Comments on Regulation of Broadcast Ownership: Contribution to the Independent Communications Authority of South Africa (ICASA) Discussion

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I. Introduction

The Independent Communications Authority of South Africa (ICASA) published a Position Paper in 2004 on ownership and control of radio stations, *The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences* (2004 Position Paper).[1] This Paper included a number of very concrete commitments and legislative proposals, but they were not incorporated into the Electronic Communications Act (ECA) when it was adopted in 2005.[2] More recently, in November 2009, ICASA published a *Discussion Document on Ownership and Control* (2009 Discussion Document),[3] raising a number of questions about these issues for both broadcasting and telecommunications, and inviting public submissions.

Rules on concentration of ownership in general serve the primary goal of protecting consumer welfare by ensuring fair competition in a market. This is a complicated area of regulation but, as a general rule of thumb, where there are two or more companies engaged in true competition, there will be an acceptable level of consumer protection.

Rules on concentration of media ownership, on the other hand, seek to promote the free flow of a diversity of information ideas in society. The goal is not just consumer protection in terms of prices and quality, but of providing a platform to foster social communication to serve a variety of social goals, such as underpinning democracy and participation, resolving disputes, enabling debate about complex issues and generating new ideas. Two competitors, even if they are relatively strong, clearly cannot achieve this in a democracy. Media diversity requires far more competition than that.

Concentration of media ownership pose a number of threats to diversity. They can directly reduce the number of perspectives and amount of information on social issues being disseminated due to syndication or through structural similarities imposed on news

[1] 13 January 2004.
[2] No. 36 of 2005.
[3] Adopted November 2009 and published by Notice 1532 of 2009 in the *Government Gazette* of 17 November 2009.

production. They also allow powerful owners to set the agenda for public debate and to shape public opinion. This can directly affect the political process, for example where owners engage in politics or support certain political parties. It can also skew the debate around other social issues in which owners have vested interests of one sort or another.

Concentration of media ownership can also bring benefits to the media sector. It can create market efficiencies (economies of scale), which can benefit both media companies and consumers, as they do in other sectors. These may, in turn, allow media outlets to provide a greater range of products and/or to offer better products, including better programmes, more investigative journalism, use of better technologies and so on. It can also help protect local (national) media against the growing dominance of foreign media giants.

Experience in other countries demonstrates that it is extremely difficult to dismantle concentrated media ownership structures once they have developed. The case of Italy is instructive. Legislation adopted in 1990 allows owners to control up to 25% of the national television and radio licences, or up to three such licences.[4] This may be contrasted with the strict rule prohibiting ownership of both a national and a local licence, whether for radio or television.[5] The bizarre rule on national licences seems tailor made to allow Berlusconi, the current Prime Minister of Italy, to keep all three of his national television networks. The lesson is clear: regulate before undue concentrations emerge.

These Comments provide an overview of international standards regarding concentration of media ownership, along with an analysis of the Findings in the 2004 Position Paper and some thoughts on other ways to approach the issues they address. The focus is exclusively on broadcasting, rather than on telecommunications.

II. International Standards

Guarantees of Freedom of Expression

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR)[6] as follows:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR was adopted unanimously on 10 December 1948, now international Human Rights Day, as a UN General Assembly resolution. As such, the UDHR is not formally

[4] Law 223 of 6 August 1990, Article 15(4).
[5] Article 19.
[6] United Nations General Assembly Resolution 217A (III), 10 December 1948.

binding on states. However, parts of it, including Article 19, are now widely regarded as having acquired legal force as customary international law.[7]

Article 19(2) of the *International Covenant on Civil and Political Rights* (ICCPR),[8] a formally binding legal treaty ratified by 165 States, including South Africa,[9] guarantees the right to freedom of expression as follows:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in all three regional human rights treaties, in Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR),[10] binding on South Africa,[11] in Article 10 of the *European Convention on Human Rights* (ECHR)[12] and in Article 13 of the *American Convention on Human Rights* (ACHR).[13]

International law, and most national constitutions, permit restrictions on freedom of expression, subject to strict limitations. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This establishes a strict three-part test to assess whether a restriction is legitimate.[14] First, the restriction must be provided for by a law which is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[15] Second, the restriction must aim to protect an interest of sufficient importance to warrant overriding a fundamental right. The list of interests in Article 19(3) of the ICCPR is exclusive in the sense that no other interests are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure the interest. The

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[7] For judicial opinions on human rights guarantees in customary international law, see, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice) and *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice). Generally, see M. S. McDougal, H. D. Lasswell, L. C. Chen, *Human Rights and World Public Order* (1980, Princeton, Yale University Press), pp. 273-74, 325-27.

