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Media ownership and the *Communications Bill*

Bill 6 of 2002-03

Specific controls on newspapers and broadcast media restrict the accumulation of certain combinations of media interests by the same owner. These rules are in addition to ordinary competition controls on concentrations of ownership.

Chapter 5 of Part 3 of the *Communications Bill* simplifies and relaxes media ownership rules but leaves some core controls in place. As a result of these changes, the ban on non-European Economic Area nationals holding mainstream broadcasting licences will be lifted, as will restrictions on the number of Channel 3 licences (ITV1) a company can own and on the ownership of Channel 5 by those with significant newspaper interests.

Newspaper mergers have long been subject to stricter merger scrutiny than those in other sectors. The *Enterprise Act 2002* gave the competition authorities rather than ministers responsibility for approval of non-newspaper mergers, with some exceptions. Chapter 2 of Part 5 of the Bill aligns the newspaper merger regime with the decision-making structures set out in the *Enterprise Act*. However, newspaper mergers of a certain scale will fall within the category of exceptions for which ministers still take the final decision.

Christopher Blair

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Summary of main points

- This paper covers controls on media ownership and the exercise of competition controls by OFCOM. Two further papers address telecommunications and broadcasting respectively under the *Communications Bill*.

- Media ownership is a sensitive and controversial area because of the media's role in disseminating and forming public and political opinion.

- The *Broadcasting Act 1990*, as amended by the *Broadcasting Act 1996*, creates a complex framework of medium specific controls which limit the ability of persons to build up concentrations of media interests.

- These controls apply in some cases within a single licence category (such as the controls on the number of Channel 3 licences a person may have) and sometimes across licence categories (such as limits on the type and scale of additional interests that those with a 20 per cent share of the national newspaper market can hold).

- In addition, some persons are barred from holding certain types of licence at all (such as the restriction on non-EEA nationals holding Channel 3 or Channel 5 licences).

- The *Communications Bill* relaxes many of these restrictions but retains core cross-media rules which will apply to the most influential types of media (i.e. newspapers, free to air television and radio) in national, regional and local markets. It also removes and relaxes some of the bars on licence holding.

- The changes would, for example, allow non-EEA nationals to hold mainstream broadcasting licences, permit controllers of significant national newspaper interests to acquire Channel 5, and allow all the regional Channel 3 licences to be held by the same owner (subject to competition approval).

- The stricter scrutiny regime for newspaper mergers will be aligned with recent changes in other merger procedures (*Enterprise Act 2002*). The regime is relaxed to focus more precisely on mergers which create competition concerns. Ministers will retain a decision-making role where newspaper mergers need to be assessed on newspaper-specific grounds in addition to their effect on competition.

- Media ownership and competition law are reserved matters. These parts of the Bill apply to the whole of the United Kingdom. The legislation can be expected to be of interest to devolved assemblies and at regional and local level because of its implications for the control of media voices in each area.

CONTENTS

I	**Introduction**	**7**
II	**Media ownership and competition**	**10**
	A. Overview	**10**
	B. Competition controls on media monopolies	**11**
	1. Merger controls	11
	2. Monopoly controls	12
	C. Adequacy of competition law?	**13**
III	**Selected UK interests of UK media groups**	**18**
IV	**Media ownership controls**	**19**
	A. Specific bars	**19**
	1. Non-EEA nationals	20
	2. Religious organisations	23
	3. Other disqualifications	27
	B. Sectoral rules	**27**
	1. Overview	27
	2. Changes to Channel 3 and Channel 5	32
	3. Nominated news provider	33
	4. Radio ownership	33
	C. Control	**35**
V	**Newspaper mergers**	**36**
	A. Current newspaper merger regime	**36**
	B. Reform of the newspaper regime	**39**
VI	**Competition and regulatory powers**	**42**
VII	**Review of media ownership provisions**	**44**

Bibliography **45**

Appendix Current Rules on media ownership **47**

I Introduction

Media ownership rules for the broadcasting sector are to be found in the *Broadcasting Act 1990*, which was significantly revised by the *Broadcasting Act 1996*. The legislation disqualifies certain persons from holding broadcasting licences altogether, and sets restrictions on the scale and nature of such interests for others which take into account the interests which that person already holds in either the same sector or in another media sector. Although there is a separate regime to control mergers between newspapers, under the *Fair Trading Act 1973*, the Broadcasting Acts do place significant restrictions on the ability of some newspaper owners to acquire broadcasting interests.

In addition to broadcasting law and the newspaper merger regime, ordinary competition law also applies to media ownership. Competition law prohibits anti-competitive agreements and abuse of a dominant market position. Both these prohibitions exist under UK law and EC law. In addition, UK competition law allows markets which are anti-competitive to be investigated.

In the 2000 Communications white paper, *A new future for communications*, the government said:

> We want to make sure that the UK is home to the most dynamic and competitive communications market in the world. Communications businesses already make an important contribution to both national and regional economies. We want to maintain the UK's competitive advantage in the rapidly changing international marketplace.[1]

The paper proposed bringing together nine regulators with responsibilities in the field of radio, television and telecommunications to form a single new regulator, OFCOM. Paving legislation, which set up OFCOM as a regulator-in-waiting, was introduced in the *Office of Telecommunications Act 2002*. The Government continued to consult on its other proposals, including, in November 2001, a specific consultation on new media ownership rules, *Consultation on media ownership rules*.[2] It announced deregulation of some of the complex restrictions on television and radio ownership and cross-ownership, and sought views on reforms to the newspaper merger regime.

In May 2002, a draft Bill was issued against a feeling in some quarters that the legislation was being unduly delayed.[3] The draft was accompanied by extensive explanatory notes and a further policy document which explained how the proposals were developing.[4] Additional clauses on media ownership were then made available on 31 May 2002 to the

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1 DTI and DCMS, *A new future for communications*, December 2000, Cm 5010, p3 ('Communications white paper')

2 DCMS, *Consultation on media ownership rules*, 26 November 2001 ('Media ownership consultation')

3 *Draft Communications Bill*, May 2002, Cm 5508-I-III

4 *The draft Communications Bill – The Policy* ('Policy')

Joint Committee of both Houses of Parliament, chaired by the film director, Lord Puttnam, which had been set up to scrutinise the draft Bill. The Joint Committee received a wide range of written and oral evidence. Its report was published at the end of July 2002, later accompanied by a substantial volume of evidence.[5]

Policy continued to be developed and refined at a late stage. While some significant decisions had long been known, such as the removal of 'audience share' barriers to Channel 3 (ITV 1) consolidation, others, such as ending the disqualification of non-EEA owners from holding Channel 3 and Channel 5 television licences, represented a late and controversial change of heart.[6] The Joint Committee was not able to scrutinise the draft clauses on the newspaper merger regime, for example, which were not put before them and instead had to proceed on the basis of a policy narrative. There was also a late change to the rules on the ability of religious organisations to hold certain types of broadcasting licences: those restrictions had attracted a significant share of responses to the ownership consultations.

During the debate on the Queen's Speech in November 2002, John Whittingdale for the Conservatives said:

> I have no hesitation in welcoming the broad thrust of the new Bill. We strongly support its provisions to allow greater cross-media ownership, consolidation and foreign investment and to move towards a regime where the media industries are treated under the same competition rules as other industries.
>
> I was particularly pleased and surprised when the Government reversed their declared policy of retaining the bar on non-European ownership of our broadcasting companies. I was even more heartened when the Government stuck to their guns and resisted the calls of the Joint Scrutiny Committee that considered the Communications Bill to reverse their position. I have no doubt that the issue of foreign ownership will be much debated in the coming months, but we will support the Government in their robustly pro-market position.
>
> The Government have shown an encouraging willingness to move still further in the direction of a competitive market in broadcasting. We welcome yesterday's announcement by the Secretary of State that the Government intend to allow an even greater relaxation of the local ownership rules. We will support the right hon. Lady in that. Indeed, we might even press her to go a little further. We also hope that her open-minded approach to the Bill will continue and that she will perhaps consider other areas for greater liberalisation, such as the rules governing the ownership of ITN, the restrictions on cross-media ownership and the

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5 Joint Committee on the Draft Communications Bill, *Draft Communications Bill*, 25 July 2002 HC 876-I ('Joint Committee')

6 For the audience share restriction, see below 'Changes to Channel 3 and Channel 5'. This latter change was announced in the May 2002 Policy document which accompanied the draft Bill. It reversed the stance of the white paper.

> disqualification of religious broadcasters. However, lest I give the impression that we can all agree on the Bill and that therefore it will complete its passage through the Standing Committee in just a few hours, let me say that it requires close and detailed scrutiny.[7]

Stressing the importance of an independent BBC, Lord McNally for the Liberal Democrats called in the Lords for the House to protect the public interest in the media:

> When the Bill comes before Parliament, we shall see its shape. We shall have to discuss issues, such as the settlement for local radio. I welcome the greater flexibility and look forward to the contribution of the noble Lord, Lord Gordon. Beyond the various precise issues, such as foreign ownership, the role of must offer-must carry and intricate issues that we shall be discussing, we must realise that there will be massive vested interests putting great stakes on the table with great winnings at the end. I am thinking of Mr Rupert Murdoch. What I admire most about him is that he looks after his shareholder interests. It is the duty of the House to ensure that the Government guard the public interest as assiduously as Mr Murdoch guards his shareholder interests.[8]

Lord Puttnam, who had chaired the Joint Committee, welcomed 'a good Bill which could, with help, become possibly even a great Bill'.[9] He drew attention to remaining concerns, including the failure to include a broad plurality test for the whole media sector, and the plan to allow Channel 5 to be acquired by newspaper proprietors. On the question of foreign ownership of television channels, he said:

> I think that our committee got it about right in recommending an "evidence-based" pause prior to a decision by Ofcom. However, to their credit, the Government moved quickly and, to a considerable degree, stole our clothes. A tightening of the existing regulations together with the anticipated outcome of the programme supply review to be published by the ITC next week are likely between them to have the effect of accommodating at least 95 per cent of my concerns. Every single instinct for good order would normally persuade me in the direction of reciprocity, but on this occasion we have far bigger fish to catch, and I for one prefer to keep my hook well baited.[10]

This paper only deals with ownership rules and competition. Two other Library research papers accompany the Bill. This paper draws heavily on the report of the Joint Committee on the draft Communications Bill and on the government's Explanatory Notes which accompany the Bill. Both are recommended as sources of more detailed information on the Bill and reaction to it.

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7 HC Deb 15 November 2002 cc330-1. Mr Whittingdale went on to criticise the plans for the BBC under the Bill.

8 HL Deb 20 November 2002 c391

9 HL Deb 20 November 2002 c394

10 HL Deb 20 November 2002 c393

II Media ownership and competition

[clauses 335-338; Schedule 14]

Chapter 5 of Part 3 of the Bill ('Television and Radio Services') sets out the government's reforms to rules on media ownership.

A. Overview

Two broad areas of law are involved in controlling media ownership: general competition law and more specific rules set out in broadcasting law.

