



PRODUCERS ALLIANCE FOR CINEMA AND TELEVISION

Response to consultation on Media Ownership

JANUARY 2002

PACT RESPONSE TO CONSULTATION ON MEDIA OWNERSHIP RULES

EXECUTIVE SUMMARY

A single ITV

- PACT's primary concern is about the effect that a single ITV company could have on competition in the markets for the production and distribution of UK-originated television programming. Given the BBC's existing dominance in these markets, if ITV becomes a single entity then it will mean both operators will have a combined share of about 70% in each market. This is not consistent with the Government's stated aim to "make the UK home to the most competitive and dynamic media and communications market in the world". Not only would such an outcome have a serious impact on competitors, it would also be to the detriment of consumers, by reducing price and creative competition in the market.
- Additionally, if ITV becomes a single entity then the current regulation of the ITV Networking Arrangements, which help to promote competition in the production distribution markets, may be discarded. If as a result, ITV were able to control more programme rights, it would have a serious effect on those independent producers that hitherto have been able to benefit from ITV's fair terms of trade. It would also allow ITV to develop a family of channels and squeeze out other channel operators, who do not have the advantages and resources of a mass audience channel like ITV1.
- However, PACT would not be opposed to a single ITV provided there are important regulatory safeguards in place of the current ITV Networking Arrangements. Safeguards would be necessary to prevent a single ITV and other dominant operators in the market from restricting or distorting competition in the market.

Regulating competition

- If the Government's aim is to create "the most competitive market possible whilst ensuring plurality of voice and diversity of content", then we think it needs to pay more attention to how to make the UK market truly competitive.
- While it is the intention to give OFCOM concurrent powers to regulate competition in the communications market, PACT does not believe that this will be sufficient to deal with the advantages enjoyed by dominant existing incumbents like the BBC and ITV. PACT therefore proposes that OFCOM be given a specific duty to "promote" competition in the production and distribution of content.
- As there is a strong likelihood that the existing ITV Networking Arrangements will become redundant, PACT proposes that they be replaced by a Code of

Practice that would apply not only to ITV, but to all broadcasters who have more than a 5% share of the television audience. OFCOM should have oversight of this Code. The Code would serve to ensure some balance between the interests of broadcasters, programme suppliers and programme distributors, and would contribute towards the aim of promoting competition.

Plurality and diversity

- Pluralism is not just about ensuring that consumers have a choice of service provider, it should also be about making sure that a range of different voices has a chance to be heard.
- Ownership restrictions are not the only method of ensuring continuing plurality. Lowering entry barriers to the market and providing an opportunity for new entrants, who can bring innovation and competition can also ensure plurality. This means the market must be regulated effectively to actively “promote” competition. The presence of independent producers in the market also helps to ensure greater pluralism, and makes it easier for new entrants to commission content.
- Similarly public service broadcasting obligations are not the only means of securing diversity. In the same way as having a range of content suppliers can assist in providing pluralism, they can also contribute towards diversity. Independent producers, whose focus is solely on the creative process of producing appealing intellectual property, have often been responsible for new and innovative programming ideas. Independents can also provide fresh perspectives. Around 30% of independent production companies are based in the nations and regions, enabling them to see issues without the “metro-centric” attitude of many in the media industry. Enabling content producers like independents to compete effectively in the market can therefore assist in securing and promoting diversity as the Government’s White Paper acknowledged.

Impartiality

- Removing impartiality requirements from services that consumers must subscribe to directly, such as premium channels, would also help to promote plurality and diversity. It would allow for the development of channels with a more polemical output.
- Replacing the impartiality requirement with an “undue prominence” rule for local television services would assist their development. Currently the requirement to achieve impartiality for such services is an unreasonable burden.

Regulating ownership restrictions

- We accept that some ownership restrictions are necessary to ensure plurality but believe that restrictions should only apply, as now, to newspapers, television and

radio as these are the dominant media forms. We do not believe there is a case for extending restrictions to cover electronic media. Moreover, as the market becomes more competitive and different media forms become more prominent, there should be less need for ownership restrictions.