[8] UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

[9] As of March 2010. South Africa ratified the ICCPR on 10 December 1998.

[10] Adopted 26 June 1981, in force 21 October 1986.

[11] South Africa acceded to the Charter on 9 July 1996.

[12] Adopted 4 November 1950, in force 3 September 1953.

[13] Adopted 22 November 1969, in force 18 July 1978.

[14] See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

[15] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[16]

Freedom of Expression and Anti-Concentration Measures

It is quite clear that a key element of the right to freedom of expression, which protects both the right to speak and the right to receive information and ideas, is diversity, in particular in relation to the media. The logic of this is quite simple, since it is only where there are a diversity of sources, presenting different viewpoints and perspectives, that the right to receive information can be said to exist.

This is supported by international case law, as well as other authoritative interpretation of the right to freedom of expression. The European Court of Human Rights, for example, has stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[17] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[18]

It is widely agreed that undue concentration of ownership threatens diversity and that States are required to take positive measures to prevent, for example, monopolisation of the airwaves. As the United Nations Human Rights Committee, the independent body tasked with oversight of the ICCPR, noted in its General Comment on Article 19, the right to freedom of expression mandates such measures:

> [B]ecause of the development of the modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.[19]

This has been recognised by other authorities as well. The African Commission on Human and Peoples' Rights, which oversees compliance with the ACHPR, adopted a *Declaration of Principles on Freedom of Expression in Africa* in October 2002,[20] which, elaborates on the content of this key right in the African context. Principle XIV(3) of the African Declaration states:

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[16] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

[17] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, para. 38.

[18] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85, November 13 29, 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985), para. 34.

[19] Human Rights Committee, General Comment 10, Article 19, adopted 26 June 1983, U.N. Doc. HRI\GEN\1\Rev.1 at 11 (1994).

[20] 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.

> States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

Assessing anti-concentration measures from a freedom of expression perspective is complex. On the one hand, inasmuch as concentration of ownership threatens diversity, measures to prevent it support freedom of expression. On the other hand, these measures may also be challenged as restrictions on freedom of expression, since they do limit the ability of media owners to develop communication tools. This is recognised implicitly in the quote above from the African Declaration, which warns against measures which are unduly stringent. It was also argued explicitly in the 2004 ICASA Position Paper, where M-Net argued that the South African cross-ownership rules breached the right to freedom of expression, an argument which ICASA rejected.[21]

It may be noted that anti-concentration measures essentially promote the right to receive information and ideas, usually at the expense of the right to impart them. As such, they pit the speaker against the listener, a private rights model of freedom of expression against one which seeks to preserve public expressive space, a traditional, non-interference, paradigm against one which calls for regulation to protect the right to receive.

Because ownership limitations are aimed at protecting freedom of expression, rather than a competing interest, it is not appropriate to require them to be justified by reference to the three-part test. This test is designed to assess restrictions on freedom of expression, and it presents a high barrier to their acceptance. To require measures designed to promote freedom of expression to surmount this barrier would be to erect a presumption against their validity; specifically, it would assign hierarchical superiority to the right to impart information over the right to receive it. This is clearly not appropriate.

On the other hand, anti-concentration measures must meet some standard of legitimacy, for otherwise measures which seriously limited freedom of expression and yet failed to impact on concentration of ownership would be allowed to stand. International courts have not addressed this issue directly and, in the few cases where it has arisen, have skated over the central issues. In the United States, this issue was raised in a 1943 case in which anti-concentration rules set by the regulator, the Federal Communications Commission, were challenged by media companies on the basis that they violated the First Amendment (which protects free speech).[22] The Supreme Court easily rejected the challenge, but its reasoning was limited. Furthermore, the rules protected small media players against the larger networks, so the direct (speaker) free speech element was fairly pronounced.

