

CONSULTATION ON MEDIA OWNERSHIP RULES

RADIO AUTHORITY RESPONSE

Introduction

1. The Radio Authority welcomes the Government's approach to the development of media ownership rules, set out in the "Consultation on Media Ownership Rules" issued in November 2001, and is pleased to have this opportunity to comment further. We strongly support the need to ensure plurality of ownership and diversity of output, as well as dynamic and competitive markets, for the broadcast media. 'Plurality/diversity' and 'competitive markets' should be the overriding objectives of OFCOM, each objective held in equal tension with the other.

2. In our submission to Government in June 2000, we set out the Authority's approach to future ownership regulation for commercial radio.

"Plurality of ownership is a proper and necessary objective for any public policy applying to broadcasting. The Radio Authority believes that it is undesirable for ownership to become so concentrated that even where there is a multiplicity of radio stations these can be in the hands of only one or two operators. While recognising that the presence of BBC radio provides some natural plurality (and increased diversity), the essentially non-commercial nature of the BBC means that plurality obligations still remain for commercial radio itself."

We set out further that:

"The Radio Authority is not convinced by the argument that existing radio operators need further ownership liberalisation in order to avoid take-over, since large groups are just as attractive as small ones and there are existing protections against non-EEA control of UK radio licences. Nor is the Authority persuaded that media groups need ownership liberalisation in their home market in order to compete overseas. There is every indication that a successful but limited domestic company has as a consequence more incentive to expand into other countries. Nevertheless, we feel that the existing ownership rules for radio are becoming anachronistic because they contrast unfavourably with the rules which apply to other established media".

That remains the Authority's position. We are pleased to note that it is endorsed by Government in respect of commercial radio, and also finds echoes in the proposed approach to media ownership generally.

3. The Radio Authority has developed this thinking, and has worked through a set of detailed proposals for the ownership rules to govern local commercial analogue licences. These proposals, submitted to Government on 28 June 2001 with the support of the Commercial Radio Companies Association, are based on protecting diversity of output through format regulation, and plurality of ownership by ensuring that in each local area where there is a mature radio market there should be at least three owners of local commercial radio stations, plus the BBC's local services. We believe that this 'three-plus-BBC' approach, which is straight-forward, transparent, fair and effective may well be of wider application in establishing media ownership rules beyond local commercial radio.

4. This response to the issues raised in the "Consultation on Media Ownership Rules" follows the order of the issues raised in that document. The Authority hopes that it will be read alongside our proposals "Radio Regulation for the 21st Century" submitted to DCMS/DTI in June 2000, our response to the Communications White Paper on 12 December 2000, and the new radio ownership rules proposed by the Radio Authority together with the Commercial Radio Companies Association on 28 June 2001 (all available at www.radioauthority.org.uk/communications-bill).

Summary

5. In response to the invitation to comment on the "Consultation on Media Ownership Rules", the Radio Authority proposes the following:

- The rules regarding foreign ownership should remain in place at present, but be subject to amendment by secondary legislation on a reciprocal basis;
- Religious bodies should be allowed to own local digital sound programme licences, but that the prohibition on religious ownership of national radio services and of digital multiplexes should remain;
- The formula proposed by the Authority, with the agreement of the CRCA, to liberalise the rules controlling the ownership of ILR stations includes a valuable protection for plurality of ownership, that there should be a minimum of three owners of commercial broadcasting station plus the BBC in any sphere. This 'three-plus-BBC' formula can have wider applicability;
- The new legislation needs a wider and stronger definition of 'control' if ownership regulation is to be wholly effective;
- OFCOM should be given the power to vary the terms of all licences in the event of take-over, in order to safeguard the character of licensed services;