- Competition law applies to all sectors of the economy, and addresses the creation of concentrations of business operations (through merger controls), the abuse of monopoly power, and anti-competitive cartels.[11] Within the merger control regime, special procedures currently exist for mergers of larger-circulation newspapers.[12] These create a presumption of detailed scrutiny for newspaper mergers which must be notified to the competition authorities before they are completed. In contrast, other mergers are only scrutinised if they are thought to raise specific competition concerns. General merger procedures are being reformed under the *Enterprise Act 2002*, which is expected to take effect during the first half of 2003. This Bill will reform the newspaper merger regime to align its procedures with those of the *Enterprise Act 2002*.

- Broadcasting law imposes additional controls on the scale of a company's media interests. These controls operate at a number of levels. Some persons are wholly prohibited from holding any broadcasting licences, or are prohibited from holding certain types of licence. Further, within individual media sectors (such as regional ITV or 'Channel 3' licences) there are limits on the scale of interests that a person may have within that sector. Finally, there are controls which apply across different types of media (such as running a national newspaper and holding a broadcasting licence) which are designed to prevent a person accumulating too great a share of the media voice.[13] These rules are detailed and complex: the Bill proposes simplifications.

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[11] The main statutes are the *Competition Act 1998* (CA 1998), and for mergers, *The Fair Trading Act 1973* (FTA 1973). The *Enterprise Act 2002*, which recently received Royal Assent, is expected to replace the FTA 1973 merger provisions in the first half of 2003.

[12] These rules are currently contained in the *Fair Trading Act 1973*.

[13] See the *Broadcasting Act 1990*, as amended by the *Broadcasting Act 1996*

B. Competition controls on media monopolies

Although different theories of the role of competition rules exist, their broad aim is to allow businesses to enter and compete fairly with each other for markets. This is expected to deliver benefits which include lower prices for consumers, more efficient allocation of resources, increased productivity and an incentive for innovation. Monopolies – where a market is concentrated in the hands of a single or a small number of firms – can threaten the competitive process, and may lead to increased prices, less innovation and the inefficient allocation of resources.

Monopolies are controlled at two stages under UK competition law. Merger controls target the creation of new concentrations in markets, whilst anti-monopoly powers allow existing concentrations to be addressed.

1. Merger controls

The UK's merger controls are currently set out in the *Fair Trading Act 1973*. Typically, the parties themselves inform the Office of Fair Trading (OFT) in advance of the merger, but the OFT can scrutinise any prospective or recently-completed merger. If the OFT believes that the merger raises competition concerns, it recommends that the Secretary of State for Trade and Industry refer the merger to the Competition Commission (CC). The CC then assesses whether the merger may be expected to operate against the public interest, a test which normally focuses exclusively on competition concerns. Where an adverse public interest finding is made, the final decision is left to the Secretary of State, who might block the merger, allow it with conditions or allow it unconditionally. If there is no adverse public interest finding, the merger must be allowed to proceed.

The *Enterprise Act 2002* (EA 2002) will alter these procedures. It transfers the Secretary of State's decision-making powers to the two competition authorities, the Office of Fair Trading and the Competition Commission. (In practice the Secretary of State usually accepts their advice already in anticipation of the change.) The Act also replaces the current public interest test, which can in theory allow a range of interests to be assessed, with a test which is exclusively focused on competition. Under the new test, which is that used in the United States, mergers will be assessed on whether they would lead to a 'substantial lessening of competition'. The authorities will, however, be allowed to take into account benefits that might flow from a merger (such as lower prices or better products) if these cancel out the adverse effects of reduced competition.

Both the old and the new controls apply only to mergers of a certain scale: under the old system, the authorities could only investigate a merger if the parties to the merger had either combined worldwide assets of £70 million or between them accounted for the supply of at least 25 per cent of the market for those goods or services in the whole of the United Kingdom or in a substantial part of it. Under the EA 2002, these thresholds are

slightly increased to £70 million in annual UK turnover (the ‘turnover test’) or 25 per cent of the supply of goods or services of a particular description in the UK or a substantial part of it (the ‘share of supply test’).[14]

Merger controls are therefore generally available to scrutinise mergers between broadcasters and newspaper publishers. Particularly as a result of the new merger test in the EA 2002, they look for adverse effects on competition (‘a substantial lessening of competition’) which may result from the increased concentration caused by a merger in any affected market.

As noted above, a special merger regime currently applies to newspaper mergers. This regime was not altered by the EA 2002. Instead, the government announced its intention to consider reform of the newspaper regime as part of the broader reform of media ownership laws. For more details on the newspaper regime, see the separate section later in this paper.

2. Monopoly controls

The main anti-monopoly provision in UK competition law now is one based on European Community law. The word ‘monopoly’ is no longer used in the statute, instead the key concepts are ‘market power’ and ‘abuse of market power’ although the scope of the law is similar to the UK’s former monopoly provisions.

Chapter II of the *Competition Act 1998* prohibits the abuse of a dominant market position (the ‘Chapter II prohibition’). It is not illegal, therefore, to be in a position of market power, but it is illegal to abuse that position for example by exploiting that power to the detriment of competitors and consumers or by using it to exclude other firms from the market. Such abuse is prohibited from the outset, and after investigation by the Office of Fair Trading may result in substantial fines and other intervention.

At the moment, the UK also has residual controls from an earlier statute (the *Fair Trading Act 1973*) to investigate certain types of monopoly that it is thought cannot be controlled adequately using the Chapter II prohibition. These powers involve an investigation by the Competition Commission (CC) which makes recommendations on remedies to the Secretary of State who takes the final decision. They were retained for the control of collective dominance (where several firms are dominant but are not colluding) and for serious market failures where structural remedies (such as the forced divestment of businesses) are thought necessary.

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[14] Note that what used to be a worldwide assets test has become a UK turnover test. The Government initially proposed adopting a UK turnover test of £45 million on the grounds that this would be broadly equivalent in its effect to the former assets test. However, at a late stage of the *Enterprise Act* proceedings, it accepted a deregulatory amendment which raised the turnover test to £70 million.

The *Enterprise Act 2002* will replace these residual provisions with the new concept of a 'market investigation'. Such investigations will allow the OFT and the sectoral regulators to refer markets to the CC for investigation as to whether the market contains features that have an adverse effect on competition. The CC will then decide on appropriate remedies. The market investigation powers (set out in Part 4 of the EA 2002) are again designed to address structural problems in markets, including non-collusive dominance.

Note that large mergers and monopolies may fall within the jurisdiction of the European Commission, which is the European Community's competition authority, rather than that of the national competition authorities. The EC's Merger Regulation provides that mergers which have a 'community dimension' fall to be considered by the European Commission.[15] In general, then, a merger will either be the exclusive responsibility of national competition authorities or the European Commission.[16] In the case of monopoly power, the EC's competition rules (Articles 81 and 82) can only apply where there is an effect on trade between member states. The similarly-worded UK provisions (ss.2 and 18 of the *Competition Act 1998*) only govern behaviour which affects trade within the United Kingdom.

C. Adequacy of competition law?

The prevailing orthodoxy is that competitive forces, supplemented by competition law, are the most desirable way of ensuring that markets work well and efficiently for business and consumers. Under this view, the opposite pole of competition is regulation, which is seen as an alternative or supplementary force to control the workings of uncompetitive or immature markets so as to prevent undesirable outcomes. As those markets are opened up to competition, or mature, then the expectation is that regulatory controls will give way to ordinary competition controls. This, for example, is the pattern that the telecoms market has taken in the twenty years since privatisation. The government re-stated this argument in its brief on the draft Bill:

> As competition becomes more pervasive in the supply of communications services, it is expected that OFCOM will be able to rely increasingly on [competition] powers, rather than powers specific to the sector, in addressing concerns about competition. However, many aspects of the sector-specific framework, e.g. universal service provision, will remain necessary and will not disappear or become redundant in the foreseeable future.[17]

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[15] In some circumstances the Commission may allow such cases to be dealt with by national competition authorities instead.

[16] Mergers involving firms which operate in more than one state may be investigated by a number of national authorities. Revisions to the EC Merger Regulation now confer on mergers which involve significant activities in at least three member states a community dimension if specified thresholds are met.

[17] Policy, para 5.3.3. Quoted by the Joint Committee

There are those who argue that competition law would be sufficient in itself to control the newspaper and broadcasting sector, and that special controls on media ownership are unnecessary:

> **Tim Yeo**: Given the wide range of free-to-air and pay television channels now available on terrestrial television, why do we need a special regime to control ownership? Why cannot we simply leave ownership to existing competition law? Is not the maintenance of a special regime merely both confusing and a device for the Government to extract either political favours or financial donations?[18]

The Culture, Media and Sport Committee, in its 2002 report on *Communications*, also called for the abolition of restrictions on media ownership outside of competition law, a view supported by News International and BSkyB in evidence to the Joint Committee on the draft Bill.[19]

The government has rejected this policy, arguing that while competition controls have a role in delivering an efficient media which also reflects the expectations of democratic society, they cannot on their own guarantee core features of the media. In the recent debate over the appropriate method of controlling media ownership, the government has dwelt on two characteristics, diversity and plurality. It uses diversity to mean a range of different types of programme content, while plurality refers to the consumer's ability to choose between different content providers. Hence:

> … although competition law is an important part of regulation, it is not designed to deliver diversity and plurality in the media. Competition rules can address issues of concentration, efficiency and choice, and will tend to encourage dispersed ownership and new entry. They should do all this more effectively once the Enterprise Bill comes into force. However, they cannot guarantee any of it. Competition law cannot therefore provide the certainty we need that a significant number of different media voices will continue to be heard, or that prospective new entrants to the market will be able to add their voice. Moreover, it cannot directly address concerns over editorial freedom or community voice.[20]

The government believes that diversity of programming should be addressed through content regulation, that is through controls which make no reference to the ownership of the content provider. To safeguard plurality, it sees a role for media ownership controls, albeit on a more limited scale than under the *Broadcasting Act 1990*.