It is submitted that anti-concentration measures should meet a dual test of effectiveness and proportionality.[23] Where they can be shown not to be effective in their primary goal of preventing concentration of ownership, for example because they are not well-designed

[21] See, respectively, p. 19 and under Findings, section 10.
[22] *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943).
[23] See Mendel, Toby, "Restrictions on Political Expression" in European Audiovisual Observatory, *Political Debate and the Role of the Media* (2004, Strasbourg, European Audiovisual Observatory).

or because new technologies or business models enable them to be side-stepped, they should be rejected as unjustifiable limitations on freedom of expression. Furthermore, where their impact on freedom of expression is disproportionate to the benefits they create, they should again be rejected. This might be the case, for example, where a measure did prevent concentration of ownership, but it also inhibited the overall development of the sector, the concern raised in the quote above from the African Declaration.

Specific Anti-Concentration Measures

A number of international instruments refer to specific anti-concentration measures, although they also stress that measures need to be adapted to the local context. For example, Recommendation 2007(2) of the Committee of Ministers of the Council of Europe on Media Pluralism and Diversity of Media Content[24] states, in relation to regulation of ownership, that "rules should be adapted to the size and the specific characteristics of the national, regional or local audiovisual media and/or text-based media market to which they would be applicable."[25] This is fairly obvious, given the very different challenges that different media markets present in terms of concentration of ownership.

Several documents refer to the idea of using the licensing system to address concentration issues. For example, the *African Charter on Broadcasting 2001* (African Charter), adopted under the auspices of UNESCO,[26] calls for licensing processes to be "based on clear criteria which include promoting media diversity in ownership and content."[27]

The special international mandates for the protection of freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information – adopted a Joint Declaration in 2007 on Diversity in Broadcasting.[28] In respect of anti-concentration measures, it states:

> In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical. Such measures should involve stringent requirements of transparency of media ownership at all levels. They should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major proposed combinations, and powers to prevent such combinations from taking place.

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[24] Adopted 31 January 2007.
[25] Clause I.2.2.
[26] The Charter was adopted in Windhoek, Namibia, in May 2001 at the 10th anniversary celebration of the historic 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press. Available at: http://portal.unesco.org/ci/en/ev.php-URL_ID=5628&URL_DO=DO_TOPIC&URL_SECTION=201.html.
[27] Part I, para. 5.
[28] Adopted on 12 December 2007. Available at: http://www.osce.org/documents/rfm/2007/12/28855_en.pdf.

This identifies a number of key points. First, it calls for special measures to prevent undue concentration of broadcast media ownership. Second, it highlights the fact that these measures need to address both horizontal, including cross-media, and vertical ownership issues. Third, in terms of specific tools to address concentration, it identifies transparency, monitoring, licensing processes, prior reporting of (major) proposed combinations and the power to prevent such combinations.

Several of these are also reflected in the Council of Europe Recommendation on Media Pluralism, including the need for special anti-concentration measures for the media sector and to address both horizontal and vertical integration, as well as tools such as transparency and the need for oversight bodies to have the power to take effective action, including by refusing to issue a licence or by preventing a combination from taking place.[29] The Recommendation includes quite a lot of specifics on media transparency, listing five key categories of information that should be available to the public, including about those able to influence and/or benefit from the media outlet, and any support measures it has received.[30] It also refers to the setting of thresholds, based on objective criteria, such as "audience share, circulation, turnover/revenue, the share capital or voting rights".[31]

Finally, the Declaration of the Committee of Ministers of the Council of Europe on Protecting the Role of the Media in Democracy in the Context of Media Concentration,[32] also refers to many of these ideas. In the context of monitoring, it specifically refers to both regulatory and co-regulatory mechanisms, presumably in light of the challenges of monitoring ownership in a very dynamic commercial sector. The Declaration also highlights the importance of public and community broadcasting to securing the goal of diversity.