- OFCOM should be able to prevent altogether the selling-on of ILR licences within two years of their grant, if such selling-on would risk damaging the character of the service for which the licence was awarded;
- A similar approach to that agreed for ILR should be adopted for the ownership of digital radio services, again liberalising the rule to the simple ‘three-plus-BBC’ formula. Accumulation of ownership of digital multiplexes nationwide should be a matter for the competition authorities, but the ownership of only one mutliplex should be permitted in each local area;
- OFCOM will need to deploy frequencies within the BBC national and local sub-bands for the extension of Access Radio on a full-scale basis;
- Cross-media ownership between radio, television and newspapers should be simply governed by the ‘three-plus-BBC’ formula, perhaps with a cap on ownership in all three media;
- For competition matters, it is important that realistic definitions of the ‘market’ are adopted, using sector-specific expertise;
- Ownership rules should not be subject to review every two years, but they should be susceptible to amendment by secondary legislation and OFCOM should have a duty to ensure that its regulation remains appropriate and proportionate.

Foreign Ownership

6. In line with our recommendations in June 2000, the Authority believes that the restrictions on non-EEA ownership for analogue radio, which are not mirrored for digital radio, should be subject to amendment by secondary legislation, in order to allow for the eventual closer integration of analogue and digital licensing regimes. It continues to be our view that the relaxation of rules preventing foreign ownership of analogue services should be considered on a reciprocal basis.

Religious Ownership

7. The Radio Authority welcomes Government’s commitment to remove the prohibition on religious bodies owning local digital sound programme service licences. The Authority remains of the view that religious bodies should not be permitted to own national analogue licences, nor national digital sound programme service licences. The severe limitations on spectrum, especially acute in respect of analogue services but sadly still present in digital as well, means that it is not practicable to allow anything like the range of religious ownership which could properly reflect a multi-faith Britain. National analogue and national digital sound programme service licences are both in their different ways obtained on a commercial/financial basis, rather than in accordance with public interest criteria. The Radio Authority remains resolutely opposed to a situation where individual faiths, or denominations

within faiths, are able to bid against each other financially for what amounts to exclusive access to national airwaves. Given the Radio Authority's record in pioneering religious ownership of local services, where these considerations do not apply, we feel well qualified to support the concept of religious pluralism, and therefore to recognise where Government may legitimately exclude religious ownership if such pluralism cannot be obtained.

8. The Radio Authority continues to be opposed also to religious bodies owning digital multiplexes. The ownership of multiplexes, whether national or local, clearly places such an owner in a dominant position as 'gatekeeper'. The chairman of GWR, in confirming that Digital One had refused to allow another classical music service onto the Digital One Multiplex, observed that "we are not going to allow someone else to take our audience. We are digital gatekeepers and it must have been obvious to them the idea wasn't going to pass muster". (Reported in the Daily Telegraph 21 November 2001). The Authority is deeply concerned that a religious body owning a digital multiplex would have the power and the opportunity to exclude from the airwaves those whose output was unacceptable to it. Against this background, we recommend that Government should maintain existing restrictions on religious organisations holding digital sound multiplex licences.

Radio

(a) Analogue Radio

9. The Radio Authority was very pleased to be able to reach an agreed position with Commercial Radio Companies Association over future rules to govern the ownership of local (ILR) and national (INR) analogue radio licences. The ILR proposals are set out in paragraphs 6.3.5 - 6.3.10 of the "Consultation on Media Ownership Rules" and we continue to endorse these. For INR we believe that the ownership of more than one national commercial service should be a matter for the competition authorities, not for specific ownership rules. It has been put to the Authority that, if the rules regarding cross-ownership between national analogue commercial radio stations and national newspapers are to be relaxed in this way, the prohibition against any one owner holding two INR licences provides public protection against undue concentration of interests. As discussed below (paragraph 21) we believe that this protection can be achieved by a separate application of the 'three-plus-BBC' rule to cross-media ownership.

10. It has been further argued that an owner holding both an AM and an FM INR licence might wish to switch the programme services provided on the separate wavebands. Given that the existing licences have been renewed on an administrative pricing basis which specifically takes wavebands into account, we would expect any future legislation to ensure that any such proposal would

involve the early surrender and re-advertisement of the INR licences, in order to ensure the fair operation of the pricing mechanism.