In its 2001 consultation paper, the government put the case for plurality:

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18 HC Deb 13 May 2002 c488
19 HC 539-I, 2001-02, para 84; Joint Committee, para 222
20 Media ownership consultation, para 1.10

> 1.6 With plurality it is not content but the source of that content that matters – the company controlling it, the 'voice' behind it. We want a plurality of voices, giving the citizen access to a variety of views that, in a competitive market, maintain their own balance. We need regulation that is specifically directed to ensure such plurality. That is why we have imposed rules on media ownership.
>
> 1.7 Proponents of the case for plurality set out at least four reasons for its importance:
>
> - Plurality ensures that no individual or corporation has excessive power in an industry which is central to the democratic process.
>
> - A plurality of owners should secure a plurality of sources of news and editorial opinion, which is vital given the position that newspapers and current affairs occupy at the heart of public debate. A healthy democracy depends on a culture of dissent and argument, which would inevitably be diminished if there were only a limited number of providers of news.
>
> - At the limit, even though a single source might produce impartial, high-quality content, they would be able to dictate exactly what constituted 'news' itself, and their inclusion or omission of stories could slant the whole news agenda in a particular direction.
>
> - Plurality maintains our cultural vitality. Different media companies produce different styles of programming and publishing, which each have a different look and feel to them. A plurality of approaches adds to the breadth and richness of our cultural experience.[21]

The government calls for a balance to be struck between protecting plurality and fostering a competitive market. The Joint Committee, which examined the draft Bill, endorsed this view but noted that while some would like ownership controls to be relaxed and reside entirely in the competition law, others would like controls to be stricter still:

> The National Union of Journalists argued that any relaxation would lead to concentration of ownership and in turn "a reduction in diversity and range of content". The Directors Guild of Great Britain also argued that the restrictions were a safeguard against dominance, and that dominance was "potentially bad for quality and creativity". Professors Steven Barnett and Jean Seaton argued that consolidation will "reduce still further the plurality of voices essential for a healthy democracy", while bringing few economic benefits to television, given the pivotal role of domestic advertising in determining revenue.[22]

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[21] Media ownership consultation, paras 1.6-1.7
[22] Joint Committee, para 221

The Joint Committee itself placed a very high value on plurality and wished to place within the competition scrutiny process a specific power for plurality issues to be considered by the competition authorities in addition to competition issues when considering media mergers. This suggestion seems to extend the special protections that are proposed for the newspaper regime (see below) across the whole of the media sector. The Joint Committee also believes in the retention of some specific ownership and cross-ownership restrictions:

> We recommend that the general merger regime, as introduced by the Enterprise Bill, be amended by the Communications Bill to permit the OFT and the Competition Commission to have regard to plurality, as well as the issue of substantial lessening of competition, in reaching decisions on media mergers. For these purposes, we recommend that plurality be specified as a consideration in respect of which the Secretary of State may serve a public interest intervention notice and that plurality be defined as:
>
> "The public interest in - (i) the maintenance of a range of broadcast media owners and voices sufficient to satisfy a variety of tastes and interests; (ii) the promotion and maintenance of a plurality of TV, radio and other broadcast media owners, each of whom demonstrates a commitment to the impartial presentation of news and factual broadcast programming; and (iii) the promotion and maintenance, in all media including newspapers, of a balanced and accurate presentation of news, the free expression of opinion and a clear differentiation between the two."[23]

The Committee's suggestion would make competition law a more flexible tool in addressing media markets. If a public interest consideration of 'plurality' were to be available for Chapter II (abuse of market power) investigations and for market investigations too, then the competition authorities, with the government, would be able to have regard to plurality issues in addition to competition issues when considering media markets. This would help address the expressed concern that whilst competition law is suited for controlling concentrations and market abuses, it is less suited for guaranteeing policy objectives on market structure.

An objection to the proposal is that it introduces core discretions at the heart of media controls, whose existence could create uncertainty for market participants and act as a disincentive to further investment in the market. The government proposes instead some limited but specific restrictions on media ownership to safeguard plurality which while less flexible would offer greater certainty. In its response to the Joint Committee's proposal it observed:

> The Government believes that the principle of plurality is central to achieving democratic debate and we did, therefore, carefully consider whether we should introduce the concept of a cross-media plurality test into merger decisions. As the

[23] Joint Committee, para 224

Committee will be aware it was one of the options in the Government's Consultation on Media Ownership Rules. There was, however, little support from respondents, mainly because of the uncertainty involved in its application on a cross-media basis: businesses generally preferred to be able to plan according to a clear set of rules. This accords with the Government's view that the only way to guarantee sufficient levels of plurality on a cross-media basis is to set clear, specific limits on ownership through a number of key rules. Since these rules, which will apply to all mergers, are directed at the same objectives as a general plurality consideration, we do not believe that there is a need to provide additionally for a general plurality test in the Enterprise Bill merger control regime.

However, we recognise that the newspaper industry does not operate under the same regime as other media sectors. Most individual media markets have licensing regimes, and within those regimes we will continue to ensure that there are appropriate controls on any increased concentration or change of ownership. By contrast, newspapers are not subject to licensing controls, and as there are no licences, no specific limits are placed on ownership. We do therefore agree with the Committee that there is a need for additional provision in the merger control regime, and have put forward proposals to protect the public interest in the accurate presentation of news, free expression of opinion and the plurality of views in the UK press.[24]

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[24] *Government's Response to the Report of the Joint Committee on the Draft Communications Bill*, Department of Trade and Industry and Department for Culture, Media and Sport, October 2002, Cm 5646 ('Government's response')

III Selected UK interests of UK media groups

Carlton Communications
Television: Carlton, Central, HTV, West Country, Carlton Cinema, GMTV (25%), ITN (20%)

Daily Mail and General Trust
National newspapers: *Daily Mail*, *Mail on Sunday*, *Evening Standard*
Local newspapers: Northcliffe Newspapers, including around 20 regional daily papers, 19 regional weeklies and over 50 free weeklies
Television: Teletext (90%); ITN (20%); Performance Channel

Granada
Television: Anglia, Border TV, Granada, LWT, Meridian, Tyne Tees TV, Yorkshire, GMTV (25%), ITN (20%), SMG (17%)

Independent News and Media
National newspapers: *Independent*, *Independent on Sunday*
Local and regional newspapers: *Belfast Telegraph*, local titles in London and Kent

Johnston Press
Local newspapers: *Yorkshire Post* and numerous other local and regional titles

News Corporation
Television: BSkyB (37.6%)
National newspapers: *The Times*, *Sun*, *News of the World*, *The Sunday Times*

Pearson
National newspapers: *Financial Times*

RTL Group
Television: Channel 5 (65%)

Scottish Media Group
Television: Scottish TV, Grampian, Ginger TV, GMTV (25%)
National newspapers: *Herald*, *Sunday Herald*
Local newspapers: *Evening Times* (Glasgow)

Scotsman Group/ European Press Holdings
National newspapers: *Scotsman*, *Scotland on Sunday*, *The Business*

Trinity Mirror
National newspapers: *The Mirror*, *Daily Record*, *Sunday Mirror*, *Sunday People*, *Sunday Mail* and the *Racing Post*
Local and regional newspapers: 240 including the *Western Mail*, *Croydon Advertiser* and *Birmingham Post*

Source: *Media Map 2002*; Annual reports; Company websites
Changes in holdings are frequent in this sector and this table is intended to provide only a rough guide to UK media interests.

IV Media ownership controls

Current media ownership controls are found mainly in the *Broadcasting Act 1990* as amended by the *Broadcasting Act 1996*. There are specific bars on certain individuals and organisations holding broadcasting licences (because of their own characteristics); rules which limit the accumulation of interests within specific media sectors; and complex rules on cross-media ownership which restrict the ability of those with media interests to acquire concentrations of interests across forms of media which may have audiences in common.

In the Communications white paper, the government observed:

> The legislation …. evolved following an extensive consultation in 1995 on a new approach to measuring and regulating media ownership. The consultation document set out proposals which would: define the total media market; reflect the different levels of influence of different media; set thresholds beyond which it would be for an independent regulator to determine whether acquisitions or holdings were in the public interest; provide the regulator with powers to prevent acquisitions or require divestment; and set out the public interest criteria against which the regulator would act.
>
> Following consultation, the then government ruled that there were too many difficulties with this model for it to be introduced at that time, not least the problem of measuring shares in individual media and how those shares would be aggregated across different media markets. The present cross-media ownership rules were therefore devised to enable some liberalisation of the media ownership regime, although a commitment was made to reforming the system in the future following more detailed research. The specific newspaper regime of the Fair Trading Act remained as a safeguard against loss of 'editorial independence'.[25]

In the white paper, the government announced that it would remove some of the specific disqualifications on ownership and would revoke the limit of 15 per cent of the share of the television audience (which was a bar to further consolidation among Channel 3 licence holders). It said it would consider reforming the radio 'points' system (which controls accumulations of radio interests by reference to the share of the potential total radio audience), and it sought comments on reforming media ownership rules generally.

A. Specific bars

[clauses 335-6]

The specific ownership bars prevent the following from holding certain types of licences:

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[25] Communications white paper, paras 4.8.2-3

- individuals and bodies from outside the European Economic Area (this restriction only covers the more mainstream licences)
- local authorities and publicly-funded bodies
- political organisations
- religious organisations (who may nevertheless be allowed to hold some types of licence with permission)
- advertising agencies
- persons subject to the influence of disqualified persons (where the effect is thought to be against the public interest)[26]

Under the Bill, some of these bars are to be removed altogether, some are to be relaxed, while some will be retained. These changes are discussed in the sections below.

1. Non-EEA nationals

Individuals and companies from outside the European Economic Area are currently disqualified from holding any of the mainstream broadcasting licences.[27] The government originally intended to retain this bar not least because many other countries have similar restrictions which make it hard for UK firms to penetrate overseas markets. In the Communications white paper, for example, the policy was stated categorically:

> We will retain the disqualifications on grounds of nationality and for political bodies. Our current restrictions on foreign (non-EC and EEA) ownership of media interests are reflected across Europe, and indeed beyond: the US restricts foreigners to a 25 per cent interest in broadcasting companies, and Australia similarly limits foreigners to a minority interest in television. Within the EC, France restricts the interests of non-EC parties in TV and radio companies to a holding of 20 per cent, while Spain and Italy are among other countries which also impose limits. We believe these restrictions play an important role in ensuring that European consumers continue to receive high quality European content.[28]

One year on, in a consultation paper specifically on media ownership rules, the government's working assumption was still that the nationality bar would be retained, although the paper did canvass a broader range of opinion:

> Some suggest this distinction between Europe and the rest of the world is unnecessary and that if we were serious about attracting foreign investment we would remove our restrictions, as some other European countries such as

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26 See Media ownership consultation, Annex C, reproduced as an Appendix to this paper.

27 They may hold licences to provide television multiplex services, national or local radio multiplex services, digital additional services, local delivery services, non-domestic satellite or radio services, licensable programme services and licensable programme sound services.

