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Department for Culture, Media and Sport
BROADCASTING POLICY DIVISION

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1. A/L 2. LETTER 3. file 4. Plurality

To Secretary of State

cc Patricia Hewitt
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From [redacted]

File Ref

Date 23 June 2003

COMMUNICATIONS BILL: PLURALITY TEST

Issue

The nature of a media plurality test.

Timing

2. Immediate.

Recommendation

3. You are asked to agree that the plurality test:

(a) should not take into account platform ownership;

(b) should be limited to a consideration of the number of suppliers;

(c) should not include a plurality floor; and

(d) should be accompanied by guidance from the Secretary of State which, amongst other things, makes it clear that the power would only be used in exceptional circumstances

4. You are asked to decide whether:

(e) the plurality test should be exercised only in those areas where the current rules are being removed completely, or more widely;

(f) you want to introduce a media plurality test into the Enterprise Act or through the review provisions in the Communications Bill

Consideration

5. You agreed at Thursday's meeting that we should develop a plurality test. This note outlines a number of approaches to such a test and asks for decisions.

Coverage

6. You decided that the plurality test should apply only to areas where there are no media ownership rules; for example, it should not apply in addition to the new radio points scheme. This could be defined in either of two ways. The test could simply apply to all areas where there are no media ownership rules and where a qualifying merger involved a Broadcasting Act licence holder, or such a licence holder and a newspaper (newspaper only mergers will continue to fall to the special newspaper regime) – see **option 1** in the Annex. (A qualifying merger is one where enterprises cease to be distinct and either the turnover of the acquired enterprise exceeds £70m or the new entity has over 25% of supply of goods or services of any description in the UK or in a substantial part of the UK.) The difficulty with this simple approach is that it could catch qualifying mergers where there have never been rules in broadcast legislation, for example, a merger involving Channel 5 and a local newspaper group with more than 20% of a particular market, or a national newspaper with less than 20% of the national market acquiring a C3 licence. If we were to cover all broadcasters it could also catch acquisitions by Sky of small digital channels (subject to whether the Enterprise Act's financial limits on jurisdiction are met).

7. Alternatively, the plurality test could only be exercised in those areas where the current rules are being removed completely. This would mean the test applied to the following qualifying mergers: national newspapers with more than 20% of the market/Channel 5; national newspapers with more than 20% of the market/national radio; Channel 3/Channel 3; Channel 3/national radio; Channel 5/national radio; national radio/national radio (see **option 2** in the annex). However, taking this route would mean that you could not apply the plurality test to a case like DGMT buying a Channel 3 licence or if there was a considerable concentration of ownership of one type of digital licence (e.g. educational services).

8. There are two ways legally of getting to option 2. We could set out in the Bill the precise areas where the test applies and take an order making to remove areas (where we consider that from a plurality point of view no

restrictions of any sort are required) or to add areas as ownership rules are removed in the future. This has the advantage of certainty for the industry but is complicated in legal terms to achieve. An alternative is to design the test so that it catches all qualifying media mergers but produce guidance which makes it clear that it is unlikely that the test will be used in areas where there are still rules, or where there have not been rules in the past. You cannot, however, guarantee this in advance as to do so would be to fetter your discretion. The industry will therefore be nervous that the policy may change at some point and the test become much more widely applied, and include areas where there are currently no rules. This disadvantage is also, of course, its advantage. It may be that in the future you would want to intervene in areas where there are currently no rules; for example if Channel 3 were to seek to acquire Channel 5, which would not be prevented by the proposed rules.

Which option do you prefer? You might wish to take option 2 without ruling out the possibility of moving to option 1 in very rare cases in the future. How you decide to act is relevant to the following consideration.

Interaction with the Newspaper Test

9. There is no reason in principle why the two tests cannot co-exist. The newspaper regime will continue to deal with newspaper only mergers while the media plurality test will look at all other mergers including newspaper/broadcast mergers. However, we cannot easily avoid any new test having some implications for the newspaper test itself. We will attempt to minimise this in the drafting, but the overlapping nature of the tests will inevitably leave room for judicial debate as to the precise intent of the two tests.

10. You agreed that the plurality test should concentrate on the number of suppliers rather than the range of suppliers. This approach lies behind the existing rules and must be right. The concept of "range" is largely redundant in the context of broadcast media because of the existing impartiality requirements on all licensed broadcasters. Broadcast media do not, and should not, have "views" in the sense that newspapers do. (There can be a range of content, for example, on radio, but that is quite separate and is achieved through licensing/formats.) The different objectives justify having two tests rather than one "plurality of voice" test along the lines of the newspaper regime.

