would fail to provide the clarity and certainty needed for media markets to function effectively.
- Existing rules are effective, but may not offer long term regulatory solutions .
- The proposal for a market share approach applied neutrally across media is attractive but incomplete:
 - The television market must include all commercial services, digital and analogue.

- A new market in platforms needs adding to address the threat to plurality from leverage between content and platforms.
- Higher thresholds may be appropriate to local markets.
- PSBs not open to takeover should be excluded from the market.
- The proposed plurality test (making all limits permeable) needs more discussion.
 - It should also address gateway control.
 - Decisions must be taken by ministers rather than any regulator.

Review of Rules

- Biennial review is probably impractical and would create too much uncertainty.
- Review should be carried out by ministers or Parliament.

1. OVERVIEW

1.1 Introduction

The BBC believes that tightly focussed, light touch media ownership rules help to create a dynamic and competitive media sector which protects plurality and diversity, which provides certainty for those operating in it, and which works in the interests of citizens, consumers, industry and investors.

As the Government has recognised, changes within media markets make a full reappraisal of the rules appropriate. The BBC can see a strong case for rolling back many of the rules without damaging the core regulatory objectives of plurality and diversity. We believe that such relaxation may well bring positive benefits to citizens and consumers. We can however see no convincing case for abandoning the rules altogether.

1.2 The Rationale for Media Ownership Rules

Media ownership regulation should extend as far as is necessary to secure the core objectives of plurality and diversity. But it is equally important that intervention in the market through the media ownership rules should not extend beyond what is necessary to support these concerns.

- **To safeguard plurality of voice in the provision of information and opinion:** Meaningful choice in the provision of news and opinion is central to our democracy. The threshold at which plurality raises concerns from a social and public policy perspective is considerably lower than the point at which competition concerns might be triggered. While content regulation has a role to play, the importance of this principle legitimises additional regulation to preserve a range of ownership of sources of information and opinion within each market.
- **To guarantee diversity in the range of content available to consumers:** The unique nature of the media product (capable of evaluation only after consumption) and of the market (tending towards monopoly as a result of high fixed costs, and low marginal costs) requires intervention to support sufficient diversity to allow consumers to make meaningful choices. Media ownership rules can work with other forms of regulation (licence obligations, statements of programme policy, etc.) to facilitate this, by ensuring that there is a range of providers of content in each medium in each market.

1.3 The Role of Competition Law

Competition law, applied effectively, has an increasingly important part to play in regulating the media sector. However, whilst effective competition law is a necessary component of a healthy media industry, its purpose is to remedy the effects of anti-competitive behaviour rather than to ensure a pluralistic and diverse media sector. Properly designed, light touch media ownership rules have a specific role in

achieving these objectives, and remain valid alongside the operation of competition law. In addition, the structural rather than behavioural approach and ex-ante nature of media ownership rules may create greater certainty for investors than the case-by-case, and often ex-post approach, taken by competition authorities.

Despite these differing approaches, in practice neither competition law nor media ownership provisions can be applied in isolation. The BBC believes that, alongside OFCOM's responsibility for policing media ownership provisions, it is critical to the future health of the sector that the new regulator should be given the powers and expertise as a competition authority to remedy concerns which fall within its jurisdiction swiftly and consistently. There will be considerable benefits for the UK media industry if the same body is able to take a view on media ownership and competition issues within the sector.

1.4 Creating Future-proof Regulation

The BBC believes that in many areas, market developments and particularly the increase in the range of sources for information justify a relaxation of the ownership limits set by the rules. The consolidation which this allows will, we hope, facilitate the provision of a diverse range of content and the development of UK-based global media companies.

We believe it is appropriate that – as the Government has proposed – the ownership of analogue terrestrial licences should continue to be the focus of the media ownership rules, given the continuing influence of analogue television and radio over audiences. But digital television penetration has already reached a point where any consideration of the overall television market needs to include digital services and audiences alongside analogue services and audiences.

As take-up increases, it is possible that the rules may need reshaping further to reflect the influence that may be acquired by at least some digital services. The need for regulation of individual channel licences through the media ownership rules in order to ensure plurality may well diminish over time. But there is already some evidence that control of the distribution of premium content such as sports rights, may be exploited to the detriment of plurality and diversity particularly where it is combined with other media interests, such as ownership of content services and platforms.

In revising the media ownership rules at the present moment, it is also important to recognise the new challenges to plurality which some digital technologies may present through the proprietary gatekeeping opportunities which they offer. The distinction which the Government makes in its discussion of digital radio between the supply of digital programme services and the control of digital multiplexes is useful, but the more considerable concern and incentive for abuse exists within digital television and digital radio where companies exercise control over both gateway and content, that is where vertical integration exists between one of the traditional content markets, and a digital platform.

