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LEVESON INQUIRY INTO THE CULTURE, PRACTICE AND ETHICS OF THE PRESS

EXHIBIT TS/1

TESSA JOWELL MP

VOLUME 1 (OF 3)

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MEDIA OWNERSHIP - FUTURE REGULATION**Issue**

1. The broad framework for future regulation of plurality of media ownership; and the extent to which a new system should distinguish between cross-media ownership activity and proposed mergers within specific markets.

Recommendation

2. We recommend that Ministers:
 - consider this submission as general food for thought for an early meeting with officials and special advisers, and consider the nature and timing of subsequent public consultation;
 - give an early indication nevertheless on whether a new media ownership regime should replace, or be operated alongside, the special newspaper regime of the Fair Trading Act.

Timing

3. Consideration of this submission before a meeting with officials which your offices are arranging. You are not being asked to take decisions at this stage: you are merely requested to give a steer along the lines of your general impression of the future framework. The communications legislative timetable is pressing - we have sent instructions to Counsel with a large gap on media ownership, the greenest part of the White Paper. Tactically, you may not wish to publish proposals in the summer, ahead of legislation. However, we would regard it as good administration to do so, and need to prepare: it could take several weeks to clear reform proposals with No 10 and the Cabinet. To stay on track, we have to advance our policy thinking now. We would be grateful for an outline indication of your views

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4. Urgent views are requested on the issue of newspapers. Competition Policy Division at DTI are under Ministerial instruction to have ready by the end of April instructions to Counsel for a Bill on reform of the general merger regime of the Fair Trading Act for introduction in the 2001/02 session. If Ministers wanted to retain a special newspaper regime, but update and modernise it, this would be the logical legislative vehicle for the reforms. Early decisions on the future position of newspapers would be needed to meet this timetable. However, if Ministers wished to include newspapers within a wider plurality framework, this legislative option would not be appropriate.

What is "plurality"?

5. Media ownership rules by definition promote plurality of ownership, which has long been seen as essential to the healthy functioning of democracy. This rests largely on the equation between plurality of ownership and plurality of information and opinion: provided there are a certain number of alternative viewpoints available, the citizen has a good chance of obtaining a balanced view of any given subject. Note that this does not depend on the alternative sources being diverse in terms of content: they need not be. The mere fact that alternative sources of information exist is a way of keeping each provider "honest" and of ensuring that scope for balance exists.
6. There is a view that requiring pluralism of ownership is in fact a form of ex-ante content regulation - in which case, why not achieve our objectives through content regulation pure and simple? This view supposes that we do not care how many media owners there are, or who they are: we simply care about what they do. It helps here to consider what might happen if we had a hypothetical media monopolist, subject to content regulation. If the monopolist were to commit a breach of content rules, he would be subject to penalty. We must consider, however, whether that penalty could be sufficient in all cases to counteract the damage done. Consider how this hypothetical media monopolist could set the news agenda in a partial way. Even if all discussions of matters on the agenda were impartial and all negative content requirements scrupulously observed, partiality in selection of topics would be impossible to spot except from a vantage point informed by alternative sources of information. It is because we do not wish to run the risk of this happening - even with a benign monopolist - that we have sought to ensure pluralism of ownership.
7. Some argue that media ownership rules should be dispensed with and that we should rely instead on general competition law. This is to miss the point of the plurality argument. Because ownership restrictions have the effect of limiting concentrations, they also have implications for the state of competition in media industries. Indeed, some ownership rules (such as the restrictions on DTT multiplex ownership which Chris Smith liberalised last year) are designed explicitly to address competition objectives. But not all are, and where they are not, competition effects are an indirect consequence of those ownership rules, not their primary purpose. Competition law might

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deliver plurality of ownership en route to delivering competition objectives, but it cannot be guaranteed to do so. In this sense, it would be a blunter instrument than direct ownership controls and a second best way of delivering plurality.

