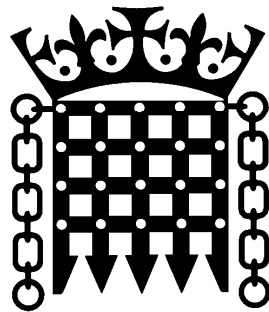


Broadcasting Bill [H.L.]

[Bill 88 1995/96]

Research Paper 96/48

15 April 1996



This Paper, together with Research Paper 96/49 : Conditional Access and Digital Television, is intended to provide background to some aspects of the *Broadcasting Bill (HL) 1995-96, Bill 88*.

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SUMMARY

Introducing the Bill on second reading on 16 January 1996, Lord Inglewood, Parliamentary Under Secretary of State, Department of National Heritage, said

"The Bill is very complicated, but reflects four key policy principles: first, to safeguard and encourage plurality and diversity; second, to maintain our unique tradition of public service broadcasting, including not only the public broadcasting corporations but also the independent sector; thirdly, to foster the competitiveness of the UK broadcasting industry, which leads the world in digital technology; and, finally, to maintain standards of impartiality, taste and decency.

It has not been possible within the scope of this Paper to deal with more than a few of the main themes, outlining the factual background and setting the provisions of the Bill in the context of the debates in the House of Lords. Here there were lively debates on Welsh and Gaelic broadcasting and broadcasting for the disabled, which it has not been possible to cover.

The Paper looks at the technology of digital television and the licensing of new channels, present plans and future possibilities for media ownership, the privatisation of the BBC's transmitter network, availability to all of "listed" sporting events, the Channel 4 funding formula and the amalgamation of the Broadcasting Standards Council and the Broadcasting Complaints Commission into a single body to deal with complaints involving questions of taste and decency and of unfair treatment and invasion of privacy.

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I Digital Terrestrial Broadcasting (Part I)

A. Digital television : the technical background

Currently, television services are based on "analogue" technology. This means that the television pictures are represented in the form of a continuously varying electrical signal. When received by a television set these signals are converted into a picture made up of 625 horizontal lines with alternate lines being broadcast every 1/50th of a second (the PAL standard)¹. This means that 25 TV frames are broadcast every second.

Digital television, on the other hand, is represented as a series of ones and zeros called binary digits or bits. Digital technology is not new; most people are familiar with the fact that music can be stored in digital form on a compact disc or in analogue form on a cassette. What is new, is that these digital techniques can now be applied to television pictures. Until recently it was thought that so much space would be required to store a digital version of a television programme that digital TV would not be a practical proposition for a number of years. However, recent advances in "digital compression" means that digital pictures can now be squeezed into far less space than ever considered possible.

If digital compression techniques are used together with digital transmission techniques then digital programmes can be broadcast over the airwaves taking up much less space (frequency spectrum) than analogue programmes. For instance, it should be possible to squeeze anywhere between four and eight digital programmes into the space occupied by one analogue channel. This is not the only advantage. Currently in the UK there are 44 frequency channels for television programmes but these can only be used to provide 4 national television services because analogue services in adjacent areas must use different channels to avoid interference problems. These problems are not nearly so severe with digital television and so if certain technical difficulties are overcome it might be possible for each of the 44 channels to be used to carry separate services. Consequently, if analogue services were stopped overnight then there would be scope for the introduction of a great number of different digital television services, possibly as many as 100. Although this is not a practical proposition, there is still scope for the introduction of digital television alongside existing services.

¹ There is more than one standard for analogue television. For instance, in the USA television pictures are made up of 525 lines with 30 frames broadcast every second (the NTSC standard)

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The scope for introducing digital television services alongside existing analogue services was examined in research commissioned by the Independent Television Commission (ITC) under the SPECTRE² project³. This research proposed the use of so-called "taboo" channels for carrying digital services. These are channels which are not available for analogue broadcasting in a given area because they would cause interference with other services, but which could be used for low-power digital transmissions. The research found that about 80% of the UK population would be able to receive at least 4 digital channels each carrying a number of services if transmissions were broadcast from the main transmission sites only.

The number of digital services available and their associated picture quality depends on three factors: the amount of frequency spectrum or bandwidth made available for digital services; the amount of digital capacity that can be carried in that bandwidth; and the amount of digital capacity allocated to each television service.

The bandwidth of a telecommunications system is simply a measure of the amount of information it can carry: its capacity. All telecommunications signals are transmitted at a particular frequency. For instance, *Radio 4* is broadcast across the UK on a longwave frequency of 198 kHz. A hertz (1 Hz) is just one oscillation or one cycle in a (radio) wave every second. So the radio wave used to broadcast *Radio 4* oscillates 198,000 times a second. In fact it is slightly misleading to say that a radio wave has a particular frequency. To be able to carry any information, a wave must actually contain a spread of frequencies within a certain band - the bandwidth⁴. The greater the frequency spread or bandwidth is, the greater the information which can be carried. The quoted frequency is simply the frequency at the centre of this band. For example, the bandwidth required to transmit a telephone call is about 4,000 Hz (4 kHz) whereas the bandwidth of a broadcast analogue TV signal is 8,000,000 Hz (8 MHz)⁵.

The capacity of a digital transmission system, such as an optical fibre cable, is measured in bits per second (bit/s) rather than as a frequency bandwidth measured in hertz (Hz) because such systems carry digital information rather than analogue signals. The term *bit* is shorthand for a binary digit, which can either be a 0 or a 1. Bits are the units used in all digital applications and computing. For instance, the information stored on a musical compact disc is represented in bits. The number of bits required to transmit a television picture depends on the quality (or resolution) of the image.

If digital television services are broadcast over the airwaves, then the digital information has

² SPECTRE - Special Purpose Extra Channels for Terrestrial Radiocommunication Enhancements

³ ITC *ITC Discussion Document on Digital Television* June 1993 Technical Annex

⁴ Brown R, *Telecommunications: The Booming Technology* 1969 p.93

⁵ 1 kHz = 1,000 Hz and 1 MHz = 1,000 kHz = 1,000,000 Hz

to be squeezed in to a particular bandwidth. The amount of digital information which can be carried in a given bandwidth depends on the way in which the digital information is encoded or modulated. Using a complicated modulation scheme it is possible to have very high bit-rates. However such signals would have to broadcast at high power causing interference to traditional analogue TV signals and they would also only be capable of being received properly by roof-top aerials rather than set-top aerials used on portable TVs. Because of these difficulties, the Government has proposed the use of a modulation scheme⁶ which would allow a data rate of 18 Mbit/s (millions of bits per second) to be carried in the same 8 MHz bandwidth as a single analogue TV channel. Further information on modulation schemes and digital compression can be found in Library Research Paper 94/83 on *Digital and High Definition Television*.

The number of digital services which it will be possible to carry in this 18 Mbit/s data stream will depend on the degree of digital compression used. Using a high compression ratio it is possible to minimise the bit-rate required for each service, however the picture quality will suffer as a result. Details of the data rates which can be achieved with digital compression for different types of television services were published in an ITC discussion document on digital television ⁷:

1. Based on the current state of the art (as considered, for example, in the ISO/IEC Moving Picture Experts Group (MPEG)), some examples of the picture quality which is likely to be available from a particular compressed digital capacity as follows (the units used to express digital capacity are millions of binary digits per second - Mbit/s):

(i) Studio high definition (HDTV) quality (1,250 lines) with no perceptible degradations	40 Mbit/s
(ii) HDTV quality with some distortion on critical scenes	20 Mbit/s
(iii) 625 line studio-quality with no perceptible degradation	10 Mbit/s
(iv) 625 line studio-quality with some distortion on critical scenes	5 Mbit/s
(v) Reduced quality (312 line) with no perceptible degradations	2.5 Mbit/s
(vi) Reduced quality (312 line) with some distortion on critical scenes	1.2 Mbit/s

As a guide for comparison, the fourth example here (5 Mbit/s) is often considered as roughly equivalent to PAL and the sixth (1.2 Mbit/s) as roughly equivalent to home video (VHS) quality (although the nature of the distortions which occur in the digital and analogue systems is very different in both cases)...

⁶ Known as 16 QAM

⁷ ITC *ITC Discussion Document on Digital Television* June 1993 Technical Annex p.1

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Consequently, it should be possible to carry at least three PAL quality television services with a data rate of 18 Mbit/s or around eight lower quality services. The actual data rate required for a given service will depend on the type of programming carried. For instance, a studio based discussion programme would require a much lower data rate than coverage of the Grand National.

Earlier developments in digital television

In June 1993 the ITC published a *Discussion Document on Digital Television* which suggested that if taboo channels were used for digital television then about 80% of the population would be able to receive at least 4 channels if transmissions were broadcast from just the main transmission sites. The document suggested three possible strategies for the gradual introduction of such services over a number of years: simulcasting; new services; and a combination of simulcasting and new services.

Simulcasting: "Under this model existing terrestrial broadcasters (ie, Channel 3, Channel 4, S4C and the BBC and - if implemented on an analogue basis - Channel 5) would be given the option of broadcasting their service in parallel on a digital channel during a transition or 'simulcasting' phase before the cessation of PAL transmissions."

New services: "This model is based on the premise that any new digital channels should be made available to any prospective users, with none being set aside for simulcasting. Existing broadcasters who wished to simulcast would have to bid like anyone else for the necessary digital channels."

Simulcasting and new services: "The third model combines simulcasting with the availability of new digital services. It is essentially a restatement of the simulcasting model, but recognising that in many areas of the UK more digital terrestrial channels are available than necessary to fulfil simulcasting requirements. Under this third model these additional channels would not lie fallow but would be made available for new services as quickly as possible."

During 1993 the future of digital television in the UK became inextricably linked with the future of Channel 5. In preparation for the introduction of Channel 5, the ITC drew up a 33 transmitter plan which was cleared internationally, allowing coverage of approximately 74% of the UK population⁸. However, when Channel 5 was advertised in April 1992, only one company submitted a bid for the licence and in December 1992 the ITC announced that the licence would not be awarded as it did not believe that the applicant would be able to maintain its proposed service throughout the 10 year licence period. In July 1993 the ITC published a paper on *Consultation Of The Future Of Channel 5*. This sought views on whether the Channel 5 licence should be re-advertised, whether the plan for a single national service should be replaced with several local stations, or whether the Channel 5 frequencies should be used for digital television. The paper made the following comments about the digital television option:

⁸ ITC *Consultation On The Future Of Channel 5* July 1993 p.2

"28. The ITC issued a separate discussion document on 28 June 1993 which deals with implementation strategies for digital television. One possibility considered in that document is that the frequencies currently set aside for Channel 5 (mainly UHF channels 35 and 37) might be used for digital television, either to improve the coverage available for a digital simulcast version of existing services, or to provide more scope for the introduction of new services digitally, or for some combination of the two.

"29. One possibility under this option is that Channel 5 itself might be used as a vehicle for the introduction of digital terrestrial television in the UK. Indeed the Invitation to Apply issued in April 1992 did not rule out the possible use of digital transmission for Channel 5. The ITC's view, however, subject to comments received in response to this consultation and to the discussion document on digital television, is that the Channel 5 of the Broadcasting Act 1990 is not the most appropriate vehicle for the introduction of digital television. Channel 5 has been framed as a single service which carries a number of programme obligations... Given the wide opportunities and the flexibility offered by digital techniques, the need for a coherent introduction strategy for digital television and the likely timescales involved, it appears to the ITC that new legislation would be more appropriate for the introduction of terrestrial services on a digital basis..."

In February 1994, the ITC announced that following the public consultation on the issue it considered that there was "a strong case for re-advertising the single national licence for Channel 5"⁹. However, it went on to state that "before the Commission can take a firm decision to re-advertise it needs confirmation from Government that the necessary frequencies will remain available, ie, that the Government accepts that a Channel 5 service is not incompatible with a longer term strategy for digital terrestrial television".

The Government's view on digital television was set out in its Competitiveness white paper¹⁰:

"The Government has a particular role in the terrestrial means through its control of radio frequencies. Digital technology is far more efficient than analogue technology. If there is a firm commitment from broadcasters to introduce digital terrestrial television services at an early date, the Government would be prepared to give priority to frequency channels for digital technology over analogue technology. This would secure the advantages of digital technology as rapidly as possible."

The statement that "the Government would be prepared to give priority to" digital technology was clarified by a written parliamentary answer from Peter Brooke, the then Secretary of State for National Heritage¹¹:

The Government will continue to look at how best to take advantage of the opportunities this [digital] technology offers. Studies are continuing into the feasibility of launching an analogue Channel 5 without prejudicing the development of digital terrestrial television in the United Kingdom, and an announcement on this issue will be made before long. These studies are based on technical work which has recently become available. The relevant sentence in the "Competitiveness" White Paper is overtaken

⁹ "Future of Channel 5: Current position" *ITC News Release 13/94* 21 February 1994

¹⁰ *Competitiveness Helping Business to Win* Cm 2563 May 1994

¹¹ HC Deb 24 May 1994 cc 98-99W PQ from Gyles Brandreth MP

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by this answer.

The Government finally announced its plans for Channel 5 and the introduction of digital terrestrial television in July 1994¹²:

- an analogue Channel 5 service giving coverage of more than 60 per cent of the population, with the option of reaching at least 80 per cent and possibly over 90 per cent with digital simulcasting,
- as many as 12 digital terrestrial television services could be provided: up to four would be broadcast as a Single Frequency Network, using frequency Channel 35, with coverage of more than 95 per cent of the population; a network of up to four more services could have 90-95 per cent coverage and there could be up to four more services with 80 per cent coverage,
- regional variations would be possible on eight of these services, but not on the Single Frequency Network,
- four of these digital services would be used to simulcast the present four terrestrial television channels, and another would be available to a successful applicant for Channel 5 to extend its coverage.

B. Government policy document on digital broadcasting

In August 1995 the Government published its policy document on *Digital Terrestrial Broadcasting*¹³. The main points of the paper were¹⁴:

- the initial availability of six frequency channels ('multiplexes') for digital terrestrial television, each able to carry at least three television channels, and at times possibly more, with potential coverage ranging from 60 - 70% to over 90% of the UK population;
- the existing national television broadcasters -- BBC, ITV, Channel 4, (and Channel 5 when it is established) -- will be offered guaranteed access to digital frequencies, with a guaranteed joint place for Channel 4 and S4C on condition that they seek to make the full Channel 4 service available as far as possible throughout Wales, while maintaining the availability of the S4C service in Wales;
- the great majority (at least 80 per cent) of the programmes broadcast on existing analogue channels should also be broadcast on the equivalent digital services;
- the competitive award of licences by the Independent Television Commission (ITC)... to operate multiplexes rather than individual channels ;
- applications to run a multiplex to be assessed on the basis of the speed and geographical spread by which digital services will be made available across the UK, on the support provided to encourage early consumer take up of digital services, and on the variety of television channels or radio stations on offer;
- the Government will require multiplex operators to make payments to the Exchequer once their operation becomes profitable. However, in recognition of the significant initial investment required in

¹² "Peter Brooke paves way for new television stations" *Department of National Heritage New Release* 14 July 1994

¹³ *DNH Digital Terrestrial Broadcasting: The Government's Proposals* August 1995 Cmnd 2946

¹⁴ "Digital broadcasting: The Government's proposals" *DNH Press Release* 10 August 1995

infrastructure and other start-up costs, the Government may waive any payment to the Exchequer for the first licence period. The Government would welcome views on whether the size of payment should be a further criterion in the licence allocation process;

- the first multiplex licences to be issued for a period of 12 years. The Government is minded that no single company should control more than two multiplexes, but seeks further views on this;

The policy document contained the following explanation of multiplexes:

2.15 At the moment, using analogue technology, frequencies are allocated to individual broadcasters. A whole frequency channel is needed for one television channel. Digital technology changes this, by allowing several television channels to be broadcast on the same frequency channel. The television channels are combined using computer technology known as 'multiplexing'.

2.16 If a frequency channel for digital broadcasting were allocated to a single broadcaster, that would mean allocating each broadcaster the equivalent of at least three television channels and potentially many more. The spectrum would effectively be in the control of perhaps only six broadcasters, so limiting opportunities for new broadcasters and for competition, and constraining the variety of programmes on offer to the viewer.

