

Comments on the Consultation on Media Ownership Rules.

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Introduction.

1. I welcome the Consultation Paper which generally advances a constructive and positive approach to media ownership issues.

2. I particularly welcome the emphasis on promoting competition which, if implemented effectively, promises to reduce barriers to entry to media markets, counteract abuse of market power by established firms and foster pluralism and diversity in supply of information goods and services.

3. However, as the Consultation Paper recognises, promoting effective competition will not necessarily achieve pluralism and diversity. For the potential economies of scope and scale in the media sector may mean that supply can efficiently be provided by few, or very few, firms. Accordingly, regulatory action to ensure pluralism and diversity is likely to be required.

4. Nonetheless, there is a central problem, common to both competition and regulation based approaches, that is the problem of defining relevant markets. This problem manifests

itself in at least two ways.

5. First, the problem is politico-geographical - what are the boundaries of distinct media markets in the UK? Certainly there is a UK media market. But what of sub-UK markets? Is there a London media market? Is there a Scots media market? And so on.

6. And second, what constitutes the relevant media which need to be taken into account when considering pluralism and diversity? Should magazines and the WorldWideWeb be taken into account? What is the extent of the substitutability between different media products? And are all media equal in their political and social relevance?

7. OFCOM potentially provides a better context in which these questions can effectively be addressed. Not only will the integrated regulator have jurisdiction across a wide range of media but it will be able to draw on well developed expertise in market definition arising in particular from Oftel's experience and expertise in analysing markets to promote competition, as required under the Telecommunications Act, and implement EU Directives on electronic communications.

8. These competition competencies are likely to be particularly important in taking OFCOM forward to a new regulatory paradigm. However, this competition based, market opening, paradigm is incompletely foreshadowed in the Consultation Paper where some

important policy questions are not framed in a forward looking, new paradigm, way. For example, the issue (6.2.8-10) of the ITV nominated news provider (NNP).

9. A competition based approach which used regulatory authority to promote competition would more effectively foster pluralism and diversity than has, and will, the NNP model. This might be achieved, for example, by decoupling news supply from broadcasting (for example by ensuring that news providers for Channels 3, 4 and 5 were independent of broadcasters) and by pluralising news supply (by requiring the franchisees of Channels 3, 4 and 5 to use different news suppliers, all of which would be required to satisfy "threshold" criteria defined publicly by OFCOM).

10. Finally, establishment of a new regulatory regime for media ownership provides the opportunity to reinforce the successes of established regulatory agencies (eg the ITC and Oftel) in public consultation. Consultation aids transparency, makes for more robust decisions and reinforces the legitimacy of regulators' decisions. Accordingly, I propose OFCOM should normally consult the public as an intrinsic part of its regulatory procedures and practices. I comment now on the detailed options identified in the Consultation Paper.

Local Authorities, Advertising Agencies and Political Organisations.

11. I welcome the broadly liberalising proposals (6.1.1-2) and the intention to retain the prohibition on broadcasting ownership by political organisations and to ensure that local authorities do not use their new entitlement to provide broadcast information services for political purposes.

Foreign Ownership.

12. I welcome the deregulatory direction of the proposals (6.1.3-5). It would be perverse to close entry to certain categories of suppliers (foreign owned) when increased pluralism in supply is desired. Accordingly, I support the proposal to keep rules on EEA broadcasters - but only in so far as this provision can effectively be used as a bargaining chip to achieve freer entry for UK firms to media markets in the USA and Australia.

Religious Ownership.

13. I welcome the proposal (6.1.6-8) to remove restrictions on the licencing of religious organisations to broadcast. Moreover, I see no objection to licencing a religious organisation to operate local or national multiplexes. For the operator's powers to decide which services should be carried will be subject to competition regulation and, therefore, the operator will be subject to sanctions if carriage is not

provided on fair, reasonable and non-discriminatory terms.

Television.