III. Comments on the 2004 Position Paper and 2009 Discussion Document

An important part of the 2009 Discussion Document, particularly in the section on broadcasting, is concerned with how other jurisdictions address the issue of foreign ownership and control of broadcasting. It may be noted that the questions posed in this document go well beyond that issue, with a strong focus on ownership and control by historically disadvantaged groups (seven of the 16 questions as opposed to just one on foreign ownership).

In most countries, general anti-competition rules apply to media outlets as to other commercial activities. As noted above, however, these are not tailored to the wider need to promote diversity in the media, but simply ensure commercial competition. In some

[29] Clause I.2.
[30] Clause III.1.
[31] Clause I.2.3.
[32] Also adopted 31 January 2007.

countries, general anti-competition regimes include special provisions for the media. In Germany, for example, intervention to prevent a merger is not allowed where the players are below a certain market size, but this level is very substantially lower for the media than for other industries.

The application of general anti-competition rules needs to take into account the specific situation of the media. In the United States, for example, general rules prohibiting monopoly players have often been waived so as to allow a single city newspaper to operate, the alternative being no city newspaper.

In many countries, specific foreign ownership and anti-concentration rules apply to the media. Foreign ownership rules are often prescribed in law though fixed percentages (thresholds). In many countries, however, a large degree of discretion is allocated to the regulator (or the general competition body) to decide whether or not to take ownership concentration issues – whether same sector or cross-ownership – into account when licensing a broadcaster or when deciding whether or not to allow a combination. This reflects the fact that more rigid rules, such as are currently provided for in South Africa, are not sensitive to the host of contextual factors that are relevant in these situations. For example, market or audience share may not reflect the actual importance or influence of a media outlet. Fixed rules on the number of outlets that may be controlled by one person, such as those found in section 65 of the South African ECA, are even less reliable as indicators of influence (because they do not even take market share into account).

The 2004 Position Paper highlights the submissions it received on a number of different matters and then provides its findings, along with specific statutory drafting language. The main focus of the findings is on licensing of new services and on the rules limiting foreign ownership and concentration of ownership.

A very important local contextual factor of great relevance to these issues is the relatively small number of commercial broadcasters in South Africa, particularly in the radio sector.[33] It would appear that approximately 16 commercial radio stations in South Africa currently have a broadcasting services licence. In contrast, it may be noted that Ghana has 84 private commercial stations, Uganda has 72 and Tanzania has 36.[34] These are all much poorer and smaller countries than South Africa and in countries with a per capita wealth more similar to South Africa – such as Brazil and Macedonia – the numbers are far larger (in both absolute and per capita terms). In this context, it is not clear why "media companies face low margins and revenues", one of the stated drivers for the 2004 inquiry.[35]

In section 10, the first under Findings, ICASA suggests that a new regulatory regime will need to be developed for a digital broadcasting environment and that the advent of digital

[33] References here to commercial broadcasters are to private commercial stations, not the public commercial stations run by SABC.
[34] All figures come from the African Media Development Initiative (AMDI) Reports. Available at: http://www.bbc.co.uk/worldservice/trust/specials/1552_trust_amdi/index.shtml.
[35] See p. 5 of the Paper.

services will not do away with the need for ownership limitations. Both of these conclusions are no doubt correct. Indeed, multiplex digital licences need to be carefully regulated to avoid a situation of greater concentration of ownership.

At the same time, it is useful to take technological developments into account when assessing regulation of media ownership for at least two reasons. First, designing current rules to be adapted, as far as possible, to a digital future can help smooth the transition. For example, thresholds can be set taking digital capacities into account. Second, other technological developments, such as the Internet, may affect regulatory design. The availability of radio over the Internet even with relatively low bandwidth, for example, may suggest a move away from geographically sensitive rules, such as are in place in South Africa. Even if Internet radio usage rates are low at the moment, this is likely to change, perhaps quite dramatically and quickly.

In this section, ICASA also rejects M-Net's arguments about the constitutionality of the South African cross-ownership provisions, although at the same time it does propose to increase the newspaper market share which triggers the main prohibitions from 20% to 25%, while refining the manner in which this is calculated. Even with these changes, it may be noted that the South African cross-ownership rules are far stricter than the rules which apply in most countries. In Italy, for example, the rules prohibit, among other things, anyone who owns three national television broadcasting licences from also owning a daily newspaper.[36] In most countries, the rules are driven by a belief that there are important diversity benefits to increasing the number of stations, even if this tends to increase ownership concentration.