2.17 Frequency channels for digital terrestrial television will therefore be allocated to the providers of the multiplexes which bring together, prior to transmission, the batch of programme services on each frequency channel. Although imperceptible to viewers, the multiplex provider will be an intermediary between them and the broadcasters. To apply for the right to use a frequency channel, a multiplex provider will therefore need to have in place contracts with a number of broadcasters, each supplying one or more television channels to be broadcast through the multiplex.

2.18 Commercially, the multiplex provider will play a crucial role in the development of digital terrestrial broadcasting. It may be asked to organise the subscription management services for the pay-TV broadcasters. It may brand and promote the digital terrestrial broadcasters. The multiplex provider may also manage the 'trade' in digital capacity between broadcasters on a commercial basis (for example, when a broadcaster needs extra quality for special events). It will get a return on its investment through commercial contracts with the broadcasters on its multiplexes and with any licensees who provide any additional services.

C. *Broadcasting Bill* proposals

Following consideration of the responses to its policy document, the DNH published the *Broadcasting Bill* in December 1995 together with the details of its amended plans for digital terrestrial television¹⁵:

- all existing terrestrial broadcasters, including Channel 5 (C5), would be offered half a multiplex (9 Mbits/second) -- they would be required to provide 100 per cent simulcast of analogue services but would then have the flexibility to develop extra channels, widescreen television services or pay-TV services;
- the BBC would be awarded its own multiplex, with the widest geographic coverage, regulated under the Charter and Agreement rather than by the ITC;

¹⁵ "Virginia Bottomley announces new proposals in Broadcasting Bill" *DNH News Release 251/95* 15 December 1995

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- Channel 3 (C3) would share the multiplex with the next widest coverage with Channel 4 (C4);
- in Wales, the Welsh Broadcasting Authority (S4C) and C4 would each be offered a quarter of this multiplex (4.5 Mbits/second), offering Welsh viewers both a full C4 service and an enhanced S4C service;
- C3, C4 and, in Wales, S4C would jointly control their multiplex;
- in return for greater capacity, S4C would have to simulcast its peak hour Welsh language service but would not be required to broadcast C4 services at other times, so would be able to provide more programmes aimed specifically at the Welsh audience;
- C5 would be offered half the multiplex with the third greatest geographic spread, the ITC ensuring that the chosen multiplex operator provided fair, reasonable and non-discriminatory terms;
- guaranteed place for Teletext to simulcast its existing analogue services;
- multiplex providers would be able to control up to three of the six available television multiplexes;
- no cash bids for the multiplex licences, and no payment to the Exchequer for the first 12-year licence period;
- multiplex licence could be 'rolled-over' at the end of the first licence period, subject to satisfactory performance and compliance with new conditions, eg payment to Exchequer of a percentage of qualifying revenue and completion of transmission 'roll-out';

In an article in the *Financial Times*, the journalist Raymond Snoddy commented¹⁶:

"Four months ago when Mrs Virginia Bottomley, the national heritage secretary, announced plans for the launch of digital terrestrial television, she said with a flourish that it would be like the transition from black and white to colour television.

Yesterday a more restrained Mrs Bottomley, after listening to four months of criticism of the government's white paper on digital terrestrial, emphasised: 'Our digital proposals are rooted in a realistic appraisal of the economics of digital broadcasting.'

She conceded yesterday that building an audience, creating a national transmission system, investing in programmes and marketing new services and technology would all involve 'substantial sums of capital', and that there was no guarantee of success.

Yet the government has gone a long way towards meeting its critics and has considerably improved the chances that digital terrestrial will be launched some time in 1997. Digital terrestrial offers the possibility of broadcasting 18 to 20 channels over most of the country from land-based transmitters to conventional television aerials, although consumers will need a digital decoder likely to cost between £300 and £400.

On offer are six multiplexes, or blocks of channel capacity. Each multiplex can broadcast at least three television channels. More can be broadcast if the programmes are 'talking heads' in the studio rather than live sport or feature films.

Perhaps the most fundamental of the changes is that the government has decided to give the existing broadcasters much more digital capacity as of right than in the white paper proposals.

The BBC will control an entire multiplex and ITV, Channel 4 and Channel 5 will each get half a multiplex each. In return the broadcasters will have to broadcast their existing channels in their entirety

¹⁶ "Broadcasters put in the picture for TV revolution" *Financial Times* 16 December 1995

in digital although they will also now be able to offer extra subscription services. The BBC said that it wanted to broadcast its two channels in digital wide-screen format and look at the possibility of introducing a 24-hours a day television news service and extra parliamentary coverage.

Although the concept remains of a separate multiplex holder, which would charge broadcasters for the service, a single company will be able to hold three multiplexes instead of the two proposed..."

Award of digital licences

The ITC will license television multiplexes, the Radio Authority will license independent radio multiplexes. Sch. 2 Part III para. 5 provides that no one person may at any time hold more than three licences to provide television multiplex services. Para. 6 provides for a points system limiting any broadcaster to around 25% of new digital services. For radio, under para. 10, broadcasters are to be limited to one national station and one (or in some cases two) local stations per multiplex. Digital sound programme services have been added to the points system table reproduced on p.26 and the 15% limit also applies. On second reading, Lord Inglewood said "To encourage investment, there are no constraints on cross ownership between multiplex providers, broadcasters and the providers of conditional access systems. A transmission provider may also be a multiplex provider".¹⁷

The ITC will license television multiplexes according to criteria set out in clause 8 of the Bill. As presented, the Bill provided that the Commission should have regard to the extent of the coverage area and timetable for putting in place the infrastructure; the applicants' ability to maintain the service during the licence period; the capacity of the services proposed to appeal to a variety of tastes and interests; the applicant's proposals for assisting viewers and listeners to obtain equipment capable of receiving digital broadcasting and whether the applicant has dealt with persons offering programme services in "a manner calculated to ensure fair and effective competition in the provision of such services".

In committee, on 6 February 1996, Lord Donoughue had moved amendments to insert quality criteria. Lord Inglewood explained that what was needed for the successful launch of digital services was a light regulatory régime:¹⁸

For digital terrestrial television to succeed, investors need to be able to put on the programmes that people want to watch and will be prepared to pay to watch. If statute and the regulator force them into a tight corset having to meet a galaxy of minimum standards for this, that and the other, they simply will not bother. They will not invest. That means that digital terrestrial television will not happen. It will remain a concept so fine and so pure that no actual service violates it, as there will not be any. The best can always be the enemy of the good, and in this instance, we believe, would slay it.

¹⁷ 16.1.96 HL Deb. 568, c.471

¹⁸ HL Deb. 569 c.211

A further attempt was made at report stage to place quality requirements on the face of the Bill. On 5 March 1996, Baroness Jay of Paddington moved amendments which again were resisted.¹⁹ However, on the same occasion, Lord Inglewood introduced amendments to provide a new overarching requirement, now clause 8(1), for the ITC to award licences having regard to the extent that each applicant would "Promote the development of digital broadcasting in the UK." He said:²⁰

The amendments which I have tabled address this issue. In doing so they provide the regulators with a framework, a common currency, in which to weigh the separate elements of the proposals put to them by the applicants for the multiplex licences. The regulators will therefore be able to look at the applicants' proposals in the round and judge them by looking at the contribution they will make to the successful launch of digital terrestrial broadcasting as a whole. This means that the ITC can look at proposals for promoting and encouraging the acquisition of set-top boxes, and consider whether they are likely to lead to a cohesive rather than a fragmented market. They can look at whether multiplex providers intend to co-operate with each other on other aspects, too; for example the roll-out of transmission infrastructure, where economies of scale might be achieved through co-operation with other multiplex providers.

In their briefing paper on the Bill, the ITC points out that it would not be lawful for them to take account of a number of factors which could increase the appeal of digital terrestrial television to viewers; namely applicants' own proposals for the inclusion of quality programming, original production and free-to-all services. They have no wish to duplicate the detailed positive programme requirements imposed upon existing terrestrial services, but regard it as "perverse" neither to encourage applicants to add elements to their applications which viewers would value, nor allow the ITC to take such offers into account.

ITV had not been in favour of adding any quality requirements, and supported the Government's view that the principle criterion should be variety.

Multiplex licences will run for twelve years, with the opportunity to renew for twelve more (clause 15).

D. Digital radio services

The development of digital radio - digital audio broadcast (DAB) - dates back a number of

¹⁹ HL Deb. 570, c.211 ff

²⁰ HL *ibid.* c.210

years and was the subject of a European collaborative research programme under the EUREKA programme.

The Radio Authority published an "Initial Policy Statement" on DAB in October 1992, and in February 1993 the DTI announced the establishment of a national DAB forum²¹. This was followed in January 1994 by announcement from the DTI that the frequency band 217.5 MHz to 230 MHz was to be made available in the UK for DAB services²².

The Radio Authority, which regulates independent radio, published a second policy statement in February 1995. This reported on progress that had been achieved since the last statement and on the timescale for the introduction of DAB services. It suggested that "the implementation of a proper, progressive development for ILR [Independent Local Radio] can only be based on the availability of realistically priced consumer equipment".

The Government's policy document on *Digital Terrestrial Broadcasting* announced that seven multiplexes each capable of carrying six stereo radio stations would be made available. One would be allocated to the BBC for national services and another for independent national radio (INR) services). The other five have been reserved for local services²³. The Radio Authority published its response to the policy document on 18 October 1995²⁴. Some of its main points are reproduced below:

- Guaranteed places for the three analogue INR licensees should be used for simulcasting purposes for at least 80% of the time initially;
- National analogue licences should be renewable by negotiation in similar manner to Channel 3 licences;
- Exchequer payments related to qualifying revenue should be at a rate pre-set by the Authority and should not apply until DAB has established itself as a viable medium;
- The Authority should be enabled to specify requirements at the application stage to ensure open access for prospective programme providers and minimum delay in the processing of applications;
- The basis on which multiplex licences (national and local) are to be renewed at the end of their 12 year term should be set out in the legislation.

In publishing the *Broadcasting Bill* on 15 December 1995, the Secretary of State, Virginia Bottomley also announced that the Government intended "to bring forward proposals which would"²⁵:

- allow Classic FM, Virgin and Talk Radio to renew their analogue licences for a further eight years if they took up their guaranteed digital radio places;

²¹ "National forum to be established to promote digital audio broadcasting" *DTI Press Notice P/93/82* 16 February 1993

²² HC Deb 19 January 1994 c.649W

²³ An announcement that the seventh multiplex would be used for local services was made on 7 December 1995

²⁴ "Digital Terrestrial Broadcasting: Radio Authority response to the Government's proposals" *Radio Authority Press Release 103A/95* 27 October 1995

²⁵ "Virginia Bottomley announces new proposals in broadcasting bill" *DNH News Release 251/95* 15 December 1995

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- give local stations investing in digital the opportunity to renew their analogue licences for a further eight years;

The Radio Authority made the following comments on the publication of the Bill²⁶:

The Radio Authority broadly welcomes the provisions relating to Independent Radio contained within the new Broadcasting Bill and the additional policy proposals which Government intends to introduce during the passage of the Bill...

The Authority notes with approval the intention to allow national and local licensees to extend their licences for a further term if they participate in DAB, although it is surprising that no performance threshold is proposed for INR. We had urged Government to introduce a less restrictive regime for local DAB licences, and are glad to note that most local companies will be able to apply for two places rather than one on multiplexes in any local area.

The Government's clear determination to guard against local monopolies is welcomed by the Authority, although the details of proposed local newspaper ownership of local radio licences may need further consideration. The Authority commends the Government's decision not to allow a company to hold more than one licence on a single waveband in a large area.

Introduction of DAB services

The BBC has been in the vanguard of introducing DAB services announcing in September 1994 that it was to start DAB broadcasts in September 1995²⁷. In November 1994, the BBC announced that its DAB service would carry the five existing networks as well as extended parliamentary and sports coverage²⁸. The BBC actually started broadcasting DAB services in the London area on 27 September 1995 with a projected roll-out to 60% of the population by 1998. NTL has also conducted a number of trials for DAB services. The most recent of these started in London on 6 March 1996 involving 7 commercial services: Classic FM, Heart 106.2, Kiss 100 FM, Melody FM, Sunrise Radio, Talk Radio UK and Virgin 105.8 FM²⁹.

The Government announced on 17 August 1995 that frequencies for DAB had been cleared for use across Europe. Two bands are to be used, Band III (VHF) which will be used in the UK and the L-band at 1,500 MHz. Receivers will be designed to work in both frequency bands. This was followed by an announcement in February 1996 that UK DAB services would be able to remain permanently at the frequencies already allocated³⁰. Previously it had been envisaged that DAB services might have to transfer to the frequency band currently occupied by FM services following the switch off of these services at some point in the future ("analogue switch off"). The DTI said that

²⁶ "Radio authority comments on publication of Broadcasting Bill" *Radio Authority Press Release 126/95* 18 December 1995

²⁷ "BBC plans to start digital radio in 1995" *Financial Times* 13 September 1994

²⁸ "BBC to launch new digital service in 1995" *BBC Network Radio Press Release* 24 November 1995

²⁹ "Commercial radio broadcasts on DAB in London for the first time" *Radio Authority News Release 25/96* 6 March 1996

³⁰ "Boost for digital radio broadcasting" *DTI Press Release P/96/130* 21 February 1996

A strategy for the use of the spectrum in Band II freed up when national analogue FM stations eventually close down will be developed closer to the time. This will exploit the fundamental characteristics of this part of the radio spectrum which make it ideally suited to delivery of services to people on the move.

The largest problem with the introduction of DAB services has been the "chicken and egg" problem; broadcasters are unwilling to start DAB services until receiving equipment is available and consumer electronics companies have little incentive to manufacture equipment until DAB broadcasts have started. The BBC has tried to force the issue by starting broadcasts even though realistically priced receiving equipment is unlikely to be available until 1997.

In awarding national radio multiplex licences, the Radio Authority is to have regard to the same requirements set out in clause 41. For local radio, the emphasis is on the extent to which digital sound broadcasts would cater for the tastes and interests of the people living in the area and would broaden the range of available programmes. The requirement to further the development of digital sound broadcasting does not apply here.

E. Multiplex frequency allocations

Currently, the ITC is drawing up transmitter plans for broadcasting digital television services with the help of the BBC and NTL (the privatised arm of the old IBA, transmitting ITV and C4). It is hoped that the plans "covering the main transmitting stations and the thirty or so major relays are expected to be completed by the end of April 1995"³¹. The Government's policy document made the following comments about this:

A10 During the first stage of development, digital terrestrial television services will be transmitted alongside the current analogue television services in the UHF spectrum, making use of spare and so-called 'taboo' frequency channels. Taboo channels cannot be used for analogue television because of interference, but they can for digital television which can be transmitted at much lower power.

A11 In July 1994, the Government announced that as many as 12 digital terrestrial television services might be available using Channel 35 as a Single Frequency Network providing four services to more than 95 per cent of the population, and eight other services from interleaved frequency channels allowing regional variations to around 80 per cent of the population. Without using Channel 35, the ITC now hopes to identify six interleaved frequency channels giving substantial national coverage, each capable of providing three programme services of excellent picture quality. Two channels might in the medium term be available to over 90 per cent of the population, two to over 80 per cent and two to between 60 and 70 per cent. These later ITC figures are for higher picture quality - 6 Mbits/s as opposed to 5 Mbits/s per service - within frequency channels of approximately 18-20 Mbits/s. More channels may become available with more local coverage. The use of Channel 35 remains an additional option, but more work remains to be done on the implications of using Channel 35 for the technical standards (and cost) of receivers.

In allocating frequencies to a particular multiplex there is a trade off between the geographical coverage which can be achieved and the maximum data rate that can be used for carrying services. The ITV Association has suggested that the multiplex it is due to share with

³¹ "Will write" letter to Gordon Prentice MP, 13 November 1995 (HC Deb 8 November 1995 c.895W)

Channel 4 (and S4C) is likely to be very crowded and it would be worth expanding the capacity of its multiplex to 24 Mbit/s by using a different modulation scheme for transmissions³². The use of more complicated modulation scheme could only be achieved at the expense of losing around 5% of coverage but the increased capacity would allow the multiplex to carry four widescreen services³³. This proposal is being given active consideration by the ITC³⁴.