Options for a new system

8. Ministers decided not to mention options for media ownership regulation in the White Paper, which consequently invites comments on how the current system might be reformed. Officials and special advisers have meanwhile had an initial discussion of the merits of the three main options for a future system. These are:
 - a) Absolute numerical limits - the retention of a system of absolute numerical limits, in which maximum holdings in specific media are stipulated, beyond which no company may go;
 - b) Plurality test - the specification of numerical limits, which, if exceeded, would trigger a plurality test which would need to be satisfied in order for the merger to be permitted (reliance on a plurality test alone with the abandonment of numerical limits would be likely to prove ineffective and inefficient, as such a system would require detailed examination of insignificant mergers);
 - c) Guarantees of independence - the abandonment of numerical limits altogether, and the adoption of a system of assurances of editorial and journalistic independence by proprietors.
9. It has been suggested that the last option would be an insufficient provision in itself to secure plurality of voice, but should instead be viewed as a potentially valuable supplementary measure.
10. We would therefore be left with two options, a) and b), both of which have the idea of "numerical thresholds" as their basis, but one of which would allow those thresholds to be breached, subject to the satisfaction of a plurality test.
11. Whichever option is adopted, we need to consider the basis on which the thresholds used in both systems - be they absolute or permeable - should be identified. In doing so, Ministers are invited to consider the wider issue of the distinction between cross-media ownership rules, and rules appertaining to specific media markets.

Market-specific limitations/share-of-voice system

12. Currently, with the important exception of the newspaper market, which is considered below, there are (in addition to the general merger regime of the Fair Trading Act), two distinct types of rules used to regulate media ownership:
 - cross-ownership limits, ie, limits to ownership across different media markets;
 - limits to concentration within any one media market.
13. It is arguable that the distinction between the two sets of rules is a false one,

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given that the objective is merely to inhibit concentration of ownership. As convergence increases, there is a view that the necessity to regulate both for ownership within specific media markets and for cross-media ownership diminishes. Cross-media ownership rules are the means to achieve the end of limiting concentration of ownership: concentration of ownership matters; cross-ownership, in itself, does not.

14. If it is accepted that this is the case, there is an argument for amalgamating both sets of rules (ie, those dealing with specific media markets and those regulating holdings across markets) within an overall "share of voice" system. Such a system would replace all existing media ownership rules including those which currently apply within markets (eg, the current 15% TV limit, and the radio points system). It would treat TV, radio and newspapers as relatively similar media which would be governed by the same rules.
15. The counter argument, however, is that different media markets have different strengths and "pervasiveness", which a share-of-voice system cannot reasonably take account of. There is the view that a company's holdings in different media are greater than the sum of their parts: if a given point of views is disseminated across a range of media, the consumer may have the impression that several different voices are concurring in the same opinion.

Newspapers

16. There are particular issues to be addressed in relation to the newspaper industry, where acquisitions are currently subject to special scrutiny under the special newspaper regime. Ministers undertook in the White Paper to consider a lighter touch for this regime. The rationale for its introduction in 1965 was that control of the media was a matter of particular public sensitivity, and that the concentration of the press in too few hands could stifle the expression of opinion and argument and distort the presentation of news. In order to address these concerns, the special newspaper regime employs a public interest test which specifically requires the competition authorities to take into account the need for accurate presentation of news and free expression of opinion. There is no statutory limit on newspaper ownership.
17. The public interest test of the special newspaper regime has been used to address a range of issues beyond plurality of ownership. These include concerns about influence by owners over editorial policy; diversity of opinion; and diversity of community voice. In all of these examples, concerns over freedom of expression arose in relation to the individual transaction, and did not relate to the share of national circulation that was being acquired.
18. In considering the options for ensuring plurality of ownership the media, Ministers will want to consider the extent to which the press remains distinct from the broadcast news media in terms of raising special issues of freedom of expression. On the one hand, newspapers no longer have a unique opinion forming role, and indeed are not generally expected to act as bastions of

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impartiality. On the other, they are allowed to be opinionated (unlike broadcast media) and so it is all the more important to protect the plurality of opinions. Nevertheless, repealing special controls on newspaper acquisitions would prove politically sensitive.

Thresholds for the new system

19. It is suggested that there are two main ways in which the numerical thresholds on all media markets could operate.

Thresholds sensitive to media

20. Ministers might opt to continue with the current system, whereby cross-ownership limits operate alongside limits to concentration within any one media market (eg, radio points system). This would permit sensitivity to the relative strengths and influence of different media. It would not, however, simplify the system.
21. The continuation of such a media-sensitive system would argue for retention of the special newspaper regime, although Ministers would still need to consider whether there is scope for a "lighter touch" for the regime as it stands.