- Of the suggested approaches to regulation, we would prefer an arrangement similar to the special ownership restrictions for newspapers in the Fair Trading Act. "De minimis" thresholds should be set for each medium and mergers that do not breach these thresholds should be allowed to proceed. Mergers that breach the threshold should be subject to a public interest test before being allowed to proceed.
- We agree that it is desirable to continue to have specific restrictions preventing common control of more than one national commercial broadcasting licence.

Restrictions on ownership independents

- Given the representations made to Government and the proposals in the Government's own "Out of the Box" report, PACT is surprised that the consultation document makes no proposals on the ownership on independent producers. We call on the Government to make clear its intentions on ownership of independent producers as soon as possible.
- We see no reason why overseas broadcasters should be prevented from owning independent producers, particularly when there are no restrictions on them owning UK commercial broadcasting licences that have no public service element to them.
- The Government's failure to act on this matter has already adversely affected the competitiveness of producers who are now owned by overseas broadcasters.
- PACT believes that provision should also be made for independent producers to own restricted service licenses and vice versa, as such a measure would be mutually beneficial to both sectors.

PACT RESPONSE TO CONSULTATION ON MEDIA OWNERSHIP RULES

INTRODUCTION

1. PACT is the UK trade association that represents the interests of independent television, feature film, animation and new media production companies. We welcome the opportunity to respond to the consultation exercise on media ownership regulation. We recognise the need to have some restrictions on media ownership to maintain pluralism in the interests of consumers. We believe that the current regime is over complicated and in need of simplification. We set out our ideas on how the Government could approach this below.
2. PACT has considered its position on a single ITV. It has decided that it would not be opposed to ITV merging into a single entity, provided there are important regulatory safeguards that prevent both the expanded BBC and ITV from further dominating the production and distribution markets.
3. We are concerned about some of the underlying assumptions in the consultation document:
 - Firstly, we do not consider that ownership regulations coupled with positive content requirements are the only means of securing plurality and diversity in the broadcast media. A competitive market in the supply and distribution of content can also contribute to pluralism and diversity.
 - Secondly, we do not support the implicit belief that allowing the creation of large conglomerates is necessary to support diversity and that without consolidation there is a danger that smaller companies will aim their services at the middle ground (the so-called Hotelling effect). Such economic theory ignores the fact that creative industries rely heavily on the creation of intellectual property, and that such properties must be clearly distinguished.
 - Thirdly, the paper seems to envisage the possible extension of ownership restrictions to electronic media, which we do not believe would be practicable or desirable.
4. Our central concern however, is the impact that a single ITV company could have on the market, particularly the markets for the production and distribution of television programmes. The paper proposes to sweep away the restrictions that would prevent ITV consolidating into one entity. It does note that competition law may prevent such an outcome, as it observes that a single ITV might have a monopoly in the television advertising market. However, a single ITV might also allow it to have huge scale monopolies in both the television production market, and in programme distribution, which could limit overall competition.

5. If the Government's aim is "to create the most competitive market possible whilst ensuring plurality of voice and diversity of content", then we think it needs to pay more attention to how to make the UK market truly competitive. This would require measures that lowered entry barriers for new competitors, and the active promotion of real competition between service providers, across the whole value chain. We set out our ideas on how this might be achieved in the television market below.
6. PACT is also concerned that the ownership restrictions on independent producers have not been addressed in the consultation document. We find this even more surprising given the recommendations in the Government's own "Out of the Box" report. It would be helpful if the Government could clarify its intentions on ownership restrictions for independent producers at the earliest opportunity.

A SINGLE ITV

7. The consultation document proposes to remove restrictions that prevent ITV merging into a single entity, although it acknowledges that competition law might prevent this. However, it appears that the Government has only considered this in relation to the television advertising market, and has not considered the effects that a single ITV could have on the television production and distribution markets.

Current Regulation of the ITV Networking Arrangements

8. The Broadcasting Act 1990 introduced new arrangements for the structure and management of the ITV Network.¹ As a result of the Networking Arrangements the ITV Licensees established an independently managed ITV Network Centre and made provisions to ensure the equitable treatment of programme proposals submitted by both independent producers and the production arms of ITV Licensees.