Since the frequency planning for the new digital services has been based on the assumption that frequency Channel 35 will not be used, the question arises as to what Channel 35 is to be used for. This is of particular interest as the frequency channel was originally allocated to the analogue Channel 5 television service but was then withdrawn to allow for the introduction of up to four digital single frequency networks. The Department of National Heritage is still holding the frequency in reserve for possible use for such networks³⁵. The DNH believes that such a use is still a possibility, but developments mean that this is less likely than it once was.

In licensing multiplexers, the ITC will set targets for digital services to be made available by a specific time to a specific proportion of the populations. The Government have stated that³⁶:

"...The precise potential coverage of the available digital frequencies, and the speed and pattern of the introduction of services on them, will vary, and it is not possible as yet to predict the outcome of the licensing process the Bill will propose to introduce."

F. EC directive 95/47/EC on television standards and conditional access

In July 1995, an EC directive on the use of standards for the transmission of television signals was adopted³⁷. This requires Member States to take appropriate measures to promote the "accelerated development" of advanced television services and for all digital television services to use a transmission system which has been standardised by a recognised European standardisation body. In addition, the directive also introduced controls on the provision of conditional access systems for digital services.

The phrase conditional access is used to describe the system by which subscription television companies, such as BSkyB, control viewers access to different programmes and channels so that only those who have paid the appropriate charges can actual watch the service. This is achieved by scrambling the TV pictures, and having a set-top box which can only unscramble

³² 64 QAM instead of 16 QAM

³³ Barry Cox, ITV Association "Opportunities and Risks in digital for Commercial Broadcasters" CDG conference 7 March 1996

³⁴ Source: DNH, 3 April 1996

³⁵ Source: DNH, 11 April 1996

³⁶ HC Deb 27 November 1995 c.438W, PQ from Gordon Prentice MP

³⁷ Dir 95/47/EC, *OJL* 281 23 November 1995

the picture if the correct smart card is present and subscribers are up-to-date with their payments. There is concern that if a single company controlled the technology for conditional access systems in the UK it could act as a "gatekeeper" controlling which services could be made available to viewers using its systems. The Government have announced their intention to introduce regulations on conditional access using existing legislation and so have not included proposals in the *Broadcasting Bill*. Further information on this can be found in the accompanying Research Paper 96/49 on *Conditional access and digital television*.

Standards for digital terrestrial television have been drawn up by a trade grouping, the European Digital Video Broadcast (DVB) group which was formally established in September 1993³⁸. It now has over 200 member organisations in 25 countries including television manufacturers, broadcasters, satellite operators, governments and regulatory bodies. The Group approved standards for digital satellite television in 1994 and standards for terrestrial television were approved on 18 December 1995. These terrestrial standards have been submitted to the European standards body, ETSI, for approval. One of the main activities of the group was in determining the type of modulation scheme to be used for terrestrial broadcasts.

Most people will be familiar with the existence of modulation schemes through the fact that radio programmes broadcast on medium wave are amplitude modulated (AM) and VHF radio programmes are frequency modulated (FM). In conventional broadcasting, modulation is simply the process by which a carrier wave used for transmitting a signal, such as pictures or sound, is modified so that it can carry that signal. For instance, in amplitude modulation the carrier wave is modified so that the variation in its amplitude represents the signal that needs to be transmitted. There are three main modulation schemes which have been proposed for use with digital television. All of these schemes rely on altering one or two characteristics of the signal's carrier wave to encode the necessary digital information to transmit a television picture. These schemes can be combined with another technique called Coded Orthogonal Frequency Division Multiplexing (COFDM) which reduces the problems such as "ghosting" and interference with other television channels. As the Government's policy document noted, one of the main debates has been over the number of carriers used for transmitting the television signals using COFDM:

A17 One issue remains to be resolved. A choice of standard needs to be made for terrestrial digital television between a system where the digital signal is spread across 8000 carriers within the frequency channel or one where 2000 carriers are used. An 8000 carrier system would be able to support wide-area Single Frequency Networks (SFNs), possibly on a national scale. A 2000 carrier system would require an interleaved system of a number of different frequencies to achieve national coverage. A Single Frequency Network allows very efficient use of the spectrum, but interleaved systems using 2000 carriers could be introduced faster and would allow for cheaper receivers. In addition, there is scope, even with 2000 carriers, for many relays to operate on the same frequency as main transmitting stations, increasing the coverage of the signal. This will enhance the efficiency of interleaved networks.

³⁸ DG XIII, European Commission *Digital Video Broadcasting: A Volume of Technical Papers Accompanying the Commission's Communication* 1993 pp 416-422

This issue was resolved by treating the number of carriers as a user-specified parameter. In other words, standards for both 2,000 and 8,000 carrier systems were adopted. The Promotion and Communications Executive for the DVB Project, John Forrest of NTL, has stated³⁹:

"...Some proponents favoured an 8,000 carrier system which is well suited to single-frequency networks and hence more efficient spectrum utilisation. It favours the position of national broadcasters, but has the disadvantage of greater complexity and hence greater receiver cost and longer timescale of implementation. Other proponents favoured a 2,000 carrier system, less suited to wide-area single-frequency networks, but much less expensive to implement in receivers and realisable within a timescale for start of service by end 1997. The sensible way to proceed, since the issues were not technical, but political and commercial was to treat the number of carriers as a user-specified parameter. Thus the 2,000 carrier proponents may start implementation plans immediately in the knowledge that future 8,000 carrier receivers, if implemented, will satisfactorily handle the 2,000 carrier transmissions. Receiver price is a very important factor in the early launch, bearing in mind that the public will in Europe have a choice in receiving multi-channel programming from terrestrial, cable or satellite networks. Given that a specification has now been agreed, it will be possible to ensure in receiver design that very considerable commonality will exist in the functional blocks required to handle inputs from terrestrial, satellite, cable or MMDS delivery. Approximately three-quarters of the circuitry is common to all of these transmission methods."

In the UK, a decision has been taken to adopt a 2,000 carrier system rather than an 8,000 carrier system. With the standards having been finalised equipment suppliers can now start designing the set-top-boxes which will be necessary to receive and decode the digital broadcasts. It is hoped that prototype receivers would be available by the third or fourth quarter of this year. If matters proceed as planned, multiplex providers should be announced by the end of this year or early next year, so that they have just under a year to arrange transmission facilities for broadcasts to commence in 1997.

G. UK Digital TV Group

In August 1995, a UK industry forum for digital television was launched to "co-ordinate efforts to develop the technical systems necessary for digital terrestrial television services to become practical as quickly as possible"⁴⁰. The Group had eight founding members - BBC, BT, Channel 4, ITV, Motorola, NTL, PACE, Sony - but that has now grown to 27. Membership of the group is "open to all participants in the European DVB project who wish to play an active part in implementing digital terrestrial television in the UK". In a press release the Group commented:

"The founding members wish to emphasise that this is an open forum, not a commercial partnership or joint venture. The aim is to develop an open and competitive market in service provision, receivers and conditional access to ensure the rapid implementation of DTT services."

³⁹ In a paper on "The European Digital Video Broadcasting Project (DVB)" prepared for the IBC/CFG/EIP conference on *Digital Terrestrial Television* 7-8 March 1996, London.

⁴⁰ "UK industry forum for digital television" *Digital TV Group Press Release* 18 August 1995

H. Analogue switch-off

One of the crucial issues which will affect the take up of digital services is whether a date is fixed for the switch off of analogue transmissions. The Government's Command Paper did not specify a switch off date:

"2.37 The Government hopes that, in the long term, it will be possible to switch off the analogue signals in order to release part of the spectrum for other uses including, possibly, further digital services. That can only happen if the public service broadcasting, including regional variations, currently provided on analogue is equally widely available to viewers on digital television."

Following complaints from the broadcasting industry, the Government did go further than this on publication of the *Broadcasting Bill*³:

"The Secretary of State would review the date for 'switching off' analogue frequencies once 50 per cent of UK households were able to receive digital terrestrial television, or after five years of the first multiplex licence period, whichever was the sooner."

In a briefing note on the Bill, the BBC has commented⁴¹:

"The Bill itself does not contain any references to the cessation of analogue transmissions. However, in an announcement related to the Bill, the Government stated that it will review the progress that is made towards the analogue switch-off and issue a statement on the timetable for such action, it seems sensible. The review will take place either within five years, or when digital terrestrial television has a 50 per cent take-up -whichever is sooner.

"The BBC believes that this review will take place within five years, as it does not expect DTT to have secured a take-up rate of 50 per cent within that timescale.

"By setting this relatively tight timetable for the discussion of the analogue switch-off, the Government will help create a public expectation that the switch-off will occur, and will possibly do so quite soon.

"The Government believes that the analogue switch-off will offer the country a number of economic benefits, notably the ability to sell off the space that will be released by digital technology's much more efficient use of the spectrum.

"The Government has said that it will not sanction an analogue switch-off until digital is available to 'roughly the same proportion of the population now available to receive analogue'. Although the BBC might have preferred a firmer commitment to analogue switch-off, this should help to create the right climate for digital services."

On 6 February 1996, the Earl of Stockton proposed a new clause to provide that all analogue territorial transmissions should cease fifteen years from the commencement of digital territorial transmissions. He said:⁴²

⁴¹ BBC *Briefing Note: The BBC and the Broadcasting Bill* January 1996

⁴² HL Deb. 569 c.225-6

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The drawback to the softly-softly approach is that it does not, in itself, bring about a more rapid transition to all-digital television transmission. It prolongs the inefficient use of scarce spectrum resources, and defers the economic boost to the UK manufacturing, transmission and telecommunications industries that the Bill places in an enviably advantageous position. It also involves the broadcasters in prolonged increased costs from dual-running their transmissions on the two systems.

Lord Inglewood believed that it was a mistake to set a firm date, but indicated that the matter would be considered further. On report stage on 5 March he said that "It could well be that as we approach the end of the first multiplex licence period, we are in a position to prepare the ground for the end game in our analogue switch off strategy".⁴³ An amendment to deal with the question was not forthcoming at third reading because of pressure on parliamentary counsel's time, and would be brought forward "in another place".⁴⁴

⁴³ HL Deb. 570 c.219

⁴⁴ HL Deb. 570 c.1266

II Ownership (Clause 66 and Schedule 2)

A. The current position

The legislation governing media ownership is contained in the *Broadcasting Act 1990* (BA) and regulations made thereunder, and SS.57-62 of the *Fair Trading Act 1973*, which deals with newspaper mergers.

The main features of the ownership rules for **broadcasting** are as follows:

- nobody may hold more than two regional channel 3 licences and not both the London licences.⁴⁵

The Broadcasting (Restrictions on the Holding of Licences) Order 1991 (SI 1991/1176) had divided Channel 3 regional licences into 9 large and 6 small and provided that a person could not hold licences for two specified large areas. The distinction was abolished by the 1993 order which came into force on 1 January 1994, and allowed takeovers of Central by Carlton, LWT by Granada and Anglia by MAI which owns Meridian.

- nobody may own more than one national Channel 3 licence (breakfast channel).
- nobody may own more than one national radio licence;
- nobody may own more than thirty five licences to provide local radio services.

The 1991 order had specified 25 licences, but this limit was increased with effect from 25 July 1995 by the Broadcasting (Restrictions on the Holding of Licences) (Amendment) Order 1995, SI 1995/1924 .

⁴⁵ BA Sch. 2 Part III para 2(1)(a) and the Broadcasting (Restrictions on the Holding of Licences) (Amendment) Order 1993 (SI 1993/3199)

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In addition, no one may have more than 15% of the total number of points in the radio licensing system. The points system is calculated as follows in the 1991 Order:

<i>Category of Service</i>	<i>Points</i>
National Radio	25
Category A local radio	15
Category B local radio	8
Category C local radio	3
Category D local radio	1
Restricted radio service provided otherwise than for a particular event	1

- 2) For the purpose of the table a local radio service falls -
- into category A if the number of persons over the age of 15 resident in the area for which the service is provided exceeds 4.5 million;
 - into category B if the number of such persons exceeds 1 million but does not exceed 4.5 million;
 - into category C if the number of such persons exceeds 400,000 but does not exceed 1 million; and
 - into category D if the number, of such persons does not exceed 400,000.
- (3) In the case of a service provided on an amplitude modulated (AM) frequency the relevant number of points applicable to the service by virtue of the table shall be reduced by one third.

- there are no restrictions on the number of local delivery and cable licences that can be owned;
- there are no restrictions on the number of licensable programme or non-domestic satellite licences (the programme services for cable and satellite) that can be owned.

For the **press**, newspaper mergers are subject to the provisions of the *Fair Trading Act 1973*. A newspaper merger is defined as involving the acquisition of 25% or more of the voting rights in a newspaper proprietor, and requires the consent of the Secretary of State for Trade and Industry. As a general rule, qualifying newspaper mergers (eg involving circulation of over 500,000 copies per day) have to be referred to the Monopolies and Mergers Commission (MMC) for investigation. There are exceptions to this rule; for example, where the Secretary of State is satisfied that the newspaper concerned is "not economic as a going concern and as a separate newspaper" and where he is also satisfied that "if the newspaper is to continue as a separate newspaper the case is one of urgency", he *may* give his consent without an inquiry by the MMC (*Fair Trading Act 1973* s.58(3)(a)). Section 58(4) of the 1973 Act also provides that where the paid for circulation of a newspaper is 50,000 or less per day of publication, discretionary consent may be given without an MMC inquiry. Until 13 June 1995, this figure was 25,000 which was doubled by the Fair Trading Act (Amendment) (Newspaper Mergers) Order 1995, SI 1995/1351.

The considerations governing the exercise of discretion by the Secretary of State or consideration by the Monopolies and Mergers Commission are:

- (i) the accurate presentation of news and free expression of opinion. This consideration is identified as of particular importance in s.59(3) of the 1973 Act. Other considerations are not defined in the statute, but are set out in the DTI code of conduct on newspaper mergers:
- (ii) competition and concentration of ownership;
- (iii) efficiency and employment;
- (iv) other media interests.

For **cross-media ownership** the main features of the rules are that:

- national newspaper owners are tightly limited in their holdings in terrestrial TV and radio, and in domestic satellite broadcasters. Within each category they may hold up to 20% of one licensee, and then up to 5% of any others. They are allowed full control of non-domestic satellite broadcasters. (There are at present no domestic satellite broadcasters; the largest non-domestic satellite broadcaster is BSkyB);
- local newspaper owners are less tightly controlled, in being allowed to own regional TV or local radio broadcasters, provided there is no significant overlap between the licence area and the paper's circulation area;
- national TV and radio (and regional Channel 3) broadcasters are limited in their cross-holdings. They are limited to a 20% stake in national newspapers and non-domestic satellite licences; and
- producers may not own more than 25% of a broadcaster and vice versa if they are to qualify as independent producers for the purposes of the 25% UK independent production quota required of terrestrial broadcasters. Two or more broadcasters may hold up to 50% of the shares in producer without prejudicing this status.

The 25% was substituted for the original 15% as from 21 July 1995 by the Broadcasting (Independent Productions) (Amendment) Order 1995, SI 1995/1925.

B. The review of Media Ownership

On 24 November 1993, the Secretary of State for National Heritage, Peter Brooke, announced the relaxation of the rules on ownership of Channel 3 companies described above, and that a review of the wider question of cross media ownership would be undertaken.⁴⁶ On January 3 1994, he invited submissions on the various issues of cross media ownership, and on 17 January set out the scope of the review in a speech to the Media Society. He pointed out that in the developing multi-media context, the traditional distinctions between the various media, IT and telecommunications were increasingly irrelevant: "The Berlin Walls which separated communication, entertainment and information are crumbling".⁴⁷ National barriers were being broken down as well: "From being a highly regulated national resource, broadcasting is becoming a more loosely regulated international one". He demonstrated the difficulty of reconciling opposing views of the same situation: "It may not be possible to please everybody. One person's idea of excessive concentration is another's economy of scale. Concentration of interests or excess of influence is hard to define. Should the definition depend on shares of advertising revenue; on audience or readership; on excessive cross-subsidisation; or a combination of these and other considerations? Is plurality of ownership necessarily the guarantor of consumer choice? Or would experience suggest that some concentration actually enhances choice?".