14. On balance, competition regulation (section 6.2.1-7 refers) is likely to provide more effective safeguards against abuse of market power in the London television advertising market than the continued prohibition of single ownership of the London television franchises. And increased diversity of supply in the television advertising market (notably Channels 4 and 5 and satellite and cable services) means that the 15% rule may safely be abolished. However, it remains desirable, both on competition and pluralism grounds, to prohibit common ownership of Channels 3, 4 and 5. Accordingly, I welcome the proposals for television, subject to prohibition of joint ownership of Channels 3 and 5 (and, indeed, of Channel 4 and/or the BBC should either or both be privatised).

ITV News Provider.

15. I regret that I find the proposals (6.2.8-12) concerning a Nominated News Provider (NNP) confused and unsatisfactory. They are unlikely to achieve either pluralism or impartiality.

16. In spite of the current 20% limit on ownership of the NNP broadcasters (Channel 3 in the present case) have a financial interest when a NNP to choose one in which they have a

financial interest (even though capped at 20%). Permitting shared ownership between broadcaster and NNP potentially threatens impartiality, and may be hostile to fair and effective competition in the supply of news services. It thus militates against pluralism. Accordingly, common ownership of an NNP and the channel on which its services are transmitted should be prohibited. In the interests of pluralism public service terrestrial channels licenced by the ITC/OFCOM (currently Channels 3,4,and 5) should be required to use different NNPs (and the BBC should not be designated a NNP).

17. This model is simpler than that advanced in the Consultation Paper and will secure pluralism and impartiality more effectively. It applies to news the well established independent producer model which obtains for other types of programme. However, implementation does require clear specification of the criteria under which a firm may be designated as a NNP. These criteria should be made public and only finalised after public consultation.

Radio.

18. I welcome the proposals (6.3.1-14) for radio which promise to simplify and liberalise the radio licensing and regulatory regime.

19. If economies and efficiencies can be secured by common

ownership of national music and speech channels, there is no reason why this should not be permitted (so long as competition policy considerations are satisfied, such as ensuring that radio licencees do not use market power in radio to improperly exercise market power in neighbouring markets - eg by giving excessive play time to works owned by associated companies). The central issue, which justifies ownership regulation, is citizens and consumers' access to a range of information and to authoritative information. Talk and music radio have, at most, a peripheral relevance to this question.

20. Implementation of a new points regime for local commercial radio should have regard to the goal of ensuring plurality and diversity of supply of news and information. Three music stations, although satisfying the criterion of three radio stations in a given reception area, will not be sufficient to safeguard and promote pluralism in supply of information. Nonetheless, it would be foolish to prohibit one or two licensees providing service if a third did not present itself.

21. However, there is no reason to regulate to ensure plurality of ownership of multiplex licences. Effective competition regulation, ensuring carriage is provided on fair, reasonable and non-discriminatory terms, should be sufficient to secure the public interest.

22. Proposals for time limiting the sale of radio licences are

sensible. But, again, it would be perverse to have a service go out of existence only because the two year rule had not been satisfied.

23. In spite of the liberalising proposals advanced in the Consultation Paper, difficulties are likely to arise from the uneasy compromise struck between use of licensing powers, (as a means to secure desired content and character of service goals), on one hand and economic efficiency on the other. Licence sale focuses these issues. Economic efficiency is likely to be maximised if licences are fully tradeable and if broadcasters pay market prices for spectrum. However, such a regime might not provide (eg because of Hotelling effects) desired outcomes of diversity and quality in services and content.

24. A possible approach would sell spectrum at market prices but abate a portion of the price payable to Government in exchange for a bidder's undertaking to provide content to meet previously notified OFCOM specifications. For example, the provision of news services from a different provider to those already available in a particular market, provision of an additional service with a public interest character in a particular market and so on. Service providers would be able to trade spectrum but their rights in spectrum acquired at abated prices would be subject to them satisfying OFCOM that the commitments initially made to secure abatement of price would

be made good or repaying the abated portion of the spectrum price.