11. The Authority's proposals for ILR, which comprise a dramatic liberalisation of the ownership rules with the removal of any nationwide points limit (which effectively ensured a minimum of seven owners of local commercial radio), represent a careful balancing of the wishes of the market and the needs of consumer and citizens. Maintaining a basic minimum of three owners of ILR licences wherever possible is an essential pre-requisite of deregulation at a nationwide level. The Authority therefore would strongly oppose any moves to dilute the local protection for listeners provided by the agreed formula of 'three-plus-the-BBC' for ILR.

12. However, effective regulation to ensure plurality of voice as well as plurality of ownership requires a more effective legislative definition of 'control'. In the current legislation 'control' is defined in terms of legal structures. However, our experience shows that it is the day-to-day management, combined with advertising sales arrangements, which controls the sound of a station and its editorial thrust and which therefore provides the product received by listeners. Thus, in order to deliver the public interest objectives sought by Government, OFCOM must be able to take into account programme management and sales arrangements, as well as legal constructions, when determining matters of 'control'. We recommend that this should be done by extending the definition of *de facto* control to include 'material interests', in much the same way as the OFT currently does. Our proposals are predicated upon a robust definition of 'control' in the new legislation. Unless such a strengthening of the definition of 'control' is to be instituted in the new legislation, minority shareholdings will continue to be used as a device to evade ownership restrictions thereby undermining the principles of plurality and diversity.

(b) Digital Radio

13. The Radio Authority has developed its thinking regarding the rules that should apply to accumulation of interests in digital radio. We have set out above (paragraph 8, in the context of the religious ownership of multiplex licences) our observations on the powerful position occupied by the owner of multiplex licences as 'gatekeepers'. With that in mind, we do not believe that any one company should be permitted to own more than one digital multiplex in any locality. However, just as for analogue radio licences, we do not believe there is a need for any dedicated regime regarding the nation-wide accumulation of local digital multiplex licences. We recommend therefore that existing limitations should be repealed and that the accumulation of multiplex licences be therefore left as a matter for the Competition Authorities.

14. The Radio Authority recommends that the ‘three-plus-BBC’ principle in its simplest form should be applied to the ownership of digital sound programme service licences. We propose that OFCOM should be charged with establishing a formula to ensure that there will be at least three separate owners of digital sound programme services in any locality, plus the BBC. OFCOM will need to decide whether to base this upon the number of services or on the percentage of available multiplex capacity (bit-rate) deployed, and the Authority can offer practical mechanisms for either approach.

15. The Authority sees no reason to depart from the ‘three-plus-BBC’ principle for digital radio. As DAB grows and becomes more widely accepted, and in the hope and expectation that more spectrum will be made available for digital radio in due course, there will be every prospect for owners to increase the number of services that they provide to each locality. But that will not lessen the importance of there being a plurality of owners, to ensure a range in the sources of news and the expression of opinion, and in such matters as dominance over the selection of music. Indeed the powerful position of the multiplex operators as gatekeepers, and also usually as multiple programme service providers, will place an even higher premium on the safeguarding of plurality in the digital future.

(c) Onward Sale of Radio Licences

16. The Radio Authority welcomes the proposal in the White Paper allowing OFCOM to review the onward sale of local licences, and the proposal in the “Consultation on Media Ownership Rules” to give the regulator the power to vary the terms of the local licence in order to secure the original character of the station. It has been the Authority's experience, when operating such existing provisions in the 1996 Broadcasting Act, that the power to amend programme formats is not sufficient to protect the integrity and credibility of the licensing system. The criteria for awarding licences set out in the 1990 Broadcasting Act cover more than just programme output, and there have been too many instances when the statutory intention of the licensing process has been frustrated by the early onward sale of recently awarded licences. The Authority therefore maintains its proposal to Government that the new legislation should include the power for OFCOM to prevent the onward sale of licences shortly after award in defined circumstances.

