News International plc

1 Virginia Street, London, E98 1EX,
Telephone: 020 7782 6000 Facsimile: 020 7782 6097

By POST & FAX: 020 7211 6337

1 August 2002

Rt Hon Tessa Jowell MP
Secretary of State
Department for Culture, Media & Sport
2-4 Cockspur St
London SE1Y 5DH

Department for Culture, Media and Sport		
DATE RECEIVED 05 AUG 2002		
Minister		
Lead	[redacted]	(Tick)
Action	Advice & Draft Reply by /	
	Advice as Appropriate by /	
	For information only	✓
Permanent Secretary	Cc:	
Director (A.K.)		
Director of Strat & Com		
Private Secretary (W.S.)		
Diary Secretary ( )		
PCU REFERENCE: 0211064/		

Dear Tessa

In advance of our meeting this afternoon, please find attached a copy of News International's response to the Draft Communications Bill, which we have submitted today to the DTI/DCMS Joint Communications Bill Team.

Alison Clark
Director of Corporate Affairs

News International plc

Response to the Draft Communications Bill

Memorandum submitted by News International on the Draft Clauses for the proposed Communication Bill concerning media ownership and on the policy document relating to newspaper mergers

Introduction

News International welcomes the opportunity to respond to the draft Communications Bill, published by the Government in May 2002.

Our response also takes into account the contents of the following papers: the explanatory notes and the policy document that accompanied the draft bill; the additional media ownership clauses that were published subsequent to the draft bill; and the memorandum on reform of the newspaper mergers regime that was provided by the DTI and DCMS to the Joint Committee on the Draft Communications Bill.

News International welcomes the broadly deregulatory approach of the Government's proposals and the reform of the foreign and cross-media ownership rules. A more open approach will encourage competition, which is bound to lead to a diversity of content as content providers seek to meet market demand. We also welcome the Government's flexible "wait and see" approach which will allow further relaxation of the regime as the situation matures.

Five principles inform the following detailed comments on the Communications Bill: a belief that competition is the best guarantor of an efficient, innovative communications sector, and that regulation is necessary only where competition is not effective; that the move towards liberalisation and deregulation should be on-going; a belief that preservation of a free press is important to the preservation of democratic institutions; the idea that free trade and the free movement of capital and ideas is in the interests of consumers; and the desire to have a regulatory regime that is administratively efficient.

Competition: It is generally agreed that wherever possible competition should be relied upon to give consumers what they want, and to determine which suppliers prosper. That is why free entry into the media business by newcomers, and free access to all of its sectors by incumbents, is essential; why a merger regime aimed at preventing an excessive accretion of market power is important; and why the prevention of the abuse of market dominance is crucial. In our view those goals can best be accomplished by relying on the authorities skilled at applying laws such as the new Enterprise Bill, and by removing political considerations from the determination of the competitive impact of various business practices and mergers.

Liberalisation: The entire thrust of the Government's media policy is aimed at liberalisation: making entry easier, attracting new players and new investment, increasing competition, choice, diversity and plurality. That process need not stop circa. 2002, but should proceed as OFCOM finds it possible to shed some of its regulation in favour of reliance on competition and market forces.

Freedom of the press: The media are unlike other businesses in that their freedom to criticise government actions is a key ingredient in the preservation of democratic institutions. Any regulatory scheme that subjects the media to pressure from self-appointed or government-selected "panels", or from ministers with a natural tendency to take offence at criticism of the government of the day, threatens that independence, and should not be made part of the new regulatory scheme in which OFCOM is the key regulator.

Free trade: A free inward flow of talent and capital is essential if the UK is to have a dynamic, diverse, innovative media industry. The failure of other countries to recognise this – to reciprocate – is no reason for emulating such self-defeating policies. Nor is a fear of a so-called flood of "cheap" American programming: data prove that British consumers prefer British programming, and that the only programmes that will "flood in" from overseas are those that consumers are willing to watch, which history suggests are the best of America's programming output. Just as foreign ownership has not led British newspapers to rely heavily on news and comment generated in America, Australia and Canada, so foreign ownership of British broadcasting facilities will not result in importation of programmes of no interest to British consumers – and will result in an openness to new ideas that should force domestic producers to compete by increasing the quality of their own programming.

Administrative Efficiency: The Government recognises that OFCOM faces a major organisational and administrative challenge. If it is to do its job without undue cost to the taxpayer and the media industry it must use simple procedures where that is possible, and draw on the already-existing expertise of the Office of Fair Trading in matters related to competition. It must also avoid setting up procedures that permit a matter to move endlessly up and down the decision chain, from agency-to-agency-to-minister-to-agency.

