

## CONSULTATION ON MEDIA OWNERSHIP RULES

### Response by BSkyB

#### OVERVIEW

1. Sky welcomes the opportunity to comment on the DCMS/DTI consultation on media ownership rules. Sky agrees that "the existing legislation needs overhauling"<sup>1</sup> and that the rules in even the Broadcasting Act 1996 are outdated<sup>2</sup>.
2. Sky agrees also that "new media forms are now widely available, distributing content in unprecedented quantities"<sup>3</sup>. Quite apart from the widespread availability of access to the internet and the diversity of content on the internet, since 1996 the number of channels available on satellite alone has risen from 49 to over 240. The range has also expanded with a vastly greater number of thematic and niche channels.
3. Over the same period the number of homes in the UK with satellite has risen from 3.3m to 5.5m, or 22% of all homes. Taking account of cable and digital terrestrial television (DTT), about 42% of UK homes have multichannel television, compared with 21% in 1996.
4. These trends - the expansion of content and growth in the number of homes with access to it - will continue. Increasingly, the market delivers diversity and plurality. Media ownership rules must recognise this fact. Sky supports, therefore, Government's intention to "be as deregulatory as possible, in the knowledge that new competition legislation should be more effective in preventing companies from abusing a dominant market position"<sup>4</sup>.
5. Sky notes, however, Government's view that it "must legislate for a situation where a large proportion of the population engages with the media in its traditional forms"<sup>5</sup>. This statement suggests that there may be a

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<sup>1</sup> Consultation on Media Ownership Rules, DCMS/DTI, para 3.1

<sup>2</sup> *ibid*, para 3.2

<sup>3</sup> *ibid*, para 3.6

<sup>4</sup> *ibid*, para 3.7

<sup>5</sup> *ibid*, para 3.10

reluctance within Government to acknowledge formally the substantial changes which have occurred already in the media landscape - let alone the changes still to come. In this context, it is worrying that Government may be prepared to legislate in 2003 certain ownership rules which may persist for ten years<sup>6</sup> and which were conceived originally in the late 1980s (many of which Government describes as inconsistent)<sup>7</sup>. Such an approach could scarcely qualify as being "as deregulatory as possible"<sup>8</sup>. Nor would it enable all UK industries to "compete in a changing global market ... attract new investment and skills ... grow ... reduce costs ... [and] develop new, improved and cheaper products and services for the benefit of consumers"<sup>9</sup>. Certain impediments to this will remain if some media ownership rules are again enshrined.

6. Government's view that it must legislate, referred to above, implies also that there is an unwillingness to come to terms with the impact of the growth in the sources of content and convergence on consumer behaviour. Perhaps the biggest single change which has occurred, and which should influence the decision whether to have media ownership rules in addition to competition law (or if there is such a need, what these rules should be), is the enhanced empowerment of consumers. Consumers are no longer passive recipients of the media but search actively for the content, and sources of content, with which they wish to engage. Thus, consumers decide for themselves what range and diversity of content they want and from what sources - with a cornucopia of choice which is easily accessible.
7. Furthermore, the statement in paragraph 5 above pre-supposes that the market is not adequately providing diversity and plurality, i.e. that media ownership rules, in addition to competition law, are still necessary<sup>10</sup>. In effect, it suggests that media ownership legislation is to be determined by the interests of the 60% of homes (a number which is declining) who - in large measure - have chosen not to adopt multichannel television and the 60%

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<sup>6</sup> Subject to whether any change is recommended by OFCOM or the Secretary of State (see section 6.6 of the Consultation Document).

<sup>7</sup> The Consultation Document refers to the fact that the Broadcasting Act 1996 only adapted the rules set down in the Broadcasting Act 1990 (para 3.4).

<sup>8</sup> *ibid*, para 3.7

<sup>9</sup> *ibid*, para 3.6

<sup>10</sup> This appears to indicate also that Government has prejudged the issue, before considering the results of the consultation.

of homes without access to the internet. These homes have elected not to avail themselves of the vast choice of content and sources of content available: they have opted out of the market. The issue is not that the market has failed to deliver diversity and plurality: it has. Hence, media ownership rules are unwarranted.