17. We believe that, similar to the duties imposed on the Radio Authority in respect of Independent National Radio licences by Section 103 of the 1990 Broadcasting Act, the new legislation should require the prior approval of OFCOM for the onward sale of ILR licences within two years of their grant. (See in particular section 103 (3) of BA 1990.) OFCOM should be required to do all that it can to satisfy itself that such a sale would not jeopardise any key features of a licence award which were material in the decision to award a

licence to its current owners. Provided that criterion was satisfied, OFCOM could then agree to the onward sale. Such provisions might also allow OFCOM to impose additional conditions on the sale of a licence in order to meet its own statutory duties. This approach would allow a market in radio licences to operate, but would keep in place public safeguards against the abuse of the licensing system.

18. In our proposals to Government in June 2000 (paragraph 5.23), we observed that if a moratorium were not to be instituted, Government might wish to consider a graduated levy on any licence holder who sold the licence within two years of its grant. We continue to prefer a statutory requirement for prior approval of the selling-on of licences, to protect the integrity of the licensing process, and to safeguard the character of stations so licensed. The Authority continues to believe that the public service obligations acquired by ILR licence holders as a consequence of the licensing process, and the format regulation derived from it, represent a necessary return for the use of the publicly owned resource of the spectrum to make private profits. However, an operator delivering this service for only a short time cannot be said to have discharged this responsibility, and it is not in the public interest for private individuals or companies to make personal profit from the exploitation of public spectrum in this way.

(d) Access Radio

19. The Radio Authority welcomes the Government's active support for the new tier of Access Radio stations, operating on a non-profit-distributing basis and ring-fenced from the commercial sector. The Authority considers these to be separate in nature from commercial radio, and therefore not relevant to calculations on the accumulation of interests in local areas. The pilot experiments, which will begin broadcasting in February of this year, will provide further information on the best basis for establishing and licensing Access Radio nationwide, within the constraints of available spectrum. The Radio Authority continues to believe strongly that Access Radio should be ring-fenced from the commercial sector. It has further proposed that OFCOM, in licensing Access Radio, should be given the specific duty of having regard for the local broadcasting ecology in any area, in order to allow the achievements of small-scale ILR services in particular to continue undamaged. It is already clear from the early planning of the Access Radio pilot experiments, that for these new services to operate to any significant degree on FM will require access to spectrum space available within the BBC's national and local FM sub-bands.

Cross media ownership

20. The Radio Authority has already suggested deploying the ‘three-plus-BBC’ principle in the future to govern cross-ownership between local radio stations and local newspapers. We have previously proposed that a local newspaper should be permitted to own a radio station within its circulation area provided that there would be at least two other owners of radio stations in that locality (plus the BBC, where the Corporation operated a local service). We continue to believe that this approach will provide a clear and fair way of ensuring that there is an adequate plurality of ownership to safeguard a range of sources of news and expression of opinion. We believe that an exception will need to be made in areas where there are only one or two local radio stations, so that local newspapers are not entirely excluded from operating in a market where the experience of recent years has suggested that they have a beneficial influence on the availability of news to the very smallest radio stations.

21. We now recommend that the ‘three-plus-BBC’ approach should be extended to cover national newspaper ownership of INR stations. Thus, although concentration of ownership among national analogue radio services would not itself be governed by radio specific rules (see paragraphs 9 and 10 above), the public interest would be safeguarded by requiring that a national newspaper could only own an INR licence if the other two licences were both in separate ownership, thus delivering three owners of INR services plus the BBC.

22. We believe that the ‘three-plus-BBC’ principle can be used to govern all cross-media rules, not just those involving radio. The “Consultation on Media Ownership Rules” envisages legislation to ensure “at least four separately controlled providers of free to air analogue television services” (paragraph 6.2.7). On the reliable assumption that one of those is the BBC, this applies the ‘three-plus-BBC’ approach to the terrestrial television market. The same principle could work well in allowing a local ITV company to own a local radio station in its broadcast area if there were two other owners of radio stations in that locality. It could also readily apply to national newspaper ownership of commercial television stations, allowing a newspaper group to own not more than one national terrestrial free to air television channel (leaving two not so owned, plus the BBC).