¹ Section 39 of the Act required that Licensees co-operate in the provision of the national Network. The arrangements for doing so are subject to approval by the Independent Television Commission (ITC) after consultation with the Office of Fair Trading (OFT). In considering the "Networking Arrangements" the OFT is required to apply a "competition test" contained in Schedule 4 to the 1990 Act.

9. Regulation of the ITV Networking Arrangements was intended to protect the interests of smaller companies controlling ITV licenses. However, it has also been of considerable benefit to independent producers, as it has provided them with equal access to the Network Centre, and with terms of trade that mirror those offered to Licensees' own production arms.
10. The advantage of these terms of trade to independent producers, who can take advantage of them, is that they get to retain all secondary programme rights. This provides the producer with an asset and enables them to make their own arrangements for selling programmes and programme formats in overseas markets. This has enabled independents that work with the Network Centre to trade on a more secure footing and benefit from secondary income streams. Additionally, the Networking Arrangements have provided for better competition among programme distributors, as independent distributors, ITV distribution arms (Granada Media International and Carlton International) and BBC Worldwide can each compete for the rights to distribute independent productions in overseas markets.
11. The ITV Networking Arrangements have been effective in providing competition in the market. However, if ITV were allowed to merge into a single entity then;
 - the provisions would become superfluous;
 - the independence of the ITV Network Centre would be lost;
 - the ITV owner would maximise the number of programmes commissioned from its own production arms and to reduce the benefits to independent producers offered by the current terms of trade; and
 - ITV would want to acquire as many secondary rights to independent productions as it can, to fuel its own channel expansion and prevent programmes from being acquired by other competing channels.

This would be to the detriment of independent producers and reduce the ability of other UK channels to compete for the rights to acquire UK-produced programmes in the secondary market. If ITV were able to extend its control of programme rights, it would have a considerable competitive advantage in launching new channels, which would also raise the entry barriers for new operators.

The production market

12. Granada's production arms already provide some 60% of ITV's programmes. In a single entity, subject only to the current independent production quotas (25% of "qualifying programmes"), the new ITV owner could easily account for 80% of all ITV programming, while also being a significant supplier of programmes to other channels, particularly on the ITV Digital platform. The resulting entity

could easily enjoy a 30% share of the UK production market for television programmes.

13. As the BBC currently accounts for around 40% of UK television production, the overall market would be characterised by two organisations with significant scale monopolies. Other production outfits, including independent producers, would find it increasingly hard to compete with two powerful and well-resourced players in the market, particularly as the independent production sector remains heavily under-capitalised.

The distribution market

14. A single ITV would also see a merger between Granada Media International and Carlton International, two of the largest UK programme distributors. In the absence of regulation to prevent ITV acquiring the secondary rights to independently produced programmes, the resulting entity could use its privileged relationship with ITV to acquire the distribution rights to most independently produced programmes commissioned by ITV.
15. As BBC Worldwide is already dominant in the programme distribution market, the emergence of a unified ITV distributor would mean that the market was heavily concentrated with two major distributors possibly controlling the distribution rights for up to 70% of the market. This would be to the detriment of smaller distributors and to programme producers. It could also be detrimental to the ability of others wanting to offer programme channels being able to access UK-produced content.

Effects on competition

16. The Government's White Paper states that it wants to "make the UK home to most competitive and dynamic media and communications market in the world". However, the expansion of the BBC activities, coupled with a possible merger of ITV into a single entity could considerably reduce competition in the production and distribution of content. It could also further raise the entry barriers to the broadcasting market, making it more difficult for new operators to offer competing services. This would insulate the market from the innovation, which new competitors can often bring.

CODE OF PRACTICE FOR BROADCASTERS

17. PACT has considered its position on a single ITV very carefully. It has decided that it would not be opposed to ITV merging into a single entity, provided there are important regulatory safeguards that prevent both the expanded BBC and ITV from further dominating the production and distribution markets and

restricting and distorting competition. What we propose would assist in promoting competition and thus help to ensure continuing plurality and diversity.

