

## Legal and regulatory overview

### Introduction

1. This appendix provides an overview of the relevant statutory provisions that govern the public interest, and in particular the plurality, assessment under the Act. It also briefly examines the relevant regulatory provisions that govern certain of the broadcasting activities of ITV and BSkyB. A more detailed examination of UK broadcasting regulation is provided in Appendix B.

### Legal framework

#### ***Relevant Enterprise Act 2002 provisions***

2. Given that our preliminary view is that a relevant merger situation has been created in relation to BSkyB's acquisition of a 17.9 per cent share in ITV, under the Secretary of State's terms of reference and section 47(2)(b) of the Act, we are required to decide 'whether, taking account only of any substantial lessening of competition and admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest'.<sup>1</sup>
3. An 'admissible public interest consideration', according to section 47(11) of the Act, means any public interest consideration specified in the Secretary of State's reference. The DTI's guidance on media mergers<sup>2</sup> (DTI Guidance) further specifies that the only public interest considerations that the Secretary of State may take into account are those set out in section 58(2C) of the Act.

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<sup>1</sup>If the CC decides that this merger operates or may be expected to operate against the public interest, it must further decide: (a) whether any action should be taken by the Secretary of State to remedy, mitigate or prevent any such adverse effects identified; or (b) whether to recommend the taking of any action by the Secretary of State or by others to remedy such adverse public interest effects. (Section 47(7) of the Act.)

<sup>2</sup>The DTI, *Enterprise Act 2002: Public Interest Intervention in Media Mergers: Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers*, May 2004.

4. The media public interest consideration specified by the Secretary of State in the intervention notice dated 26 February 2007 and incorporated in the terms of reference is set out in section 58(2C)(a), namely 'the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience'.<sup>3</sup>

### **Interpretation of 'sufficient plurality of persons'**

5. There is no statutory definition of 'sufficient plurality of persons' in the Act. The Explanatory Notes to section 375 of CA 2003, which introduced the provisions in section 58 of the Act, state that the first limb of subsection 58(2C) 'is concerned primarily with ensuring that ownership of media enterprises is not overly concentrated in the hands of a limited number of persons'. The DTI Guidance (in paragraph 7.7) states that 'This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality.' The DTI Guidance adds further that 'The Secretary of State will assess whether there is likely to be a significant reduction in plurality in relation to any relevant audience as a result of the merger'.<sup>4</sup>
  
6. BSkyB argues in its main submission (in paragraphs 3.1 to 3.3, Part E) that these DTI Guidance provisions indicate that the legal threshold for an adverse public interest finding is high and will only be exceeded if the merger gives rise to 'unacceptable levels of ... dominance' and/or a 'significant reduction in plurality'. 'Fundamentally', BSkyB argues, 'the concern is with the ability of any one person to influence opinions and control the agenda' (paragraph 3.1). BSkyB adds that the

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<sup>3</sup>The other two possible public interest considerations specified in section 58(2C) are: the need for a wide range of broadcasting of high quality and calculated appeal to a wide variety of tastes and interests (section 58(2C)(b)); and the need for those carrying on with control over media enterprises to have a genuine commitment to the applicable broadcasting standards objectives (section 58(2C)(c)).

<sup>4</sup>DTI Guidance, paragraph 7.11. The DTI Guidance in paragraphs 7.3 and 7.4 notes that there is a 'recognisable overlap' between the competition assessment and the sufficient plurality assessment, which means that, in some cases, action to safeguard competition 'will by itself be likely to provide a sufficient plurality of control'.

provisions in paragraph 8.8 of the DTI Guidance ‘raise the bar for regulatory intervention even higher’. In that paragraph, the DTI states that the Secretary of State will only consider intervening ‘in exceptional circumstances’ where there continue to be media ownership rules (like the ‘20/20’ rule in this case—see paragraph 27) or where there have been no such rules and the merger ‘may give rise to serious public interest concerns’.

7. We consider that it is not necessary to take a view on precisely how many owners would constitute a ‘sufficient’ level of plurality of persons. Rather, we must come to a qualitative view on sufficiency and the change in plurality as a result of the acquisition. An examination of Parliament’s intentions behind the plurality provisions suggests that the preservation of ‘sufficient plurality of persons’ is aimed, fundamentally, at ensuring the maintenance of a sufficient plurality of voices.<sup>5</sup> Thus, our qualitative assessment considers the ‘sufficient plurality of persons’ in relation to both ownership and voices. (See further comments below on section 58A(4) and (5) of the Act on the reasoning behind this.)

