

CONSULTATION ON MEDIA OWNERSHIP RULES
ITC RESPONSE

Executive Summary

The ITC welcomes the Government's consultation and its commitment to relying as far as possible on competition law in relation to ownership rules. But, as the consultation document makes clear, there are still some important requirements for information and debate that competition alone cannot guarantee. Within any single medium, however, the emphasis should be on competition law. (Paragraphs 1-3)

Technological change and market expansion mean that plurality issues are of diminishing concern outside news and current affairs. But countervailing trends towards consolidation, vertical integration and the emergence of global players, mean access regulation, as a key tool of competition policy, has an important role to play. (Paragraphs 4-5)

Access rules are a necessary but not sufficient condition for plurality; a number of factors make media markets different; in particular, the media's role in news and information for shaping public policy debate and the limitations on behavioural remedies (effective in economic regulation) to address plurality issues. (Paragraph 6)

The ITC endorses the view that a "one size fits all" set of rules is unlikely to serve media markets well. The principles outlined above lead it to the following conclusions.

- Within television, subject to securing competition in airtime sales for the advertising market, the proposed abolition of the 15 per cent ownership ceiling and of the prohibition on a single Channel 3 London licensee, are warmly welcomed. (Paragraphs 10-11)
- Arrangements for a Nominated News Provider for Channel 3 should be retained for the present. Profit margins in news are not high and the UK market is not large enough to support a sufficient number of proprietor-owned news providers to ensure plurality. The key is to ensure security for an independent force in National TV News, able to provide to parties other than just Channel 3. The ITC supports relaxing the ownership ceiling to a level consistent with this objective (Paragraphs 12-13).
- On foreign ownership of terrestrial TV channels, the ITC recognises concerns about reciprocity, but hopes that the Government will take the lead within the EU to argue for reciprocal liberalisation, in the forthcoming GATS Round, with those major media markets, notably the USA which also

maintain restrictions. The ITC believes there are potential advantages from such reciprocal liberalisation both for inward investment into the UK media industry and from opportunities for UK players to showcase UK creative talent in major overseas markets. (Paragraph 14)

- On religious ownership, the core principle should be relaxation of ownership constraints on platforms where sufficient spectrum is available to ensure that a wide range of religions, open to all, are able to acquire airtime. (Paragraph 15)
- In radio, the ITC welcomes the agreement between the Radio Authority and the companies. In line with paragraph one above, the ITC would encourage liberalisation to go as far as possible and hopes that consideration be given to a more relaxed regime for digital radio to encourage investment. It is a fine judgement whether the limits for local analogue radio in any area should be set at a minimum of “the BBC plus 3” or “the BBC plus 2”. (Paragraph 16)
- In newspapers, the ITC favours a reformed version of the special merger regime process rather than an exceptional ‘call in power’ on the grounds of transparency and predictability for the process. The key issue is that the Secretary of State should retain the responsibility for taking the final decision on significant mergers on ‘freedom of expression’ grounds. It welcomes the proposed role for OFCOM in advising the Secretary of State on such decisions. (Paragraphs 17-18)
- For cross-media ownership, the ITC agrees that regulatory certainty, or at least predictability, is vital for investment. This militates in favour of a numerically based system of rules and against more subjective tests. (Paragraphs 19-21)
- The proposal for regular reviews of the cross-media ownership rules implemented by Statutory Instrument has much to commend it: it injects a degree of flexibility to meet changes in the market but leaves the ultimate decision with Ministers accountable to Parliament. It is a fine judgement how frequent those reviews should be: sufficiently regular that the system can adapt to the evolving market, but not so frequent that the industry is kept in a state of constant uncertainty. (Paragraph 22)