18. Our proposal is based on replacing the current regulation of the ITV Networking Arrangements with new regulations that would apply not just to ITV, but to all the existing major broadcasters. We see no reason why ITV's programme commissioning system should be regulated effectively while there is no such regulation of the BBC, Channel 4 and Channel 5. While regulation of the Networking Arrangements has been effective for PACT members, we recognise that ITV finds itself at a disadvantage in wanting to develop ITV2 when compared with the BBC's digital side channels. Presently if ITV wants to use programmes developed for ITV1 on ITV2, it must pay an additional licence. The BBC however, rarely makes additional payments for the re-use of content on its digital side channels, which is not only unfair to producers, but also to its commercial competitors.
19. The Government proposes to give OFCOM concurrent powers to regulate competition in the communications markets, but it appears that current thinking is that these powers would be focused on issues such as conditional access systems, interoperability, electronic programme guides and telecoms issues. OFCOM will, of course, have wide discretion as to how to use its competition powers but PACT believes that legislation should spell out some of its duties in exercising its powers. PACT proposes:
 - ***a specific duty for OFCOM to "promote" fair and effective competition in the production and distribution of content, including control of rights; and***
 - ***provision for OFCOM to oversee the operation of a "Code of Practice on Broadcasters' Commissioning of Content". This would be similar to the current regulation of the ITV Networking Arrangements by the ITC and the OFT. This arrangement would also be parallel to the arrangements introduced to protect the interests of suppliers to supermarkets, following the recent Competition Commission Inquiry.***

How a Code might work

20. In proposing such a Code of Practice, we wish to make it clear that we believe OFCOM should have more than just concurrent powers to regulation competition. We quote the comments made by OFTEL in its response to "Regulating Communications in 1999. OFTEL, which has had considerable experience in moving the telecommunications industry away from a State monopoly into one of the more competitive telecoms markets in the developed world, said:

“Some rules in addition to competition law are expedient to prevent the residual advantages of incumbents being exploited in a way which frustrates the development of competition or unfairly exploits the consumer. Competition law, with its emphasis on waiting until an abuse has occurred and focussing remedies on individual abuses, is inappropriate to deal with the long term and widespread advantages enjoyed by historically incumbent firms”.

21. OFCOM's competition powers should therefore utilise the model provided in the Telecommunications Act 1984. This contains some specific duties about how OFTEL should exercise its powers. For example, OFTEL is required, in addition to promoting competition in the provision of telecommunications networks, to also “promote” competition in the supply of telecommunications equipment. We therefore wish to see a specific duty to promote competition in the production, supply and distribution of content for communications networks. We believe these powers should be forward-looking, allowing OFCOM to take a strategic view on how the market can be made more competitive and dynamic, rather than them having to look for specific abuses after the fact. PACT is currently consulting its lawyers to propose a suitable clause.
22. In addition to the specific duty to promote competition in the production and distribution of content, we believe that OFCOM should oversee the operation of a Code of Practice, in much the same way as the ITC and OFT have oversight of the ITV Networking Arrangements. It is always likely that there will be some tension between the producers and broadcasters of content on intellectual property matters and we consider that such tensions could be held in check by the operation such a Code.
23. The BBC, Channel 4 and some ITV companies are significant aggregators of the intellectual property rights to programmes, there should be some direct measures that prevent them from using such rights to restrict or distort competition in both television and other audio-visual markets. Control of rights has been a significant factor in allowing broadcasters to develop additional programme channels and move across into other delivery platforms such as the Internet.
24. In considering this matter we have not just looked at the ITV Networking Arrangements. Our attention was drawn to the Competition Commission's deliberations on supermarkets and their suppliers. The Commission noted that some supermarkets had a significant market share, and were able to use their buying power to the disadvantage of their suppliers. The Commission concluded that a Code of Practice regulated by the OFT would provide a suitable remedy.
25. There are certain parallels between the positions of supermarkets and their suppliers, and the position of content producers and broadcasters. As with the supermarkets case, this Code would not need to apply to all broadcasters, but should apply to those above a certain threshold. We think it would be

appropriate for it to apply to all broadcasters whose combined audience share amounts to 5% or more of the total television audience.