### **Scope of ‘media enterprises’**

8. ITV and BSkyB each consider that they are ‘media enterprises’ as defined under the Act, but they query whether their respective news services can be considered in the plurality assessment since ‘news content providers’ are not ‘media enterprises’. Section 58A(1) of the Act defines ‘media enterprises’ as those entities whose business ‘consists in or involves broadcasting’. Section 44(9) of the Act explains that ‘broadcasting’ consists of services which Ofcom licences under Part 1 or 3 of the Broadcasting Act 1990 or Part 1 or 2 of the Broadcasting Act 1996. ITV and BSkyB

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<sup>5</sup>In opening the debate on the Communications Bill in the House of Lords, Baroness Blackstone explained that one of the main purposes of the legislation was to ‘ensure the existence of a range of media voices, safeguarding the vibrancy of democratic debate’ (Hansard HL Debate, 20 November 2002, c 381). This focus on ensuring a plurality of voices is reiterated in Lord Puttnam’s opening comments in the debate on the public interest test provisions in CA 2003 (Hansard HL Debate, 5 June 2003, c 1431).

each have such licences. ITN also told us that it holds such a licence from Ofcom but only for broadcast services over the mobile telephone network.

9. We agree with the parties that ITV and BSkyB can each be construed as 'media enterprises' whereas entities that are news content providers, in themselves, may not be. Nevertheless, we consider that both ITV's and BSkyB's news services are relevant to the plurality assessment in that ITV serves a television audience for news through ITN and BSkyB serves a television audience for news through its in-house news service, Sky News.
10. In its main submission (in paragraph 4.6), ITV states that 'It is not entirely clear from the terms of the statutory test in s. 58A(1) whether or not the position of ITN as a producer of news is susceptible to investigation under the public interest test'. ITV said that it was arguable that ITN did not fall within this definition given its position as a producer of news and also queried whether the production of television news 'should be a central factor in any assessment of plurality' given that the relevant merger situation relates to ITV rather than ITN. Given ITV's shareholding in and relationship with ITN, as well as the fact that ITV serves a television audience for news through ITN, we believe that it is appropriate to consider ITN in this plurality assessment.
11. Under section 58A(2) of the Act, in a merger situation where one of the enterprises ceasing to be distinct involves broadcasting, references to media enterprises in section 58(2C)(a) include references to newspaper enterprises. This means that it is appropriate to take into account cross-media considerations to the extent that these are raised by the merger. BSkyB noted that the DTI Guidance appears to suggest that section 58A(2) applies only to circumstances where a relevant merger situation involves both broadcast media enterprise and a newspaper enterprise, BSkyB submitted that this is not the case here because the merger referred was the ceasing

to be distinct of BSkyB and ITV. However, section 58A(2) is not limited in the way suggested: it states that if one of the parties to the merger consists in or involves broadcasting, references to 'media enterprise' both in the plurality public interest consideration in section 58(2C) and in the various definitions in section 58A include references to newspaper enterprises.

### **Definition of 'relevant audiences'**

12. The Act (section 58A(7)) and the DTI Guidance (paragraph 7.12) provide the decision-makers with a considerable margin for discretion on the definition of an 'audience': it can include such persons as 'the decision-making authority considers appropriate in the circumstances of the case' and 'may allow for persons to be treated as members of an audience if they are only potentially members of it' (section 58(7) of the Act). In addition, in determining what audience a media enterprise serves, section 58(6) of the Act enables us to consider any of the audiences served by that media enterprise, all of its audiences taken together, or a number of the audiences taken in whatever group that we consider appropriate.
  
13. BSkyB contends that the relevant audience for television news needs to be considered on a platform-by-platform basis. It notes that the Act refers to the audience served by 'a media enterprise' and suggests that this does not allow the CC to aggregate audiences served by wholly different media enterprises in order to create a cross-media audience. However, we consider that we have wide discretion in our interpretation of 'relevant audience'. We are not limited to considering the relevant audience on a platform-by-platform basis, nor are we precluded from considering a cross-media audience (audience can also mean 'readership'). We can also consider potential members of the audience in our assessment. Whilst section 58A(6) refers to an audience being identified in relation to a (specific) media enterprise, the public interest consideration in 58(2C) is concerned with the plurality of persons controlling media enterprises serving every different audience in the UK.