The following detailed suggestions are aimed at helping the Government to realise these goals.

Competition

Schedule 14 – Cross-media ownership and Channel 3 licences

1. We believe that vigorous application of competition law will enable the Government to achieve its objective of ensuring diversity and plurality, without further regulation. Competition rules are already in place, and more sophisticated rules are in the Enterprise Bill, which ensure that mergers between newspaper proprietors and any Channel 3 licence holder will be examined by the OFT. In such an examination full account can be taken of the structure and performance of the market, and of the various players in it. The full range of remedies, including divestment, will be available under that legislation, and the authorities will be able to consider all factors relating to market performance.

2. We also believe that the Government should reconsider its proposed ban on ownership of Channel 3 by any company "controlling more than 20% of the

national newspaper market". Imposing a blanket ban at an arbitrary market share level is a crude means of regulating a rapidly changing market. Arbitrary thresholds punish success and cannot take account of the rapid changes that are occurring in the industry and the new forms of competition that media companies face. The fact that the constraint here proposed is almost certainly discriminatory is still another reason for eliminating it. By contrast, competition law, with its wide investigatory powers and remedies, is a flexible instrument for achieving and maintaining competition.

3. On point of detail: we note that in paragraph 3(3) of the new Schedule 14, there is a difference in the wording of the new sub-paragraphs (a) and (b) in that one refers to "circulation and influence" and the other refers to "circulation or influence". It is not clear why there is a difference in the wording. We believe that the former wording (in sub-paragraph [a]) is adequate and that the wording in sub-paragraph (b) should mirror it.

OFCOM should have no role in newspaper mergers

4. We note that the Government intends OFCOM to advise on any "public interest" issues arising in a newspaper merger. We would argue strongly against the introduction of a fourth regulator – in addition to the three existing bodies that regulate this sector (the OFT, the Competition Commission and the Secretary of State), especially one with no record of experience of newspaper mergers.

5. OFCOM is being established primarily to deal with electronic communications. It is not suitable for the purpose of advising on matters relating to newspapers. None of the agencies that will form OFCOM has any knowledge or experience of the newspaper industry and it would therefore be inefficient.

6. Paragraph 5.11 of the Government memorandum on newspaper mergers requested by the Joint Committee proposes that OFCOM be involved not only in giving advice to the Secretary of State but also in consulting on newspaper public interest issues. As we have stated above, we do not believe that OFCOM has or should be burdened with acquiring the relevant expertise in these issues. Ample expertise in dealing with newspaper mergers and plurality issues resides with the DTI, the OFT and the Competition Commission, and there is no evidence that any issue has not been properly considered in any particular merger.

7. Paragraph 7.1 states that OFCOM will be asked to keep the new newspaper merger provisions under review. But it is intended that the OFT have the function of keeping the newspaper market under review; from that, we expect OFT to be the lead regulator for the newspaper industry. It is difficult to see how OFCOM, with its expertise limited by lack of experience and the rarity of newspaper mergers, can usefully contribute to a review of legislation regulating newspaper mergers.

Market Definition

8. We applaud the Government's intention – as set out in the Government's

memorandum on newspaper mergers - to replace the current thresholds, based on paid-for circulation, with a 25% market share test. But the draft clauses should make clear that in determining whether the 25% threshold has been passed, the regulatory authority is required to look at the economically relevant market in each case.

The Enterprise Bill

9. We believe that the provisions relating to newspaper mergers which do not affect broadcasting should appear in the Enterprise Bill. All the substantive provisions relating to investigations, reports and remedies are in the Enterprise Bill. We therefore seek an assurance from Government that the new clauses in this area will be additions to the Enterprise Bill, whether or not they actually first see the light of day as part of the Communications Bill. The alternative of having to fit legislative provisions in one Act with those in another would be a jig-saw too far.

Liberalisation

OFCOM reviews

10. We note the proposal to require OFCOM to review the operation of the media ownership provisions and the news providers provisions on a three-yearly basis. We welcome a review process which will lead to the exercise of the amending powers in paragraphs 6 and 10 of Schedule 14 of the draft clauses, but only where the recommendation is to liberalise the regime further.

11. The Government stated in paragraph 5.2.2 of the policy document accompanying the Draft Bill: "*OFCOM will be subject to a duty to secure light touch regulation, requiring it to carry out regular reviews of its functions to identify any areas where regulation is no longer necessary or appropriate and publish an annual statement setting out how it plans to meet this requirement.*" OFCOM is therefore required to ensure that regulation is kept to a minimum and to identify any areas where regulation is no longer necessary, according to Government policy. The bill should make clear that regulation can be increased only if OFCOM first returns to Parliament.