8. Sky notes, also, that Government proposes that media ownership rules should possibly endure only in a limited number of areas. The presumption is that competition law, coupled with sector-specific content regulation<sup>11</sup>, is sufficient to ensure plurality and diversity in some areas (notably concentration within ITV) but not others (e.g. foreign ownership and, possibly, cross-media ownership). Sky believes that Government must justify any discriminatory approach to media ownership against the background of consumer expectations, consumers' use of the media and the rapidly changing media landscape. Anything else would constitute the use of media ownership rules as a Government tool to manipulate competition and to favour certain market players above others.

#### **CROSS-MEDIA OWNERSHIP**

9. There is one particular aspect of the current media ownership rules which affects Sky, i.e., the cross-media ownership rules. As DCMS/DTI are aware, Sky is, uniquely, prevented from acquiring more than 20% of a Channel 3 licence or of the Channel 5 licence because one of its shareholders, News International, controls more than 20% of national newspaper circulation.
10. This prohibition has, in fact, existed since 1990; a time when the internet had not developed in the UK and the multichannel satellite offering consisted of 10 channels supplied to less than a million homes. Accordingly, at that time terrestrial television and radio were the only sources of news available to consumers, other than newspapers. Although in 1995 Government stated that "alliances between television and newspaper companies are a logical and natural product of the economic and technological dynamics of the industry and will allow a healthy interchange of skills and

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<sup>11</sup> Para 1.4 of the Consultation Document notes that diversity has traditionally been maintained through content regulation, not ownership controls. Sky assumes, therefore, that ownership rules are designed to maintain plurality and that would be the purpose of any rules going forward. Sky's response is prepared on that basis.

creativity for the benefit of the consumer"<sup>12</sup>, Sky has been prevented from maximising such benefits because of its perceived alliance with News International. As a consequence, consumers of terrestrial television have been denied the investment, creativity and innovation which Sky has brought to satellite.

11. In 1995 Government acknowledged that media ownership rules should allow the media sector to develop. Consequently, newspaper proprietors with a circulation of less than 20% were allowed to own a Channel 3 or the Channel 5 licence, subject to complying with the statutory public interest test applied by the ITC<sup>13</sup> and the 15% limit on audience share<sup>14</sup>. On the other hand, newspaper proprietors with a share of newspaper circulation greater than 20%, or companies in which such a newspaper proprietor has more than a 20% interest, were denied a similar opportunity to develop. There is, of course, now only one such proprietor, News International, and one such company, Sky.

12. In its response to the 1995 ownership consultation Sky argued that the so-called 20:20 rule was arbitrary, discriminatory and lacked any coherent rationale. In Sky's view, Government failed to explain how the perceived 'threat to plurality' or 'undue influence' of a newspaper proprietor might manifest itself.

13. Sky considers that in its current consultation Government has again failed to provide such a rationale. In Sky's view this is incompatible with Government's commitment to ensure that regulations are proportionate. Moreover, in light of Government's intention to abolish the rule that imposes a limit of 15% on any company's share of the television audience, Sky believes that such a rationale would be even more difficult to find today.

14. In effect, if Government preserves the existing prohibition on cross-media ownership this would mean - on a hypothetical basis - that a newspaper proprietor with marginally less than 20% of newspaper circulation could provide television services which attract 52.8% of the total audience. Conversely, a newspaper proprietor with

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<sup>12</sup> Media Ownership: The Government's Proposals, Cmnd. 2872, May 1995

<sup>13</sup> Schedule 2 Part IV, para 13, Broadcasting Act 1996. Subsequently the ITC applied the public interest test in the context of MAI's acquisition of United Newspapers and Carlton/Granada's proposed acquisition of UN&M. In no case were the proposed mergers prohibited on public interest grounds.