The BBC believes that the failure to address this issue within the context of a revised rules on cross-media ownership would be a serious omission, and would mark a failure to address the fresh regulatory challenges presented by the digital world.

1.5 The BBC's Relationship to Media Ownership Rules

The media ownership rules mark an intervention in the market in order to secure plurality and diversity in the supply of media for citizens and consumers within the UK. The BBC exists for the same purpose of ensuring plurality and diversity within the market, a situation which is reflected through our distinctive regulation in other areas. The unique role which the BBC plays within the broadcasting market makes it entirely inappropriate that media ownership rules should apply to the BBC's public service activities:

- The BBC's Charter and Agreement ensure that the BBC operates in the market entirely in accordance with our public service remit.
- As a publicly funded broadcaster, we would be failing in our duty to licence payers if we did not try to reach as many of them as possible through their communication means of choice.
- The BBC is not in a position to choose to acquire or to merge with other players in the market, or itself to be taken over, which is the key concern of the media ownership rules.

Any commercial services in which the BBC is involved in any capacity should of course be subject to these rules in the same way as all other commercial services.

2. GENERAL PROHIBITIONS

2.1 Religious Ownership (Proposal III)

The BBC welcomes the Government's recognition of the need for distinction between access to the airwaves through programme service licences, and the control of the airwaves conferred through the holding of a multiplex licence. Whatever views are on the ownership of individual digital sound programme service licences, the ownership of digital radio multiplex licences raises substantial concerns. As the Government notes, control of the gateway to audiences provides considerable scope for limiting the range of content to which that audience may have access, and thereby damaging plurality and diversity. We therefore see a role for media ownership rules in restricting ownership in this area, both through *maintaining the ban on the ownership of multiplex licences by religious organisations*, and through using cross-media ownership rules to address any potential for abuse in this area. Please see our later comments at 5.2.

3. TELEVISION

3.1 Introduction

The BBC believes that the interests of citizens, consumers and the media sector as a whole are best served by ensuring that Channel 3 exists as a strong and competitive player, both within the UK and internationally. The media ownership rules currently hamper the channel's ability to play this role, by limiting licensees' ability to consolidate and by restricting licensees' and others ability to invest in Channel 3's news service. We therefore believe that the majority of these provisions should be rolled back.

3.2 Ownership of ITV Licences (Proposals IV and V)

The BBC supports the Government's proposal to *relax the rules which prevent consolidation within ITV*. As the Communications White Paper emphasises, much of the strength of UK broadcasting derives from a mixed Public Service Broadcasting ecology with a number of diverse and strong players, and we welcome proposals such as these which we believe will support that.

Concerns regarding regional responsibilities must be dealt with through licence conditions, statements of programme policy, and other content regulation mechanisms. They are not a matter for media ownership rules. Any concerns about advertising sales should be left to the competition authorities.

3.3 Joint Ownership of ITV and Channel 5 (Option VI)

We believe that the issue of *joint ownership of ITV and C5 is properly a concern for the competition authorities*, and that the concerns raised may be effectively dealt with through competition law. We do not support the inclusion of a specific ban within the media ownership rules.

3.4 Requirements on the Nominated News Provider (Proposal VII)

High quality, impartial news provision on television is essential to underpin our democracy when many people depend on television news as their primary source of information. The BBC believes healthy competition within television news, through the existence of a range of different quality news providers, acts to raise standards across the industry, and to provide greater choice and a higher level of service for viewers. However, *it is far from clear that the current arrangements with regard to the nominated news provider for Channel 3 are the best way to ensure that citizens receive the optimum service*.

The BBC is delighted that the Government is taking this opportunity to review the provisions established in the 1990 Broadcasting Act. We believe that the key concern with regard to the news service on Channel 3 should be the quality of news coverage provided. It is not clear that the current rules relating to the nominated news provider act to address this concern.

Regulatory tools for ensuring quality news coverage should continue to include content standards for news coverage (impartiality, accuracy, and potentially specified levels of commitment to regional coverage and to news provision within the schedule as a whole). But *regulation should also require a clear commitment by the Channel 3 licence holder(s) to adequate financing for its news service*. The Government's white paper *A New Future for Communications* has already proposed a number of news content standards as tier one and tier two obligations. Remaining concerns may effectively be addressed through licence conditions and statements of programme policy for ITV, rather than through the media ownership rules.