C. The Policy Document: Media Ownership. The Government's proposals Cm. 2872, May 1995

The introduction to the policy document set out the justification for a media ownership régime "in order to maintain a diverse and pluralistic industry". It made a distinction between the economic objectives secured by competitive legislation and the wider objectives which make the media industry different from others:

1.4 General competition legislation is mainly concerned with securing economic objectives, although it can also encompass other non-economic objectives. However, wider objectives are important so far as the media are concerned. A free and diverse media are an indispensable part of the democratic process. They provide the multiplicity of voices and opinions that informs the public, influences opinion, and engenders political debate. They promote the culture of dissent which any healthy democracy must have. In so doing, they contribute to the cultural fabric of the nation and help define our sense of identity and purpose. If one voice becomes too powerful, this process is placed in jeopardy and democracy is damaged. Special media ownership rules, which exist in all major media markets, are needed therefore to provide the safeguards necessary to maintain diversity and plurality.

The results of the consultation exercise were briefly described as follows:

4.2 Support for current ownership restrictions was expressed, on commercial and public interest grounds, by smaller companies, consumer interests, trade unions and a number of independent media experts. The regulatory authorities tended to take the middle ground, arguing for some relaxation of

⁴⁶ HC Deb. 233 c.58W

⁴⁷ DNH Press Notice 5/94, 17.1.94

the ownership rules coupled with the maintenance of safeguards to protect diversity and plurality.

4.3 Reliance on competition legislation to prevent excessive concentration was generally favoured by the larger newspaper and media companies, although some expressed a preference for a managed, evolutionary process of liberalisation. Medium-sized and smaller companies generally valued their independence, and a media ownership regime for the preservation of plurality. They also argued that size was not necessarily essential for success. In general, newspaper companies argued the case for their control of broadcasters; terrestrial broadcasters wanted access to satellite channels; and radio companies wanted simplification of the rules governing their sector. Consumer groups, advertisers, academics and trade unions emphasised the need to protect diversity, and to look beyond what they considered to be exaggeration in much of the current multimedia excitement.

The National Heritage Department's original proposals identified main points for discussion and proposed, in advance of the long term proposals, a package of primary and secondary legislative changes to liberalise media ownership regulation while safeguarding the public interest in plurality of media ownership. This package would

- allow cross control between national newspaper companies with less than a 20 per cent share of total national newspaper circulation and television companies, up to a limit of 15 per cent of the total television audience, and subject to a limit of 2 terrestrial television licences. The new rules to apply, reciprocally, allowing TV companies to acquire interests in newspapers on the same basis;
- require proposals for cross control between TV and newspaper companies to satisfy two important safeguards;
 - any such investment to secure the consent of the Independent Television Commission (ITC), which would have the power to restrict transactions which they deem to be contrary to the public interest, against criteria set out in legislation;
 - no cross control allowed between newspaper and TV companies where the newspaper companies' regional titles account for more than 30 per cent of regional newspaper circulation in the relevant ITV region;
- introduce parallel arrangements for cross control between newspapers below the 20 per cent threshold and radio companies, subject to Radio Authority consent, and a local threshold of 30 per cent newspaper circulation;
- abolish the restrictions on ownership between terrestrial, satellite and cable television services, subject to the 15 per cent limit on total television audience;
- restrict terrestrial television ownership for those satellite and cable television companies in which a national newspaper above the 20 per cent national circulation threshold already has more than a 20 per cent stake;
- lift the 50 per cent limit on the combined Channel 3 holdings in ITN;
- remove the numerical limit on the number of local radio licences subject to a limit of 15 per cent of the total radio points system, and subject to a limit of 1 national

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licence; and,

- clarify the definition of 'control', to ease enforcement of media ownership rules.

Certain changes were to be made by delegated legislation. As described above, these have now been enacted and

- increase the number of local radio licences which may be held from 20 to 35, prior to the abolition of the limit in the primary legislation;
- relax the limits on holdings of category A and B radio licences;
- raise the equity ceiling between independent producers and broadcasters from 15 to 25 per cent and liberalise the definition of an independent producer, so that EU independent producers can own non-EU broadcasting companies; and,
- double the circulation threshold for newspaper referrals to the Monopolies and Mergers Commission (MMC) from 25,000 to 50,000.

The Government also announced longer term proposals, on which consultation will continue, with a view to:

- abolishing the existing structure of detailed rules;
- measuring media markets by revenue or audience share, and weighting sectoral markets according to their relative influence;
- setting ownership thresholds at:
 - 10 per cent of the total UK media market
 - 20 per cent of regional media markets in Scotland, Wales, Northern Ireland and the regions of England
 - 20 per cent in each sectoral market (ie television, newspapers and radio);
- requiring existing or new concentrations above these levels to be subject to approval by an independent media regulator who would be charged (against criteria set out in legislation) with determining whether they were in the public interest; and,
- leaving the regulation of concentrations below the thresholds to competition law alone.

In an article in *Media Law and Practice* vol 16 no 2 1995, Gillian Doyle argued that controls

over access rather than ownership might be appropriate in the future.⁴⁸

Concerns about the competitive position of domestic media firms can overshadow the public interest case for ownership restrictions to promote pluralism and diversity within the media. By and large, the industry's case for a relaxation of cross-ownership regulations is expressed without any persuasive acknowledgement of the political rationale for limiting concentrations in media ownership. Also, it can be argued that with the arrival of an information superhighway pluralism will need to be addressed through controls over *access to* rather than *ownership of* media. If, as is widely expected, the tendency towards convergence in the technology of computing, telecommunications and broadcasting results in plentiful capacity to distribute all sorts of information and entertainment direct to the consumer via broadband digital networks, then the policy objective of pluralism might well need to be tackled through rules on access to the means of distribution rather than, as at present, limits on ownership of media services. But this situation may be several years away and, until it actually arrives, media ownership restrictions are an essential means of securing pluralism and maintaining a diversity of media sources.

The British Media Industry Group, BMIG,⁴⁹ who argue for higher permitted levels of cross ownership, in their response to the consultation exercise, proposed a new methodology for reassuring and controlling media ownership. They advocated that assessments of consumer usage of media, rather than advertising revenue shares for example, be measured and controlled in order to encourage diversity of view. The BMIG set out the top four places in current national 'share of voice' as the BBC on 19.7%, News International on 10.6%, Daily Mail and General Trust on 7.8% and Mirror Group Newspapers on 7.6%.⁵⁰

A local market was defined for the purpose of measuring share of voice as all newspaper evaluation, tv viewing and radio listening in the local newspaper circulation area in and around any town or city with at least one paid-for daily newspaper. Radio listening would be down-weighted by 50% compared with newspaper circulation and tv viewing. Such measurements would form part of the Government's long term plan for this media.

The DNH provided a general summary of responses to the media ownership document:⁵¹

10. Most groups who commented on the media ownership proposals accepted the case for change and the logic of allowing greater cross-holdings between media, although a small minority of respondents felt the case for deregulation in media ownership had not been made out. There was a range of opinions about how change should be taken forward. Some felt it was right to introduce interim

⁴⁸ The cross media ownership debate, loc cit, p.38

⁴⁹ Associated Newspapers Ltd, Pearson plc, the Guardian Media Group plc and The Telegraph plc

⁵⁰ A new Approach to Cross-Media Ownership, February 1995, p.2.

⁵¹ Summary of responses to 'Media Ownership : the Governments' proposals Cm 2872

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measures ahead of the long term ownership proposals, believing that the Government should proceed with caution, letting the rope of regulation out gradually. A few respondents felt that while there was a case for allowing greater concentrations within the television and radio industries, there was little benefit to be derived from allowing cross-holdings between media. Some commented that common ownership between newspapers and broadcasters could cause difficulties given that newspapers enjoy complete editorial freedom, whereas broadcasters have obligations on programming and impartiality. Others expressed opposition to the interim proposals because they retain a system which applies specific rules to individual media rather than approaching the media as an integrated market. A few respondents felt the Government should introduce its long term ownership proposals as soon as possible and saw no real need for the interim measures.

The main issue was the proposed retention of the two licence limit for Channel 3, which a number of respondents felt was too cautious: "To limit ownership by the number of licences was thought inappropriate because a licence is not a balanced unit of measure.... a two licence limit takes no account of the size or market power of a business and.... would be inconsistent with the Government's general approach of setting limits according to audience share".

The ITC suggested that the limits should be set on a market share basis, such as 25% of total advertising revenue.

The Campaign for Press & Broadcasting Freedom responded that "The Government's proposals pay lip service to the vital issues of diversity and plurality in the media, but in reality pave the way for a dramatic increase in cross-media ownership and the reduction of range, choice and quality."

The BBC considered that ownership rules should be seen as "a necessary, but not sufficient, component of media regulation." Other essential components were

- continued regulation of content to ensure an appropriate range, diversity and balance of programming;
- the maintenance of public service broadcasting and the range of programmes and views on offer;
- specific action to supplement the competitive framework - in particular to ensure that owners of conditional access systems should not restrict access of other broadcasters.

The BBC expressed doubts about any audience share as the basis of an integrated media exchange rate.

BSkyB protested that the "20/20" rule for newspaper and television holdings was unfair, and discriminated against growth in general and B SkyB in particular:

- virtually every other British media group (Carlton, Pearson, Granada, Associated Newspapers, United Newspapers) will be able to own fully satellite, cable, terrestrial TV and newspapers.

- it will allow Channel 3 and 5 licensees to exploit infrastructure and audience created by BSkyB at its own enormous risk and expense, while denying any corresponding ability for BSkyB to own more than 20% of a single Channel 3 or Channel 5 licence.

BSkyB advocated amendments either to abolish the rule completely or to introduce greater flexibility through the introduction of controlling interest or public interest tests. It was pointed out that despite the 40% stake held in BSkyB by News International (NI) this did not result in control: that all BSkyB Board decisions must be taken by directors of whom the majority are independent of NI who have five appointees among eighteen directors.

BSkyB was also opposed to the 15% television audience share limit imposed on holders of more than one licence by Sch. 2 Part III para 2, from which the BBC, Channel 4 and Channel 5 are exempt. It was described as both inequitable and counterproductive by BSkyB who said that it should preferably be abolished completely or, in order of preference, raised to 25% in line with competition law, amended so as to exempt organic growth from the calculation, or mitigated by the introduction of a public interest test.

The Newspaper Society welcomed the Government's recognition that the media market was becoming increasingly indivisible, but were concerned that the proposals could discriminate against regional and local newspapers: "It would be unacceptable to most regional newspapers, for example, if a national newspaper outselling the regional newspaper in any particular area were able to buy the commercial broadcasting stations in that area while the local newspaper was blocked arbitrarily from doing the same".⁵²

D. Ownership proposals in the Broadcasting Bill (HL) 1995-96

Policy changes since the consultation exercise include:

- The two licence ownership limit for Channel 3 companies is abolished except for the two London licences. Instead, such companies will be permitted to combine as they wish within an overall limit of 15% of total television audience share.⁵³
- The ITC is given specific powers to ensure that any changes in the ownership of Channel 3 companies do not jeopardise regional programming and programme production. (Clause 67).
- The rule preventing Channel 3 companies, radio companies and local newspaper groups from owning cable services in areas of overlap is abolished. This is to help investment in the sector, and is seen as no threat to plurality because their principle business is providing a means of delivery and not the provision of content.
- It was proposed that newspaper groups with more than 30% of local paid-for

⁵² Newspaper Society Press Release: Media Ownership: a guarded welcome to Dorrell proposals, 23.5.95

⁵³ Sch. 2, Part III, para. 2

newspaper circulation in the relevant area should be prevented from buying broadcasting licences. Free newspapers are now to be included in the threshold, to avoid circumvention of the ownership rules putting freesheets in an advantageous position vis-a-vis expansion into other media, and because they increasingly carry significant amounts of news and editorial and thus should be considered as much part of the market as paid-for newspapers. The threshold for this larger market is raised from 30% to 50% (Sch. 2 Part IV). But newspapers having over 20% of local newspaper circulation will be able to acquire local radio licences only if they do not control more than 50% of available local radio points in the area. Where an area is served by more than one radio group, newspapers with less than 50% of local circulation will be able to acquire local radio licences provided they do not control more than 50% of the radio points in that area. The public interest test will apply.

- On 5 March 1996 at report stage, Lord Inglewood moved a series of amendments designed to remove unnecessary barriers to the potential development of domestic satellite services by placing them on the same footing as non-domestic satellite services as far as cross media ownership is concerned.⁵⁴ There is, at the moment, no domestic satellite service.

In the second reading debate on 16 January 1996, Lord Inglewood, Parliamentary Under-Secretary of State, Department of National Heritage, said of the ownership measures that they represented a substantial liberalisation. But he referred also to two safeguards; the new power of the ITC under clause 67 to vary a Channel 3 licence following a change of control, to preserve regional programming and prevent metropolitan domination, and the public interest test under Sch. 2, Part IV para. 9.⁵⁵

These measures represent a substantial liberalisation. But we have also built a number of important safeguards into the Bill. First, alliances between newspapers and broadcasters will be subject to a public interest test. The Independent Television Commission and the Radio Authority will have the power to prevent newspapers acquiring broadcasting licences if they judge this to be against the public interest. There will be three criteria to assess this: promoting media plurality and diversity; maintaining a strong industry for the benefit of the country; and ensuring the proper operation of markets. The ITC and the Radio Authority will seek advice as necessary from the competition authorities.

A second important safeguard will ensure the regional nature of the Channel 3 network. The unique regional nature of ITV is a major strength. Channel 3 licences include commitments to both regional programming and regional programme production, which are closely monitored by the ITC. Most of the ITV companies regularly exceed their regional programming commitments

⁵⁴ HL Deb. 570 c.290

⁵⁵ HL Deb. 568, c.474

and see that as in their commercial interests.

Sch. 2 Part I para. 1(3) of the Bill also revises the definition of what constitutes control to include a person who does not have a 50% controlling interest in a body but

"although he does not have such an interest, it is reasonable, having regard to all the circumstances, to expect that he will be able, by whatever means and whether directly or indirectly, to secure that the affairs of the body are calculated in accordance with his wishes".

E. The Lords discussion of ownership

In Committee, on 13 February 1996, Lord Thomson of Monifieth moved Amendment 156A to abolish the 20% rule, which he saw as affecting only Mirror Group Newspapers and News International:⁵⁶

The Bill as it stands provides that any national newspaper group with more than 20 per cent. of the market cannot have more than a 20 per cent. interest in a Channel 3 licence, a Channel 5 licence or a radio licence, but any other newspaper can. According to my sense of fairness, it does not make sense that a national newspaper group with, say, 19 per cent. of the market may fully own such a licence, subject to the public interest test, whereas a group with a 21 per cent. market share must be banned absolutely from owning it, regardless of its good or bad effect on the public interest. Equally, it is nonsense to suggest that a participation level of 19 per cent. by one larger newspaper group may be allowed but that a group with a level of 21 per cent. should be prohibited absolutely. I do not see how one could regard such a system as anything other than arbitrary. It is difficult to see how the public interest can be adequately served by such a system.

We all know what we are talking about in practical terms. Only the Mirror Group Newspapers and News International are affected by the prohibition in the 20 per cent. rule as they are the only newspaper groups with more than 20 per cent. of the national newspaper market.

The amendment would have made all licence holders and newspaper owners subject to a public interest inquiry, to be conducted by the MMC should the ITC so decide. The amendment was supported by peers on the Government side. For the Government, Lord

⁵⁶ HL Deb. 569, c.539

Inglewood set out the argument that those who enjoy a position of dominance in the national newspaper market should not be allowed to become dominant broadcasters, and vice versa:⁵⁷

In this rather long contribution to the debate I have endeavoured to set out the Government's stall. It is important to have an upper threshold beyond which the most dominant newspaper groups should be prevented from also becoming dominant broadcasters, while at the same time remaining free to develop broadcasting interests in emerging markets. It is right that Parliament should set that threshold rather than leaving it for the regulators to determine.

