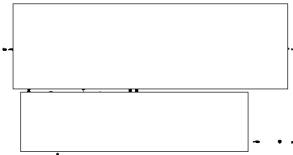


Department for Culture, Media and Sport
Rt Hon Tessa Jowell MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

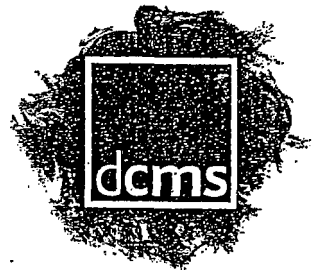
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C01/31268/10685/mk

PPM

Rt Hon Charles Clarke MP
Minister Without Portfolio
House of Commons
London
SW1A 0AA



13th March 2002

Mr Charles

Thank you for passing me your letter from Paul Dacre, of Associated Newspapers. Mr Dacre does indeed raise some interesting points. You will appreciate that at this point in time, as we finalise the shape of the draft Communications Bill, I cannot give away any detail of our plans for reform of the media ownership rules. We will publish our final proposals later this Spring. In the meantime, I will respond to his general points.

It is not correct to suggest that UK companies have been unduly limited in their growth by excessively tight regulation. I enclose a copy of our recent paper, Consultation on Media Ownership Rules, Chapter 4 of which illustrates this point. Almost all modern democracies have sought to place some limits on media markets. France and the US have particularly detailed regulation in this area, as Annex C of the paper shows, but this has not hampered the growth of AOL-Time Warner or Vivendi Universal.

We want to attract new investment to the market, to develop new and better services for the consumer. We also want to give UK companies the chance to compete internationally. That is why we are committed to deregulation, to create the most competitive market possible.

However, democracy depends on a media culture of dissent and debate. For that reason we have to strike a balance between the need to promote competition and the need to make sure a significant plurality of competing voices continue to be heard. We welcome Associated Newspapers' support for this position, and the proposals we publish in the draft Bill will certainly aim to meet their other objectives: clear consistent rules in a transparent regulatory environment.



INVESTOR IN PEOPLE 521

MOD300006155

We are confident that our proposals for content regulation of broadcasting will be sufficient to maintain a diversity of programming, and to sustain appropriate levels of local and regional content.

Yms



TESSA JOWELL

Inter-Departmental Case no 01/31268 | 10685

Draft reply for:

Rt Hon Charles Clarke MP
Minister Without Portfolio
House of Commons
London
SW1A 0AA

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TESSA JOWELL

Drafted by: Alex Towers (6414)



Minister without Portfolio

**CABINET
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1 March 2002

The Rt Hon Tessa Jowell MP
Secretary of State
Department for Culture, Media and Sport
2-4 Cockspur Street
London SW1Y 5DH

Dear Secretary of State,

ASSOCIATED NEWSPAPERS LTD

Department for Culture, Media and Sport	
DATE RECEIVED 04 MAR 2002	
Minister	SOS
Lead	Diana Kahn (Tick)
Action	Advice & Draft Reply by 18/03
	Advice as Appropriate by 1
	For information only
Permanent Secretary	Cc:
Director (FR)	
Director of Strat & Com	
State Secretary (WS)	
Diary Secretary (J)	
PCU REFERENCE: 07131268	

I am enclosing a letter that I have recently received from Paul Dacre, following lunch with him and some of his colleagues.

I think that the points that he raises are interesting and I would welcome any comments that you feel able to make at this stage.

I will take up his invitation to meet further at some point and will let your office know before that takes place.

Yours sincerely,

Christian Clarke

PP THE RT HON CHARLES CLARKE MP

(Approved by the Minister, and signed in his absence.)

B(1) 6/3/13 File Sky, cc. Media Ownership Consultation Bill

From: Cassells, Sheila [Sheila.Cassells@bskyb.com]
Sent: 08 March 2002 12:33
To: 'andrew.ramsay@culture.gsi.gov.uk'
Cc: 'bill.bush@culture.gsi.gov.uk'
Subject: Media Ownership Consultation.

Importance: High



Consultation on Media Ownershi...

Further comments from Sky are attached. Apologies for the delay.

These focus on the BBC, C4 and SMG's submissions. I would be grateful for an opportunity to discuss this further with you.

<<Consultation on Media Ownership Rules 040302.doc>>

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Thanks.

SK
This is typically fortnight, but well if it coincides with our views on the SMG & C4 proposals.

CONSULTATION ON MEDIA OWNERSHIP RULES

Supplementary Comments by BSkyB

1. Sky is grateful for the opportunity to submit further comments on media ownership. As Government is aware from Sky's response to the consultation, Sky considers that, increasingly, the market delivers plurality and diversity and there is no justification for the maintenance of ownership rules.
2. The comments below are made in response to the submissions of the BBC, Channel 4 and SMG. In Sky's view these responses contain proposals that are totally contrary to the principles of the Better Regulation Task Force¹ which Government proposes should be applied in this area².