28 Communications white paper, para 4.9.5

> Germany, Spain and the Netherlands have done already. Media companies will always have to produce content attractive to a British audience (as they already do in the newspaper market) and will also have to abide by whatever regulations on content may apply.
>
> However, a number of our key trading partners, such as the US and Australia, impose restrictions on British ownership of their media. Without reciprocal arrangements with other nations that would allow our own companies to expand into their markets, we do not feel we could justify lifting our ban at the present time, although we would be willing to listen to arguments in favour of repeal.[29]

However, the government had changed its mind by the publication of the draft Bill. The following brief paragraph from the Policy document which accompanied the draft Bill announced:

> The existing prohibitions on the non-EEA ownership of broadcasting licences will be removed. These rules are inconsistent and difficult to apply. The Government wants to encourage inward investment from non-EEA sources, to allow the UK to benefit rapidly from new ideas and technological developments, aiding efficiency and productivity. Content regulation will maintain requirements for high quality, original programming.[30]

The Joint Committee regarded many of the assertions made in favour and some of those against this move as largely unproven:

> The potential of ITV consolidation and continued European investment to strengthen or maintain the position of ITV and Channel 5 remains relatively unexplored. We have received much persuasive evidence that broadcasting is distinct from other industries; a US investor with a broadcasting background would have a level of incentive to utilise pre-existing material in a way that simply does not apply in other sectors. In broadcasting, unlike many other markets, the US investor has an advantage over a German, French or Italian investor on language grounds. We would not wish to characterise this as "dumping": rather, what is more likely is a determined and sophisticated attempt, backed by enormous marketing expertise, to shift the balance of audience and regulatory expectations away from domestic content produced primarily with a British audience in mind, towards a more US or internationally focused product mix. The inescapable reality is that a US media company investing in the United Kingdom will be concerned every bit as much with enhancing the wider market value of its domestic content as with increasing its return on an investment in the British-based marketplace. These same considerations, however, may illustrate the extent to which foreign, particularly US, direct investment may increase the competitive intensity in United Kingdom broadcasting, to the extent that United Kingdom producers will produce content which is not only preferred by British

[29] Media ownership consultation, paras 6.14-5
[30] Policy, para 9.3.1

> audiences, but which may well then also find increased markets in the USA and elsewhere.
>
> 249. We agree in principle with Commissioner Reding that restrictions on the nationality of ownership should not be imposed when "public policy objectives can be achieved in a less restrictive and more effective way". However, we are not convinced that more effective means are yet in place.[31]

The Joint Committee's conclusion was that the disqualification should not be removed in the *Communications Bill*. Instead, OFCOM should be tasked with reviewing the relevant markets once it had established itself as an authoritative regulator. OFCOM was also to be tasked with reviewing the British market for programme supply. In its response to the Joint Committee, the government defended its policy decision at length:

> We are pleased that the Committee has no objections in principle to foreign ownership of broadcasting licences, and does not consider reciprocity to be pivotal. However, we also note its view that there is currently insufficient evidence to justify removing the restrictions now. We will, of course, consider any new evidence arising from the ITC review of programme supply, which will include a consideration of the implications of liberalisation in the media ownership rules and their impact on the programme supply market. However, we do not believe that there is a strong case for delaying the policy in the way proposed by the Committee. As we are sure the Committee will understand, no predictions can be made about the level of foreign investment that will result from our proposed changes, since that is a matter for the individual businesses concerned. However, we believe that a more open market will create conditions that are conducive to greater competition, more investment, and an injection of new skills and ideas. We believe that this will translate into better programmes for viewers and listeners.
>
> The Government does recognise the Committee's concern about the risks posed to the UK broadcasting ecology by the entry of large American companies into the market. We do, however, believe that we have put safeguards in place so that these risks have been addressed. The Bill makes provision for content regulation that will prevent any 'dumping' of US programming in the UK. In the television industry, Channels 3, 4 and 5 will be subject to obligations for original programming, made for first screening to a UK audience, above the EU requirement for a minimum of 50% EU-originated content. There will also be additional obligations for independent production and for regional production and regional programming on ITV. In radio, local stations will have to maintain the formats they agreed with the regulator. Whenever a local radio licence changes hands, OFCOM will be able to vary the licence to make sure the local character of the service is maintained and OFCOM will also be given a new power to protect and promote the local nature of local radio.

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[31] Joint Committee, paras 248-9

> Such provisions will act as a guarantee of quality and diversity.[32]

The DCMS commissioned a review of the market for programme supply in the UK as a result of the Joint Committee's report. The review was conducted by the Independent Television Commission (ITC) and published on 26 November 2002. Its main recommendations include that OFCOM be granted powers under the Bill to:

- Strengthen the longer term viability and growth potential of the independent production sector;
- Safeguard original UK production against the background of the Government's proposed changes to media ownership rules;
- Support production in the Nations and Regions; and
- Strengthen commitment to training across the sector.[33]

2. Religious organisations

The 1990 *Broadcasting Act* (Schedule 2 Part II para 2) contains rules which disqualify religious bodies from holding television or radio licences granted, respectively, by the Independent Television Commission and the Radio Authority.[34] Both bodies are given discretion to waive this disqualification in relation to cable or satellite TV and local analogue, cable or satellite radio services. The criteria used by the Radio Authority have been summarised in a written answer:

> Religious bodies may apply to the Radio Authority for any of these licences. The Radio Authority will assess such applications against its criteria, as set out in its Code on News and Current Affairs and Programming, and its guidelines on ownership, particularly in respect of compliance with the authority's religious broadcasting guidelines, and ensuring spectrum is available for the service before issuing a licence.[35]

The ownership provisions of Schedule 2 of the 1990 Act were amended by the *Broadcasting Act 1996* which added licences to provide digital television and radio services to those from which certain bodies were already disqualified. Because digital services were not at the same time added to the services which the ITC or Radio Authority had a discretion to award under Schedule 2 Part II para 2(2) of the 1990 Act, religious organisations cannot apply for any form of digital licence. On 21 July 1999, Lord McIntosh of Haringey noted 'that was an omission from the 1996 Act'.[36] It would appear that no amendment was proposed to remedy this. However, the Communications white paper, published in December 2000, gave a commitment to rectify at least this anomaly:

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[32] Government's response, recommendation 86
[33] See ITC press release 88/02, *ITC publishes review of UK programme supply market,* 26 November 2002
[34] The section is based on material provided by Grahame Danby, Home Affairs section.
[35] HC Deb 5 March 2002 cc264-5W
[36] HL Deb 21 July 1999 c970

> 4.9.1 We will address one anomaly in the current legislation about ownership of radio licences by religious bodies. Such bodies may own a local terrestrial analogue, but not a local terrestrial digital licence. This disqualification will be lifted in the new legislation.
>
> 4.9.2 We would welcome views on whether we should further relax the ban on religious ownership. There is a strong demand by some for religious content. But religious content has a particular capacity to offend those with different views and opinions, or, sometimes, to exploit the susceptibilities of the vulnerable. Religious issues may also shade into matters of political controversy. These concerns may not be fully dealt with by the regulation of religious content and are particularly acute in relation to terrestrial licences where scarce spectrum means that choice is naturally limited for viewers. We nevertheless welcome views on whether we could relax the prohibition when choice increases in the digital future, or whether it will remain a necessary safeguard which should be retained.[37]

A further consultation on media ownership rules provided the following elaboration:

> 6.1.8 There are other restrictions on religious organisations. They are not able to apply for national analogue licences, national and local digital multiplex licences and national digital sound programme licences. However, they are able to supply programme content to national radio stations and, providing the regulator thinks it appropriate and subject to compliance with the guidelines, they can hold local analogue, satellite and cable licences. Over 6,000 respondents to the White Paper supported lifting the restrictions on national religious broadcasting, mainly on the grounds of freedom of speech. Some, however, including some church organisations, were more cautious while a few opposed relaxation. For example, the Commission for Racial Equality were concerned that a relaxation of the restriction could militate against the promotion and understanding of all faiths practised in the UK. Where licences are currently awarded to the highest bidder, there could be the potentially divisive prospect of a bidding war between different religions competing for a licence. There are also concerns about whether religious organisations should be able to apply for national or local multiplex licences, given that a multiplex licence holder decides which other organisations may broadcast what type of service through that multiplex.[38]

The government proposed extending the class of licences which religious organisations would be allowed to hold to include a number of additional licence types. The rules are of the prohibition-concession type, in that religious organisations which want to hold one of these licences need to seek discretionary approval from OFCOM to do so; they have no automatic right to a licence:

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[37] White paper, 4.9.1-2

[38] Media ownership consultation, para 6.1.8

> 9.3.3 The Government has considered the many representations in connection with the restrictions on religious broadcasting. Where there is sufficient spectrum availability, restrictions on religious bodies holding licences will be removed. The draft Bill will therefore be amended to allow OFCOM to award to religious bodies TV licences for digital programme services, digital additional service licences and restricted service licences. This is in addition to the undertaking in the Communications White Paper to allow religious bodies to hold digital local sound programme licences. Religious bodies can already hold local analogue radio licences and satellite and cable TV and radio licences. There will continue to be restrictions on national analogue radio and national digital sound programme licences, analogue TV licences and analogue additional services licences, and local and national radio and TV multiplex licences.[39]

The Joint Committee noted that three main issues were raised by the Christian organisations which made submissions to it: the operation of the regulator's discretion as to whether to grant licences to religious owners; the fact that certain types of licence were still to be unavailable for religious organisations; and the continuing claim by religious organisations that the current and proposed restrictions were in breach of rights guaranteed by the European Convention on Human Rights (ECHR).

The government points to spectrum scarcity as the reason for continuing to bar religious organisations from the holding of licences of which only a restricted number can be made available. However, the Joint Committee heard claims that this argument was not persuasive in the case of national digital sound programme licences. One witness, the Centre for Justice and Liberty, questioned whether spectrum scarcity could really be said to be an issue when twenty such licences were already available. The Committee agreed:

> The case for retention of the general prohibition on religious ownership of national digital radio licences, and for the compatibility of that prohibition with Convention rights, has not been established by the Government to our satisfaction. We recommend that the Government give these matters further consideration before presentation of the final Bill.[40]

The government indicated that its mind was not yet made up on that recommendation when it responded to the Joint Committee in October 2002. The Bill, as introduced, does now allow, in addition to the other new licence categories, religious organisations to apply for approval to hold licences for national digital radio stations.[41]

The Joint Committee also heard claims from its witnesses that the prohibition on religious organisations from holding some types of broadcasting licence was in breach of rights guaranteed under the European Convention on Human Rights:

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[39] Policy, para 9.3.3
[40] Joint Committee, para 237
[41] See clause 335, 'Modification of disqualification provisions'

> The final concern related to the desirability and compatibility with Convention rights of the general prohibition as applied both to religious bodies and to individuals. An application for consideration by the European Court of Human Rights of the general disqualification was held to be inadmissible in 2000, and the disqualification considered to be justified. This led the Radio Authority to view the existing and proposed prohibition on national radio licences as legally sound. The Centre for Justice and Liberty thought that the decision on admissibility was based on incomplete information and that the legality would be open to further challenge; these arguments find at least some support in the recent Report of the Joint Committee on Human Rights.[42]

The Human Rights Committee had welcomed the extension of the availability of local radio licences to religious organisations in the draft Bill, but raised concerns about the justification of the disqualification on holding national licences. It noted as relevant factors the weakening of the argument on spectrum scarcity with the growth in digital radio, and the possibility of controlling applications from inappropriate bodies through other means (such as the 'fit and proper' requirements). It thought that the continued ban on granting national radio and television licences to religious organisations merited reconsideration by the government.[43] Since the Committee's scrutiny, the government has announced that religious organisations may apply for national digital radio licences. It remains to be seen when the Committee scrutinises the Bill itself whether it will find that this change is sufficient to address its concerns.

The government now maintains that this part of the Bill is compatible with the Convention:

> Clause 335 modifies the rules that disqualify religious bodies from holding certain broadcasting licences. The Bill will relax the current rules so as to allow religious bodies to apply for a wider range of licences. Under the Bill, in addition to those currently permitted by the legislation, such bodies would be able to apply for a digital television programme services licence (allowing them to broadcast on television multiplexes) or a local or national digital sound programme licence. They will also be able to hold restricted television licences (permitting broadcasting to a particular establishment or event) and digital additional services licences (on television or radio multiplexes). Religious bodies will still be unable to hold national analogue radio licences, radio or television multiplex licences, licences to provide the nationwide analogue television broadcasting services or analogue television additional services.
>
> The government's view is that the retention of the disqualification for religious bodies to the extent proposed by the Bill is compatible with the ECHR. The aim of the ban (as summarised by the European Court of Human Rights in ruling

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[42] Joint Committee, para 235

[43] Joint Committee on Human Rights, *Draft Communications Bill*, 31 July 2002, HC 1102 2001-02, paras 52-7

inadmissible the challenge brought against the ban in the UK by United Christian Broadcasters) is –

> "to promote the efficient use of scarce resources i.e. radio spectrum in order to safeguard pluralism in the media, cater for a variety of tastes and interests and avoid discrimination as between the many different religions practised in the United Kingdom."