We can consider any audience, defined as we consider appropriate, including an audience which is served both by television and newspaper enterprises.<sup>6</sup>

### **Scope of section 58A(4) and (5) of the Enterprise Act 2002**

14. The media public interest consideration requires a detailed consideration of sections 58(4) and (5) of the Act. These provisions are as follows:

(a) Section 58A(4) of the Act: 'Wherever in a merger situation two or more media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards.'

(b) Section 58A(5) of the Act '... Where two or more media enterprises—

(a) would fall to be treated as under common ownership or control for the purposes of section 26, or

(b) are otherwise in the same ownership or under the same control they shall be treated (subject to subsection (4)) as all under the control of only one person.'

15. Several parties, including Ofcom, ITV and Virgin Media, have argued that, given sections 58A(4) and (5), plurality should be assessed according to a binary assessment. In other words, as Virgin Media puts it, section 58A(4) creates a statutory presumption that there has been a reduction in the number of media enterprises serving an audience and, hence, a reduction in plurality. BSkyB has submitted that the CC should not follow this approach but instead consider the actual effects of the level of influence acquired and 'not proceed on the basis of any legal fiction as respects the nature of control', particularly given that BSkyB is expressly prohibited by law from acquiring full control of ITV as a result of the '20/20' rule.<sup>7</sup>

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<sup>6</sup>DTI Guidance, paragraph 7.12. See also section 58A(8) of the Act.

<sup>7</sup>See paragraphs 2.2 to 2.8, Part E, of BSkyB's main submission.

16. BSkyB has submitted that the purpose of section 58A(4) of the Act is to ensure that, regardless of the level of control acquired:

the Commission would still be allowed to carry out a 'reduction in plurality' assessment. BSkyB argues that this is why under s. 58A(4) the number of enterprises serving the same audience is deemed to have reduced even if, in fact, it has not. This does not alter the fact that, if a merger situation is subject to the plurality analysis by virtue of s. 58A(4), the Commission is not required to extend this legal fiction to the actual level of control acquired and deem that full control has been acquired when this is not the case. ... If any merger situation under the Enterprise Act was deemed to give rise to an acquisition of full control, ... one would expect the Secretary of State and Commission not to be entitled to scrutinise plurality issues arising at each incremental change in the level of control. [BSkyB main submission, paragraphs 2.2 and 2.4, Part E.]

17. Our preliminary view is that section 58A(4) serves as an anti-avoidance provision to ensure that the plurality assessment required by section 58(2C)(a) can be carried out for all mergers, 'including those involving an increase in the levels of control of such media enterprises ... even though the number of enterprises may in fact be unchanged'.<sup>8</sup> The DTI Guidance (paragraph 7.13) further clarifies that: 'This means that the Secretary of State can assess whether, as a result of the merger, there will be sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged.'
18. The interpretation of section 58A(5), read in conjunction with section 58A(4), seems less clear. At first sight, section 58A(5) appears to provide that once a media enterprise falls to be treated as under the ownership or control of another for the

purposes of section 26 of the Act, it must also be treated as under the control of that company for the plurality assessment, without consideration of the quality or nature of control actually attained. Under this interpretation, the sufficient plurality of persons assessment requires a consideration of the number of other participants serving the defined audience to ascertain whether there remain enough players to satisfy that sufficiency.