3.5 Ownership of the Nominated News Provider (Proposal VIII)

The BBC believes that the provisions of the Broadcasting Act 1990, which set a cap of 20% on any single shareholding and limited the overall investment by ITV licensees in the nominated news provider, have restricted investment and had a detrimental effect on the overall provision of television news.

While welcoming the Government's proposals to raise the investment limits in the nominated news provider, *the BBC sees no reason why ITV licensees, or indeed a single ITV in the future, should be prevented from owning the nominated news provider in its entirety*. We believe a number of benefits to news provision for citizens might follow from the Channel 3 licence holder(s) taking on both financial responsibility and regulatory obligations for the delivery of a quality news service.

However, regardless of the level of investment which ITV chooses to make in the nominated news provider, we believe that the Channel 3 licence holder must be encouraged through its licence and through its statements of programme policy to make sufficient financial and regulatory commitments to the news provider to support a high quality news service on Channel 3.

4. RADIO

4.1 Introduction

The BBC believes that existing media ownership regulation has been overly restrictive in this area. Moves to support some degree of consolidation will we believe support diversity of provision within markets. There is therefore a strong case for increasing reliance on competition law within radio markets.

4.2 Radio Points System (Proposal IX)

The radio points system has been overly complicated and overly restrictive and it is entirely appropriate to abandon it. We support the Government's proposal *that the competition authorities should determine the limits for accumulation of radio interests within the radio market*. Cross-media ownership however raises different concerns which are discussed within section 5.

4.3 Regulation of ILR Licences (Proposal IX)

We support the proposal put forward by the Radio Authority and CRCA. We believe that its goal of ensuring a minimum of 3 ILR owners in each area in addition to the BBC effectively addresses plurality concerns, while allowing a level of consolidation which should help to increase investment in content, and to enhance the range of services. In working through the details of the scheme, it will be critical for its successful implementation to establish clearly and beyond doubt what constitutes a "local radio area".

4.4 Ownership of National Radio Licences (Proposal X)

We believe that the clearly defined remits for each national analogue licence, effectively enforced by the regulator, are sufficient to guarantee diversity. *We support relaxation of the ban on ownership of more than one national radio licence.*

4.5 Ownership of Local Digital Sound Programme Service Licences (Proposal XI)

The BBC considers that the concerns about plurality which underpin the Radio Authority/ CRCA proposal for licences in analogue markets remain relevant as users migrate to digital radio. We would therefore support the suggestion that *OFCOM should be responsible for introducing a comparable scheme to ensure a minimum of 3 alternative owners of digital programme licences in each area in addition to the BBC in each market.*

4.6 Ownership of Digital Multiplex Licences (Proposal XI)

We welcome the recognition within the consultation paper of the importance of plurality in the ownership of multiplex licences. As take-up of digital radio increases, multiplex owners will become increasingly powerful gatekeepers and some level of regulatory control may be required in order to ensure that they consistently operate in the interests of plurality and diversity. We would suggest that at the current stage

of development *OFCOM should consider implementing an appropriate scheme based on the Radio Authority/ CRCA plurality model to ensure a minimum number of different owners of multiplexes within markets.*

4.7 Onward Sale of Licences (Proposal XII)

We share the Government's concern with regard to the onward sale of licences shortly after they have been awarded, and subsequent changes to services.

The most significant barrier to such activity must be appropriate pricing for the initial sale of licences, and the effective enforcement by the regulator of the conditions set at the time that the licence was originally awarded, in particular of those conditions which define the remit of the service to be provided. Regardless of whether the licence owner is the original purchaser, or has taken over the licence subsequently, the regulator has a responsibility to deal with any failure to deliver the licensed service as defined, and – as a last resort – should demand the return of the licence and re-advertise it in an open competition.

The prevention of the onward sale of licences for a period of time may be a useful addition to such regulatory activity. However, it is not clear to us that two years is the appropriate duration for such a ban. We would suggest that if it were discovered, subsequent to the introduction of such legislation, that licences were being sold on at inflated prices after that expiry of two years, OFCOM should be encouraged formally to review the provision and to bring forward proposals for tackling the problem.

4.8 Access Radio

The Government has already set out its proposals to develop a new tier of radio licences to provide local and community services in its white paper, *A New Future for Communications*. If, as the Government intends, these services are to become important sources of local news and information, they could raise similar plurality concerns to existing radio licences, and some ownership controls may be needed in those circumstances.

We would anticipate concerns with regard to the accumulation of licences by a single body, either within a market, or across markets, and to the onward sale of access radio licences. It will be important for OFCOM to develop a suitable regulatory framework which might include a parallel system to that proposed for ILR, in those markets where there are sufficient numbers of Access Radio licences to merit such measures.