<sup>14</sup> Broadcasting Act 1996, Schedule 2, Part III, para 2

just over 20% of newspaper circulation would be limited to 18.8% of the total TV audience.<sup>15</sup> Illogically, there would remain an implicit audience share limit for such a newspaper proprietor in the very diverse and pluralistic multichannel environment because of the prohibition on owning Channel 3 and 5. On the other hand, if the cable and satellite audience grew sufficiently, such a newspaper proprietor could come to control services which dominate the ratings. Thus, the outcome is totally arbitrary and illustrates the pitfalls of retaining an anachronistic rule which was set at a time when ITV had saturation coverage in all TV homes.

15. The digital world is fundamentally different to that which existed when the rule was introduced. As noted above, there are over 240 television channels on digital satellite, of which about 100 are not retailed by Sky (and, in fact, Sky owns just 22 channels). Within the total, there are six dedicated news services - and news broadcast by the public service broadcasters is available also (including the regional variants on the BBC and ITV). Moreover, about 60% of satellite homes have access to the vast number of sources of content on the Internet.

16. Sky believes strongly, therefore, that the existing cross-media ownership rules should be abolished since they are unjustified, arbitrary and discriminatory and that no other threshold (whether reformulated or permeable<sup>16</sup>) should be adopted. The remainder of Sky's response focuses on two main issues which support Sky's view:

- The adequacy of competition law; and
- Discrimination in media ownership rules.

Sky also comments on the proposal for a periodic review of ownership rules.

#### **COMPETITION LAW IS SUFFICIENT**

17. Sky considers that the existing infrastructure for, and approach to, competition analysis is more than adequate for addressing the issue of plurality.

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<sup>15</sup> The numbers are derived from ITC Press Release 65/01. The figure of 18.8% represents the total television audience share excluding the BBC services, Channel 3, Channel 4 and Channel 5.

<sup>16</sup> Consultation Document, para 6.5.3

Government states that plurality is concerned not with content but with the sources of content<sup>17</sup> and that it is considered important for four reasons, viz:

- To ensure that no-one has excessive power;
- To promote a healthy democracy through a 'culture of dissent and argument';
- To prevent control over the news agenda via the inclusion or omission of stories; and
- To maintain cultural vitality<sup>18</sup>.

18. The objectives of competition policy are broadly:

- To protect consumer welfare and promote efficiency;
- To diffuse private power where this may have adverse consequences for welfare and efficiency; and
- To maximise opportunities for individual enterprise.

19. Although the terminology differs, plurality is essentially about consumer welfare. It concerns an intangible benefit which (it is perceived) consumers gain from having access to a variety of views and opinions.

20. Plurality has many of the attributes of merit goods<sup>19</sup>: a concept which is prevalent in broadcasting and familiar to economists. Measuring the benefits of plurality - or potential loss of plurality arising from a change in ownership or reduction in the number of sources of content - is conceptually more challenging than is the case where tangible products, such as supermarkets, are involved. As with much in media economics, it involves quantifying qualitative values<sup>20</sup>.

21. The Competition Commission has all the powers necessary to review media concentration. Under the

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<sup>17</sup> *ibid*, para 1.6

<sup>18</sup> *ibid*, para 1.7

<sup>19</sup> A merit good is a good whose value exceeds the valuation an individual would place on it. Merit goods (for example, hospitals, museums) are deemed intrinsically desirable and often justify government intervention.

<sup>20</sup> A similar exercise would be valuing the benefits of 'high quality' programmes or diversity in programme. In carrying out market reviews and in determining the role of public service broadcasting in the digital age, OFCOM will have to undertake such exercises.

reformed merger regime reductions in plurality, which lead to a substantial lessening of competition, can clearly be taken into account. In defining the relevant market and analysing the expected effect of any proposed merger on that market the Competition Commission would have regard to all relevant rules (e.g. the statutory impartiality obligation for broadcasters) and to the ability of the owner to exert undue influence, to the detriment of consumers, over the entities he controls.

22. Sky considers that this approach is eminently workable; the infrastructure is already set up and working; the analytical approach is understood, and the Competition Commission already has expertise in mergers. The outcome of such an approach will be far less arbitrary than a strict ex ante rule. It involves an assessment of whether consumer choice is constrained by allowing producers of different products to merge. This is very familiar territory for the Competition Commission, which - as is the usual practice - would receive input from relevant regulators (e.g. OFCOM).