19. An alternative interpretation is that section 58A(5) is applicable not just (or not at all) to the merging media enterprises (to which subsection (4) applies) but instead to *other* players in the market. The words ‘would fall to be treated’ and ‘are otherwise in the same ownership or under the same control’ both seem to indicate that this subsection is referring to something other than the parties to the relevant merger situation. The proviso ‘subject to subsection (4)’ also gives some credence to this view. Such an interpretation also seems to be consistent with the Explanatory Notes to the legislation, the DTI Guidance provisions, and the Parliamentary Debates. The following provisions, among others, are helpful in supporting such an assessment:
- (a) The Explanatory Notes to CA 2003 (at paragraph 805) state that section 58A(5) ‘ensures that the authorities can look at the substance of who controls media enterprises when carrying out a plurality assessment’. This also suggests that News International can be considered in this assessment.
  - (b) The Explanatory Notes to CA 2003 (in paragraph 806 and reiterated in the DTI Guidance at paragraph 7.14) state that ‘in assessing the effect of a merger on the sufficiency of plurality of persons with control of media enterprises, the decision-making authority needs to assess the total number of persons with control of media enterprises and what effect the merger will have on the plurality of media as a whole’.<sup>9</sup>

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<sup>8</sup>Explanatory Notes to section 375 CA 2003, which introduced the section 58A of the Act provisions.

<sup>9</sup>In support of this effects-based test, see the comments of Lord Puttnam during the Parliamentary debate on the Communications Bill in which he stated: ‘... In a period of rapid economic, technological and ownership change, the one thing we cannot do is even begin to guess at who might or might not attempt to control this or that element of the media. What we can do, however, is refuse to contemplate any broadly unacceptable level of media concentration where each of the component

- (c) The Explanatory Notes to CA 2003 (paragraph 807) note that section 58A(5)(b) 'is intended to cover any situation where the *other* media players have never been "brought" under common ownership or control at any point' (italics added).
- (d) The DTI Guidance also provides (in paragraph 7.6) that 'it will be necessary to analyse and consider all the relevant circumstances on a case-by-case basis'.

20. We therefore consider that sections 58A(4) and (5) can be interpreted as:
- enabling the CC to consider whether the acquisition operates or may be expected to operate against the public interest even though the number of media enterprises serving the same audience has not in fact changed; and
  - enabling the CC to look at who controls (in the merger control sense, comprising material influence and de facto control as well as full control) the other media enterprises serving the same audience.
21. BSkyB has provided us with a joint Opinion from leading Counsel, which concludes that there is nothing in section 58A(4) and (5) which requires us to address the plurality consideration on the basis of any statutory fiction, ie that wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises shall be assumed to be more immediately before they cease to be distinct than it is afterwards, and that we should proceed to a close examination of the facts.
22. We consider that, regardless of the specific construction placed on these provisions it is possible, and indeed appropriate, to undertake a qualitative assessment which examines the actual level of influence acquired and not, as BSkyB puts it, to base our analysis on a statutory fiction. In its oral hearing on 31 July, ITV agreed that the

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parts is of significant size and reach in its own right. 'What we need, therefore, is the ability to identify these concentrations as and when they occur, examine them in an analytical, fact-based way and ask whether they fit our definition of "unacceptable"' (Hansard HL Debate, 5 June 2003, c 1432).

construction of these provisions is not clear. It suggested that it was likely that the CC would have to conduct both a qualitative assessment and a binary assessment.

### **Ability to consider cross-media issues in this case**

23. BSkyB argued that 'it is not appropriate for the Commission to consider News International's newspaper publishing interests as a relevant consideration' for the purposes of this analysis on the grounds that it would 'undermine the validity of a regulatory regime approved by Parliament which was specifically designed to deal with the present situation' (paragraph 5.23, Part E, BSkyB main submission). However, our preliminary view is that we can and should undertake a cross-media analysis in this case, and that sections 58 and 58A of the Act explicitly provide for such cross-media considerations in the context of the public interest test. Whilst the '20/20' media ownership rule (see paragraph 27) was clearly envisaged to be 'a sufficient check on the power of newspaper proprietors for the public interest to be satisfied',<sup>10</sup> the relevant public interest consideration was not disapplied from situations in which the 20/20 rule is applicable. BSkyB acknowledges<sup>11</sup> that the DTI Guidance (at paragraph 8.8) expressly notes that intervention may be considered necessary in exceptional circumstances even where there are media ownership rules in place as well.

### **Sufficiency of the existing regulatory framework**

24. BSkyB argued that the existing regulatory framework ensured sufficient plurality. However, there is a difference between the Codes that are designed to ensure, among other things, impartiality in terms of news presentation and plurality of person with control of media enterprises. We believe that the regulatory framework, while relevant to plurality and, hence, the statutory public interest assessment, does not

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<sup>10</sup>Dr Howells, Minister for Tourism, Film and Broadcasting, House of Commons, 30 January 2003, quoted in Sky Initial Submission at note 127, p58.