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Key Principles

1. The ITC welcomes the Government's Consultation. The ITC believes that, whenever possible, the audience interest is best served by competition within a free market. But, as the Consultation Document says, there are some important requirements for information and debate in a democratic society which competition alone cannot guarantee to meet.
2. The ITC endorses the distinction between the related concepts of 'diversity' and 'plurality', which the Consultation Document makes. Diversity can be supported by competition in the market, buttressed in television and radio by public service broadcasting with its positive obligations to provide original content across a range of genres and by Independent Production requirements which ensure a wide range of creative inputs. Plurality requires a range of different voices – particularly in news and editorial opinion, which, hitherto, ownership rules have sought to safeguard.
3. The UK faces a period of technological and market transition during which it is vital not to over-regulate. As spectrum scarcity diminishes and the range of channels increases there is a strong case for relaxation of the special ownership rules. Plurality of voice becomes diminishingly less of a concern in genres outside of news and current affairs.
4. While new distribution platforms and services bring the potential for more voices, the regulatory framework needs to be capable of dealing with market and technology-led tendencies towards consolidation, vertical integration and the emergence of global players. As the Consultation Document notes, access regulation, as a subset of the competition framework, has an important part to play in ensuring that a wide range of service providers can reach audiences and customers through the different distribution platforms and electronic gateways. A careful balance is needed to ensure that freedom of access for service providers does not stifle incentives for innovation and infrastructure investment. This requires a graduated approach.
5. While effective access regulation is a necessary condition for plurality and diversity, it may not itself be a sufficient condition in the current state of the market's development.
6. There is a number of factors which make media markets 'different':

- Continuing spectrum scarcity in some media markets (notably terrestrial broadcasting) which pose major barriers to entry, regardless of the competitive behaviour of the incumbents.
- The presence of a public funded operator (the BBC) in radio and television, which, in other markets, would be a dominant operator in its own right.
- The limitations on behavioural remedies (an effective tool in economic/competition regulation) to address issues of plurality.
- The media's role in shaping public policy debate: allowing a dominant operator across several media to 'set the agenda'. A dominant operator in other markets can act independently of competitors and customers but not, ultimately, of the competition authorities. But within media, significant market power can be accompanied by significant political power, enabling the dominant operator to influence those who set the rules, leveraging their agenda-setting power to sustain an otherwise unjustified position of economic dominance. The existence of this phenomenon in some overseas markets suggests that it would be risky for the UK framework to ignore it.

7. Against that backdrop, the ITC endorses the key aims of ownership rules set out in the Consultation Document, viz.:

- To create a competitive market while preserving plurality of voice and diversity of content;
- A framework which is robust but adaptable;
- As much regulatory certainty and predictability as possible for players in the market;
- Reasonable and proportionate implementation.

8. The ITC specifically endorses the emerging conclusion from the Consultation Document that a 'one size fits all' set of rules is unlikely best to serve all the media markets.

9. In its specific comments, the ITC will focus on the TV market but also the other markets where these raise questions of general principle relevant to plurality overall.

Television

10. The ITC warmly welcomes the Government's reaffirmation that they will abolish the 15 per cent limit on TV audience share and the prohibition on one person holding the two London licences.

11. The consolidation of ITV has considerable potential benefits in terms of efficiency and competitiveness. Plurality is no longer an issue. The public interest can be safeguarded through positive content obligations – particularly, as the Consultation Document suggests, on regionalism to

counter the centripetal tendency from consolidation. ITV consolidation certainly raises important competition issues in the advertising market. But, with suitable behavioural or structural safeguards these issues should not be insuperable and will be addressed – as they properly should – on competition grounds.

12. The ITC supports the Consultation Document’s approach towards retaining the ‘Nominated News Provider’ for Channel 3. In the current state of the market some form of NNP arrangements remain necessary to ensure plurality of British news providers for a British audience. Unlike the American market, which is large enough to support a range of proprietarily-tied news providers sufficiently wide to ensure plurality, the size of the UK market is such that there will be a small range of providers. This reinforces the continued need to sustain an independent force in news provision, which has been the explicit aim of public policy for successive Governments. Since a successful ‘independent force’ in television news requires active, committed and independent shareholders who will, despite the tough parameters, be able to see a return on their investment, it will be necessary to provide assurance in legislation of the long-term requirement for independence.

13. Viewers’ interests coincide with those of shareholders in knowing that ITV news will be well-funded, broadcast at regular times, including in peak, and capable of providing effective competition with other national news services, especially the BBC. Plurality and independence of news provision require both NNP arrangements and strong Tier Two obligations on ITV (as envisaged in the Government’s White Paper “A New Future for Communications”). Effective safeguards for pluralism in news and information are the prerequisite for relaxing ownership constraints elsewhere.