The Press.

25. The Consultation Paper recognises (6.4.7) the difficulty of including local papers in any concentration of ownership calculus. This issue signals the importance of more general, and potentially difficult, issues of market definition. It is certainly true that there are very high levels of local concentration of ownership of the media. But in some cases this has to be accepted. Not all markets are able to sustain more than one economically viable supplier.

26. But sometimes this is not the case. Consider, for example, the prima facie preponderance of the Scottish Media Group (SMG) newspaper and television interests in the West Central Belt of Scotland commercial media market. Local concentration requires detailed case by case consideration and substantiates the need for a dedicated, sector specific, media and communications regulator, OFCOM.

27. Local media markets do matter. The UKwide, Westminster, political community is not the only relevant political community - as the case of Scotland (and distinct markets within Scotland) shows. Accordingly, (see discussion of section 6.5 cross-media ownership), where mergers result (or can be

reasonably supposed at some proximate future date to result) in a significant reduction in pluralism in any market, including local market, then the merger should be subject to scrutiny and possible prohibition.

28. Newspaper mergers have properly been subject to consideration by the Secretary of State. They should continue to be so. Newspapers are both important sources of information and vehicles for the expression of political values and opinion. A reduction in pluralism and diversity consequent on a merger would be undesirable. But whereas other media sectors have not been subject to scrutiny by the Secretary of State changed circumstances demand that the Secretary of State's powers should extend beyond newspaper mergers.

29. Accordingly, when a merger is proposed which has the potential to reduce pluralism and diversity in media markets important for the circulation of information and the expression of political opinion the merger should be subject to consideration by the Secretary of State. The Secretary of State should make his/her judgement after receiving advice and analysis from OFCOM. This advice should be made public and OFCOM should, save in exceptional circumstances, undertake a public consultation before advising the Secretary of State.

30. Nonetheless, it is important to recognise that merger, even one which diminishes pluralism, may be the least worst of

realistic alternatives. Prohibiting a merger of two weak enterprises might result in both ceasing to trade - an inferior outcome to the survival of one merged enterprise.

31. The Secretary of State should retain reserve powers of control over newspaper (and more broadly defined media) assets (6.4.9 refers). The strengthening of the UK competition regime and changes in industry structure (though technological change, the break up of vertical integration between printing, distribution, publishing and other elements in the media supply chain etc) may well make such reserve powers appear unnecessary but the potential for harm is great and, on balance, they should be retained.

32. I support the proposed (6.4.10) de-criminalisation of the media merger regime.

33. Should the newspaper regime be extended more widely (6.4.11)? Yes, but only to existing media (ie, not just newspaper) proprietors. Extending it more widely might chill entry of new entrants to media markets. Further, it would involve speculative judgements about the likelihood of any particular new entrant prejudicing freedom of expression. Government power to prohibit entry to media markets may pose a more serious threat to freedom of expression and pluralism than that posed by an "unsuitable" new entrant to media markets.

34. Should OFCOM assess transfers of ownership or should a public interest gateway test apply (6.4.12-15)? OFCOM should have the lead responsibility for an assessment, though the Director General of Fair Trading and the Competition Commission should not be excluded from assessing mergers on competition and any other relevant grounds. The emphasis should be on assessing the threat to pluralism posed by any potential change of ownership, and by merger in particular, rather than on considering whether a transfer would compromise accurate presentation of news and free expression of opinion. Few established newspapers would be free of concern if accurate presentation of news were to be a decisive criterion. Applying a criterion of accuracy might diminish the publication of tendentious, partisan and polemical views - the essence of freedom of expression. Indeed, some now argue that the trenchant expression of a range of partisan opinion has already been too far diminished.