It will also be important for OFCOM to ensure diversity in Access Radio. The regulator will need to monitor and enforce the remit of each service so as to guarantee that Access Radio fulfils the purpose which the Government has outlined for it, in opening up access to the airwaves to new community groups, and providing dedicated community radio services.

5. CROSS MEDIA OWNERSHIP (Option XIV)

5.1 Introduction

The BBC welcomes the Government's recognition of the importance of addressing cross-media ownership concerns through the media ownership rules. While competition law has a role to play in tackling these issues, dedicated rules help to guarantee plurality within the sector, and to deal with the distinctive concerns raised by operations across different parts of the media sector, as compared to those raised within particular parts of the media sector and dealt with through single media rules. The evidence suggests that cross-media ownership rules do not act as a barrier to the development of media companies capable of competing globally. Rather we believe that by enhancing competition within the UK, the cross-media rules support the development of a competitive market and a range of diverse players capable of moving into international markets.

5.2 The Need for a "Platform" Market

We have studied the options set out in the consultation paper for reform of the cross-media rules at some length, and our comments on the individual proposals may be found below. However, we believe that all options as they stand at present fail adequately to address the challenges of digital developments which have created powerful new positions in controlling access to the airwaves, with the capacity for considerable impact on plurality and diversity.

We welcome the Government's recognition of the need to prevent abuses in such areas, through the proposals put forward in relation to digital radio multiplexes (proposals iii and xi in the consultation paper). But the greatest incentives for misusing a gatekeeping position to limit third party content providers' abilities to access audiences, and vice versa, arise where companies are vertically integrated with control over both platforms and content – that is, where companies are active across both platforms and other media markets.

The potential impact on plurality and diversity, and the cross-media nature of the issue suggest that this is an issue which should be dealt with through the cross-media rules. We would propose that as a first step towards effective future-proof regulation *it is necessary to recognise the emergence of a fourth market in "platforms" or "gateways" and to apply cross-media rules to it alongside existing markets in radio, television and newspapers.*

Two alternative mechanisms would then be possible, within the range of options for reform of the body of cross-media rules as a whole which the Government has set out. *Either a new rule might be introduced to prevent any combined ownership of the new platform market and any of the traditional content markets. Or the new platform market might be integrated alongside the traditional markets into a regulatory system which places limits on cross-media ownership according to market share applied neutrally across markets.* We refer you to our further comments at 5.6.

5.3 Reliance on Competition Law

We do not believe that reliance on competition law combined with single media rules would be the right way forward. Cross-media ownership raises particular plurality concerns which quite properly lie beyond the scope of economic regulation. We are not persuaded that the rules limit competition to an extent which merits abandoning them. Given that the Government has accepted the case for a continuing body of media ownership rules in other areas, we can see no justification for abandoning rules altogether in this area, which lies at the heart of dedicated regulation of the media market.

5.4 Weighting the Influence of Different Media

As the Government acknowledges, ideas which try to establish “share of voice” or to develop a “media exchange rate” by weighting the influence of different media and capping the total allowable influence across media do have considerable intellectual attractions. But such schemes invariably tend to adopt a relatively arbitrary and/ or subjective weighting for different media. *We are not persuaded that a scheme along these lines can either reflect the true influence of all media, or provide the clarity and certainty needed for media markets to function effectively.*

5.5 Existing Cross-Media Rules

The existing cross-media rules have we believe delivered effective regulation of media markets. They are however heavily focussed on controlling the ownership of analogue terrestrial broadcasting licences. In a world of converging communications, and given the popularity of digital services, it is uncertain whether this will continue to be the most effective way of regulating the sector to deliver plurality in the longer term although it may retain its usefulness for some time to come.

5.6 Market Share Applied Neutrally Across Media

The fourth option put forward by the Government, which proposes the establishment of a common set of limits for all forms of cross-media ownership, so that for example no owner can control more than 40% of one market, or 30% of two markets, or 20% of three markets *has the potential to provide an effective mechanism for balancing concerns about supporting plurality with the desire for a more straightforward system of rules.* However, as currently proposed it adopts a very traditional approach to identifying the key media markets for cross-media control, limiting its consideration to analogue television, radio and newspapers.