Platform Ownership

3. In particular, Sky wishes to comment on the proposal that there should be a new media ownership rule which applies to "platforms" or "gateways"³. At its most extreme, in the Channel 4 submission, this appears as a proposal to regulate so that "ownership" of a "platform" (whatever that is) is separated from the provision of content⁴.
4. Sky notes that such proposals are inconsistent with the Government's intention to be "as deregulatory as possible"⁵ and with Government's recent decision to remove ownership limits on DTT multiplexes in response to market-driven consolidation⁶. Furthermore, Sky notes that neither the proposed rule nor the justification for it are clearly articulated by the proponents of it⁷. Consequently the BBC, Channel 4 and SMG have to rely on vague and inarticulate assertions about "problems" which they perceive to arise, or to be potentially capable of

¹ These principles are transparency, accountability, proportionality, consistency and targeting.

² DCMS/DTI Consultation Paper on Media Ownership, para 5.6.

³ BBC Response, para 5.6; Channel 4 Response, page 4; SMG Response, (which is less explicitly focussed on platform ownership but the SMG proposal the same effect).

⁴ Channel 4 Response, page 5.

⁵ DCMS/DTI Consultation Paper, para 3.7.

⁶ DCMS Press Release 183/2000.

⁷ In the case of the satellite platform it is impossible to point to anything which is "owned" by Sky: the satellite is owned by SES and the population of decoders is owned by the subscriber base itself. Sky has the right to administer the conditional access system in those boxes, but that right is already, via the UK's implementation of the Advanced Television Standards Directive, regulated by OFTEL. Thus, there is no justification for the proposed rule.

emerging, because of the existence of vertically-integrated media players.

5. As Government stated in its White Paper, "A New Future for Communications", it would be wrong to ban vertical integration outright⁸. In this statement Government acknowledges that vertical integration does not give rise per se to anti-competitive effects and, indeed, can have beneficial outcomes. It recognises also that the appropriate course where problems are identified, and which justify regulation, is to impose behavioural rules which guarantee access to platforms, not structural separation which will stifle investment in both infrastructure and content.
6. The example of Sky itself illustrates the benefits of vertical integration, as well as the fact that vertical integration should not be presumed to be anti-competitive⁹. As a content provider Sky needs to secure distribution of its channels to make a return on its investment in rights and channel production. The only way in which Sky could be guaranteed distribution for its content was for Sky to invest in and build its own platform since access to both cable networks and terrestrial spectrum was, and remains, closed^{10, 11} and, hence, controlled by those platform operators. The risk of recouping that investment was totally borne by Sky: it had no guarantee that other broadcasters would join the platform and contribute, or that if they joined, how long they would stay.
7. Consequently, Sky invested heavily, first in the analogue satellite platform and then in digital satellite; creating a digital infrastructure which is essential to Government's objective of switching-off analogue

⁸DTI/DCMS: "A New Future For Communications" CM5010, December 2000, Para 2.3.4.

⁹Sky notes with concern that there is some quarters (e.g. the BBC and Channel 4 responses, the evidence given by the ITC Chief Executive to the Culture, Media and Sport Select Committee on 26 February 2002) a presumption that vertical integration is inevitably anti-competitive and that ex ante rules should be applied. Sky considers that Government should confirm that ex ante (prescriptive and prohibitive) rules must be applied by OFCOM to only those areas to be specified in primary legislation.

¹⁰DCMS/DTI appear to consider that there is open access to all digital platforms (see Consultation on Media Ownership Rules, para 6.2.14). As Government is aware both DTT multiplex operators and cable operators are able to refuse channel providers, like Sky, access to their platforms. In such circumstances platform operators can (as has happened on DTT and cable) give preference to their own content through the exclusion of other services which might compete with it. The exceptions to this are the BBC, ITV and Channel 4, some of whose channels have 'must carry' status.

¹¹Additionally Sky is unable to obtain distribution in its own right on analogue terrestrial spectrum and gifted terrestrial capacity because of the current cross media ownership rules.

terrestrial transmissions. Moreover, once created, this platform exists for the benefit of other entrants: access to the DSat platform is open, thereby, allowing all content providers who wish to secure satellite distribution to benefit from the investment which Sky has made. As a consequence, digital satellite viewers in the UK enjoy the most diverse and pluralistic range of services available.