11. It is important to be clear what the proposed test can and cannot do. The test could prevent an acquisition on the basis on the overall media holding of the acquiring person. Thus one could justify blocking the acquisition of Channel 5 by someone with a significant newspaper holding. The test we propose would not enable the Secretary of State to take into account other broadcasting-related media holdings not covered by the existing rules, eg ownership or control of a cable or satellite platform. To

cover this would give a plurality test more substance, and it could provide a justification for blocking a merger which the proposed rules would otherwise permit. However, it is not clear why platform ownership should be a relevant consideration in the acquisition of another media interest. It might be objected, for example, that on satellite, the controller of any conditional access system or EPG needed by viewers must allow all broadcasters to use the system on fair, reasonable and non-discriminatory terms, making it hard to see how the controller could exercise subjective or editorial control over the services accessed via the system. We would therefore **recommend** not including other media interests in the test. The net result is a very narrow test. It is important to stress this because the narrower the test, the more scope there is for challenge to any ministerial decisions under it by way of judicial review for acting for an extraneous purpose.

Are you content that the Secretary of State should not be able to take into account holdings in other media not presently covered by the media ownership rules?

12. A test based on plurality as essentially a matter of numbers would not allow the Secretary of State to block a merger on other grounds (e.g. by reference to the track record of the purchaser, their nationality, political or religious views, or ownership of media other than UK national newspapers or national broadcasters. Thus, the Secretary of State could not block a merger on the grounds that the character/ track record of a particular owner suggested that they might not comply with the impartiality requirements of broadcast media (under broadcasting legislation they would, of course, have to comply with the basic fit and proper test). We think that to give the Secretary of State that ability raises an inconsistency with the approach adopted where there are rules (and hence no plurality test) and, in practice, would be difficult and controversial to do, and would seem to be another area which would invite judicial review. We therefore **recommend** that the test be limited to a consideration of the number and relative size of media owners. If you did want such additional factors into consideration to be taken into account, we would probably need to adopt a plurality of views approach in line with the newspaper regime.

Do you agree that the plurality test should be limited to a consideration of the number of media owners?

An alternative approach

13. The ITC have suggested an alternative way of introducing a plurality test. The Bill already makes specific provision for OFCOM to conduct a review where control of a Channel 3, Channel 5 or local radio licence changes. At present OFCOM must consider the effect of a change of control on a whole range of content and production issues (eg, effect on original productions, news and current affairs programming, regional programmes and production) and, where they consider it necessary, make changes to the licence. The

Bill could be amended so that the TV reviews (but not the radio reviews) also considered the effect of a change of control on plurality. The review would need to include a new power to block a merger, not just change licence conditions. All the decisions could be left to OFCOM. However, given that plurality is fundamentally a democratic and political consideration, we think that, if OFCOM conclude that a merger should be blocked, the Secretary of State would have to take the final decision.

14. This approach has some positive features. For example, the Enterprise Act, by design, deals only with "relevant merger situations". The ITC approach would catch every situation in which a licence-holding company changes hands, regardless of whether the qualifying merger threshold was exceeded (though this, of course, could seen to be a disadvantage for the industry's perspective). It also keeps a clearer distinction between our test and the existing newspaper test, if only presentationally. The real question is whether Lord Puttnam would be satisfied. He may think we are pulling a fast one, though it should be possible to sell it as a comprehensive media-specific solution to a media problem. Furthermore, industry would probably be even more concerned with a "one stage" licence decision by OFCOM rather than the "two stage" Enterprise Act investigation route plus a clear route of appeal to the Competition Appeals Tribunal.

We recommend using the Enterprise Act route – are you content?

Further Concessions?

15. There a number of further concessions which could be considered if a plurality test along the lines outlined above did not prove sufficient.

(i) A Wider test

16. If you adopt a plurality test for specified mergers only (see para 8 above), a concession could be to extend the test for all qualifying media mergers including those not previously caught by ownership rules. Guidance could nevertheless make it clear that Ministers would only exercise the power in exceptional circumstances.

(ii) Range of voice

17. We recommend above (para 12) that the plurality test should be limited to the number of media owners because we do not believe that factors such as range of views are relevant to broadcast media owners given the existing impartiality and diversity requirements. However, a possible concession would be to include additional factors other than simply numbers – two possible factors could be concerns that the acquirer would not follow the impartiality requirements of would take steps to unacceptably narrow the range of content broadcast. There is a danger that this will be seen as an

admission that content rules are not always able to deliver, but the existence of ownership rules in the first place already recognises that to a degree.

(iii) Plurality Floor

18. We understand that Lord Puttnam is interested in the idea of a plurality floor. This would fix the level of plurality where it is now and only allow changes which increased the number of players in the market or left it unchanged. It would have the perverse effect of allowing non-media owners to buy up media companies while preventing media players themselves from consolidating, and would render the proposed liberalisation redundant for those whom it is intended to benefit. For example, in the field of radio, it would allow the American Clear Channel to buy an existing radio group but would prevent an existing owner such as GWR or Capital from doing the same. We therefore strongly **recommend** against such a floor.