26. We believe that such a Code would provide a modern and flexible regulatory tool that would assist in the promotion of competition. It would provide for a more transparent market and is sufficiently light-touch and self-regulatory to fit with the Government's aims. It would not impose undue administrative burdens on broadcasters, but would provide for a better balance between the interests of broadcasters and its content suppliers.
27. Our view is that the Bill should make provision for such a Code, but that the actual provisions should be kept simple, to allow OFCOM full flexibility to review and amend the Code as necessary, to reflect changing market circumstances. The Code might simply provide that a broadcaster having more than a certain market share should send its proposals for commissioning content to OFCOM for approval. Before approving such arrangements OFCOM should have regard to its general duties to protect and promote the interests of consumers, including the promotion of competition. OFCOM might be empowered to publish general guidance to broadcasters on what issues their proposals for commissioning content should address.
28. The intention of the Code should be to:
 - **Ensure equal access to programme-making opportunities**
In-house producers, independent producers and others, should all have equal access to programme commissioners, and the structures broadcasters' have in place should provide for this. The Independent Production Order provides independent producers with a share of the market, however, with broadcasters like the BBC treating the quota as a ceiling and not a floor, it does not guarantee equal access.
 - **Ensure publication and monitoring of terms of trade**
As with the Supermarket Code, the proposed Code of Practice should provide that terms of business are available in writing. The operation of those terms should be subject to monitoring by OFCOM in the same way as the ITV Networking Arrangements are monitored
 - **Ensure fair dealing**
Broadcasters should not be able to exploit the fact that a producer has started production to enhance their negotiating position. Nor should they be able to operate any other arrangements, such as the terms on which they will enter into licensing deals that have the effect of being anti-competitive
 - **Ensure no undue delay in payments**
Broadcasters should be required to pay producers promptly, both for commissions and any profit shares from secondary sales

- **Regulate third party dealings**
In commissioning content, broadcasters should not be able to insist that the producer use certain suppliers or distributors. In particular, it should not be a condition of a contract that a producer must use the broadcasters' own distribution arm, and producers should be able to freely enter into any negotiations with any distributor
- **Provide for a disputes resolution procedure**
The Code should provide for a disputes resolution procedure. This might involve a senior person within the relevant broadcaster, followed by a mediator, with OFCOM as the ultimate body to whom an aggrieved party could complain
- **Provide a right of appeal to Competition Commission**
Interested parties might be entitled to appeal to the Competition Commission if it believes the Code of Practice is being applied in a way that does not satisfy the competition test. This would echo the provisions in Schedule 4 to the 1990 Act.

PLURALITY AND DIVERSITY

29. For the purposes of this response, we accept the general distinctions that the Government has made between plurality and diversity in its consultation document.
30. The consultation paper warns of the dangers of the so-called "Hotelling effect" where if a market has too many operators, the products and services will all be aimed at the middle ground. However, providing for the emergence of larger media companies does not provide a check against the "Hotelling effect". To some extent one can already see it at work in the present broadcasting market, where both BBC1 and ITV1 compete for the middle ground, and where several new channels have evolved whose programme propositions rely on retransmitting or "re-purposing" content that has already been transmitted on public service channels. BBC Choice, ITV2, Granada Plus, UK Gold and UK Gold Classics all rely to some extent on exploiting a broadcaster's back catalogue. The current market seems to support an over-provision of such channels. Arguably the interests of consumers would be better served if channels could compete openly for the rights to retransmit such programmes, rather than existing incumbents reserving such programmes for their own side channels. This would reduce duplication in the market and result in better quality channels. This aim could be achieved if there was a wider range of operators in the market having control over intellectual property rights. If, for example, a greater number of independent producers could control the secondary rights to their programmes, then it would enable a wider range of broadcasters and other content distributors to compete for the rights to transmit their products.