The ITC and the Radio Authority are best placed to consider matters of pluralism and diversity which are at the heart of the public interest test and, where appropriate, they will consult the OFT on economic considerations. We see no need to have the formal involvement of the MMC in applying the public interest test. But where a merger falls to be considered under normal competition legislation, the MMC will continue to consider medium mergers where appropriate.

The noble Lord's amendments would effectively remove the distinctive role which the ITC and the Radio Authority play in policing ownership in the broadcasting industry and the distinctive system of controls which recognises the uniqueness of that industry.

On the same occasion, Lord Donoghue moved amendments to take the threshold from 20% to 25% and to remove the distinction between national and local papers.⁵⁸

As I said before, we understand the Minister's concern and the fact that broadcasting is different. I refer him again to my earlier amendments strengthening the public interest obligation. We shall come back to that because the stronger the public interest obligation, the less agitated we need to be about various ceilings. In my amendments I seek to loosen the ceilings. Above all, I am concerned with the discrimination, mentioned by others, against one group; namely, the *Mirror* group.

By picking on the arbitrary threshold of 20 per cent. and using the single market determinant of national share, the Bills ends up discriminating against the *Mirror*. In principle, though it is in fact theoretical, it also discriminates against News International. But that is not discrimination that has any practical effect because News International is not banned from entering television. It

⁵⁷ HL Deb. 569 c.547-8

⁵⁸ *ibid*, c.550

already has a giant television business. I understand that it probably does not wish to expand into terrestrial because it would soon hit the 15 per cent. ceiling limiting its growth in satellite.

Lord Inglewood rejected both proposals. On the local/national press question, he said: ⁵⁹

Of course, it is true that in market terms there is an overlap between national newspapers and those which are primarily local or regional. But, as I have consistently said throughout our debates on this schedule, we are not concerned in broadcasting legislation to regulate the operation of markets as such, particularly markets in newspapers. That is a matter for competition policy. Broadcasting legislation has, rightly, only sought to regulate newspapers seeking to buy into broadcasting. Newspaper markets and advertising markets are regulated under the normal operation of competition law, as I have already said. What concerns us in this context is the interaction between publications and broadcasters which play a key role in determining and debating the national news agenda. The local and regional newspapers pay little or no part in that process. Quite simply, I cannot accept that we should include them in the threshold calculations because to do so is self-evidently absurd, as I have already intimated.

He defended the 20% threshold:⁶⁰

I believe it was the noble Lord, Lord Desai, who said that the figure of 25 per cent. is used for the purposes of regulating competition in markets. However, the point here, is that we are not talking about regulating competition. The basis of the separate broadcast licence regulation system is precisely that, in broadcasting, levels lower than 25 per cent. of market share can affect plurality and diversity if they are allowed to control other sources of influence, whether within a particular medium or across the media as a whole. This is the approach which we have adopted throughout the Bill with a 15 per cent. audience share for the powerful broadcasting media and 20 per cent. circulation for the influential local and national newspapers; these being the levels that we believe represent the current tolerable levels of concentration.

Despite the 20 per cent. threshold, the Mirror Group will still be free to expand into cable, as it has already done, and to enter the satellite market, as indeed it is free to do now. It can do this either by setting up new businesses or by taking stakes in existing businesses. It is also free to establish itself as a programme provider

⁵⁹ *ibid*, c.554

⁶⁰ *ibid*, c.555-6

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through the independent production sector and to acquire stakes of less than 20 per cent. in those broadcasters it is forbidden to control. The Bill also - as we discussed at some length on a previous occasion - will create a new opportunity for the group in digital terrestrial television broadcasting.

The Government believe that the 20 per cent. threshold is right and have not been persuaded by any of the arguments which have been advanced so plausibly for raising it to 25 per cent - or for that matter setting it at any other level. It would in our view be wrong to raise the threshold merely to benefit one particular media group. If any one group thinks that it is essential for it to be allowed into Channel 3, it is open to it to devise a strategy that will bring it below the 20 per cent. threshold. After all, is Paris worth the Mass?

Lord Donoughue again sought to introduce a 25% limit on third reading on 5 March⁶¹, when Lord Inglewood in reply made a distinction between the sort of protection of the public interest afforded by competition legislation and the need for separate media controls based on market share rather than revenue.⁶²

As a result of the consultation on our media ownership proposals, the Government concluded that there remains the need for separate media ownership controls, in addition to normal competition legislation, in order to protect plurality. A 25 per cent. threshold was judged to be too high, as that is the level at which competition law would normally bite. By contrast, 15 per cent., which is the level at which the market limits are set for television and radio, was judged to be too low, because while the opportunity to become a broadcaster is restricted by spectrum scarcity, no such hurdle faces those who wish to become newspaper proprietors.

Lord Harris of High Cross moved amendments designed, as he said, to "remove another 20 per cent arbitrary restriction": the exclusion of BSkyB from the scope of proposed deregulation.⁶³

This group of amendments seeks to remove another 20 per cent. arbitrary restriction-this time not as regards the circulation of newspapers but the ownership by a newspaper of a satellite; namely, BSkyB. It is part of the deregulatory feature of this Bill that it would now allow satellite and cable companies to control Channel 3 and Channel 5 licences, which in turn are free to move into

satellite broadcasting, as the Minister has explained. That gives a welcome green light to cross-media or cross-sectoral growth so that companies can take advantage of internal and external economies in developing a structure which we cannot at the moment even begin to predict. Yet once again BSkyB is cast as the Cinderella at the feast. It is to be excluded from the general rejoicing. In

⁶¹ HL Deb. 570, c.284

⁶² *ibid* c.285

⁶³ HL Deb. 569, c.558

Schedule 2, in the provisions relating to restrictions on proprietors of newspapers, a new formula is conjured up which deliberately excludes B Sky B from that otherwise welcome liberalising process.

Under that formula a satellite company can control a commercial terrestrial television company, but it may not do so if it is more than 20 per cent. owned by a newspaper company with more than 20 per cent. of the total national newspaper circulation. It could do so if it was owned by a duff company which does not have a large circulation. News International, alas!, since taking over the ailing *Sun* and the threatened *Times*, has built up its circulation. News International is guilty of building up a total diversified newspaper circulation in excess of 20 per cent. of the national circulation. That is naughty. The mathematical application of the rule concerning 20 per cent. control and more than 20 per cent. of newspaper circulation succeeds in singling out Sky for punishment.

I argue that both of the 20 per cent. rules collapse on close examination. News International owns more than 20 per cent. of Sky. Indeed, it owns 40 per cent. However, that 40 per cent. does not give News International a controlling interest. There are two reasons for that, which the Minister can verify. First, Stock Exchange rules require that a company is capable of operating independently of any shareholder owning 30 per cent. or more of the voting rights. Secondly, the board of B Sky B numbers 18 directors, of whom only five are News International appointees. Therefore, the 20 per cent. control by News International is a phantom. It is frightening Ministers needlessly when there are many other things for them to be frightened of.

Lord Inglewood rejected a suggestion that influence could be measured solely through the time devoted by viewers, listeners and readers to a company's programmes, radio broadcasts and newspapers:⁶⁴

I wish to go to the heart of the debate because I do not wish to go over our general policy. I have explained what it is, some Members of the Committee accept it and others clearly do not. As it stands, the Bill will also prevent newspaper groups having 20 per cent. or more of national market share from exerting an influence over Channel 3, Channel 5 and radio licence holders through cable and satellite companies in which they have an interest above 20 per cent. Even if one disagrees with the approach which the Government adopt, it must follow that if there is a market share threshold, one must ensure that the Government's intentions cannot be circumvented by

⁶⁴ *ibid.*, c.561-2

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newspaper companies using companies in which they have major shareholdings from controlling such licences. The amendments of the noble Lord, Lord Harris, would remove that restriction from the Bill.

We must be clear about one point which was touched on earlier in the debate. We are not saying that News International controls Sky. We say that News International has such a large share in it that it should not be allowed, through Sky, to acquire control in leading broadcasters on top of its national newspaper dominance. It seems to me that that is a relatively simple and straightforward proposition to grasp.

Lord Harris returned to the theme again at report stage on 5 March, HL Deb. 570, c.288.

The Bill contains in Sch. 2 a new definition of control described as follows by Lord Inglewood on second reading:⁶⁵

The Bill also revises the definition of "control" in the Broadcasting Act 1990. Our aim is to ensure that the legislation cannot be circumvented by arrangements which, while producing control in practice, do not technically breach the statutory definition. The revised definition allows the relevant regulator to conclude that control is exercised if it is reasonable, having regard to all the circumstances, to expect that a person will be able, by whatever means and whether directly or indirectly, to secure that the affairs of the body in question are conducted in accordance with his wishes.

At report stage, Lord Thomson of Monifieth moved an amendment to strengthen the control provision and eliminate the possibility of using "warehousing" devices to circumvent the rules. He mentioned two examples where measures had been permitted which were later described by Lord Inglewood as "within the letter of the law but contrary to the spirit of it".⁶⁶

However, underlying the amendment is a real problem which upsets me a good deal and has certainly upset the Independent Television Commission. It relates to the fact that the various franchise holders of the independent television system now have got themselves into a mood-I think encouraged by the climate created by the present Government-that they do not need to observe the spirit of broadcasting law so long as they can find clever enough lawyers to get round it with the letter of the law.

I refer, for example, to the ownership of Independent Television News. We argued a great deal about the pattern of ownership for ITN in the 1990 Act. At the end

⁶⁵ 16.1.96 HL Deb. 568, c.474

⁶⁶ *ibid* c.268

of the day, the Act emerged with certain provisions which limited the amount of shareholding by individual ITV companies. If I remember rightly, the figure was 20 per cent. In fact, two shareholders-Granada and Carlton-today have 36 per cent. each. The ITC is always patient and understanding in these matters-I think excessively patient in this case. It gave both those companies an extended time beyond the letter of the law to make the necessary divestments by the end of last year. At the end of the year, they did not make those divestments. They engaged instead in the so-called deadlocking formula, blatantly defying the spirit of the law which Parliament passed and the ITC has the responsibility of administering. I noticed that in the proposed merger of MAI and United Newspapers, involving the Meridian television company, the same deadlocking device has been used, defying the spirit of the law and getting clever people to follow its letter. In that case, it went even further.

The Minister gave assurances that the question was being looked at carefully.⁶⁷

The amendment is concerned with the definition of "control" in the Bill and your Lordships are anxious that it should be adequate to deal with ownership structures which use devices such as deadlocking and warehousing arrangements in an attempt to get round the limits set out in Schedule 2. Since the 1990 Act, we have seen a number of instances where that has occurred within the letter of the law but contrary to the spirit of it. There is no need for me to enumerate them.

We do not as yet have proposals for amendments, but I assure all noble Lords that we are considering this matter very carefully. If we deem it necessary, we certainly shall bring forward proposals for amendments in due course.

The current restriction on any one person having more than a 20% stake in ITN is to be maintained, but the restriction which prevents Channel 3 companies from having combined holdings of more than 50% is to be removed. The relevant provision is not yet in the Bill.

Clause 67, which as Lord Inglewood said, includes a power to protect existing levels of achievement in regional programming at the time when a licence changes hands, was largely welcomed, though it was agreed that further consultation should take place with the ITC about strengthening the proposal. The word "significant" in connection with the possibility of a reduction in regional programming was removed at report stage on 7 March.⁶⁸

⁶⁷ HL Deb. 570, cc 269-70

⁶⁸ *ibid* 570 c.443

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Further assurances about amendments to come, including the promise of a definition of regional programming, were given on the same occasion.⁶⁹ On third reading on 19 March 1996, Lord Inglewood explained that this had not been possible because of pressure of time.⁷⁰

⁶⁹ HL Deb. 570, c.126

⁷⁰ *ibid* c.126

The question of the limits on the ability of local newspapers to acquire local broadcasting outlets, was raised by the Newspaper Society in their response to the Government policy documents. On 5 March 1996 the Director of the Newspaper Society drew attention to the perceived imbalance in a letter to the *Times*, in which he said that the Bill as it stood would give national newspapers "massive commercial advantage over the regional press in the day-to-day competition for advertisers, readers, news stories and markets. Amendments to make changes to the threshold calculations were moved by Lord McGregor of Durris on 5 March, and were withdrawn after Lord Inglewood had accepted that some "detailed improvements" might be needed. But he emphasised the difference between national and local papers in the local context:⁷¹

I accept that national newspapers compete to some extent with local papers for readers and advertisers. They do not, however, provide the local news and information, for which readers turn to local and regional newspapers. Our proposals are about protecting plurality, and not about regulating competition in the markets. Newspaper markets and advertising markets will continue to be subject to normal competition law.

As the Bill stands, local newspapers will be free to buy broadcasters outside their circulation areas and to apply to control broadcasters within their own areas where their circulation is within the thresholds. The 50 per cent. threshold proposed for local newspapers buying into local radio already allows a considerable level of local media concentration. It seems to us that any local newspaper so dominant within its own area as to fall foul of that threshold should not also be allowed to control the local radio station. That was the point made by my noble friend Lord Stockton. The inclusion of national newspapers in the calculations would seriously dilute our proposals and remove in practice the protection of plurality at local level at a stroke.

F. The European Dimension

In 1992, the European Commission published a green paper "Pluralism and Media Concentration in the Internal Market" (4213/93) to investigate the scope for action at community level to adopt regulatory measures to limit media concentration and safeguard pluralism. There have been follow up exercises since the first consultation, and the Government's view of the need for harmonisation was set out by Ian Sproat on 25 October 1995:⁷²

⁷¹ *ibid* c.278

⁷² HC Deb. 264, c.664W

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Mr. Allen: To ask the Secretary of State for National Heritage if she will make a statement on the European Commission's proposed directive on media concentration; and what is the policy of Her Majesty's Government towards the concept of cross-European media regulations.

Mr. Sproat: The European Commission has not yet put forward proposals for a directive in this area, but has instead undertaken a series of consultations among member states and other interested parties. The Government's position is set out in our response to EC questionnaire No. III on 'Pluralism and Media Concentration in the Internet Market', which is available in the Library of the House. Our view is that the media industry cannot be treated on the same basis as other sectors of the economy. Ownership restrictions are an essential safeguard for plurality and diversity and, as such, are distinct from the separate question of controls on anti-competitive behaviour. We believe that member states are best placed to assess where the balance lies in securing both economic and cultural objectives, and do not therefore support the case for introducing harmonising legislation at the European level.

III Privatisation of the BBC's transmission network (Part VI and Schedule 5)

A. Background

On 27 November 1995, the Government announced that the BBC's transmission network was to be privatised at the same time as it published the BBC's new draft charter. The announcement was not unexpected as the future of the transmission network had been under consideration for some time.

In its 1988 White Paper on *Broadcasting in the 1990s: Competition, Choice and Quality* the Government announced that it favoured moving television transmission networks into the private sector⁷³:

9.1 The UHF transmission networks run by the BBC and IBA give a highly effective service to the public... As broadcasting enters a more competitive phase, the Government intends to see that high technical standards are maintained, while moving the UHF transmission system progressively into the private sector, and separating transmission (ie service delivery) from service provision.

9.2 The Government considers that the best arrangement in due course would be a regionally based, privatised transmission system designed to promote competition, while containing certain common carrier obligations. The route towards this objective is complicated at present by the way in which the IBA's system is entwined with that of the BBC, and by the fact that the BBC's transmission responsibilities are rooted in its Charter which lasts until the end of 1996. The government proposes to discuss with the BBC, the IBA and others how the objective of moving towards a privatised transmission system might best be taken forward...