23. The application of the ‘three-plus-BBC’ rule to cross-media ownership as a whole has the merit of certainty, simplicity and transparency. It also has the merit of reducing regulatory overheads. The discretionary public interest tests, at present required of the Radio Authority and the ITC, suffer in particular from being always on a case-by-case basis (and being labour-intensive). This means that commercial certainty is unavailable and hostile take-overs are particularly difficult. The Radio Authority favours a much

clearer and more consistent approach than an opaque discretionary test will ever be able to provide.

24. The 'three-plus-BBC' principle is workable whether applied to radio, television or newspapers. If all three media are involved, the test is simply applied for each one of the three sets of two media on the same basis (radio/television; radio/newspapers; television/newspapers). However, if Government believes that this simple test still allow for too great a concentration of ownership if applied across all three media, then it could be adjusted to an 'either/or' basis. Thus for example, a national newspaper could own either a national radio station or a national television channel, provided that the 'three-plus-BBC' rule was satisfied, but not both. Whether such a 'cap' is imposed or not, the Authority believes that it is preferable to apply a clear formula, rather than requiring OFCOM to carry out an overriding public interest test, with all its attendant disadvantages. Other ways of regulating cross-media ownership such as calculating overall share of voice have persistent difficulties, for example establishing a reliable exchange rate mechanism between the three very different media.

Competition considerations

25. The liberalised regime proposed by the Radio Authority to govern ILR and INR ownership, and any approach eventually agreed for cross media ownership, would necessarily also be subject to competition considerations. Whether these competition duties are carried out by the Competition Commission, or by a division within OFCOM it would be crucial to ensure that proper, sector-specific knowledge is available to those adjudicating competition questions. In this context, the Authority stresses again the importance of OFCOM maintaining a level of experience and expertise in radio, and each of the other media involved.

26. In addition, it may be that Government would wish to offer guidance about the definition of the markets, which would be central to competition adjudications. The Radio Authority finds it barely credible that previous competition decisions have assumed that there is no substitutability of advertising between local radio and local newspapers. That is entirely opposite to the evidence derived from experience of the radio medium at first hand, where local newspapers and local radio stations actively compete for the same advertising monies. In any competition adjudication affecting broadcasting, the definition of the relevant 'market' should be based upon the practical operation of sales in that market.

Review of ownership rules

27. The Radio Authority does not support the proposal that all media ownership rules should be subject to automatic review by OFCOM every two years. This would have the advantage of producing flexibility, but would be likely to mean that legislation would go into more detail than might otherwise be thought necessary. Similarly, whilst such flexibility would be welcomed by those who had lost the initial argument in the legislative process, it would introduce a considerable degree of commercial uncertainty. To impose upon OFCOM a duty continually to pull itself up by the roots to examine how it was growing, will simply add another layer of bureaucracy. To require Parliament to re-examine ownership rules so frequently is a further recipe for uncertainty.

28. The Radio Authority would support provisions instead to allow any numerical formulae in the legislation to be adjusted by secondary legislation. We recommend that OFCOM should be required to implement mechanisms which deliver the 'three-plus-BBC' formula. How it does that should be initially its own concern, subject of course to such review and scrutiny as is required of the operations of OFCOM as a whole. We believe that deregulation as a whole should be a specific task of the non-executive OFCOM Commissioners and that provision should be made in the legislation for the laying down of unnecessary regulation, again on the basis of secondary not primary legislation. To achieve this, OFCOM should be under a duty to review its functions and procedures to ensure that only appropriate and proportionate regulation is applied.

Radio Authority
Holbrook House
14 Great Queen Street
London WC2B 6DG
www.radioauthority.org.uk

January 2002