Pluralism

31. The paper describes plurality purely in consumerist terms. Securing plurality is not just about ensuring that consumers have a choice of different service providers (the “demand side”), it should also be about ensuring that different voices have a chance to be heard. A pluralistic media needs to provide opportunities for dissenting voices and those of special interest and minority groups to get their voices heard.
32. We do not yet have an abundance of spectrum for broadcasting, so it is essential that there should be some form of regulation to ensure that the broadcast media serve a wide variety of interests. Media ownership limits coupled with positive content requirements for public service broadcast channels have traditionally been used as blunt instruments to ensure a range of suppliers (plurality) and a range of different programmes (diversity) in the broadcast media.
33. While spectrum is still to some extent scarce, we are moving towards a market that, could provide for more competition, enabling the provision of a range of broadcast services to serve a wider range of interests than at present. Importantly, it ought to provide for new operators to enter the market to compete with existing operators.
34. The development of new delivery platforms in the UK has demonstrated how easily existing operators can develop new channels and services and take advantage of new distribution platforms. The BBC has expanded its interests through new public service channels, new commercial channels in a joint venture with Flextech, and has also developed a substantial presence on the Internet. Others like Channel 4, Granada and Carlton have followed suit. In most cases their ability to leverage a position across delivery platforms has been achieved through control of intellectual property rights. This allows them to exploit rights on their own services across different channels and platforms, while preventing other operators from purchasing those rights. This has resulted in higher entry barriers for new entrants to the market and has thus restricted the development of competition and innovation.
35. General competition law by itself will not secure plurality, at least not in the traditionally dominant and influential media forms of television, radio and to a lesser extent newspapers. We agree that some special measures will continue to be necessary. Media ownership limits are one way to continue ensure some degree of plurality. However, there are other measures that would help to promote both pluralism and diversity. Foremost among these is the need to ensure that the market operates in a properly competitive way, by reducing the advantages enjoyed by existing incumbents and lowering the entry barriers to the market. Instead of just concentrating on the “demand side”, regulation should support the needs of the “supply side.”

36. Independent television producers, who have benefited from the operation of statutory independent production quotas and Channel 4's publisher/broadcaster status, have contributed to the range and quality of programmes available to viewers. Requiring broadcasters to transmit minimum levels of independently produced programmes increases "internal" pluralism. The price and creative competition they provide has also had a positive impact on the quality and efficiency of television programme-making to the benefit of viewers.

Diversity

37. Public service broadcasting obligations help to ensure that consumers have access to a range of different programmes catering for a range of different interests. However, they are not the only means of securing diversity. In the same way as having a range of content suppliers can assist in providing pluralism, they can also contribute towards diversity.
38. Around 30% of independent production companies are based in the nations and regions, enabling them to see issues without the "metro-centric" attitude of many in the media industry.
39. We welcome the commitment to maintain ITV's requirements for regional programming, which are an essential part of ITV's ongoing public service obligations. However, these regional commitments are not just about maintaining the diversity of output on ITV – the requirements make it possible for the UK to sustain production companies and talent outside London. Production in the UK nations and regions – whether by ITV companies or independent producers – creates significant economic benefit in those regions, and maintains a plurality of voice. As with our concerns about a single ITV taking a dominant position in rights ownership, we would want to see the new regulator take a strong stance and affirm a single ITV's commitment to independent production in the nations and regions.
40. Enabling independents to compete effectively in the market can assist in securing and promoting diversity as the Government's White Paper acknowledged.

Impartiality

41. We note that the Government intends to retain impartiality requirements for all broadcast services. However, the market is moving towards a situation where high quality audio-visual products may be deliverable through various networks, and where such services might be receivable through a television set or radio. We consider it important to retain impartiality requirements for free-to-air services and for channels that might be included in basic subscription packages. However, it seems odd to prevent consumers from being able to subscribe to services that are not impartial, provided they know what they are subscribing to. Subjecting all channels to impartiality requirements seems inconsistent with the aims of ensuring regulation is proportionate and adaptable for the future. Removing impartiality requirements for services available only on a premium subscription basis would also assist in creating a more competitive and dynamic market by opening up broadcasting to groups and organisations that are currently excluded from providing services.
42. Local programme services would benefit from the operation of an “undue prominence” rule in place of impartiality requirements. This exists for local services delivered through cable². This provision recognises that it is much more difficult for local services with relatively small resources to secure plurality at all times. Regrettably such provisions were not applied to Restricted Service Licenses.