Following a review by Price Waterhouse, the Government announced in July 1989 it was still its intention "to privatise the transmission networks owned and operated by the BBC and the IBA as soon as we are in a position to do so"⁷⁴. The Government stated that "the IBA has welcomed the proposal that its transmission operation should be privatised, and we will be including the necessary provisions in our legislative proposals on broadcasting". As far as the BBC was concerned announcement stated:

The BBC's transmission responsibilities are rooted in its royal charter which lasts until the end of 1996. It has indicated that it does not wish to have these responsibilities transferred to a private transmission operator. We have therefore decided that the BBC should retain its transmission responsibilities, including for the world service, until the expiry of the charter, unless it wishes to divest itself of those responsibilities earlier. The position will be reviewed at that point with a view to privatisation. In the meantime the BBC will be confined

⁷³ Cm 517, November 1988

⁷⁴ HC Deb 4 July 1989 c.102W

to transmitting its own services, and will not be permitted to compete for the transmission of new broadcasting or telecommunications services. We are concerned that the private transmission market should develop in a fair manner; and, while the BBC's transmission operation remains in the public sector, there would be insuperable difficulties in ensuring that the BBC entered this market in a way which would be perceived to be fair to its competitors.

Provisions for the privatisation of the IBA's transmission system were contained in the *Broadcasting Act 1990*. In preparation for sale, the transmission assets of the IBA, essentially its engineering arm, were established as an independent Government owned company, National Transcommunications Limited (NTL), in January 1991. The remaining assets of the IBA were transferred to the other successor bodies - the Independent Television Commission and the Radio Authority. NTL was then sold via a competitive trade sale in October 1991 to Mercury Asset Management, a publicly quoted fund management company. Further details on this can be found in report from the National Audit Office on *The Sale of National Transcommunications Limited*⁷⁵. NTL's transmission charges to ITV and C4 are regulated by OFTEL under a price cap formula. The current cap of RPI - 1% expires on 31 December 1996, and so OFTEL is currently considering what cap should apply from 1997 until 31 December 1996 when the broadcasters current transmission contract with NTL ends.⁷⁶

In July 1994 the Government published its white paper on *The Future of the BBC* which contained the following conclusions about the BBC transmission services:⁷⁷

4.28 The Government welcomes the BBC's interest in the early introduction of digital terrestrial broadcasting services, recognising that this would have implications for the future of the BBC's transmission services. The Government wishes as far as is possible to combine the early introduction of digital broadcasting services by the BBC with the benefits of privatisation of the transmission network, which would stimulate competition and reduce the barriers to entry for new operators, without increasing the costs to the BBC. It remains to be seen whether introducing digital broadcasting services would make full privatisation of the transmission service less attractive. The Government is not convinced that the BBC needs to retain direct responsibility for transmission, and the BBC has made it clear that it will keep functions within the BBC only when there is a compelling reason for doing so.

4.29 The Government is, therefore, exploring with the BBC possible options for the future of its transmission services, taking account of the development of its plans for digital broadcasting. These studies should be complete towards the end of the year. Privatisation of the whole transmission service, or parts of it, are among the options being considered. An injection of private capital would offer significant benefits for the BBC in meeting the costs of introducing digital services, if this should prove feasible. The Government has made it clear to the BBC that there is no question of increasing the licence fee to pay for this; if the BBC decides it can go ahead, the Government expects it to seek private sector finance.

⁷⁵ NAO *The Sale of National Transcommunications Limited* HC 285 1992/93 27 November 1992

⁷⁶ OFTEL *NTL Price Cap Review: A Consultative Document* 24 January 1996

⁷⁷ Cm 2621

In order to help its studies on future options for the BBC transmission service the Department of National Heritage appointed consultants to make recommendations on the issue⁷⁸. The reports from Hill Samuel, Nera and Smith Systems Engineering have not been made public on grounds of commercial sensitivity⁷⁹.

In its August 1995 policy document on *Digital Terrestrial Broadcasting* the Government only briefly referred to the BBC's transmission service:

2.19 Following publication of the White Paper, *The Future of the BBC* (Cm 2621, July 1994), the Government is considering the options for the future of the BBC's transmission service, including privatisation. No decisions have yet been taken. Privatisation would lift the current constraint on BBC Transmission to compete for third party transmission contracts, including digital transmission.

In its response to the document the BBC stated⁸⁰:

3.14 The BBC is deeply conscious that it cannot approach the digital age with the same financial freedom and attitude to risk of a commercial operator. In particular, the BBC is aware that the cost of the new digital transmission and delivery infrastructure, on top of the need for service development, will make investment in digital television a high-risk business...

3.15 It is, therefore, clear that the BBC could not afford to carry the investment risk of developing the transmission network for digital terrestrial television - either on the licence fee or, indeed as a commercial speculation - even if Government competition policy permitted it to do so. Whatever arrangements are ultimately made for transmission, the BBC's concern is to ensure that its transmission costs remain as low as is practicable, and in particular that:

- *It incurs no unreasonable exposure to increased analogue charges*
- *Digital charges should be appropriate to the provision of services and not load the overall business risk of developing DTT onto public service channels*
- *Frequency planning and technical standards are designed to deliver services at the lowest possible cost compatible with a robust service and the evolution of digital to deliver what the audiences require, including national coverage and widescreen capacity.*

4.28 Transmission operators are most likely to find the economics of DTT attractive if they are able to secure economies of scale. ...there is a possibility that the first mover in engineering a digital terrestrial multiplex could well become a monopoly supplier albeit requiring access to other operators' sites and masts in order to complete roll-out. Specifically, BBC Transmission is likely to be the sole supplier of digital audio broadcasting transmission. And, whichever transmission operator is able to secure a first mover advantage in DTT transmission may well emerge as the primary supplier to the industry.

4.29 In these circumstances, there is a strong public interest case for regulation to limit the degree to which transmission operators are able to exercise monopoly powers over programme services providers...

⁷⁸ HC Deb 2 November 1994 c.1188W

⁷⁹ HC Deb 21 February 1995 cc 147-8W

⁸⁰ BBC *Britain's digital opportunity: The BBC's response to the Government's proposals for digital terrestrial broadcasting* October 1995

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4.31 ...If, as seems likely, digital terrestrial transmission is to be a monopoly or duopoly, then there should be a clear requirement for the multiplex and transmission operators to achieve full availability of DTT within a set time period. Since the overall viability of DTT depends on the availability of the full range of services, preference in awarding licences should be given to operators willing to commit to national coverage and to the timetable for achieving it.

The Department of National Heritage announced on 27 November 1995 that the BBC's transmission service would be privatised⁸¹:

The Government's proposals for privatisation of the BBC's transmission services are that:

- the BBC will handle the sale;
- receipts from the sale of licence-fee funded transmission facilities will be retained by the BBC;
- OFTEL will regulate the costs of any private sector supplier with which the BBC subsequently contracts to provide transmission services, to ensure that the BBC does not pay more for the services it currently needs;
- the BBC will also benefit from a share of any productivity gains achieved by the privatised transmission services.

The Secretary of State, Virginia Bottomley, commented [ibid]:

These proposals represent double good news for licence payers. They will bring downward pressure on transmission costs. They allow more resources to be invested in the high quality programmes for which the BBC is world-famous.

The BBC's interests will be safeguarded by a fair and effective regulatory framework. I have agreed that most of the proceeds of sale will be retained by the BBC, since much of the network has been funded by licence-fee payers. The BBC has welcomed this decision.

Provisions for privatising the transmission network were contained in the draft of the BBC's new Charter and Agreement published at the same time as the announcement. Specifically, Article 24(2) of the Charter would allow "the Secretary of State to issue directions to the BBC concerning its powers to own transmission assets" similar provisions were contained in paragraph 7.5 "allowing the Secretary of State to direct the BBC to privatise its transmission service".

⁸¹ "BBC Charter and Agreement published" *DNH News Release* 27 November 1995

In a statement on the draft Charter and Agreement the BBC stated⁸²:

The Corporation has made clear that it will keep functions within the BBC only if there are compelling reasons, of cost and quality, for doing so.

As regards transmission, the BBC's main concern has been to ensure that the interests of licence fee payers and of its staff are properly reflected. In particular, there should be:

- no increase in the cost of transmission for existing services;
- an ability to continue reducing costs over the years as a result of productivity savings;
- and the retention by the BBC of the yield from assets created by the licence fee-payer.

The BBC believes that the terms announced by the Secretary of State meet these criteria. The terms involve the BBC being given responsibility for the sale, in liaison with the Department of National Heritage. A BBC working group will be set up to handle the negotiations and will make an immediate assessment of the options.

The BBC had not been persuaded that, in an analogue-only world, privatisation could ensure the continuation of high-quality services with no increase in costs. It believes, however, that in a digital world - with the large-scale capital investment that will be required - there are strong arguments for a different role for the private sector.

The BBC believes that it now needs to concentrate on:

- the conditions of sale and of contracts for supply to guarantee a continuingly cost effective and universally available service;
- the interests of the staff concerned; and
- the security of the engineering functions that will remain within the BBC, such as Research and Development.

The Charter and Agreement were debated in the House on 15 February 1996⁸³ and came into effect on 1 April 1996.

B. Broadcasting Bill proposals

Provisions for the privatisation of the BBC's transmission service are now contained in Part VI of the Bill, clauses 110-112 and in Schedule 5. The provisions in the original Bill were amended during the Bill's passage through the House of Lords. In the original Bill (HL Bill 19 1995/96) Clause 90 provided for the sale of the "BBC transmission network" which was defined as those parts of the BBC concerned with:

- (a) the provision of broadcasting transmission services or services related to those services, or
- (b) the carrying out of research and development work relating to broadcasting

⁸² BBC Public Affairs *Briefing Note: The New BBC Charter and Agreement* January 1996

⁸³ HC Deb 15 February 1996 cc 1172-1234

However, following concern that the BBC would lose its research and development services, the Government tabled an amendment at the Report Stage to remove the BBC's R&D services from the definition. In moving the amendment, Lord Inglewood stated⁸⁴:

...We have agreed that the BBC needs to retain its research and development function in order to be a properly informed customer for privatised transmission services and to continue its vital contribution to the development of the BBC's services and to the wider broadcasting equipment industry in this country.

The amendment was agreed to without a division.

At third reading, Baroness Dean moved two amendments concerning the employment and pension rights of BBC staff affected by privatisation. The first amendment sought to ensure that the provisions of the *Transfer of Undertakings (Protection of Employment) Regulations 1981* (TUPE) would apply to those staff transferred. This amendment was withdrawn following reassurance from Lord Inglewood that "it is now clear that TUPE will apply to the transfer contemplated by the Bill"⁸⁵. As far as pension rights were concerned Lord Inglewood said that the Government would [ibid]:

consider the issue further so we can reach as definitive and satisfactory agreement with the BBC as to the position on pensions. If necessary, the Government will bring forward an amendment for the avoidance of doubt along the lines of what is provided for the BSC [the new Broadcasting Standards Commission] at paragraph 4 of Schedule 4 to the Bill.

In a briefing paper for the Lords' second reading the BBC stated:

The BBC has welcomed the Government's announcement that the Corporation will retain most of the privatisation's proceeds. These will be invested within the BBC on digital production technology. The Corporation has also been given important guarantees on the future cost of the transmission services that it will require.

The Corporation has been entrusted with the task of managing the privatisation. More generally, the BBC and the Government need to come to an agreement on the transfer of property rights that will be necessitated by the privatisation.

A privatised BBC transmission company could:

- act as the BBC's multiplexer, under contract;
- apply to provide other multiplexes; or
- provide transmission for other multiplexes.

⁸⁴ HL Deb 7 March 1995 c.535

⁸⁵ HL Deb 19 March 1996 c.1247

As far as a privatised transmission company bidding for multiplexes is concerned, it would seem that the sale of the transmitters would have to be resolved before decisions on multiplex bidding could be decided. It remains to be seen whether the timescales involved in the sale process and in the multiplex bidding process would permit this.

C. Possible bidders

NTL has made no secret of the fact that it would be like to purchase the BBC transmission service. In March 1995 it published a paper on *The Future of Television Transmission* in which it stated that it believed in "full privatisation" of the BBC's transmission services including the BBC's research and development activities. It commented:

1.7 NTL would be interested in purchasing the BBC's transmission networks and, because of the economies of scale in the combined operation, is likely to offer the highest price. NTL believes that this would result in the lowest cost to customers. Any competition issues which such a purchase would understandably raise, should be dealt with through the normal channels of the Office of Fair Trading and of the Monopolies and Mergers Commission.

In its consultation document on the *NTL Price Cap Review*, Oftel commented:

63. NTL has expressed an interest in purchasing the BBC transmission system. In the event that NTL bids for and is the successful bidder for BBC Transmission (subject to clearance under normal competition rules), it is likely that the price control would be reopened. The economies of scale and scope available to a common owner of both assets would be potentially significant, and account would need to be taken of this fact. In addition, OFTEL would be required to ensure that the regulated prices charged to BBC Television were on a consistent and non-discriminatory basis vis-a-vis C3, C4 and S4C. It would probably be necessary to review all regulated prices charged by the new combined business in order to achieve this. radio markets would also need to be considered.

At a recent conference on Digital Terrestrial Television, Oftel's Director General, Don Cruickshank commented that competition in the digital terrestrial television transmission market was not essential as competition issues could adequately be dealt with through price regulation⁸⁶. He said that it was much more important to achieve satisfactory competition between terrestrial, satellite and cable digital television services.

In February 1995 the journal *Broadcast* published a lengthy article on the forthcoming privatisation of the BBC's transmission services⁸⁷. It reported the views of BECTU, the trade union representing the staff involved, and commented on how the BBC was handling the sale:

'Privatisation of BBC Transmission is unwanted, unnecessary, unwelcome and damaging to the fabric of the BBC as a unified public broadcaster,' says Brian Marsh, BECTU national officer.

⁸⁶ IBC/CFG/EIP conference on *Digital Terrestrial Television* 7-8 March 1996, London.

⁸⁷ "Mast action" *Broadcast* 9 February 1996 pp 18-19

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Clearly, the union's membership is likely to feel the brunt of what Bottomley calls the 'pressures for efficiency' under a privatised transmission regime. Indeed, NTL's managing director, Andrew Sukawaty, makes no bones about the fact that cost-cutting and efficiencies form part of its plan should it win the BBC bid.

'We could cost-reduce it and improve quality much as we have done with NTL,' Sukawaty declares, sounding bullish as befits the boss of a company that is gearing up for flotation in the summer. 'The main thing we could offer more than anyone else is offer a cost-effective service because of the combination that could be created between the two entities.'

No indication of Sukawaty's chances of winning the bid for BBC Transmission are, however, forthcoming from the corporation itself, which has circled its wagons on its sell-off plans. The BBC is currently replying 'no comment' to questions about the details of the privatisation process, citing a defence of 'commercial sensitivity'.

BBC sources, however, do reveal that the corporation has been busy turning itself into a semi-commercial animal in order to effect the privatisation, since it has, curiously, been charged with the task of acting as sales agent for the transmission network. That the BBC is actually handling the sale is doubly ironic since insiders suggest it would have preferred to keep its transmission operation.

Nevertheless, the BBC has set up two internal groups to examine the issues surrounding the sale: an overall Transmission Steering Group (TSG), staffed by five members of the board of management and chaired by deputy director-general Bob Phillis, plus a Transmission Working Group (TWG), tasked with taking a hard-nosed City-wise view of the sell-off to get the best deal.

According to a BBC spokesman, the TSG, which includes managing director of BBC Resources Rod Lynch, aims to 'effect the preparation and execute the sale of Transmission in a manner which maximises value to the BBC and the licence-fee payer while protecting the interests of Transmission's employees.'

While that may provide some succour to worried staffers, the BBC has also brought in a 'privatisation specialist', chartered accountant Charles Honnywill, to chair the TWG. He is a veteran of the sale of the UK's electricity utilities and British Coal - and BBC Transmission employees will doubtless be mindful of the job losses entailed through privatisation in both those industries.

Again, the BBC spokesman is keeping tight lipped about any potential job losses, explaining only that Honnywill's group is masterminding 'operational work' and is 'determining exactly what constitutes 'transmission' and therefore what can be sold'.

Honnywill's panel includes BBC chiefs of technical resources, personnel and World Service resources - plus a property lawyer and a representative from merchant bank Lehman Brothers.

After bids have been received for the business following an advertising campaign, Lehmans will help the BBC draw up a 'preferred bidder' shortlist. That list of buyers will be based, according to the official BBC line, on their 'integrity, financial stability and evidence of ability to raise adequate funds'.