Foreign Ownership

14. The Consultation Paper notes that the Government is open to argument for liberalisation of the current rules, which prohibit non-EU ownership of terrestrial TV stations. The ITC recognises the concerns, set out in the Consultation Document, about the absence of reciprocity in other major markets, notably the USA and Australia. The ITC hopes the Government will take a lead in the EU to argue for reciprocal liberalisation of foreign ownership rules. The prize of reciprocal liberalisation could bring a number of advantages to the UK:

- As Irwin Stelzer noted in *Culture and Communications*, the free flow of capital into the media industries will be an important condition for success in the age of convergence. The UK has traditionally adopted a liberal and welcoming approach to inward investment.

- Successive studies of inward investment have shown that the benefits to the UK have come at least as much from exposure to best international management practice as from the capital infusion itself.
- The UK has a substantial pool of creative talent and media companies – both publicly and privately owned – who could take advantage of liberalisation to provide a strong platform to showcase British creative talent to a global audience without losing that talent to emigration.

Religious Broadcasting

15. The ITC notes the Consultation Document's proposals. We propose a simple test for channel ownership, whether on radio or television, by religious organisations:

- If spectrum scarcity has been sufficiently ameliorated that all reasonable shades of view can be expressed then the case for liberalisation is overwhelming.
- Where spectrum scarcity prevents the free expression of all religions, spectrum should be made available only to those channels prepared to encompass all main faiths and beliefs fairly within their air-time.

Radio

16. The ITC recognises that the Radio Authority has pre-eminence in this field. The ITC welcomes the agreed proposal on ownership between the RAu and the companies. If plurality can be safeguarded the ITC would encourage liberalisation to go as far as possible. For example:

- It is a fine judgement whether, for local radio, in well-served areas, two commercial competitors to the BBC might be sufficient to guarantee plurality.
- In local radio, plurality rules act in part as a proxy to safeguard diversity – particularly as format controls are relaxed. While this may remain necessary in analogue radio, where Spectrum constraints are less pressing – as in digital radio - the ownership rules could be correspondingly more liberal.

Newspapers

17. The Consultation Document poses two options for reform of the newspaper merger process: either a reformed version of the special regime or a ‘gateway’ power for the Secretary of State to call in mergers which give rise to ‘freedom of expression’ concerns. An assessment about whether such concerns have foundation would have to be made under either route. On balance, the ITC favours a reformed version of the special regime on the grounds that it is a more transparent and predictable process. In either event, the key principle is that the Secretary of State must remain able to take the final decisions on significant newspaper mergers on “freedom of expression” grounds. This has to be a decision made by the democratically accountable.

18. The ITC welcomes the proposal for OFCOM to advise the Secretary of State on such “freedom of expression” decisions: OFCOM’s broad experience of content regulation and knowledge of the sector as a whole will make it well placed to add real value here.

Cross-media Ownership

19. The issues raised by cross-media ownership go to the heart of plurality. In news and current affairs, the broadcast media are the most trusted; but readers value highly the combination of news and, often robust, editorial opinion which they get from newspapers. These sets of values are separate but complementary. Together they provide a wide range of voices in the democratic debate. In terms of news accuracy, impartiality and plurality, the UK is in relatively healthy shape in international terms.

20. It will be vital for the democratic process for the new cross-media regime to sustain this healthy balance. But where that is safeguarded, the aim should be to liberalise where possible. This means rules which are both more tightly focused on need and – elsewhere - relaxed. The core area of concern is news and current affairs. In other genres (eg, entertainment, film, music, radio) the only concern is diversity. Ownership rules have no place as a tool of regulatory policy in these areas.

21. In the limited area where cross-media rules remain needed, the system needs to meet the core principle of certainty and/or predictability. This militates in favour of a numeric-based system and against subjective tests like the ‘share of voice’ system, and even more importantly against ad hoc plurality tests, which risk making industry players incur nugatory expenditure on mergers without at least a predictable regulatory outcome.

22. The ITC supports the proposal for periodic reviews of the cross-media ownership rules. Again, 'certainty' suggests that such reviews should not be so frequent as to leave Parliament, regulators and the industry itself open to constant lobbying and pressure. This suggests that two-yearly intervals may be too frequent. Reviews which start from market reality rather than prior assumptions are most likely to produce the best overall result. The 'Sunset Clause' approach may be too much of an 'all or nothing' response to what may require a more flexible and nuanced judgement, addressing the condition of the market at the time.

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