12. The provisions for review set out in the draft clauses allow Parts 1 and 2 of Schedule 14 - which impose restrictions on cross-media ownership between newspapers and Channel 3, and on the ownership of radio multiplex licences - to be entirely rewritten. Where the effect of any amendments is to remove restrictions, secondary legislation may be appropriate. However, where the effect is to reverse existing policy by increasing restrictions, there must be a full opportunity for the legislature to express its opinion and if necessary to change the proposed amendments. The effect of any such new restrictions must by definition be to interfere in a most substantial way with private rights already in existence. Such rights should only be reduced or removed by full debate in the legislature.

13. The fact that the statutory instrument is an affirmative resolution procedure instrument does not affect this argument. Such instruments can only be agreed in whole or rejected in whole, and where the Government has a working majority the prospects of a Government order being rejected are minimal. There is no real debate on the merits of the policy expressed in such an instrument and such debate as there is is restricted to a small number of members of Parliament. This can never be a substitute for the full House debating the pros and cons of a Bill.

14. The fact that the powers in paragraphs 11 and 12 of Schedule 14 are exercisable by statutory instrument means that they can be changed from time to time, increasing or reducing the restrictions at the will of the Secretary of State. These powers are comparable therefore to the other powers to amend in paragraphs 6 and 10 of the Schedule and are equally objectionable as regards the power they confer to increase the restrictions with little parliamentary control.

Freedom of the press

Co-regulation

15. We note the statement in paragraph 4.4.3 of the policy document that it is the intention that OFCOM should establish links with non-statutory self-regulators with a view in some cases to co-regulation. The following comments respond to this issue only in so far as it would directly affect the newspaper industry.

16. We are not convinced that co-regulation can be made to work and we are very concerned about the implications for the freedom of the press.

17. In the UK, historically there has been no perceived need for statutory regulation of the publishing industry. The Government has gone on record as supporting the current system of press self-regulation as administered by the Press Complaints Commission. Publishers are subject to no special legal regime above and beyond the stringent general laws of defamation, obscenity, breach of confidence, copyright, court reporting rules, and so on. This reflects the belief - as guaranteed by Article 10 of the Human Rights Act - that freedom of expression and opinion are rights that must be strictly protected in a free and democratic society.

18. Key to the success of this system is the fact that it is set up voluntarily by the industry. Any attempt to "underpin" the current system through co-regulation would undermine the effectiveness of the self-regulatory process and would leave the industry susceptible to random intervention on a party political basis. That would be contrary to the goal of a free society of maintaining uncensored access to news.

19. Content regulation can only be justified if there is spectrum scarcity. This is not the case in either the publishing industry or the Internet. In broadcasting, so long as there is spectrum scarcity, some content regulation might be justifiable. However, as this scarcity disappears there should be a move from statutory

regulation to self-regulation of broadcasting content.

Competition Commission consultation

20. We note that the Competition Commission is expected to ascertain "a representative cross section of opinion of those who may be affected by the newspaper merger" perhaps "in the form of citizens' juries" (see paragraph 5.16 and Annex E of the Government memorandum on newspaper mergers provided to the Joint Committee). It is not at all clear how this would work or why it is necessary, and it raises concerns about freedom of the press.

21. These "citizens' juries" presumably will consist either of "volunteers" with agendas unrelated to the issues in the merger proceedings, or be selected on some sort of random basis by the Competition Commission. In either case, they cannot add to the specialised economic expertise of the Competition Commission and, if expected to comment on other issues, will have to be acquainted with a daunting amount of information. In any event, the most likely result is that these Citizens' Juries will feel free, indeed feel obliged to give their views on the content and editorial stances of the newspapers involved in the merger. Obliging the Competition Commission to give weight to such comments represents a threat to newspapers' editorial independence, and subverts the successful self-regulatory regime now in place.

Free Trade

22. News International has consistently argued for the abolition of the restrictions on foreign ownership. The proposal to repeal the restriction on non-EEA broadcasting licence holders is therefore most welcome.

23. Fears about a flood of foreign content are misplaced. Content is driven by consumer demand, not by ownership. The competitive nature of the media industry in the UK does not allow a foreign owner to foist its own agenda on British consumers. All the evidence suggests that domestic programming is popular in the UK - as it is in any country. The objective of any media company must be to be successful within the local market. To do so, it must provide local content that people want, or it will not survive.