The government are satisfied that the less wide-ranging ban proposed by the Bill pursues a legitimate objective in a proportionate manner and is compatible with the ECHR.[44]

3. Other disqualifications

The government also proposes to remove the current restrictions on advertising agencies holding broadcasting licences (a move opposed by the Joint Committee). Such applications will be considered solely under competition law.

Local authorities will be allowed to hold licences to provide local information services by television and radio, but the rules which prevent them from publishing material which might affect political support for a party will be tightened.[45]

The government and the Joint Committee agreed that political organisations should continue to be disqualified from holding licences.

B. Sectoral rules

[clauses 337, Schedule 14]

1. Overview

Restrictions on concentrations of ownership interests within specific sectors and between specific sectors ('cross media ownership') are perhaps the most complex area of ownership controls. This complexity stems in part from the level of detail in the current prescriptive regime, and in part from the different approaches which are used for different media sectors. In its media ownership consultation, the government explained that its instincts were generally to remove cross-ownership controls except in the most influential areas of the mass media. This means that there is to be significant loosening of the controls that are currently in force for television licence holders (in their own market) and for newspaper owners (in other media markets):

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[44] 'Compatibility with European Convention on Human Rights', *Communications Bill*, Explanatory Notes, 19 November 2002, EN-6 2002-03

[45] See clause 336, 'Licence holding by local authorities'

> 9.4.1 The Government proposes to deregulate. UK companies have to be allowed to grow, to find new opportunities to reduce costs and attract new investment, if they are to bring better products to consumers. However, there will continue to be rules preventing the most influential media in any community being controlled by too narrow a range of interests.
>
> 9.4.2 Cross-media regulation will be reduced to three core rules, to regulate the three forms of media voice: national, regional and local:
>
> i A rule limiting joint-ownership of national newspapers and Channel 3:
>
> > (a) no one controlling more than 20% of the national newspaper market may hold any licence for Channel 3;
> >
> > (b) no one controlling more than 20% of the national newspaper market may hold more than a 20% stake in any Channel 3 service;
> >
> > (c) a company may not own more than a 20% share in such a service if more than 20% of its stock is in turn owned by a national newspaper proprietor with more than 20% of the market.
>
> ii A parallel, regional rule: no one owning a regional Channel 3 licence may own more than 20% of the local/regional newspaper market in the same region.[46]

The focus of the remaining controls is on those forms of the media that are thought to be particularly influential. Despite the increase in the types of broadcasting licence that are available (as a result of spectrum reforms and new digital technologies), and the different ways of disseminating information, the government believes that newspapers, analogue radio and free-to-air television are still the most important sources of news and opinion for most people. The ownership regime therefore seeks to prevent individual licence holders (either directly or through companies that they control) from accumulating large shares of specific markets, or, by acquiring significant interests across different types of media, from accumulating too great a share of the media voice generally. Despite this, some of the existing controls, particularly those which restrict the ability of national newspaper owners to have interests in mainstream television and radio, are being relaxed. National newspapers (with 20 per cent of the market), however, will still not be able to have significant interests in the main ITV franchises (Channel 3 licences):

> 9.4.3 National newspapers are the most editorially influential mass medium. The deregulation proposed will allow newspaper proprietors to buy into national and local radio markets, and into Channel 5, creating many new opportunities for investment and growth. However, in the Government's judgement, joint ownership of a substantial share of the national newspaper market and a

[46] Policy, 9.4.1-2. This extract discusses only the first two rule. The third, which concerns local radio ownership is discussed below under 'Radio ownership'.

> substantial part of Channel 3, the only commercial public service broadcaster that currently has universal access to a mass audience, would represent an unacceptable concentration of influence in the current circumstances.[47]

Similar rules are also being retained to prevent the accumulation of large shares of the media voice at regional and local levels:

> 9.4.4 The rule preventing joint ownership of a regional ITV licence and more than 20% of the local/regional newspaper market in the same region runs parallel to the national '20% rule'. Regional TV and regional/local newspapers are the two most important media, in size and scope, at regional or city level. This rule will prevent any one company becoming the most influential voice in both.[48]

As the Government acknowledges, the bars that are being removed will make possible, subject to ordinary competition approval, certain types of cross-media ownership which are currently prohibited:

> 9.4.5 The new rules remove uncertainty and provide a clear and simple framework that protects plurality where it is important to do so, while deregulating elsewhere. All other rules on cross-media ownership will be removed. As a consequence some new forms of cross-holding will be allowed:
>
> - Joint-ownership of national TV and national radio licences.
> - Joint ownership of a regional Channel 3 licence and a local radio licence in the same area (as long as there are two or more other radio stations that reach more than 50% of the adult population in the radio station's area).
> - Ownership of more than 20% of the national newspaper market and Channel 5.
> - Ownership of more than 20% of the national newspaper market and national and/or local radio licences.[49]

The Joint Committee had recommended that competition law be amended to include a plurality test which could be applied in all media cases.[50] It thought that such a test – rejected by the government – would be particularly appropriate in the event of Channel 3 licence holders acquiring the Channel 5 licence also.[51] The Joint Committee did not endorse relaxing the rules to allow a national newspaper owner with 20 per cent of the newspaper market to acquire the Channel 5 licence.[52] The charts below show

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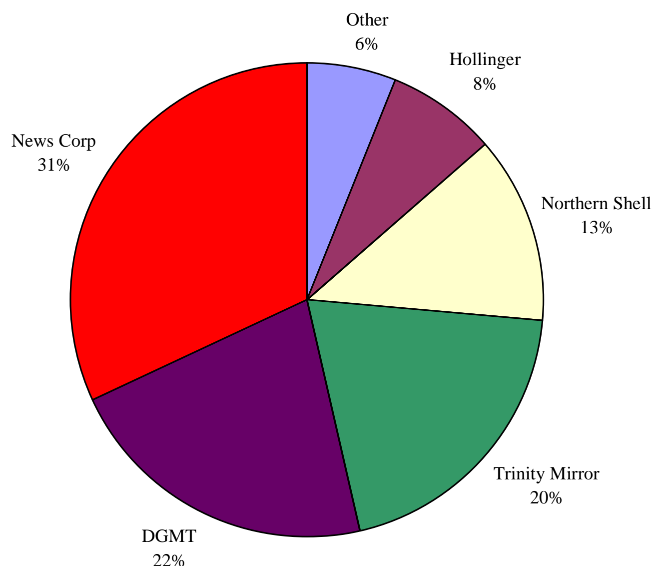
47 Policy, May 2002, 9.4.3
48 Policy, May 2002, 9.4.4
49 Policy, 9.4.5
50 See above ('Adequacy of competition law?')
51 Joint Committee, para 252
52 Joint Committee, para 258

approximate market shares for newspaper proprietors based on Audit Bureau of Circulation figures.[53]

Share of daily newspaper market by publisher (six month period May to October 2002)



The figure of Rupert Murdoch is rarely far from discussions on media ownership. The extent of Mr Murdoch's media interests in the UK is currently restricted both by the bar on non-EEA ownership of terrestrial television interests and by the cross-media rules which restrict certain newspaper owners from acquiring substantial TV interests. Murdoch is never mentioned by name in the Joint Committee's report, but commentators were quick to identify his presence. Writing in the *Financial Times*, Ian Hargreaves was sceptical about both the Joint Committee's opposition to US investment and the demarcation lines drawn up by the government over cross-media interests:

> The committee, with six Labour members, two Lib Dems, a cross-bencher and three Conservatives, was always going to want to show its hostility to American corporate power and Rupert Murdoch. There will, no doubt, be further fulmination in the House of Lords, but it won't make any difference. The government has not struggled across the minefield of media ownership to have its mind changed now. On the matter of permitting newspaper groups to buy into television, there is a logical flaw in the Bill's position that Murdoch may own Channel 5, but not ITV, because C5 is weak, when the goal of widening the investment pool is to make C5 strong enough to challenge a unified ITV and give

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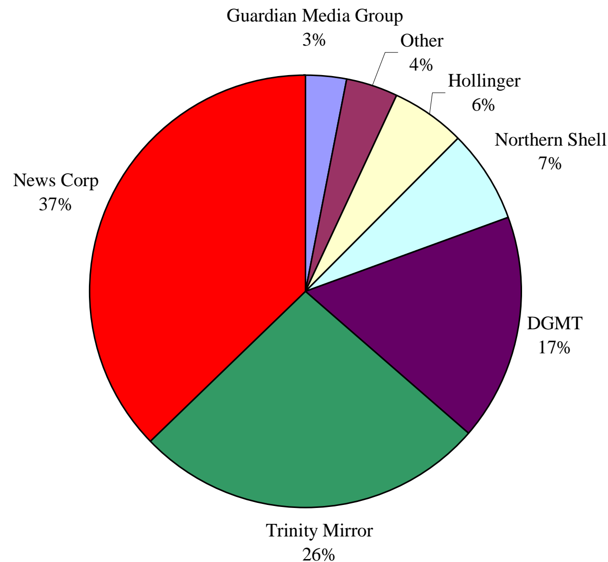
[53] These figures are only illustrative: they do not show how markets and connections between entities might actually be assessed under the Bill.

> advertisers a mainstream alternative. Ministers are, however, convinced that Carlton and Granada have lost the will to live and will see events at Bertelsmann and Vivendi as further evidence that it is foolish for legislators to predict which foreigners are likely to be active investors.[54]

Share of Sunday newspaper market by publisher (six month period May to October 2002)



While the chief executive of one of the leading Channel 3 broadcasters, Carlton, called for American ownership to be permitted, the CBI reportedly argued that any change to ownership restrictions should be done on a reciprocal basis:

> 'The idea that an American company, or a German or Spanish one, would take over a British television group and stuff the programmes with content that would be alien to a British audience is completely specious,' [said Gerry Murphy].
>
> Murphy adds: 'People forget that the issue here is about programming, not ownership; broadcasters are subject to rules and regulations laid down by the broadcasting authorities and those rules - which cover standards relating to quality and decency - must be upheld, no matter who owns ITV.' Ministers last week rejected parliamentary demands that the Government postpone plans to allow US media companies to buy British TV broadcasters.
>
> The Confederation of British Industry supported the call for a delay, saying the market should be opened up to US companies only when UK media companies could invest freely in the US. The CBI's view was backed by City analysts.[55]

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[54] Ian Hargreaves, 'An appetite for change', *Financial Times*, 6 August 2002
[55] 'Let US into British TV, says Carlton', *Observer*, 4 August 2002

Newspaper owners who sought to acquire broadcasting licences were previously subject to a broad 'public interest' test which was applied by the sectoral regulators. That test is being abolished:

> 9.4.7 There are currently a set of rules that together stipulate the application of a loosely defined public interest test to any acquisition of any broadcasting licence by any newspaper owner. These rules, and the uncertainty and costs they create, are disliked both by newspaper proprietors and by regulators. They will be removed - the rules that remain constitute a sufficient check on the power of newspaper proprietors for the public interest to be satisfied.[56]

2. Changes to Channel 3 and Channel 5

In addition to the abolition of the restriction on a single person holding the two London Channel 3 licences (currently held by Carlton and LWT), a restriction that prevents anyone having licences which account for more than 15 per cent of the television audience is to be removed. It will therefore be theoretically possible for all Channel 3 licences (ITV1) to be held by a single person, including the two London licences, and there will no longer be a bar on the same person holding Channel 3 licences and the Channel 5 licence.[57]

Concerns have been expressed about the effect of these changes – which have been anticipated to a large degree by recent consolidation among Channel 3 licence holders – on ancillary markets such as the market for free-to-air television advertising.[58] The Institute of Practitioners in Advertising, while noting that competition law would still apply to further consolidation in Channel 3 licence holders, thought that advertisers would feel restrained from making complaints to the regulators about their main media outlet.