The test for assessing the constitutional question, proposed above, is whether the rules are effective and proportionate. This is a highly context-dependent matter which would depend, among other things, on the extent of actual concentration in the market, the number of players, and so on. Given the small number of commercial broadcasters in South Africa, the rule may be legitimate. But as that number climbs, it will become harder to justify. Thus the threat to diversity of joint ownership of a daily with a 25% market share and a radio which is one among only three or four available to listeners in that market is one matter, but where ten radio stations are available, this threat is clearly diminished.

The second section under Findings proposes to increase the coverage of the Greenfields stations. This will bring more stations to more people which, given the relatively small number of commercial stations in South Africa, seems a good idea. Similarly, the third Finding calls for four additional secondary market licences and three additional primary market licences. Again, in light of the small number of licensees, this seems like a good idea.

This section also rejects the idea of a national radio licence, on the basis of limited frequency availability. It would appear that one explanation for this, given the relatively

[36] This rule forced Berlusconi, who does own three national television licences, to divest himself of *Il Giornale*, his erstwhile Milanese daily.

small number of licensed services overall in the country,[37] is that priority has been given to the 18 SABC stations, many of them national in scope, and the relatively large number of community broadcasters. Many of the submissions, as reported in the Paper, expressed concern about the dominant position of the South African Broadcasting Corporation (SABC). Licensing a national radio broadcaster would be one way to reduce that dominance.

Section 13 proposes to use the same definition of "historically disadvantaged persons" for broadcasting as has been developed in the context of telecommunications. Given the fact of convergence between these two sectors, this makes sense and will help ensure regulatory consistency and coherence.

Section 14 addresses proposed changes to sections 48-50 of the Independent Broadcasting Authority (IBA) Act dealing with foreign ownership, concentration of ownership and cross-media ownership.[38] These need to be read in conjunction with the actual proposed drafts for these IBA Act sections. Two options are put forward, repealing these sections and giving ICASA the power to prescribe rules, and a set of specific redrafting proposals.

Serious thought should be give to these two options and whether there may not be a third, middle-way option. As noted above, in many countries, regulators have wide discretion to decide whether or not to issue a licence or allow a combination that would result in greater concentration of media ownership. This allows all of the circumstances to be taken into account when making these decisions.

On the other hand, the experience of other countries demonstrates that allocating too much discretion to regulators has tended to lead to what many commentators believe are dangerous levels of concentration of media ownership, both within a media sector and in terms of cross-ownership. The experience of Canada and Germany, for example, bears this out.

A possible middle path is to leave decision-making in the hands of the regulator but to set out a framework of rules in the legislation to constrain regulatory discretion. In the United Kingdom, for example, the law sets out specific public interest factors to be taken into account when deciding whether or not to permit an ownership situation which might pose a threat to diversity. Furthermore, in the United Kingdom, any change which might lead to more than 25% of the market being controlled by one player must be assessed against these public interest criteria.

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[37] The AMDI Report for South Africa suggests there were a total of 122 radio licences across all sectors – public, commercial and community – in 2005. Information received by the author indicates that at the time of writing there were 16 private commercial stations, 18 SABC stations and around 120 community radio licences, not all operational. This suggests the availability of a lot of spectrum, even if these are heavily concentrated on the FM band. However, the author is not familiar with the frequency situation in South Africa.

[38] These are very similar to sections 64-66 of the ECA, which repealed the IBA Act.

To some extent, this discretion is provided for in the existing law, and even more so under the ICASA proposals, through the ability of ICASA to waive the threshold-based rules where "good cause" is shown, and without departing from the objects and principles of the law. It may be noted that these constraints are both less onerous than those in the United Kingdom system – for they only require ICASA not to depart from the objects of the law, and not to take these specifically into account – and more general – since the objects of the law are not specifically tailored to ownership considerations.[39] ICASA does set out some more precise considerations in the Paper (under section 14.6 of the Findings), but it has not proposed that these be included in the actual law.