IV Televising of sporting and other events of national interest (Part IV)

The Committee stage of the Bill in the House of Lords had a dramatic start with the success of Amendment No 1 and a Government defeat by 223 votes to 106. Lord Howell successfully moved a new clause amending s.182 of the *Broadcasting Act 1990* to extend the protection of listed events from being shown exclusively on pay-per-view to subscription television as well.

A provision against any one broadcaster obtaining exclusive rights to certain sporting events of national interest was established originally by the *Television Act 1954*, which gave the Government the power to draw up a list of non-exclusive, or protected events. S.182 of the *Broadcasting Act 1990* restricts listed events from being shown exclusively on pay-per-view channels, but otherwise all major sporting events are subject to open bidding for exclusive or shared rights by all television services, including those available on subscription. The list is drawn up by the Secretary of State for National Heritage (previously the Home Secretary) in consultation with the interests concerned. The current list was announced on 17 April 1991:⁸⁸

Mr. Jacques Arnold: To ask the Secretary of State for the Home Department if he will announce the conclusion of his consultations with interested parties about possible changes to the list drawn up for the purposes of section 182 of the Broadcasting Act 1990.

Mr. Kenneth Baker: Following consultation with broadcasters, the rights holders of the events concerned, the Sports Council and the Central Council of Physical Recreation I have drawn up a list including eight events. They are:

1. Cricket Test matches involving England
 2. The Derby horse race
 3. The FIFA World cup finals
 4. The FA cup final
 5. The Grand National horse race
 6. The Olympic games
 7. The finals weekend of the Wimbledon tennis championships and any subsequent days if the championship overruns
 8. Additionally in Scotland, the Scottish FA cup final.
- The Commonwealth games when held in the United Kingdom and the Oxford and Cambridge boat race have both been removed from the list, as have all but the finals weekend of the Wimbledon tennis championships.

The Home Office press notice which accompanied the statement adds "Pay-per-view is a system which viewers are charged an additional sum for watching a particular event. The Broadcasting Act does not prohibit listed events from being shown as part of a subscription service, where the subscription covers the service as a whole and individual programmes are not charged for separately. Nor does the Act guarantee that these events will be shown at all."

⁸⁸ HC Deb 189, c.178W

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The provision and its effects were considered by the National Heritage Committee in their Fourth Report on Sports sponsorship and television coverage in 1993-94 HC 289 - I-III. Their findings were that the protection for listed events should be extended to subscription services:⁸⁹

139. The Committee stated its view on listing in its Report on the Future of the BBC, namely that the listing of sporting events as comprised in section 182 of the Broadcasting Act 1990 should stand.

140. Having considered the matter further, the Committee has come to the conclusion that the Broadcasting Act may have been inadequately or imprecisely drafted and that the intent may have been to prevent the exclusive purchase of listed events not only by pay-per-view services but also by subscription services. If that was not the intention, the Committee believes that it should have been. **The Committee therefore recommends that exclusivity in transmission of listed sporting events should be prohibited not only for pay-per-view services but also for subscription services.**

141. **The Committee further recommends that the list should be kept under regular review by the Department of National Heritage with the criteria for listing relating to events which, because of their national or traditional significance, attract interest and attention from a public wider than sporting devotees.**

142. **The Committee recommends also that changes in technology which may eventually widen the range of subscription services, including even the BBC, should also be taken into account in the regular review by the Department of National Heritage which the Committee recommends.**

In their response of December 1994 the Government denied that it had been the intention in the 1990 Act to extend protection to exclusive showing on subscription services. They suggested that stimulation of interest in sport by live coverage might, in the long term, off-set short-term disbenefits, while rights holders should be able to exploit their rights to the full:⁹⁰

It was not the Government's intention in the Broadcasting Act 1990 to prevent the exclusive purchase of listed events for showing on subscription services, as well as pay-per-view. The Government decided that it was right to liberalise the market for the benefit of rights holders who should not, without good reason, find themselves inhibited from realising the full market potential of their rights. This remains the Government's position.

In considering broadcasting arrangements rights owners have to balance the short-term and longer term advantages of a range of factors. These include the level of income from the broadcasting rights, the size of the television audience, and the amount of broadcast coverage. They may also want to consider the type of coverage offered by different broadcasters, and the impact on potential young players. Rights owners will also wish to consider whether live coverage would reduce attendances at the event, or encourage future attendances, through increased interest in the sport.

Different conclusions may be arrived at for different sports; for example, whether they own the rights to many relatively short events, such as football matches, or to a single event, or a few relatively long events spread over several days. Rights owners can offer different kinds of coverage to different broadcasters. They are beginning to do this, and the Government welcomes this development.

During the passage of the Broadcasting Act 1990 it was made clear that the arrangements would give no absolute guarantee that a particular sporting event would be made available to everyone who wanted

⁸⁹ 1993-94 HC 289-I

⁹⁰ 1994-5 HC 58

to see it. This is no different from the arrangements under the earlier legislation.

As it stands the Committee's recommendation could lead to a situation where, because the terrestrial channels were unable or unwilling to secure the rights to particular listed events, those events could not be shown on television at all, since by definition their inclusion in a subscription service would be on an exclusive basis.

The Government is not persuaded that accepting this recommendation would be in the best interests of the sporting bodies or broadcasters in the long-term.

Moving the new clause to the Bill, on 6 February 1996, Lord Howell expressed his "profound belief in the social purpose of sport." But, he went on to say,⁹¹

Those precepts are being increasingly undermined by the total domination within sport of financial considerations above all others. No wonder all the arguments put forward to oppose the new clauses concentrate exclusively upon the right to sell all sport to the highest bidder. All the letters we have received and all the statements which we have read deal exclusively with money. The protagonists never rise above the pure material: the price of the product. They have nothing to say about the worth and value of sport in the community. They ignore the 30 million to 40 million people who cannot afford or get Sky. They ignore the elderly and infirm who have supported sport in better days and who are now to be sacrificed apparently to the interests of one man - Rupert Murdoch. The protagonists write off their duty to the young who, in their millions, obtain their inspiration to take up sport, to have a go for themselves, because they see sport in its excellence in their millions in their own homes, on terrestrial television. Nick Faldo said that he took up golf because he saw Jack Nicklaus playing on television.

On the same day, the Office of Fair Trading announced that the deal between the Premier League and BSkyB and the BBC for rights to football matches until the end of the 1996-97 season were to be referred to the Restrictive Practices Court.

In the week before Lord Howell's amendment was agreed to, the Department of National Heritage issued a discussion paper: *Broadcasting Sports Rights: Informing the Debate*. An annexe to the document set out recent developments in the coverage of sporting events, based to some extent on evidence to the National Heritage Select Committee. These include the fact, for example, that before BSkyB no live coverage of an England overseas cricket series had ever been provided. The paper described the "complex and changing balance between the interests of the sporting bodies, the new cable and satellite services, the traditional broadcasters and the viewing public." It then set out the factors to be taken into account in reviewing the best balance of those interests:

- the need for rights holders to exploit their rights to promote the development of the sports
- the effect of any change on subscription broadcasters' ability to develop in the interests of diversity and choice
- the need for flexibility at a time when broadcasting technology is changing rapidly

⁹¹ HL Deb 569, c.122-3

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- the need for change to be compatible with competition policy and the legal requirements of international trade

The paper also set out the possibility for rights for live, recorded and radio rights to be sold separately - the concept of "unbundling."

Finally, the paper pointed out that sports rights holders do not always consider income when negotiating new deals. They have also taken into account factors such as quality of coverage, size of viewing audience and sponsors' needs. Such deals involved Rugby Union (1994) or Wimbledon tennis, where the Lawn Tennis Association and the All England Club awarded primary rights from 1995-99 to the BBC at a cost estimated to be £30m. The International Olympic Committee earlier this year concluded a deal with the European Broadcasting Union to give exclusive European rights to the Winter Games until 2000 and the Summer Games until 2008. For the UK broadcast, this means that the BBC has the rights. The deal was estimated to be worth £900m and was considerably lower than offers received from satellite broadcasters.

The results of the consultation were announced on 4 March 1996. In a Lords written answer, Lord Inglewood undertook to introduce an amendment building on the new clause introduced by Lord Howell:⁹²

The government accept the strength of public and parliamentary concern on this issue and that there is a case for additional protection for listed events. We propose at Third Reading to bring forward an amendment building on Clause I of the Bill as amended in Committee to guarantee the availability of live coverage of listed events for terrestrial free-to-air television and to provide for a number of measures to secure the best deal for sports bodies, broadcasters and the public. These include scope for subscription and pay-per-view services to offer alternative or fuller coverage of a listed event, supplementing terrestrial coverage to the benefit of viewers. We shall include a review mechanism, to reflect the need for flexibility in the fast-moving broadcasting sector.

In addition, the Government keep the list of listed events under review. One point raised in consultation was that the process of deciding on the list should be made more transparent, and that criteria should be established to act as a reference point for future decisions. The Government think that this is an interesting suggestion and will consider it further.

⁹² HC Deb 570, WA8

The Government agreed to the suggestion that consideration be given to making the process of drawing up the list more transparent. On 'unbundling' he responded:⁹³

The Government have also consulted on a separate proposal that broadcasting rights to any sporting event of national or local interest should be "unbundled", so that a broadcaster with exclusive rights will be obliged to license rights to recorded or radio coverage to general reception broadcasting services. The Government are not persuaded of the case for such a control. It would introduce an entirely new concept, of very wide scope. It could have damaging financial consequences for sport. And it ignores the widespread availability of highlight and radio coverage, freely negotiated between sports bodies and broadcasters. The Government understand that the ITV Association thinks it preferable that the market should take its course within existing competition rules, and sees advantage in this approach.

Finally, it was agreed that the Sports Council should develop a voluntary code of conduct:⁹⁴

The Government understand that the Sports Council advocates a voluntary code of conduct, including an agreement by governing bodies of major spectator sports that viewers and listeners should have the widest possible access to major sporting events. The Government see attractions in this approach and invite the Sports Council to develop it with the governing bodies.

On 5 March 1996 at the beginning of Report stage Lord Howell introduced a new clause to provide for the unbundling of sports broadcasting rights, which was opposed by Lord Inglewood and withdrawn. On third reading, the latter introduced the promised amendments to replace Lord Howell's clause 1, to guarantee the availability of live coverage of listed events to terrestrial free-to-all television. These are now Part IV, clauses 77-85 of the Bill. The key clause is clause 81 which provides that no listed event may be shown live on one of the two categories of service defined in clause 78 (free-to-air and other) without the consent of the ITC, unless rights to show it have also been acquired by the other.

In response, BSkyB points out that they have not taken exclusive rights for any listed events, and that only 1% of Sky's sports coverage has moved from terrestrial television. The existence of a dedicated sports channel means increased access to sport for the British viewer. In 1995 there were over 9,500 hours of sport on Sky of which nearly 3,000 were live. They were able to cover all kinds of minority sports, and exploit new technology.

⁹³ *ibid.*

⁹⁴ *ibid.*

Sky maintain that the sports governing bodies know best how they would like the sport to develop, and should be free to decide. BSkyB is received by approximately 22% of British households.⁹⁵ BSkyB continues to maintain that the listing of any event will undermine its commercial value: "denying sports the right to sell exclusive coverage of events to pay-television will damage them financially." They propose amendments to the bill to give a minimum degree of financial protection for listed events and oppose 'unbundling' because "it focuses far too much on the interests of terrestrial broadcasters, and far too little of the funding and future of British sport. It fails to recognise that separate highlights packages are already a reality."⁹⁶

The BBC has welcomed the Government amendments to protect the "Crown jewels" of British sport, the eight listed events. It is concerned that other important events, such as the Five Nations rugby championship, the Commonwealth Games and golf's Open Championship are vulnerable. The BBC also believes that unbundling offers a number of important benefits:

"First and foremost, it would guarantee that they could not be forced to sell all rights to one monopolistic broadcaster. Second, it would ensure that the largest possible number of people were encouraged to take an active interest in their sports. And, finally, their financial interests would be protected by ensuring different types of broadcasting rights could be sold, category by category, to the highest bidder."⁹⁷

ITV believes that it is logical to extend the listed events prohibitive to subscription channels, but would not support efforts to enshrine the existing list or additions to it in statute. They share concerns about possible abuse, but reckon that market forces are already beginning to encourage rights holders to unbundle. They believe that it is preferable to allow the market to take its course without further legislation at this stage.

⁹⁵ BSkyB Ltd: Sport and television - the facts

⁹⁶ BSkyB : Sport and Television: Listed Events, 1996

⁹⁷ BB Bulletin, April 1996

V The Channel 4 Funding Formula (Clauses 69-70)

The *Broadcasting Act 1990* established Channel 4 as a statutory non-profit making corporation, the Channel Four Television Corporation from 1 January 1993, licensed and regulated by the ITC. Channel 4 had previously, since 1980, been a subsidiary company of the IBA, then the ITC. The service was launched in November 1982.

Until the end of 1992, the ITV companies had sold Channel 4 airtime in their own regions in return for an annual subscription determined by the IBA (17% of ITV net advertising revenue) which financed the service, with 80% for Channel 4 and 20% for S4C in Wales.

Since 1 January 1993, Channel 4 has sold its own airtime, in competition with the regional Channel 3 licensees. SS.26 and 27 of the *Broadcasting Act 1990* established a system of income support for Channel 4 : the so called "safety net" to ensure that the Channel's income remained sufficient to enable it to discharge its statutory responsibilities, including the requirement to provide Channel 4 as a public service containing a suitable proportion of matter calculated to appeal to tastes and interests not generally catered for by Channel 3, innovating and experimenting in the form and content of programmes and generally having a distinctive character of its own.

Where Channel 4's revenue exceeds 14% of total terrestrial qualifying revenue (mainly advertising and sponsorship income) the surplus has to be divided, with 50% being paid via the ITC to the Channel 3 licensees, 25% being paid into a reserve fund of the Channel 4 corporation and the remaining 25% being available to Channel 4 for current expenditure. If Channel 4's revenue falls below 14%, the shortfall must be made up first from any balance in the reserve fund. Subsequently, Channel 3 licensees have to pay Channel 4 via the ITC to 2% of total qualifying revenue. The ITC is required to determine the proportion of the surplus to be paid to each Channel 3 licensee or the contribution to any deficit to be made by them. Indicative figures, for payments to or from Channel 4 were published in the ITC's Invitation to Apply for Channel 3 licences of February 1991 and the existence of the formula formed part of the companies' business plans. In a short debate in the House of Lords on 27 February 1995, Lord Hollick said "We signed up for a licence on the basis of the conditions that were in the legislation and the conditions that were in the invitation to apply".⁹⁸

Under s.26(10) of the *Broadcasting Act 1990*, the Secretary of State may by order substitute a different percentage for the 14% and 2% specified in sub-sections 2 and 4, but no such order may be made before the end of 1997.

⁹⁸ HL Deb. 561 cc1392-93

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On 9 February 1996, the ITC announced that it had determined that for 1995 total terrestrial qualifying revenue was £2,140.0m and that Channel 4's minimum income was, therefore £299.6m. Channel 4 earned qualifying revenue of £448.0m and thus the amount to be paid by Channel 4 to Channel 3 was £74.2m, with £37.1m to be placed in the reserve fund.

These figures may be subject to adjustment in the light of ITC audits of licensees' qualifying revenue. For 1994 these resulted in a revision to the figures determined for 1994, and the amount paid by Channel 4 to Channel 3 was reduced by £197,000. This is reflected in the payment due in respect of 1995 which is set at £74.0m net. The amount to be placed in the reserve fund for 1994 was reduced to £28.6m.

In the apportionment of Channel 4 surplus between Channel 3 licensees, the largest sum to be paid to Central: £10,960,612, followed closely by Carlton: £10,938,410. The smallest share is that of Channel: £29,603.⁹⁹

Ever since the first year of operation, Channel 4 has been campaigning for the formula to be changed on the basis that it seems to be most unlikely that Channel 3 will be required to subsidise Channel 4 during the term of its licence. Its 1993 Annual Report recorded that

"An unsatisfactory consequence of the payment which has been made is that Channel 4 now finds itself providing a safety net of considerable significance to the more enthusiastic bidders for Channel 3 licences. If the money paid to Channel 3 had been retained by Channel 4, it would have been deployed in strengthening our position through increased investment in British created film and programme production".