8. As Government is aware, Sky does not control the availability of satellite transponders. Broadcasters who wish to distribute their services via satellite can obtain transponders from Astra and broadcast such services unencrypted without entering into any arrangement with Sky.
9. Those broadcasters who wish to encrypt their services - whether to ensure that they broadcast only in those territories for which they have rights and/or to enable them to charge viewers for the services - have a choice of either deploying their own set-top boxes or using Sky's conditional access system which provides access to the 5.7m population of DSat decoders. If the latter route is chosen, access is guaranteed and can be negotiated on fair, reasonable and non-discriminatory terms, regulated by OFTEL.
10. That broadcasters have taken the latter approach (making use of the conditional access system administered by Sky), and with over 360 TV and radio services available on digital satellite and 15 interactive service providers using the return path from the decoder box, provides evidence of the benefits accruing from Sky's investment and the absence of any alleged problems attributable to vertical integration. Sky suggests that Government should deem the existence of approximately 180 conditional access agreements regulated by OFTEL between Sky and other broadcasters; the fact that there has been just one complaint to OFTEL; and the lack of any need for pervasive regulation by OFTEL to be ample and sufficient evidence that the proposal that there should be ownership limits on platforms is based on mere assertion of illusionary problems. It also totally ignores the existence of the regulatory framework under which entry and competition have flourished. The proposal cannot be justified on the basis of the facts.

11. Furthermore, it would contravene Sky's legitimate expectations if Government were to impose now a limit on platform ownership. Sky has invested in its digital satellite infrastructure and in content in the expectation that it would be able to develop and grow its business unfettered by ex ante ownership rules (other than the current cross media ownership rules which Sky has argued should be revoked¹²). It would be invidious - to say the least - if having allowed Sky to incur the associated risks Government were now to restrict Sky's ability to earn a return on its investment.
12. Government will also be aware that Sky, like cable operators and telecommunications companies, continue to invest in infrastructure. Sky believes that Government will appreciate that the introduction of any new rule on platform ownership will hinder Government's ambitions for digital switchover and the roll-out of broadband, and will discourage potential new investors from entering this field.

Sports Rights

13. In its submission the BBC refers also to the need to consider the potential impact of control of premium content such as sports rights, including particularly where there exists exclusive rights to distribution of such content in non-traditional media markets¹³. The BBC suggests that such control may be used to reduce choice and plurality, and, hence, should be considered in any assessment of plurality. It is not clear what the BBC is suggesting, other than it would be helpful to them to remove Sky as a competing bidder for rights (and, ironically, reduce plurality in favour of the BBC).

The BBC and Ownership Rules

14. Sky agrees with SMG that the BBC services must be taken into account in assessing plurality. Insofar as the viewer is concerned the BBC is one source amongst many sources of opinion, albeit a very significant one. The public interest in plurality lies in there being a number of different sources of opinion and it would be a dereliction of that interest if the BBC were allowed to

¹²Sky's Response to Consultation on Media Ownership.

¹³BBC Response, para 5.8.

dominate news and current affairs across all media by being excluded from the assessment of plurality¹⁴.

Other Aspects of the SMG Submission

15. Sky considers that, in other respects, the SMG proposal is flawed, and fails Government's key aims for ownership rules, in a number of respects, viz:

- A threshold based on revenue shares penalises - rather than rewards - successful companies and dampens competitiveness. Furthermore, it could result in unpredictable outcomes. An advertising downturn could have the effect of increasing a subscription broadcaster's share of revenue - thereby leading to an inadvertent breach of media ownership rules;
- The proposal is not deregulatory. For example, whilst removing the 15% limit on audience share, it introduces a new threshold based on revenue share which will, in some cases, be derived from an audience share of less than 15%, i.e., it is potentially more restrictive;
- The proposal is complex and discriminatory. Revenue is not a 'common currency'¹⁵ or an appropriate surrogate for share of voice: a £ of the BBC's or ITV's revenue equals a much higher share of audience or voice than a £ of Sky News' revenue. A £ of DMGT's revenue for example, is different still. In fact, SMG's proposal has many of the deficiencies of the 'share of voice' concept which Government consulted on, and rejected, in 1995/96;
- The proposal would impose considerable burdens on media players (as well as OFCOM) who would have to apportion and report revenue, where this is earned across more than one channel. OFCOM would have to employ significant additional resources to administer a reliable and enforceable system;
- The proposal would not be sufficiently flexible to address the changing and increasing, level of plurality delivered by convergence. For instance, the internet now provides a substantial number of sources of news and

¹⁴As the ITC notes in its response to the Media Ownership Consultation, a dominant operator across several media can 'set the agenda' (para 6). Sky understands that the ITC's comment relates to the BBC.

¹⁵It is odd that SMG suggests this approach given that it also argues that media are generally not substitutable (SMG Response, para 4.0.1 to 4.0.4).

current affairs; the revenue of which (if there is any) is incapable of being measured; and

- As SMG itself acknowledges, the 'prime media assets' proposal is "intrinsically subjective and would require periodic reviews"¹⁶.

16. The list above is not exhaustive. However, in Sky's view it is sufficient to demonstrate why Government should not adopt the SMG proposal.

¹⁶SMG Response, para 6.5.3