Share-of-voice system

22. A possible model for a share-of-voice system is that proposed by the IPPR in 1996. Here, a set of rules is proposed to ensure a minimum number of players across four media markets: national newspapers, regional newspapers, television and radio. A 15% limit is applied to each of the four sectors where a media company has interests in each - this limit relaxes progressively if a proprietor is not present in all four sectors (eg, a 20% limit applies if a proprietor has an interest in three of the four markets; a 30% limit if he has interests in two of the four, etc).
23. The IPPR credited this model as being clear and flexible without being destabilising, insensitive to share, or overly sensitive to technology. However, the system might in fact prove insensitive to technology if, for example, newspapers' presence on the internet expands rapidly.
24. If Ministers were attracted by this proposed system, we would provide further advice on which markets could be included.

Option 1 - Absolute numerical thresholds

25. The first option is the retention of absolute numerical thresholds, which might perhaps be set at different levels to those currently. Only if the thresholds were set as per a "share-of-voice" system could we argue that this was a significant change from the current regime. A "share-of-voice" system would certainly have a greater degree of simplicity than the current regime, and would be clearly understood, provided markets and thresholds could be clearly defined.
26. The absolute nature of this system would however have several potential drawbacks: firstly, if a model as prescriptive as the IPPR model were introduced now, it may require divestments on the part of newspaper groups which also have an interest in satellite television, for example. Absolute limits

might also serve to prevent takeovers of failing firms, which may be desirable on diversity as well as economic grounds.

27. Whether the thresholds were based on a "share-of-voice" system, or were sensitive to different markets, we could however institute a regular review of the limits they impose, in order to ensure that they remain sensitive to changing market conditions. Such a review might also cover the nature of the markets concerned, so that, for example, if it was felt that the internet should not be subject to limits at this stage, it could be included in the scheme later.
28. A further issue for consideration is whether the limits are intended to "kick in" only at the time of acquisition, or over time: again, this might prevent companies from growing.
29. Ministers also need to decide whether this model would replace the special newspaper regime or operate alongside it. Absolute limits of the kind suggested could not themselves address concerns over freedom of expression, if that remained a Ministerial objective. However, limits on ownership plus retention of the special newspaper regime would not be seen by industry as a lighter-touch approach.

Option 2 - Numerical thresholds + plurality test

30. Under this option, the thresholds on ownership would not be absolute, but a breach of them by a company would result in the application of a plurality test.
31. Such a test could be tightly defined to relate to plurality of voice, as distinguished from diversity of content. We would advise further on whether OFCOM or the OFT would assess whether the plurality test would apply in any given case. If so, the merger would be referred to the Competition Commission for an in-depth review. Thought would also need to be given to how a "plurality" inquiry would operate alongside any competition inquiry which the Competition Commission might be conducting into the merger.
32. The test itself would be concerned with the number of players left in the media market following a merger, ie, plurality of voice, and not diversity of content, or indeed freedom of expression. Again, Ministers would need to decide whether this model would replace the special newspaper regime or operate alongside it.
33. One option could be to consider whether it would be possible to write into the general media plurality test a special subset for newspaper transactions, specifically providing for freedom of expression issues.

Conclusion

34. Ministers are asked for urgent views on the future regulation of newspaper ownership. Should newspapers be included within new plurality rules? In order not to increase regulation on the industry, this would indicate repealing the special newspaper regime, although it may be possible to include a subset for freedom or information issues within a plurality test. If Ministers were not inclined to include newspapers within a wider plurality framework, further advice will be provided on what "lighter touch" options might remain in

terms of reform of the special newspaper regime.

35. Ministers are asked to consider the following issues at a meeting:

- Do Ministers wish to see a simplified "share-of-voice" system, or do they wish to see market-specific limits retained?
- Should the numerical thresholds be absolute, or should there be an additional plurality test for those developments which exceed the limits?
- When and how proposals should be publicised.

36. Behind is a table showing current holdings of major cross-media groups.


Media Ownership Officer

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