<sup>11</sup>BSkyB Initial Submission, Part E, paragraph 3.2.

necessarily ensure sufficiency on its own.<sup>12</sup> The regulatory provisions can be considered to maintain ‘internal plurality’ whilst the public interest test under sections 58 and 58A of the Act governs ‘external plurality’.

25. The fact that the public interest provisions introduced in the CA 2003 sit alongside revised and updated media ownership rules suggests that Parliament intended the public interest test to supplement the regulatory framework provisions. As Baroness Buscombe put it in agreeing with Lord Puttnam’s public interest test proposals: ‘one needs an extra provision to preserve media plurality in some way’.<sup>13</sup>
26. The main regulatory mechanisms with an impact on plurality which are relevant to BSkyB and ITV in the context of changes to ownership and the ‘internal plurality’ assessment are outlined here. Appendix B provides a more detailed overview of the overall regulatory framework. Certain relevant contractual provisions and the EC Merger Regulation provision on ‘legitimate interests’ are also briefly discussed here.
27. Relevant regulatory change of ownership provisions follow:
  - (a) *The 20/20 media ownership rule:* Paragraph 2 of Schedule 14 CA 2003 places restrictions on shareholdings in Channel 3 licence holders. It provides that no proprietor of a national newspaper with a share of 20 per cent or more of the total national market readership may hold an interest of more than 20 per cent in a Channel 3 licence holder. This prevents BSkyB from having a shareholding of 20 per cent or more in ITV.

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<sup>12</sup>See also the comments of Nick Harvey, MP, during the House of Common’s Standing Committee debate on the inclusion in the Communications Bill of public interest considerations under section 58(2A) and (2B) of the Act, which notes the distinction between the plurality test and competition law matters: ‘In their policy document, the Government stated that “competition law alone is not sufficient. It can address issues of concentration, efficiency and choice, but it cannot guarantee that a significant number of different media voices will continue to be heard, and it cannot address concerns over editorial freedom or community voice”. They have hit just about the right note in that statement, and the plurality test ... would be a good way to give effect to that policy statement. ... There is a public interest in maintaining a range of owners and voices in the broadcast media, and achieving that should be one of Ofcom’s purposes’. Hansard HC Standing Committee E Debate, 6 February 2003, c 998.

<sup>13</sup>Hansard HL Debate, 5 June 2003, c 1439.

- (b) *Change of control restrictions on Channel 3 licensee*: Section 351 of CA 2003 imposes ownership restrictions on Channel 3 licences and on any national news provider for regional Channel 3 licences.
28. The following regulatory provisions each serve to maintain a degree of internal plurality:
- (a) ITV licence obligations under section 279(1)(b) of CA 2003 require, among other things, ITV to provide news and current affairs programmes that are of 'high quality' and deal with both national and international matters.
  - (b) Ofcom's Broadcasting Code: These are content rules (which apply both to ITV and BSkyB) that are designed, among other things, to ensure due impartiality, due accuracy and fairness.
  - (c) Public Service Broadcasting (PSB) requirements under section 265 of CA 2003: The regulatory regime for Channels 3, 4 and 5 must include a condition requiring the provider of the channel or service to fulfil the public service remit for that channel. The public service remit for every Channel 3 (and Channel 5) service is the 'provision of a range of high quality and diverse programming'. These requirements help fulfil an important internal plurality objective by providing a range of content to cater to different audience groups. In conjunction with ownership restrictions, they also play a role in generating external plurality. These requirements also guarantee that there are a number of different, independent suppliers of news.
29. These regulatory obligations are then cascaded into certain relevant contracts. For example, the ITV/ITN contract (currently in 'Heads of Agreement' form) commits ITN

to 'supply high quality national and international news to the regional Channel 3 licence holders in compliance with' their legal and regulatory obligations.<sup>14</sup>

30. EC Merger Regulation: note that media plurality may be considered as a 'legitimate interest' under Article 21 of the EC Merger Regulation (Council Regulation 139/2004/EC).

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<sup>14</sup>ITV main submission on the public interest test, paragraph 5.7.