35. How should decisions be made? Ministers should decide after receipt of regulators' advice. However, in the interests of transparency and as proposed above, regulators' advice should be made public and should only be formulated after a period (which, of necessity, may in some instances have to be fairly short) of public consultation.

36. In summary, control powers over media transfers and mergers are desirable and should apply to the whole media sector (that

is to media which may affect significantly access to information about public and political issues and the formation of public opinion).

Cross-ownership.

37. Limits to concentration of media ownership are needed (6.5.12). An economically efficient media market could be a market of very few suppliers as firms exploit economies of scale and scope. However, convergence and technological change promise to exert a positive influence. Substitutability, reduction of entry barriers and the growth of new media may help augment pluralism and diversity. But it would be reckless to count on this. Reserve powers to limit concentration of ownership are therefore required. Here a distinction must be made between **concentration** of ownership and **cross** ownership. It is the reduction or limitation of pluralism that attends concentrated ownership that constitutes the problem. Cross-ownership is not intrinsically objectionable. Cross-ownership regulation historically has been the means by which Government has addressed concentration of ownership. Cross-ownership not a problem in itself.

38. How should concentration of ownership be regulated (6.5.6)? By share of voice regulation, for what matters is the effect on flows of information and the formation of opinion. Share of voice is the least worst of relatively objective and robust

measures of this. Certainly, this method is open to the objections rehearsed in the Consultation Paper. But there are more powerful objections to be made to the chief alternative method canvassed in the Consultation Paper - the plurality test sketched in Appendix B. This involves very difficult judgements such as assessment of what is "a sufficient number"; what are "different sources"; what constitutes control by "different people or companies"; and how "particular regard to sources of news and opinions" should be exercised. The plurality test thus seems no easier, indeed more difficult, than implementation of a share of voice system.

39. Nonetheless, the Consultation Paper rightly identifies difficulties in implementing a share of voice system, not least setting a media "exchange rate". However, this is not as intractable a problem as it might appear. Certainly, some media should be excluded from immediate consideration - neither music radio, nor special interest magazines, nor the internet are yet (and may never be) sufficiently important to bring them into consideration. But other media, notably the national and local newspaper press, radio and television undoubtedly are relevant. What weighting, if any, should be applied to each of these media?

40. One approach might be to argue that pluralism is so important a goal that the media exchange rate should be set at par - all relevant media should be considered to be equally

important. Such an approach would also recognise the extent to which editors, journalists and other news professionals rely on other media to shape their own news values and agendas. Radio news takes into consideration what the newspapers and television have defined as news, television takes into account radio and the newspapers and so on.

41. Another, research based, approach would consider viewers', listeners' and readers' perceptions of the relative importance of different news media. If the public regards one medium as less important a source of information than another (or than others) that medium could be "discounted" for the purposes of setting the media exchange rate. This approach would be sensitive to the relative importance attributed to different media by users and would be free of regulatory or political bias in setting an "exchange rate".

42. Finally, and on balance I prefer this approach, there is the method set out in para 6.5.11 of the Consultation Paper. That is, no company should have more than a 40% share of voice in any one of four relevant markets (local papers, national papers, radio and television), no company should have more than a 30% share of each of two markets, no more than a 20% share of three markets and no more than 15% of each of the four relevant markets. Curiously, the Consultation Paper describes this scheme as simpler than the share of voice system (because it does not weight each medium). But this is not so - this system

is a version of the share of voice system, a version which weights each medium equally.

Review of Ownership Rules.

43. Finally, how and when should rules be reviewed (6.6.4)? The sunset legislation approach, though desirable in ensuring that no dead weight of redundant regulation weighs on the bodies of living media markets, is fatally vulnerable to possible pressure on the Parliamentary timetable. This might mean that desirable regulatory powers lapsed for no good reason. Secondary legislation following OFCOM bi-annual recommendations is to be preferred. Though a two year interval may be too frequent, three years might be better. But whatever the interval, OFCOM's recommendations should be made public and should be preceded by public consultation.

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