The campaign waged has been vigorous. They placed an advertisement in the *House Magazine*, 12.2.96, which claimed "We have just signed away 1,5000 new jobs and 645 hours of new British programmes":

This is the penalty paid by viewers and British programme makers for a piece of rogue legislation. In 1990, Parliament intended to provide a "safety net" for Channel 4 to support its ability to deliver its programme remit. In the event, the "safety net" has proved to be a millstone. Because Channel 4 has done well, we are now paying a huge subsidy to the much richer ITV companies - £170 million in the last three years. This year's instalment of over £74 million is equivalent to double our annual budget for films and drama. It is a case of Robin Hood in reverse. We cannot make the home-grown documentaries, dramas, arts programmes and films which British viewers deserve. The money disappears into the coffers of the ITV companies instead. These funds helped Granada buy Forte last month, not to make programmes. We are prevented from giving new British talent the chance to write, produce and direct. If we could invest the money, it would create 1,500 new British jobs in the film and television industry. The Ministers who drafted the 1990 Act say it should now be changed. The Independent Television Commission say Channel 4 should make no payments to ITV after 1997. The advertisers and programme-makers agree. Now it is back to Parliament. The law is in disrepair. We look to Parliament to put it right. 1,500 jobs and the interests of viewers hang on its judgement.

⁹⁹ ITC press notice, 9.2.96

ITV have maintained that the formula should be retained at least until 1997 when Channel 4's share of advertising revenue is likely to have peaked, and that it was in the public interest that competition between the terrestrial commercial broadcasters be managed. In December 1995 the ITV Association issued a report on the funding arrangements which made the points that:

- Any alteration to the formula before the end of 1997 would constitute retrospective legislation;
- ITV companies have received an estimated £258 million less advertising revenue than expected in their business plans, the majority of which has gone to Channel 4 so that the income from Channel 4 is crucial in meeting their financial and programme commitments.
- Channel 4's programme budget has increased by 44% or £81 million over three years, most of which is being devoted to US programming, not less and it has spent £62 million on a new office building.
- Abolition of the funding arrangements would remove a vital check on Channel 4's ability to pursue 'a ratings first' rather than 'remit first' policy and would upset the competitive balance between Channels 3,4 and 5. The arrangements are "part of a much wider and more complex set of arrangements for funding commercial television as a whole and cannot be considered in isolation."
- Channel 4 was never intended to be a full commercial competitor to ITV or Channel 5 and should be allowed to compete only if privatised, i.e. required to pay for its licence and lose the benefits of cross promotion with ITV, *inter alia*.

On second reading, on 16 January 1996 Lord Inglewood described the provision in what is now clause 70:¹⁰⁰

Clause 66 amends the formula for securing the income of Channel 4. It gives the Government powers to alter by order the distribution of any Channel 4 revenue above its guaranteed income, by adjusting the percentages allocated to the ITV companies, to Channel 4's reserve fund and to Channel 4's current expenditure.

The present arrangements are not a subsidy to the ITV companies, but a form of insurance premium as a guarantee of Channel 4's long term future. Channel 4 has been tremendously successful in the past two years. But with Channel 5 and new digital services in prospect we still see the need for a safety mechanism for Channel 4 to secure its continuing success within its existing remit. Nevertheless, we want to be able to allow Channel 4 to retain more of its own revenues to invest in programmes. We propose to specify the relevant percentages nearer the time, taking account of the prevailing circumstances of the broadcasting market.

¹⁰⁰ HL Deb. 568, c.475

On 13 February, in committee, the Earl of Stockton moved amendments the object of which was to abolish in its entirety the Channel 4 funding formula. Lord Inglewood expressed caution.¹⁰¹

The Government's approach retains the basic framework of the funding formula. However, it includes the power, by order, to adjust the treatment of Channel 4's earnings above the 14 per cent. threshold which I have described. It also updates the definition of total national advertising revenue to include multiplex revenue as well as the other elements (including Channel 5 revenue) specified in the 1990 Act. It would not be right to change the rules applying to funding flows between Channel 3 and Channel 4 before 1997. To do that would be unfair.

The Government's approach has two benefits. First, retaining the formula will keep the safety net for Channel 4 in place as a prudential measure. I hear the arguments that that safety net is unnecessary, since Channel 4 has every expectation of being able to stand up for itself in future. We do not feel that it is responsible to be so sanguine. The broadcasting industry is going through a period of intense change. Indeed, I doubt whether there has ever been a period of such change. There is a plethora of uncertainty, arising from the launch of Channel 5, the advent of digital terrestrial television and the projected expansion of the cable and satellite sector, with scope for several hundred channels to be available in future. As the ITC has acknowledged, the outlook for Channel 4 into the next century is uncertain. Some forecasters anticipate a downturn in Channel 4's share of net advertising revenue, in particular as Channel 5 develops in the early years of the next century.

He went on to describe the effect of the Government's proposal in the bill and to announce the capping of the reserve fund.¹⁰²

The second major characteristic of the Government's proposals is their flexibility. Clause 66 will provide powers for the Secretary of State, by order, to adjust payments from Channel 4 to Channel 3 companies downwards from their current level of 50 per cent. of Channel 4's income above the 14 per cent. threshold. It is too early to say what the new funding level will be, but there is scope to adjust the current distribution significantly and our intention will be to enable Channel 4 to retain significantly more of its revenues for programmes. Under the affirmative resolution procedure, Parliament will have an opportunity to debate the issue fully in due course.

Furthermore, included in these powers is one by which we can reduce Channel 4's payments into the statutory reserve. It may help the Committee to know of the Government's present intention so far as the reserve is concerned. The reserve currently stands at more than £70 million. Assuming no unexpected difficulties, it is the Government's present intention that the reserve would be capped at an appropriate level, with no further payment made into it unless circumstances changed. Even assuming no change in the level of payments to Channel 3, that would at a stroke double Channel 4's income above the threshold to spend on programmes.

He provided more detail about the timing of change on report stage on 7 March.¹⁰³

¹⁰¹ HL Deb. 569, c.621-2

¹⁰² *ibid*

¹⁰³ HL Deb. 570, c.443

The Government's proposition is that we should proceed by a phased approach, which would seek to meet the interests both of the Channel 3 companies and of Channel 4. As a first step, we should seek to make an order on enactment to end Channel 4 payments into the statutory reserve with immediate effect. To put that into perspective, Channel 4's payment into the reserve for 1995 was £37 million. If our proposed order is agreed, the effect will be that in respect of the payment relating to 1996 and later years Channel 4 will have more revenue to apply to programmes. In effect, the gain as against earlier expectations will be equivalent to two years' payments into the reserve.

As a second step, we propose to introduce reductions to Channel 4 payments to Channel 3 in two phases. The first reduction would take effect from 1998; the second would take effect from 1999. It is too early to say what the new levels would be, but we have indicated that we expect significant adjustment in Channel 4's favour, and we are taking powers which would in principle enable us - if we so judge nearer the time and Parliament agrees - to reduce Channel 4 payments to Channel 3 to zero from 1999. Whatever the final level, there would be a stepped reduction towards it from 1998.

On third reading Lord Thomson of Monifieth moved amendments to abolish the formula by 1 January 1998. Lord Inglewood again reiterated the Government's desire to retain the funding formula "as a prudential measure". He moved amendments to enable the reserve to be capped and to allow Channel 4 payments to Channel 3 to be reduced in principle to zero by 1999. (Clause 70(4)). The order making power is subject to the affirmative procedure.

ITV accepted that the phased reduction to the formula was one way of providing the necessary cushion against significant reduction in ITV's income and welcomed the fact that the discussion could take place towards the end of 1997 when the impact of increased competition in the broadcasting environment could be assessed. Yorkshire Tyne Tees, however, supported Lord Thomson's amendment.

VI The Broadcasting Standards Commission Part V

Clauses 71-94 of the Bill provide for the establishment of a new body to deal with complaints about broadcasting, the Broadcasting Standards Commission (BSC).

The National Heritage Select Committee in the report on the future of the BBC in 1993-94 recommended that "the present tangled skein of complaints bodies should be abolished and be replaced by one overall body."¹⁰⁴ The White Paper on the BBC recorded that a number of organisations including the Voice of the Listener and Viewer and the Labour party favoured the setting up of a Broadcasting Consumers' Council. The Government, however, took the view that the effect of such a body would be to undermine the direct links which should exist between the public and the broadcasters and regulators.¹⁰⁵ It was acknowledged that members of the public have difficulty in knowing to whom they should complain about what, and the White Paper set out the Government's proposal to merge the Broadcasting Standards Council and the Broadcasting Complaints Commission.

It describes the two bodies as follows:¹⁰⁶

7.2. The Broadcasting Complaints Commission was established in 1980. It examines complaints of unfair or unjust treatment and unwarranted infringement of privacy. Its remit extends to all radio and television programmes, including cable and satellite services, broadcast advertisements and teletext. In its consideration of a complaint, the Commission can require broadcasters to provide recordings or transcripts of programmes or any relevant documents, and a written statement in answer to the complaint, which is also sent to the complainant. It can also require broadcasters to attend hearings and to publish its findings on complaints.

The Broadcasting Standards Council was established in 1988 and put on a statutory footing in the Broadcasting Act 1990. The Council can consider complaints from the public about the portrayal of violence and sexual conduct and taste and decency. In 1993, it considered 1,355 complaints within its remit. The Council draws up codes of practice to be followed, and broadcasters and regulators have to take account of the Council's codes in preparing their own codes or guidance. In February 1994, the Council issued a revised Code of Programme Standards. It can also carry out research into the portrayal of violence or sexual conduct and standards of taste and decency.

The new Commission is to consider complaints about unfair treatment and invasion of privacy and complaints about taste and decency. Clause 99 provides that where the BSC have considered a complaint of either kind, they may give directions for the publication of a summary of the complaint, the BSC's findings and any observations by the BSC. Publication may not be accompanied by observation other than those of the BSC. On second reading, Lord Inglewood described differences between the powers and functions of the new body and those of its predecessors:¹⁰⁷

¹⁰⁴ 1993-94 HC 77-I, pXIV

¹⁰⁵ Cm 2621 1994 p.49

¹⁰⁶ *ibid.* pp47-8

¹⁰⁷ 16.1.96 - HL Deb. 568, c.476

The new body's powers and functions differ slightly from those of its predecessor. In addition to the Code of Practice previously produced in the areas of taste and decency, the commission will now be invited to produce privacy and fairness guidelines. It will also be required to publish, in its regular reports, summaries of every fairness or standards complaint, whether they have been upheld in whole or in part, and details of all steps taken by broadcasters as a result of findings made against them. Such action would include both the direct response to the commission's conclusions and any internal measures taken. Broadcasters will thus need to demonstrate to the public that they have given the complaint due and proper attention within any timescale set by the commission.

The proposal has in general been welcomed, but the second reading debate in the House of Lords indicated that proposals for amendments were to be forthcoming. On 15 February, Baroness Jay of Paddington moved an amendment to make the Commission a consumer body, to be known as the Broadcasting Standards and Consumers Commission, able to investigate all broad qualities as well as specific complaints.¹⁰⁸ Lord Inglewood replied that such an extension of powers was unnecessary because it duplicated the powers already available to the regulators.¹⁰⁹

Viscount Caldecote moved an amendment to replace "*may* draw up guidance" with "*shall* draw up codes."¹¹⁰ He felt that "guidance" could be ignored, whereas a code was more likely to produce compliance. This was a distinction not accepted by Lord Inglewood, though he undertook to consider these amendments further.¹¹¹

Lord Chalfont moved an amendment to clarify the concept of unjust or unfair treatment by introducing the concept of impartiality.¹¹² He advocated a single overarching independent regulator, with no responsibility for broadcasting. He acknowledged that the purpose of the amendments was to make the BBC, like the commercial broadcasting sector, subject to the regulation of an independent authority:¹¹³

The amendment to Clause 71 is designed simply to introduce a concept of objectivity or impartiality into the complaints procedure of the BSC so that there is, as in the commercial broadcasting sector, an independent regulatory body to which complaints can be addressed about alleged lack of objectivity, impartiality or fairness in any programmes, including those of the BBC, which, as I have suggested, does not have an independent regulatory body.

Lord Chalfont also advocated the removal of the requirement, now in clause 76, that a fairness complaint may be made only by or on behalf of the person directly affected.¹¹⁴

¹⁰⁸ HL Deb 569 c.777

¹⁰⁹ *ibid.* c.784

¹¹⁰ *ibid.* c.808

¹¹¹ *ibid.* c.814

¹¹² *ibid.* c.822

¹¹³ *ibid.* c.824

¹¹⁴ *ibid.* c.826

Research Paper 96/48

On report stage on 7 March 1996, Lord Inglewood moved a number of amendments, which had been suggested in Committees. He announced that the Government had come to the view that the drawing up of guidances should be mandatory.¹¹⁵ He also introduced an amendment along the lines of that proposed by Baroness Dean of Thornton-le-Fylde in Committee:¹¹⁶

The noble Baroness, Lady Dean, introduced an amendment in Committee to prevent broadcasters making comment alongside any summary of a BSC finding which they were required to publish or broadcast. The noble Baroness, your Lordships will recall, offered the example of a finding by the Broadcasting Complaints Commission against the programme "The Cook Report" where the broadcaster, in broadcasting a summary of the finding, accompanied it with negative comment by the programme's presenter, Roger Cook. I understand that the ITC subsequently required that the summary be broadcast again, this time without additional comment, and that was done. Nevertheless, the point is a good one. Amendment No. 205 is intended to ensure that broadcasters may not comment alongside any published or broadcast summary of a BSC finding which they are required to make. That would not, of course, restrict the broadcasters' freedom to comment elsewhere on such a finding.

Lord Chalfont and other again pressed for the word guidance to be replaced by something 'more forceful': "It may be worth reminding your Lordships that in the Scott Report we had a prime example of the dangers of giving people guidelines rather than clear and unambiguous rules or codes."¹¹⁷ Lord Chalfont also returned to his desire to impose an enforceable impartiality requirement on the BBC and the requirement that the complainant be directly affected by the unfairness complained of:¹¹⁸

I conclude by reminding the House that the three amendments are interdependent. They are designed to empower the Broadcasting Standards Commission to adjudicate not only on complaints about standards of taste and decency, but also on complaints about fairness, objectivity and impartiality, including complaints on such matters in BBC programmes. I also seek to remove the curious provision which seems to me to be totally lacking in logic that, while complaints about taste and decency may be made by any listener or viewer, complaints about fairness and objectivity may be made only by people who are directly affected. I totally fail to see the logic of that position. I have been infinitely more offended, and I know others who have felt the same, by a programme which has been inaccurate and biased on a historical or political subject than by all the taste and decency arguments that one can advance.

¹¹⁵ HL Deb 570, c.496

¹¹⁶ HL Deb 570, c.496

¹¹⁷ *ibid.* c.497

¹¹⁸ *ibid.* c.510

After some debate, Lord Inglewood pointed out that substantial changes had been made to the BBC Charter and Agreement and that "the Secretary of State, the new Chairman of the BBC and the Government are all emphatic that 'those abuses of the past should not continue.'"¹¹⁹

Lord Inglewood agreed to remove the entirety of what was then clause 84 (10) giving absolute privilege to any report of the BSC on fairness complaints.¹²⁰

The purpose of granting the Broadcasting Standards Commission absolute privilege in the clause for reports of its proceedings is to define the matter beyond argument and to ensure that the commission may carry out its duties without fear of false allegations of defamation which could embroil its members in lengthy and costly court proceedings. However, I fully understand the anxieties of noble Lords. On reflection, we now believe that it would be more appropriate to remove the entirety of subsection (10).

The provision is still there, as clause 99 (11).

On third reading on 19 March 1996, Lord Inglewood, in response to previous debates introduced an amendment to substitute "a code giving guidance to" for "guidance".¹²¹

¹¹⁹ *ibid.* c.526

¹²⁰ *ibid.* c.530

¹²¹ *ibid.* c.1219

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