Digital television already plays a significant role within the television market. Its influence, and its consequent potential to impact on plurality and diversity, will increase steadily as digital take-up continues. In order to construct rules which are sufficiently robust to regulate markets as we move towards digital switchover, the BBC believes that any definition of the television market which is to be used in considering limits for cross-media ownership needs updating. It is no longer appropriate to limit consideration of the television market to analogue terrestrial

services. In the interests of creating flexible and future-proof rules, we therefore propose that *any market definition must include the whole of the commercial market, both analogue terrestrial and all forms of digital transmission.*

As we have already indicated in our comments at 5.2, in considering the distinctive markets within the media sector to be regulated under the cross-media rules, it is essential to recognise the emergence of a new market in “platforms” or gateways. While this proposal in its current form represents an innovative regulatory mechanism, *its application would be fundamentally flawed if it failed to apply cross-media rules to this fourth market alongside existing markets.*

In this case it may be inappropriate to impose the suggested limit of 40% within one market, but application of the proposed 30% and 20% limits on control of two or three markets respectively would, we believe, ensure that any new regime effectively supports plurality and diversity as convergence continues and we move towards switchover.

With regard to the issue of limits to be imposed in local markets, we support the Government’s suggestion that *higher thresholds may be appropriate.* However we believe that *more thought needs to be given to the interrelationship between national and local cross-media rules* to address the issues of plurality which may arise where acquisitions are contemplated between the two.

5.7 The Relationship of PSBs to Consideration of the Market

We assume that whichever proposal the Government resolves to adopt following this consultation process, *the definition of markets will focus on commercial services which are open to merger and acquisition, and will exclude public service broadcasters which are not open to takeover* (i.e. BBC, Channel 4 and S4C).

The presence of these services in the market is in any case designed to support diversity and plurality in the market in exactly the same way as the media ownership rules. The intention of the rules must be to support plurality within commercial broadcasting – the inclusion of public service broadcasters who cannot be involved in the commercial deals which the rules are designed to address can only result in diminishing the effectiveness of their application.

5.8 Plurality Test

We welcome the Government’s reemphasis of the importance of plurality through its proposed plurality test. However, while the proposed approach – to allow all thresholds set for cross-media holdings to be exceeded upon satisfaction of a plurality test – will undoubtedly ensure flexibility in the rules, it will need to be applied with extreme caution if it is not to undermine the certainty delivered by the media ownership rules.

In setting such a test *it is critical that due weight is given to gateway/ platform control*, in addition to those factors which the Government sets out in its draft test. Any assessment of plurality in the digital world should also give consideration to the potential impact of control of premium content such as sports rights, and in particular

exclusive control of the distribution of such content which may fall outside traditional media markets but which, when combined with other substantive cross-media interests, may effectively be used to reduce choice and plurality of services for consumers within media markets.

The BBC believes strongly that *any decision to allow the limits set through the cross-media ownership rules to be exceeded must be taken by ministers rather than by OFCOM*. Cases in which such decisions will be called for will be highly political. It is essential that those making them should be fully independent from those licensees who are party to the case, and that they should be fully accountable both to Parliament and to the general public.

This potential impact of this innovation on the sector is such that we believe *considerable further discussion is needed* of both the content and the application of any plurality test, before full legislative proposals are drawn up.

6. REVIEW OF OWNERSHIP RULES (Proposal XV)

6.1 Proposals for a Biennial Review of Rules or an Automatic Lapse

The BBC fully supports the Government's desire to ensure that the media ownership rules continue to be relevant to a changing market. However, the proposals put forward for either an automatic biennial review of the rules by OFCOM, or a lapse in the rules after two years unless their continuation were agreed by Parliament, both *risk creating a level of regulatory uncertainty which would have an extremely detrimental effect on the sector.*

The proposed two year time frame for review, as the duration of this current review process highlights, would also appear to raise considerable practical challenges.

6.2 Responsibility for Review

While we appreciate that the Government wishes to find ways of expediting the process of updating the rules, in order to avoid holding back the market, we believe that this is an area where *there will continue to be a role at the very least for careful ministerial scrutiny and consultation before any changes are made.*

The role of the media ownership rules in conserving plurality and diversity, themselves crucial to our democracy, suggests that Parliament needs active involvement in designing and amending the rules. As the sectoral regulator, OFCOM will have an important part to play within the process, but the final decision on any changes should be made by those with democratic accountability.

6.3 BBC Proposal for Future Review

We would suggest that:

- *OFCOM should be mandated to carry out a routine review of the media ownership rules every four years.*
- *OFCOM may argue for, and carry out, more frequent reviews of the rules where it believes such review to be necessary.*
- *Following its review, OFCOM should then present its recommendations to the Government to allow ministers and/or Parliament to decide on any changes.*

We believe such a system will achieve the flexibility and responsiveness which the Government is seeking, while preserving plurality and diversity, and providing a degree of regulatory certainty which the industry needs.