(iv) A different trigger

19. We are proposing that the EA Act plurality test should be triggered in cases of qualifying mergers. As indicated above, a qualifying merger is one where enterprises cease to be distinct and either the turnover of the acquired enterprise exceeds £70m or the new entity has over 25% of supply of goods or services of any description in the UK or in a substantial part of the UK. (For the share of supply test to apply, there must be some form of overlap between the activities of the parties.)

20. We think that would catch all major mergers. For example, it would have caught the Carlton/Granada merger on turnover grounds (about which more below), but it would not catch a merger of Classic FM and either of the other national radio stations on turnover grounds, though it may do on share of market terms. It is impossible to give definitive answers as to how this would operate in all cases since the determination of whether or not the share of supply test is satisfied it cannot be done in advance. It must be done on a case-by-case basis by the OFT in the first instance and by the Competition Commission in the event of a reference.

21. It would be possible to have a different trigger for a media plurality test and there is a precedent in the newspaper special interest test which allows the Secretary of State to look at mergers which do not fall within the scope of the general merger regime. Under the newspaper special interest test, the Secretary of State can consider a merger if a non-newspaper proprietor acquires a paper which already has 25% of the share of supply. (The consideration in these case only covers plurality of views, accurate presentation of news and freedom of expression, not competition.) It would be possible to have a similar special scheme for media mergers. However, there is no real advantage in this as the concerns that we are seeking to address revolve around existing media owners increasing their empire, not new entrants into the market. So far as we are aware, Lord Puttnam would

be content with general merger regime trigger. Nevertheless it could be given as a concession were it thought it would make a difference.

22. An alternative would be to set a lower threshold for qualifying mergers. This would present the difficult of explaining why we needed a lower threshold, though to some extent this can be answered by saying that the media market is different from other markets – as is already recognised by the existing ownership rules. Clearly, the lower the threshold, the greater number of mergers caught and the greater the opposition from the media industry. We therefore do not think this has much to recommend it.

(v) Restore 20/20 rule for Channel 5

23. This is the most logical give. Its hits the target direct without the complexities of a plurality test and has no unwanted side effects such as upsetting the special newspaper regime or catching other mergers which we are not interested in. Legally it would be quite straightforward, and the review mechanism in the Bill would allow it to be removed if the circumstance (market or political) changed. The downside is that it is politically damaging to do so, though given that we will be presenting the plurality test as an effective alternative to the 20/20 test, there is arguably not much between the two options in political terms. There is also no guarantee that it will satisfy Lord Puttnam.

Carlton/Granada merger

24. The Carlton/Granada merger would have been caught by a plurality test of the sort proposed. However, Carlton/Granada has been referred to the Competition Commission under the Fair Trading Act 1973 so under the transitional arrangements the current proposed merger is to be decided (as a matter of merger law) according to the public interest test under the FTA and the plurality test will not catch it. It the merged company was acquired in the future, it is likely that that transaction would be caught by the plurality test. It is also important to remember, however, that the Secretary of State does not have to call in a merger on plurality grounds just because it exceeds the qualifying merger threshold; a decision to do so is at the Secretary of State's discretion. We would **recommend** that the Secretary of State should issue guidance which, amongst other things, made it clear that the power would only be used in exceptional circumstances.

Next Steps

25. Once we are clear as to the policy, we will need to consult immediately with OFCOM on Tuesday/Wednesday, Puttnam on Thursday and consult more widely on Friday.

Department for Culture, Media and Sport

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Annex

Plurality Test Coverage

Option 1. The test would catch qualifying mergers where there are no media ownership rules - indicated in the table with "PI". This involves introducing a plurality test in cases where there are presently no restrictions (shaded). It would also catch for the first time mergers involving national papers with less than 20% of the national market and broadcast licences, and local newspapers acquiring an ITV licence in a different region.

	National papers (>20% of market)	Local papers (>20% of market)	C5	C3	National radio
National papers (>20% of market)	SNR	SNR	PI	20/20 rule	PI
Local papers (>20% of market)		SNR		20/20 local rule	
C5				PI	PI
C3				PI	PI
National radio					PI

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Plurality Test Coverage

Option 2. The test would catch mergers in areas where the Communications Bill removes rules entirely - indicated in the table with "PI". It would not introduce the test into areas where there are no rules at present.

	National papers (>20% of market)	**Local papers (>20% of market)**	**C5**	**C3**	**National radio**
National papers (>20% of market)	SNR	SNR	PI	20/20 rule	PI
Local papers (>20% of market)		SNR	No rules	20/20 local rule	No rules
C5				No rule	PI
C3				PI	PI
National radio					PI