The government's regulatory impact assessment on the media ownership rules refers to studies which suggest that foreign establishments (e.g. new overseas holders of UK broadcasting licences) may be significantly more productive than domestic businesses.[59] It also calculates that consolidation in television ownership might be expected to lead to efficiency gains, albeit of a modest order.[60] However, it warns that the competition controls which will still apply after the deregulation of broadcasting ownership restraints are unlikely to permit consolidation to the maximum theoretical level:

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56 Policy, 9.4.7

57 Policy, 9.5

58 This point was raised with the Joint Committee by the Institute of Practitioners in Advertising, see para 252

59 Department for Culture, Media and Sport, *Media ownership rules: Regulatory Impact Assessment*, November 2002, para 15

60 Potential efficiency gains are estimated at between £10 to £30 million. See *Media ownership rules: Regulatory Impact Assessment*, para 23

> At present…it is very unlikely that the competition authorities would allow a merger of the sort postulated, or even a merger which results in a single ITV company, given the dominant position such a company would have in the market for advertising in free-to-air TV. Whilst these efficiency savings should (potentially) be possible it is unlikely that all of these efficiency gains would be achieved if the market were to become too concentrated. The removal of the competitive constraint would reduce the incentive for the firms to actively seek these efficiency gains, which would be detrimental to economic welfare. Hence, competition law is believed to result in the most efficient outcome and to maximise welfare.[61]

3. Nominated news provider

At the moment, Channel 3 is obliged to use a single source for networked national news, the 'nominated news provider' (i.e. ITN). No one is permitted to own more than 20 per cent of the news provider. The Bill will increase that limit to 40 per cent, but at the same time a new restriction – that Channel 3 licence-holders collectively may not own more than 40 per cent of the news provider – is to be introduced.[62] The government argues that this system is necessary to provide a quality competitor for BBC news, and that the ownership rules act to safeguard the news provider's editorial independence. Additional changes in the Bill will require Channel 3 licence holders to provide the news provider with adequate financial support. However, the Bill will also make provision to allow the nominated news provider system to be modified or repealed by order. It would also allow a similar system to be instituted for Channel 5, which might be exercised should Channel 5 acquire a significant share of the free-to-air TV audience in the future.

In evidence to the Joint Committee, the retention of the nominated news provider system was criticised by ITV, Teletext and BSkyB, but broadly supported by Channel 4 and ITN itself. The Joint Committee believed that the system should be retained for the moment – given anticipated changes to ITV ownership – but expressed doubts about the long term desirability of the system:

> We recommend that OFCOM hold an early review of the restriction on the proportion of the Channel 3 nominated news provider that may be owned by any one organisation to determine whether it is the best way of ensuring that there is a strong news provider to compete with the BBC and BSkyB.[63]

4. Radio ownership

There are currently three national analogue radio services: the Bill will allow the holding of more than one of these licences. At national level, the radio points system which

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[61] *Media ownership rules: Regulatory Impact Assessment*, para 23
[62] See clause 338, 'Restrictions relating to nominated news providers'
[63] Joint Committee, para 255

controls the holding of other national radio licences will be abolished and competition law will become the tool for controlling concentration.

At local level, a new regime for local radio aims to ensure that there is a plurality of owners. A scheme was initially drawn up to deliver this aim jointly by the statutory regulator, the Radio Authority, and the Commercial Radio Companies Association (CRCA). The current points system was to be replaced. Under the original scheme, it was intended that in each local market which had a well-developed radio market, there should be a minimum of at least three station owners in addition to the BBC's local radio service ('three plus one').

Such a scheme was not set out in detail in the draft Bill. This is also a feature of the Bill itself, although an important policy announcement was made shortly before the Bill's publication. In the Bill, general provisions about the scheme are made in Part 2 of Schedule 14, with the detail of the scheme to be set out in a draft order.

The Joint Committee observed that having initially worked to develop the new scheme, the CRCA had become highly critical of it:

> The CRCA and radio companies individually have advanced several objections to the scheme to explain their about-turn. They contend that what appeared liberalising in November 2001 seems less so now in the light of the consolidation being permitted in the television market; consolidation of radio will be hindered by unique single medium ownership rules. They contend that radio, the least well-developed medium, is bearing the main burden of plurality. They consider that radio's influence is limited compared with other media: local commercial radio is predominantly music-based and subject to formats and content regulation, including obligations on balance and impartiality. Finally, they argue that the radio proposals cut across the separate principle of three distinct media voices in any region.[64]

The government and the Radio Authority rejected these arguments. The Joint Committee cautiously endorsed the 'three plus one' rule but thought it should be made subject to a 'sunset' clause. Others who gave evidence to the Joint Committee proposed alternative systems, including a system of regional competition rules backed up by competition law (CRCA); plurality criteria for all media, supported by competition law (Scottish Media Group); and, a modified system of 'two plus one' (Daily Mail and General Trust, Trinity Mirror).

In its reply to the Joint Committee, the government welcomed the Committee's support but indicated that its mind was still open and that a 'two plus one system' was actively under consideration.[65] On 14 November 2002, Tessa Jowell announced that the 'two plus

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[64] Joint Committee, para 263
[65] Government's response, Recommendation 92

one system' was being chosen instead along with a slimmed down points system. The DCMS press release said, 'the government has listened to the radio industry's arguments for further deregulation, and has amended a proposal set out in the draft *Communications Bill* in May this year'.[66]

The details of the new scheme are:

- A '2 + the BBC' system, which would limit the largest operator in a market to 55 per cent of the available points.

- A parallel rule to prevent any operator owning more than 55 per cent of the local digital services in an area (by limiting the number of services they can provide to any local multiplex).

- A stricter points limit for cross-media owners, in any market with more than 2 radio stations. In such areas, neither the regional ITV licence-holder nor any company that controlled more than 50 per cent of the local press in a radio station's coverage area would be allowed more than 45 per cent of the points.

These rules mean that in markets that are well-developed, there should be at least four local media voices, including the BBC and commercial radio, TV and newspaper owners. As for the effect on local radio ownership, in the *Media ownership Regulatory Impact Assessment*, the government says:

> Broadly speaking the effect will be that rather than having a minimum of seven owners for all radio stations, there will be a minimum of two, allowing significant consolidation. What the final figure might be is unknowable; at present there are about 70 owners so it is by no means certain that the full concentration which the rules potentially permit will take place.[67]

C. Control

[clauses 339-343]

Licence-holding as a method of control is not enough in itself to carry out the aims of media ownership restrictions. While licences may formally be in the hands of a particular company, that company may form part of a group of companies (where other companies within the group hold other media licences) or it may subject to controlling influences from shareholders or others who are not part of a formal corporate structure. Media

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[66] DCMS press release 199/02, *Tessa Jowell sets out new regime for local radio ownership*, 14 November 2002

[67] *Media ownership: Regulatory Impact Assessment*, para 43. The previous rules limited owners to 15 per cent of the available points in the system (hence the figure of seven).

ownership therefore looks beyond the immediate, identified holder of a licence, where necessary, to take due account of other parties who because of a degree of connection with the licence holder, or because of a shareholding stake, need to be taken into consideration with the licence holder when applying ownership rules.

Clause 343 of the Bill amends the definition of 'control' in the *Broadcasting Act 1990*. As at present, control can be established at ownership thresholds of below 50 per cent. The Bill specifies certain presumptions about whether control exists at lower thresholds. In particular, there is an assumption that anyone with a stake of more than 20 per cent will have effective control of that company unless the contrary can be demonstrated. De facto control will also be found where a person is able to ensure that the affairs of a company are carried out in accordance with his wishes. OFCOM is tasked with providing guidance on how it will interpret the definition of control.

Changes in control are a regulatory trigger point. Channel 3 licence holders and holders of local sound broadcasting services are required to notify OFCOM in advance of proposals which will result in a change in the control of the licence holder, or of a person connected with the licence holder who supplies programmes to it.[68] OFCOM must then report on the likely effects of the change, paying particular attention to the effect on regional and local programming and service characteristics. It may also vary the licence but not to secure changes which would not have been met by the service previously.

V Newspaper mergers

[clauses 359-375]

A. Current newspaper merger regime

Under the general merger regime, it is only those mergers which raise competition concerns that are formally investigated by the Competition Commission. Under the newspaper regime, however, there is a presumption that large-scale transfers of newspaper titles or assets to those who already own newspapers, will always be investigated by the Competition Commission. In addition, there is an obligation to notify the authorities *before* a merger takes place and any transfer that is carried out without the prior consent of the Secretary of State is null and void. These rules are backed up with criminal offences for their breach.

The newspaper regime applies to transfers of newspaper titles or newspaper assets when made to another newspaper owner, where the combined circulation of the titles held (including those which are being taken over) will be 500,000 or more per day ('qualifying newspaper transfers'). The regime is therefore targeted at increased concentrations of

[68] See clauses 339 ('Changes of control of Channel 3 services') and 341 ('Variation of local licence following change of control')

newspaper ownership, since a transfer of newspaper titles to someone who does not already have newspaper interests would not be covered by the special regime. The 500,000 daily circulation threshold appears quite high, but because local and regional newspapers are predominantly owned by proprietors with a stable of other titles it can be triggered relatively easily.

Although there is a presumption that the Secretary of State will not give consent to a newspaper transfer until she has received a report on the transfer from the Competition Commission, there are exceptions. The Secretary of State can allow a transfer without making a reference to the CC where a newspaper is in severe financial difficulties such that it is not economic as a going concern and action is required urgently if it is to continue in publication. Another situation in which a Competition Commission reference is not required, is where although the combined circulation exceeds 500,000 daily copies, the title which is being transferred has a daily circulation of 50,000 or less. [69]

The test which is applied by the Competition Commission to newspaper references, and which therefore forms the basis of its advice to the Secretary of State, is set out in s.59(3) of the *Fair Trading Act 1973*:

> (3) On a reference made to them under this section (in this Act referred to as a "newspaper merger reference") the Commission shall report to the Secretary of State whether the transfer in question may be expected to operate against the public interest, taking into account all matters which appear in the circumstances to be relevant and, in particular, the need for accurate presentation of news and free expression of opinion.