REGULATING OWNERSHIP RESTRICTIONS

43. We have considered the detailed options for reforming the current restrictions on the holding of broadcasting licenses outlined in the consultation paper. Our first observation is that current restrictions apply only to television, radio and newspapers. We consider this is appropriate because these are the three most dominant and influential media forms. We do not consider that it would be appropriate to extend restrictions to holdings in other media forms, such as magazines or online services. Online services may have become a more significant form of communication in recent years, but this has only added to pluralism. There must be an argument that, as more and more services become available through a number of forms of delivery, then the need to retain special ownership provisions will be reduced. We are concerned that the consultation document appears to envisage the possible extension of restrictions to electronic media, which we do not think would be desirable or workable.

² The provisions of section 47(5) of the Broadcasting Act 1990 provide where a service is intended for a particular locality, the ITC can replace the impartiality requirement with a requirement that “undue prominence is not given” to the views of particular persons or bodies on politically sensitive matters.

44. Of the options suggested, we would prefer an approach similar to the special merger provisions for newspapers contained in the Fair Trading Act 1973. We believe that legislation should provide for a “de minimis” threshold for each of the existing mediums that are regulated, namely newspapers, television and radio services. Mergers that do not result in one person or body exceeding the threshold for a particular medium should be allowed to proceed. Where a proposal exceeds a “de minimis” threshold, the merger should be subject to consideration under the special merger provisions by OFCOM (or the OFT as appropriate), against a public interest test. We agree that such a test should consider the effect of the proposed merger on pluralism and diversity in the media and the need for free expression of opinions. The “de minimis” thresholds should be set out in legislation but should be amendable by Order on advice from either or both of OFCOM and the OFT. We believe that such an approach would provide the most flexible and adaptable system that could keep pace with developments in the market.
45. PACT agrees there should be specific restrictions preventing the common ownership of national services like ITV and Channel 5. We believe that such restrictions should also prevent common ownership of national radio stations and national television services.
46. We do not consider that a system based on measuring media market shares, and using an exchange rate to express shares in one medium in terms of another would command support or be workable.

RESTRICTIONS ON OWNERSHIP OF INDEPENDENT PRODUCERS

47. In the last two years representations have been made at all levels of Government about the current restrictions on broadcasters owning independent production companies. We are therefore surprised that the Government has not set out any proposals on this issue in its consultation document. This is especially so, as the White Paper promised at paragraph 4.3.2 to consider the impact of loss of independent status by producers and to take account of the findings in the “Out of the Box” report. Furthermore, the last consultation on media ownership in 1995 signalled the Government’s intention to make amendments to restrictions on ownership of independents. We therefore ask the Government to make clear its intentions on ownership of independent production companies as soon as possible.

Ownership by overseas broadcasters

48. Current regulations provide that a television broadcaster cannot hold more than a 25% interest in an independent producer, and two or more broadcasters cannot hold more than a 50% interest in such a producer. However, there is an anomaly in as these restrictions apply to broadcasters regardless of where they are established. The restrictions therefore apply equally to a broadcaster in

Argentina as they do to a UK broadcaster. This is inconsistent with the approach that restricts ownership elsewhere in the UK television and radio industries, where restrictions apply only to services that are licensed by the ITC or the Radio Authority. A broadcaster in France and Germany therefore faces no restrictions in buying a UK broadcaster or a newspaper under current ownership rules, but cannot have more than a 25% interest in a UK independent production company. We cannot see the rationale for continuing with such restrictions, especially as they have affected the competitiveness of two UK production companies that have recently been acquired by companies with overseas broadcasting interests.