#### **COMPETITION LAW PLUS**

23. It is crucial to bear in mind that content regulation is also used to support the attainment of plurality (as well as diversity). In particular, all ITC licensees are subject to a requirement to be impartial. This means that the suppliers of television news and current affairs cannot "form opinions" in the way that newspapers can<sup>21</sup>. In the context of cross-media ownership it is important to recognise that a proprietor who owned both a newspaper and a television service would - because of the impartiality requirement - be unable to use the television service to take a stance on, say, key political issues. This could only be done, if it were done at all, through the newspaper(s).
24. There is also an important self-regulatory measure (in addition to the impartiality requirement) to which Government should have regard in considering the adequacy of competition law for ensuring plurality. Television audiences expect television news and current affairs to be impartial. If a television service ceased to be impartial, viewers would switch to another channel. (On the other hand, newspaper readers (who are generally also

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<sup>21</sup> Consultation Document, para 6.4.6

consumers of television news) are fully aware, and accept, that newspapers differentiate themselves through the views they express on different issues. Allegiance to a particular newspaper is created by this very approach.)

25. In the event that Government does not consider competition law coupled with content regulation (and the self-regulation imposed by consumer behaviour) sufficient to ensure plurality<sup>22</sup>, then Sky would argue that the appropriate response is to tighten the impartiality rules in relation to those services which Sky is currently prohibited from owning, i.e., Channel 3 or Channel 5, rather than impose restrictions on ownership. **If impartiality is considered an important issue per se, then it is important that impartiality is maintained whether or not the owner of Channel 3 or Channel 5 also owns newspapers.**

26. For example, the existing statutory requirement for ITV and Channel 5 to provide 'news and current affairs programmes which are of high quality and deal with both national and international matters'<sup>23</sup> could if necessary, be made more explicit. A possible model already exists. The Channel 4 licence states, inter alia, that Channel 4 news programmes "shall be accurate, impartial, authoritative and comprehensive, in terms both of geography and subject matter..."<sup>24</sup>. In Sky's view, such a condition should be sufficient to address concerns that the news agenda may be "controlled" to the detriment of consumers, particularly when backed by the range of sanctions for non-compliance with licence conditions which already exist.

27. Sky commends the arguments above to Government. They provide the safeguards which appear to be deemed necessary to ensure plurality and would enable all media players to achieve "greater efficiency" more scope for investment, and a more significant international presence"<sup>25</sup>.

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<sup>22</sup> For example, it is suggested that "even though a single source might produce impartial, high quality content, they would be able to dictate exactly what constituted 'news' itself, and their inclusion or omission of stories could control the whole news agenda in a particular direction" (para 1.7, Consultation Document). Government exposed this concern in its 1995 review of media ownership also (Cm 2872.).

<sup>23</sup> Section 16(2)(a), Broadcasting Act 1990

<sup>24</sup> ITC Licence Granted to Channel 4, varied on 23 February 1998.

<sup>25</sup> Consultation Document, para 1.8

### **The "Exceptional Public Interest" Approach**

28. DCMS/DTI ask also whether plurality of the media should be treated as an exceptional public interest (EPI) issue under the reformed merger regime<sup>26</sup>. Sky notes that it is intended that the Secretary of State will have a reserve power to classify mergers, in addition to those involving national security, as EPI cases. In Sky's view, however, there is no justification for concluding in advance that media mergers should constitute EPI cases. To do so would risk politicising the approval of mergers: one of the very things which the reformed merger regime is intended to avoid.

### **OFCOM Plurality Test**

29. Similarly, Sky believes that a two stage process, requiring merging parties to pass a plurality test applied by OFCOM then the 'substantial lessening of competition test' applied by the Competition Commission, is unnecessary. For the reasons set out in paragraphs 17 to 22 above, Sky considers that the Competition Commission is well-equipped to take account of plurality in adjudicating on mergers, taking advice from OFCOM as appropriate. To give OFCOM a specific power to decide whether plurality would be compromised by a change in ownership would expose companies to double jeopardy (which the creation of OFCOM is, inter alia, intended to eliminate).