The DTI has prepared guidance on how it handles newspaper mergers. A section headed 'What issues do the Competition Commission and the Secretary of State consider?' states:

> The Act requires that the Competition Commission investigate and report to the Secretary of State whether the proposed newspaper merger may be expected to operate against the public interest. The Competition Commission will take into account all matters which appear relevant (for example competition, concentration of ownership, efficiency and employment) amongst which will always be the need for accurate presentation of news and free expression of opinion. When deciding whether to exercise his discretion to grant consent without a Competition Commission inquiry, the Secretary of State will also have regard to these issues.[70]

[69] Until 13 June 1995, this figure was 25,000. It was doubled by the *Fair Trading Act (Amendment) (Newspaper Mergers) Order 1995* (SI 1995/1351). If a reference has been made to the CC and the CC has not reported within its deadline, the Secretary of State may take a decision without waiting for the report. In addition, if the newspaper is not economic as a going concern and will not be maintained after a transfer as a separate title, the Secretary of State *must* give consent without a CC reference.

[70] *Guidance on DTI procedures for handling Newspaper Mergers*

Clearly the guidance allows the decision-makers considerable discretion in what factors they consider and how they assess them. In the ordinary merger regime, the Secretary of State is able to vary or overturn the recommendations of the Competition Commission in coming to her own decision in every case, except where the CC has found that a merger may not be expected to operate against the public interest. It is thought that the discretion is even wider for newspaper mergers – the Act is worded differently – and that the Secretary of State could opt to block even a newspaper merger cleared by the CC.[71]

A standard competition textbook notes that relatively few newspaper merger cases have involved national newspapers, but that there have been a number of decisions on concentrations in local markets.[72] In particular, there were a number of adverse decisions on the basis of the detrimental effects of concentrations in local newspaper ownership during the 1980s, including in Bristol and part of Sussex. There have also been adverse findings on editorial grounds. In 1990, the CC's predecessor the MMC advised that the acquisition of the *Bristol Evening Post* by David Sullivan, then publisher of *Sport on Sunday*, would be against the public interest because of its likely effect on the character and content of the paper.[73] The acquisition of the *Nottingham Evening Post* by the *Daily Mail's* owners was only allowed subject to conditions designed to limit the threat to the diversity of opinion in the region.[74] In a sale which involved Northern Ireland titles, conditions have also been imposed which required the buyer to dispose of some of the titles in order to protect the expression of opinion.[75]

On a number of occasions, mergers which resulted in adverse findings have been allowed to proceed where suitable undertakings on such matters as editorial independence have been obtained. Such assurances were given, for example, when the Thomson Organisation acquired *The Times* in the mid 1960s, and similar assurances were obtained when the *Observer* was acquired by a Lonrho company in 1981. Perhaps the most controversial newspaper transfer, however, was one approved without a prior reference to the Commission. In 1980, approval was given for the acquisition by News International of *The Times* and *The Sunday Times* on the basis that the titles were not going concerns and action was needed urgently. Conditions were however set, including one which required News International to amend its articles of association in order to safeguard the editor's independence.

On past experience it appears that local concentrations will often not trigger competition concerns, and that even where concerns about the accurate presentation of news and the free expression of opinion are raised, undertakings on editorial independence are often sufficient to secure regulatory approval. Nevertheless, transfers of newspaper titles still

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[71] Richard Whish, *Competition law*, 2001, p847

[72] Whish, *Competition* law, 2001, pp 847-9. The following examples are drawn from this book.

[73] *Mr David Sullivan/ The Bristol Evening Post plc,* Cm 1083, 1990

[74] *Daily Mail and General Trust plc/ T Bailey Forman Ltd*, Cm 2693, 1994

[75] *Trinity plc/ Regional Independent Media Holdings Ltd*, Cm 4393, 1999

arouse controversy, as can be seen from the current reaction to speculation that Scottish Media Group may sell its Glasgow-based *Herald* title to the Barclay brothers who own the *Scotsman*.

B. Reform of the newspaper regime

The current special regime for newspapers was introduced in 1965 and derives from a recommendation of the 1961-2 *Royal Commission on the Press*: the Royal Commission had recommended that newspaper mergers be handled by a special court.[76] According to the government's 2001 *Consultation on media ownership rules*:

> The rationale…. was that control of the Press was a matter of particular public sensitivity, and that increasing concentration of newspaper ownership in too few hands could stifle the expression of opinion and argument, and distort the presentation of news. In the light of these concerns, newspaper transfers are judged against 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. The statutory provisions do not seek to prescribe any particular limit on concentration, or impose any requirement for impartiality.[77]

The government still accepts the underlying rationale for this special regime but plans, through the Bill, to simplify the newspaper merger regime so that it is targeted more precisely at those newspaper mergers which raise genuine concerns.[78] It noted in its 2001 consultation that of the 180 cases scrutinised since 1980, just three were refused, and a further five allowed subject to conditions.[79]

The proposed new newspaper regime is to adopt the procedures of the main merger regime, as revised by the EA 2002, so far as is possible. The major policy reform of the EA 2002 for merger control was to remove the decision-making role of the Secretary of State from almost all mergers. In most cases, under the main regime it will now be the OFT which takes the decision on whether to refer a merger which falls within the scope of the Act to the CC (rather than the Secretary of State on the OFT's advice, as now). In most cases, it will then be the CC that determines whether to allow the merger and what remedies if any are appropriate to address identified competition concerns.

There are limited exceptions in the EA 2002 which allow the Secretary of State to intervene (by an 'intervention notice') for specified classes of mergers which raise the 'public interest consideration' of national security. Where that public interest

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[76] Cmnd 1811

[77] Media ownership consultation, para 6.4.3

[78] The Newspaper Society in evidence to the Joint Committee which reviewed the draft *Communications Bill*, and for different reasons the Joint Committee itself, questioned whether this deregulatory aim will in fact be achieved. Joint Committee, paras 275,

[79] Joint Committee, para 6.4.4

consideration is identified, the OFT and the CC retain jurisdiction for the competition decision (i.e. will the merger lead to a substantial lessening of competition). However, the Secretary of State is the arbiter on the public interest consideration, and although she must accept the competition authorities' competition findings, it is she who makes the final decision. The Secretary of State can only issue an intervention notice where the ordinary scope test of the Act is met (i.e. the turnover test or the share of supply test). However, the EA 2002 contains a further exception to the principle of independent competition authorities in the form of a 'special intervention notice'. Such notices allow the Secretary of State to intervene in mergers which fall below the scope tests but which involve defence contractors.

In proposing that the Bill will align a reformed newspaper regime with the EA 2002 procedures, some complexity of treatment has resulted, not least because the EA 2002's main principle is to remove ministerial decision-making in most cases, whereas the rationale for distinctive treatment for newspaper mergers is to retain ministerial involvement. The Bill repeals the current FTA 1973 newspaper regime. There will then be four broad possibilities for handling newspaper mergers under the Bill:

- A merger which involves newspaper titles, may simply be dealt with in the same manner as any other merger. If the merger is of sufficient scale for the turnover test or the share of supply test in the EA 2002 to be met, the merger can be assessed on competition grounds by the OFT, and if referred, by the CC. The CC will set any remedies and the Secretary of State will not have a role.

- A new public interest consideration is being added to the EA 2002 which specifies as public interests, the need for accurate presentation of the news and free expression of opinion in newspapers; and the need so far as is reasonable and practicable for a plurality of views in newspapers in the UK's newspaper markets.[80]

  In such cases, the EA 2002's turnover or share of supply tests must still be met. The OFT has a duty to bring cases which may raise public interest considerations to the attention of the Secretary of State. If she decides to issue an intervention notice which mentions the newspaper public interest consideration, the OFT then reports to the Secretary of State on the competition issue raised by the merger. OFCOM is charged with providing advice and recommendations on the public interest considerations to the Secretary of State, together with a summary of any representations which it has received on the point.[81] The Secretary of State then decides whether to refer the merger to the CC.

[80] See clause 361, 'Newspaper public interest considerations'
[81] See clause 363, 'Additional investigation and report by OFCOM'

The CC then carries out its investigation, having regard to both the competition and newspaper public interest considerations. Where a newspaper public interest has been specified, the CC will appoint members of its special newspaper panel to the report team. Instead of making its own decision, the CC reports to the Secretary of State who takes the final decision.

- An additional use for the 'special intervention notice' procedure will also be created in the EA 2002. Currently such notices may be used for mergers which involve those who possess classified information which might jeopardise national security (because they have carried out defence-related contract work for the Government). For newspaper special public interest cases, the same public interests (accurate presentation of the news, free expression of opinion and the need for plurality of views) as above will apply. The difference is that the standard scope tests need not be met.

  Instead a special intervention notice may be issued where there is a merger involving the supply of newspapers or the supply of advertising in newspapers where one of the parties has a 25 per cent share of that market. The market may be for the supply of newspapers of any description in the UK or a substantial part of the UK.[82] The relevant decisions will again be taken by the Secretary of State.

- A merger which involves newspaper titles may fall below the turnover and share of supply test. If no special intervention notice is issued, the merger will be permitted to proceed without scrutiny.

With these reforms, some distinct features of the current newspaper regime are lost. The requirement for prior approval for newspaper mergers (which never applied to other mergers) disappears. The criminal sanctions which enforced those obligations – which it appears were never used – also go. The current regime only applies to acquisitions of newspaper titles by other newspaper owners: if a non-newspaper owner acquired newspaper titles, that would have been subject to the main merger regime. That distinction is now to be removed, so that a newspaper public interest consideration could be specified irrespective of whether the new owner already has newspaper interests.

A new feature of the regime is the role of OFCOM in providing advice to the Secretary of State on the issues of accurate presentation of the news, free expression of opinion and the need for plurality of views. The Joint Committee noted that this was not popular with some newspaper proprietors:

> As far as the newspapers from whom we heard are concerned, the most controversial aspect of the Government's proposals is the intention that OFCOM will be the main source of advice to the Secretary of State in reaching a decision

[82] See clause 363

> on public interest grounds. The newspaper groups argued that OFCOM had no business commenting on newspapers; OFCOM would be staffed to look at regulated sectors with spectrum scarcity; it would have no real understanding of the distinctive culture and character of newspapers, particularly at a local level.[83]

However, the Joint Committee supported giving OFCOM this limited role, which the Secretary of State had told them was one it would be well-placed to carry out.[84] Other issues raised before the Joint Committee included the alleged complexity of the new regime, the undesirability of the Secretary of State retaining a role, and the possibility that small newspapers might unnecessarily be made subject to the regime.

VI Competition and regulatory powers

[clauses 304-6; 355-8]

This section of the paper looks briefly at provisions in the Bill which provide for the operation by OFCOM of competition law powers, and controls on the relationship between its competition powers and its sectoral powers. It does not provide an account of OFCOM's regulatory powers.