49. There is a further anomaly in the regulations arising out of the amendment passed in 1995. This allowed a UK independent producer to acquire a broadcaster outside of the European Economic Area without it affecting that producer's independent status. However, these arrangements are not reciprocal, so an independent could buy a Canadian broadcaster without any hindrance, but if a Canadian broadcaster buys a producer, it loses its independent status.
50. PACT and Endemol Entertainment UK have made several representations on this matter, pointing out the Government has the ability to amend the current restrictions through secondary legislation and could act tomorrow if it wished. The Government appears to believe that its ability to address this anomaly in legislation is somehow fettered by the provisions of the Television Without Frontiers Directive. But the Directive gives Member States considerable discretion to make their own arrangements in defining what constitutes an independent production. Research carried out both by PACT and Endemol has demonstrated that no other EU Member State has interpreted the Directive in such a way that restrictions on ownership of independent producers apply to broadcasters outside their own country. The UK is therefore out of step with the rest of Europe. The Government has also argued that it would be wrong of it to act, when the European Commission is considering revising the Directive, but any such revision is unlikely to come into force before 2004. We see no reason why the Government cannot proceed with secondary legislation now.
51. Removing these unnecessary restrictions would not have any adverse effect on the competitiveness of the UK broadcasting industry. Deregulation could well have a positive effect by providing independent producers with a new source of possible investment.
52. The Government's failure to act has, however, directly affected the competitiveness of two UK independent production companies. Café Productions was acquired last year by Alliance Atlantis which has broadcasting interests in Canada, and therefore no longer qualifies as an independent producer under UK regulations. Endemol also lost its independent status last year when its parent Group in the Netherlands was taken over by the Spanish telecoms group Telefonica. Telefonica has broadcasting interests in both Spain and Argentina. Endemol has been affected directly having lost its contract to

produce "The Sunday Programme" for GMTV because the production no longer contributes towards GMTV's compliance with the statutory independent production quota. We also understand that broadcasters like the BBC have declined to commission new programmes from Endemol and its subsidiaries as such programmes would not contribute to their quota obligations.

Restricted service licenses

53. In our responses to the White Paper, PACT suggested that there was no need for restrictions to apply to common ownership of independents and restricted services, which are mainly small-scale local television channels offered through spare capacity on the terrestrial broadcasting spectrum. The White Paper acknowledged that there is scope for more local television services and we believe that removing the restrictions on common ownership would be beneficial to both independent producers and restricted television services. This could easily be achieved by amending the definition of a broadcaster in the Broadcasting (Independent Productions) Order 1991 (as amended), so as to exclude restricted licenses from the definition. "Out of the Box" suggested an alternative approach that would have a similar effect, by removing restrictions on common ownership of broadcasters and independents, where the broadcaster had less than 1% of the total television audience. However, the Government has not responded to either of these proposals.

CONCLUSION

54. PACT has serious concerns about the impact that a single ITV company could have on the market, particularly the production and distribution sectors in television. Additionally, without any checks and balances, a single ITV company could have significant competitive advantages over other services, especially if it is allowed to use control of intellectual property rights to launch new programme services.
55. A single ITV, coupled with the BBC's existing dominance in the market could seriously harm competition and be to the detriment of consumers. The concerns we have could be addressed to some extent by the introduction of effective arrangements allowing OFCOM to use its regulatory powers to actively "promote" competition in the production and distribution of content.
56. PACT proposes that OFCOM should have a specific duty to promote competition in production and distribution, and allow the emergence of a number of rights holders who could sell their programmes in a more open and competitive market.
57. In particular, we believe that OFCOM should have oversight of a Code of Practice for broadcasters, which might work in similar way to the current ITV Networking Arrangements.

58. Giving OFCOM effective and forward-looking powers that would allow it to create the conditions in which a more competitive market could emerge, would contribute towards the goal of securing plurality and diversity.
59. We believe the Government should think again about whether impartiality requirements should apply to all broadcasters. We consider there is scope to allow certain services to develop that are not impartial, but would contribute towards consumer choice and further provide for a competitive market.
60. PACT is concerned that the Government's consultation document does not address the representations made to it on changing ownership restrictions for independent producers. It asks that the Government should make clear its intentions and act as soon as possible to rectify anomalies in the current regulations.

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