24. In the UK newspaper industry, a long history of foreign ownership has brought new investment and innovation, adding to diversity and competition. From Max Beaverbrook and Roy Thomson, to Conrad Black and Rupert Murdoch, this foreign involvement has helped to create the most competitive and popular newspaper market in the world.

25. Foreign investment has enabled cable and satellite television to grow and it is only because the rule restricting foreign ownership did not apply to non-domestic satellite television that Britain has become the world leader in that field.

26. Nor is the question of reciprocity relevant. Why Britain should adopt a flawed policy that stifles inward investment merely because a minority of other countries have such rules is unclear. Indeed, it is not at all clear why the policies of other countries should necessarily be a model for Britain.

27. Foreign ownership disqualifications date from an era when scarcity of spectrum and concerns about national security were the prevailing conditions, but these conditions no longer apply. Indeed, the rules are so out-dated that they apply only to analogue terrestrial licence. In the context of the Government's commitment to analogue switch-off, such restrictions look more and more absurd.

28. In any case, the restriction does not apply to equally "foreign" German and French companies such as Bertelsmann and Vivendi Universal. This is indicative of the arbitrary nature of foreign ownership rules as a whole.

29. It is also clear that these controls are no longer lawful. Leading counsel opinion states that the existing foreign ownership prohibitions, and any subsequent legislation which fails to remove these prohibitions, will be open to action on grounds that it is in breach of the Human Rights Act of 1998 by virtue of its incompatibility with Article 10 and Article 14 of the European Convention of Human Rights.

Administrative Efficiency

Deregulation?

30. The Government has stated in the memorandum on newspaper mergers provided to the Joint Committee that the newspaper mergers regime should be deregulatory and better targeted. In view of the fact that the clauses on newspaper mergers have not yet been published, we would like to reserve our position generally. On the basis of the generalised policy proposals in the memorandum, we strongly endorse the aim to be deregulatory and better targeted and we welcome the proposed abolition of the pre-merger consent requirement and the criminal sanctions. But the proposals remain unduly burdensome, both on the parties to any merger and on the regulatory authorities.

31. If a newspaper merger appears likely to threaten competition, the OFT can and will refer it to the Competition Commission, which has the expertise to decide whether the merger can be permitted to go forward without substantially reducing competition. If the Government is minded to continue to involve the Secretary of State in these mergers and, in the view of the Secretary of State, other factors

should be considered, she can review any decision concerning referral by the OFT, or final decision by the Competition Commission. There is no need to complicate and extend the process by requiring the Secretary of State to consult OFCOM, which will have no special expertise and should be fully engaged in its other missions.

32. Indeed, it may well be that at some point the political problems and dangers to freedom of the press created by the involvement of the Secretary of State will prompt her to extend the abnegating principle that has caused her to withdraw from involvement in most other merger cases. She should be left free to make that decision.

Procedure

Definition of "newspaper"

33. Paragraphs 3.1 and 3.2 of the Government memorandum on newspaper mergers provided to the Joint Committee state that the existing definition of "newspaper" is to be retained but paragraph 3.2 also states that there will be a power to alter this definition by statutory instrument. This seems an unusual power to take since it is the fundamental basis of the newspaper merger provisions. Surely if there is to be a change it should be by way of primary legislation so that the issues can be properly discussed and the legislature given an opportunity to amend any Government proposals in this area?

Information gathering powers

34. We note the proposed amendment to section 44 of the 1996 Act set out in paragraph 81 of the new Schedule 10. This does not contain the exception in section 44(2)(d) for information not within the knowledge of the licence-holder. In so far as the events relate to changes in directorships, then clearly there will not be any difficulty in making the information available to OFCOM. But with regard to changes in shareholdings and other events affecting directors (we are not entirely sure what is envisaged with regard to these latter events) the situation may be much less clear. We believe that information can only be required which is within the knowledge of the licence holder.

Conclusion

The principle guarantor of a vibrant, innovative, consumer-friendly media industry is competition.

The Enterprise Bill and the long experience of the OFT and the Competition Commission guarantee that the tools are available to preserve competition, and the expertise exists to use them.

Competition will be increased and new investment and skills attracted to the UK by the proposed relaxation of the foreign ownership rule, which should be extended to all broadcast facilities.

The new regulatory regime should be as light-handed as possible, with reliance placed on the existing expertise of the OFT and the Competition Commission, and any measures that threaten press freedom assiduously avoided.