30. Sky notes also the suggestion that there may be some "clear and explicit rules to act as benchmarks for what is desirable"<sup>27</sup> (in relation to plurality). DCMS/DTI invite comments on the robustness of such an approach.

31. Sky considers that setting a benchmark for what constitutes plurality is unnecessary and would be likely to amount to an ex ante prohibition, like the current threshold. In effect, the existence of a benchmark is likely to lead either OFCOM or the Competition Commission to prejudge that a merger is against the public interest, without recourse to the rigorous analysis which a Competition Commission investigation would involve.

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<sup>26</sup> *ibid*, para 6.0.6

<sup>27</sup> *ibid*, para 6.0.6

## **DISCRIMINATION IN MEDIA OWNERSHIP RULES**

32. Sky believes DCMS/DTI should be persuaded by the arguments above. If Government persists with ownership rules which prevent Sky alone from expanding its television interests into terrestrial television, consumers will be denied the benefits of Sky's investment, innovation and entrepreneurship.
33. In addition, Sky would continue to be discriminated against. The effect of that discrimination - and the detriment to consumers - becomes greater the more the rules relating ITV ownership are relaxed. When the ITV licences were put to competitive tender in 1990 it was possible to own just two regional ITV licences; and only one for a 'big' licence area and one for a 'small' area. A number of changes have occurred since then which have allowed ITV companies to grow through acquisition, exploiting the synergies and economies of scale thereby made available. In addition ITV has been gifted digital terrestrial capacity and awarded licences for DTT multiplexes which have enabled it to expand its business, as well as diversify as into pay TV. This major expansion of ITV should be contrasted with the treatment of Sky over the same period. As DCMS/DTI are aware, Sky was barred from taking a 33% interest in ITV Digital at a time when Sky had just 5% of the total television audience and was received in only a few million satellite and cable homes, whilst ITV was received in all homes with an audience share of over 30%.
34. The proposed abolition of the 15% audience share limit means that, subject to scrutiny by the Competition Commission, there could be one owner of ITV, commanding almost 30% of the audience and 60% of advertising revenue. Whether this is appropriate or not should be a question for the Competition Commission, acting independently. However, inconsistencies in Government's approach to ITV and Sky respectively are very apparent. If ITV were allowed to consolidate it would have a total audience share of just under 30% and it could be owned by any of the proprietors of any of The Telegraph, Independent, Financial Times, Daily Express, Daily Mail or Mirror. It would continue to be received in 22m homes, would have guaranteed DTT capacity and pay TV services as mentioned above and would be free to invest in any number of cable and satellite channels. In contrast, if the cross-media ownership rules are retained

then Sky could not combine with, say, Channel 5 to achieve an audience share of just 12% and a television advertising revenue share of just 13%<sup>28</sup>. At best, this is illogical: at worst, it is discriminatory.

#### **REVIEW OF OWNERSHIP RULES**

35. Sky notes that the question of whether all media ownership rules should either be reviewed every two years by OFCOM or be subject to sunset clauses<sup>29</sup> arises only if Government intends to retain such rules (which Sky considers unnecessary and inappropriate).

36. If, despite Sky's views, Government retains certain rules then Sky would support the suggestion that they should have sunset clauses, provided that the sunset clause is invoked at intervals of no more than two years. This approach would be consistent with the proposal that OFCOM should use sunset clauses to ensure that regulation is kept at the minimum necessary level to deliver Government's goals for consumers and society<sup>30</sup>. In order to achieve certainty, however, reviews should only be able to result in a relaxation, not a tightening, of the rules.

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<sup>28</sup> The ITC's recent decision on airtime sales prevents Sky and Channel 5 combining their advertising sales, despite ITV having 60% of television advertising sales.

<sup>29</sup> Consultation document, paras 6.6.1 to 6.6.4

<sup>30</sup> A New Future for Communication, para 8.11.2