It is established practice for sectoral regulators, such as the Office of the Rail Regulator in the case of the railways or Oftel in the case of the telecommunications sector, to be able to use the mainstream competition legislation in respect of their sectors. The *Competition Act 1998* allows the competition authorities to investigate and take punitive or remedial action where an undertaking is engaging in an agreement which restricts, prevents or distorts competition (the 'Chapter I prohibition) or where an undertaking is abusing a position of market power (the 'Chapter II prohibition). Those powers would normally be administered by the Office of Fair Trading, the leading competition authority, but for regulated sectors may be exercised concurrently by the sectoral regulators and the OFT.

Sectoral regulators have interests beyond competition, of course, which they exercise with a range of sector-specific powers, typically related to the awarding of licences and the setting of licence conditions for those they regulate. In some circumstances, a regulator such as OFCOM will face a choice of whether to take action against an undertaking using its sector-specific powers or whether to use its concurrent powers to apply mainstream competition law. The Bill seeks to manage that choice to avoid any unfair treatment of regulated firms and to make sure that regulatory choices are appropriate.

Clause 304 of the Bill (Part 3, Chapter 4) gives OFCOM a generalised power to ensure competitive outcomes in its markets over and above the *Competition Act 1998* powers.

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83 Joint Committee, para 278
84 Joint Committee, paras 280, 278

OFCOM is to include in its licences any conditions which it believes are appropriate 'for ensuring fair and effective competition in the provision of licensed services or connected services'. Those conditions will specify practices and arrangements which OFCOM believes jeopardise fair and effective competition, and may require compliance with OFCOM codes and directions.

Whenever OFCOM proposes to use a broadcasting sector power for a competition purpose, it must first consider whether it would be more appropriate to use a *Competition Act* power instead. If a *Competition Act* power is thought to be more appropriate, then OFCOM is not permitted to use a broadcasting sector power instead.[85] Appeals from the use of broadcasting sector powers, when exercised for a competition purpose, lie to the Competition Commission Appeal Tribunal (CCAT), although if an undertaking has a grievance about OFCOM's choice of competition or broadcasting powers, such complaints can only be pursued through judicial review by the courts.

OFCOM is required periodically to review those of its codes, guidance and directions which are designed to secure fair and effective competition.[86]

The Bill later defines the extent of OFCOM's concurrent powers with the competition authorities (Part 5, Chapter 1). OFCOM is able to exercise the functions of the Office of Fair Trading, concurrently with the OFT, in relation to 'communications matters'. The current legislation allows Oftel to exercise concurrent powers for 'commercial activities connected with telecommunications'. The definition of 'communications matters', set out in clause 355, is broader, and includes broadcasting and related matters. OFCOM's powers include those under the *Competition Act 1998* (anti-competitive agreements and abusive dominance), and the new market investigation power of the *Enterprise Act 2002*. The Bill sets out safeguards to ensure that the same power is not used in respect of the same matter by both OFCOM and the OFT. The Secretary of State has conclusive jurisdiction to rule on whether a power is exercisable by OFCOM in the event of a dispute.

In practice, concurrency is an established procedure, under which the principle is that any action will be taken by the most appropriate authority. There are formal regulations which govern the use of concurrent powers and the Office of Fair Trading also chairs a monthly meeting of the Concurrency Working Party to ensure further co-ordination between the sectoral regulators and the competition authorities.

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[85] See clause 305, 'Exercise of Broadcasting Act powers for a competition purpose'. On page 263, line 7, the word 'any' appears to have been omitted before 'provision'.

[86] See clause 306, 'Review of powers exercised for a competition purpose'. In this clause OFCOM is referred to in both the plural ('they', c.306(1)) and in the singular ('his', c.306(2)).

VII Review of media ownership provisions

[clause 377]

The Bill provides for OFCOM to review the operation of media ownership controls at least every three years.[87] The first review is to take place within three years of the Bill coming into force. The government places a high importance on this provision in keeping the new regime relevant and flexible.

Such reviews may trigger the reform of the media ownership provisions in the Bill. Many potential reforms (for example, the contents of Schedule 14, 'Media ownership rules') do not require primary legislation and can be altered through secondary legislation using the affirmative procedure.[88] Various bodies expressed their concerns to the Joint Committee about the consequences of this provision. The Committee itself criticised the powers:

> Flexibility is a merit in legislation, but in this context it appears to be perceived as an economic tool, when the primary aim of media ownership rules is to protect plurality. This is a matter which is central to the democratic process and is deserving of the full parliamentary process of primary legislation to establish whether change is justified, whether the mechanism of change is correctly drafted or could be improved by amendments and whether the full legislative consequences have been considered. In due course, if the additional plurality test for the OFT and the Competition Commission that we have recommended can be demonstrated to be working effectively, Parliament may be willing to delegate almost all decisions on media ownership to those competition authorities, providing the "future-proofing" that the Government seeks. We do not believe this time has yet come. General powers to revise almost all primary legislation on media ownership by means of secondary legislation provide "future-proofing" at an unacceptable cost in terms of effective parliamentary control. We recommend that the provisions of the final Bill on media ownership should not include any powers for the Secretary of State to revise primary legislation by means of secondary legislation other than in the limited case of the Channel 3 nominated news provider.[89]

[87] See clause 377, 'Review of media ownership'
[88] Schedule 14, Part 4, para 15
[89] Joint Committee, para 283

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Appendix Current Rules on media ownership

(reproduced from DTI and DCMS, *Consultation on media ownership*, November 2001, Annex C)

This annex summarises the rules relating to media ownership that are set out in the Broadcasting Acts (1990 and 1996). In addition, media mergers are subject to the European merger regime or to merger control procedures of the Fair Trading Act 1973.

The rules operate through general disqualifications on the holding of licences; disqualifications on licence-holding based on levels of market share, as measured in some way by audience size; and disqualifications based on the number of interests held in discrete media markets.

This is a summary guide only. No one should act in reliance on any statement in, or omission from, this guide without first having taken legal advice. Note that 'Channel 3' is used by the ITV network.

General disqualification on holding licences by:

- non-EEA individuals and bodies (except licences to provide television multiplex services, national or local radio multiplex services, digital additional services, local delivery services, non-domestic satellite or radio services, licensable programme services and licensable sound programme services)
- local authorities
- political organisations
- religious organisations (regulators have discretion to waive this in relation to cable/satellite TV and local analogue, cable or satellite radio services)
- publicly funded bodies
- advertising agencies
- a person who is in the opinion of the regulators subject to influence from a body which is itself disqualified, the effect of which is, or is likely to be, adverse to the public interest.

TV Ownership

Disqualification on BBC, Channel 4 or S4C from providing Channel 3 or Channel 5 services or a local delivery service

Disqualification on holding both a national Channel 3 licence and a Channel 5 licence

Disqualification on holding two Channel 3 licences for the same region

Disqualification on holding two or more television licences where the licensee has 15% or more of total television audience share (BBC, Channel 4 and S4C are included for the purposes of calculating the total audience share, but are otherwise exempted from the conditions of this rule)

Disqualification on holding more than 6 licences to provide television multiplex services, or from having a stake greater than 20% in more than 6 bodies holding such licences.

Disqualification on having a stake of more than 10% in 8 or more licences to provide television multiplex services.

If services are provided for the BBC multiplex, then above rules apply in relation to 5 or 7 licences respectively.

Radio Ownership

Radio points system limits licensees to 15% of the total points in the system.

Disqualification from owning more than one national radio service, more than one national radio multiplex service, or more than one national digital sound programme service

Disqualification from holding:
• any two licences to provide local radio services which may share a potential audience unless one is AM and the other FM, or a public interest test is met
• any three licences to provide local radio services which may share a potential audience unless the licences include both an AM and an FM licence and a public interest test is met
• any four or more licences which may share a potential audience

Disqualification from providing more than one non-simulcast local digital sound programme service on a single multiplex, unless there is another multiplex operating in the same geographical area

Newspaper Ownership

Under the newspaper provisions of the Fair Trading Act 1973, proprietors of newspapers circulating within the UK must obtain the prior consent of the Secretary of State for Trade and Industry before acquiring a newspaper (or newspaper assets) where the total paid-for daily circulation of the newspapers involved is 500,000 or more.

The Secretary of State is required to refer newspaper applications to the Competition Commission (CC) for a detailed report before deciding whether or not to consent to the transfer. There are, however, three exceptions to this rule:

The Secretary of State may consent to a transfer without a CC reference if he is satisfied that the newspaper is not economic as a going concern and that, if it to continue as a separate newspaper, the case is urgent (section 58(3)(a) of the Act).

The Secretary of State must consent to a transfer without a CC reference if he is satisfied that the newspaper concerned is not economic as a going concern and that it is not intended to continue as a separate newspaper (section 58(3)(b) of the Act).

The Secretary of State may consent to a transfer without a reference to the CC if he is satisfied that the newspaper being taken over has average daily sales of 50,000 or less (section 58(4) of the Act).

Newspaper transfers to companies or individuals who have no existing interests, either directly or indirectly, in newspapers circulating in the United Kingdom are not caught by the newspaper mergers legislation. Neither are transfers to newspaper proprietors whose newspapers, taken with those to be transferred, have an average paid-for circulation of less than 500,000 copies. Such transfers might however, be subject to the general merger provisions of the Fair Trading Act.

Cross-media Ownership

Disqualification from holding a licence to provide a national Channel 3 service or Channel 5 and a licence to provide a national radio service

Disqualification from holding a licence to provide a local radio service or local digital sound programme service and a licence to provide a regional Channel 3 service whose coverage area is to a significant extent the same

No person who runs one or more national newspapers with combined market share of 20% may hold a licence to provide regional or national Channel 3 service or Channel 5; or a national or local radio service

No person who runs one or more local newspapers with a combined local market share of 20% in a Channel 3 region may hold a licence to provide that regional Channel 3 service

No person who runs one or more local newspapers with a combined local market share of 20% in the coverage area of a digital programme service may hold a licence to provide that digital programme service

No proprietor of national newspaper(s) with a national market share of 20% or more may have more than a 20% stake in a regional or national Channel 3 service or Channel 5; or a national or local radio service

Disqualification from holding a licence to provide a local radio service by a person who owns one or more local newspapers with a local market share of 50% or more in the coverage area of the service, unless the radio service shares a potential audience with another local radio service (and two such radio services are not owned) and subject to a public interest test.

Limit on ownership of two overlapping local radio service licences for owners of local newspapers with market share of 20% in the coverage area provided one is an AM licence and the other is an FM licence and subject to a public interest test

Limit of three overlapping local radio service licences for owners of local newspapers with
market share of less than 20% in the coverage area, subject to a public interest test

Applications to hold a licence to provide a national Channel 3 service or Channel 5, a national radio service or a national digital sound programme service by a national or local newspaper will be subject to a public interest test

Applications to hold a regional Channel 3 service or a local radio service by a national or relevant local newspaper will be subject to a public interest test

Digital programme services shall not be provided for three months after the award of a licence to a national or relevant newspaper unless a public interest test is met

The matters to which the ITC and the Radio Authority shall have regard in determining the public interest test include:

• the desirability of promoting
– plurality of ownership in the broadcasting and newspaper industries
– diversity in the sources of information available to the public and in the opinions expressed on television, radio or newspapers

• economic benefits
• market effects