ICASA proposes to raise the permitted level of foreign investment in a broadcasting service to 25% where the company is not listed, to 35% for listed companies and to an overall level of 35% for more than one foreign owner in an unlisted company (no overall limit appears to be proposed for listed companies but this may be addressed in general company law). These rules will move the South African system closer to other countries, consistently with a general global trend to allow greater levels of foreign ownership. As noted in the Paper, there are a number of potential benefits to this, which include not only attracting capital but also important expertise and skills.

ICASA is also proposing to drop the fixed rules on maximum number of radio stations – currently capped at two each in the FM and AM markets – and to replace this with a rule limiting ownership to 35% of the total number of licences (that would be five in a market of 16 licensees). There seems to be an error in the new proposed section 49(6)(2)(a), which refers to "the number of licences being rounded to the closest integer", although the number of licences will always be an integer.

More importantly, it may be noted that this is a rather permissive proposal. 35% of licences is already a high level of ownership – as noted above, in the United Kingdom, for example, 25% is set as the level at which a public interest test must be undertaken – and influence could be far greater than this number represents, since all or some of the stations could command significant market share. Working on the basis of a total of 16 stations, this would allow control of the two top radio stations in each of Johannesburg and Cape Town and the top radio in Durban. That could represent quite a lot of influence. Certainly it is a far cry from the present regime, in which the maximum of four stations can only be attained by operating in both the FM and the far less popular AM markets.

Another option, which would still do away with fixed numbers and yet be more closely aligned to the overall goal, would be to impose overall percentage limits on market control (for example in terms of audience or advertising). The Council of Europe Recommendation on Media Pluralism refers, in this regard, to "audience share, circulation, turnover/revenue, the share capital or voting rights".[40]

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[39] Section 2 of the ECA does refer to the need for competition (section 2(f)), to the need to promote diversity in the media (section 2(s)) and to the need for diversity of media ownership (section 2(v)), but not the more specific ideas of ensuring the survival of a failing newspaper or commercial broadcaster, which are listed in the Paper.

[40] Clause I.2.3.

In terms of cross-media ownership, ICASA is proposing to retain the basic framework, while increasing the trigger for the prohibition on owning both a newspaper and a broadcaster to a 25% market share on the part of the newspaper in the market served by the broadcaster. The appropriateness of this rule has already been discussed above. Although the proposed relaxation is an improvement, one can certainly imagine situations where it would be hard to justify. This is perhaps an area where the array of complicating contextual factors make it particularly appropriate to make decisions on a case-by-case basis, through allocating discretion to the regulator.

Finally, ICASA is proposing to add in a provision granting it the power to prescribe by regulation the procedures to be applied where a licensee needs permission for a change in ownership that does not amount to an amendment or transfer of a licence. Such regulations will be useful in clarifying the rules, for example relating to situations where shares in a company change hands, providing greater certainty and encouraging investment in the sector.

IV. Addressing Ownership Concentration

There is no magic bullet for promoting media diversity or for controlling media concentration. The basic framework of anti-concentration measures in the existing South African legislation, as well as in the proposals by ICASA, is based on setting thresholds for maximum ownership, along with the power to waive these thresholds in appropriate cases.

A number of other approaches might be envisaged, some of which may be able to be applied through the existing legal framework. As noted above, transparency of media ownership is very important for both monitoring and applying the rules. The existing licensing framework for broadcasters provides a structure for imposing transparency rules. Given that requiring transparency is not particularly onerous for broadcasters, the rules should be quite stringent. They could, for example, require all broadcasters to file publicly available statements listing all beneficial owners with over a 1% interest, and to update these statements whenever this changes. Where these owners also have interests in other media sectors, this information could additionally be required to be provided.

The Council of Europe Recommendation on Media Pluralism calls for openness in respect of all persons and bodies participating in the "structure of the media" or "likely to exercise a significant influence on the programming policy or editorial policy", as well as other media interests held by these persons.

Addressing vertical integration should also be considered in South Africa. In many countries, telecommunications service providers are getting into 'triple play' situations, where they offer telephony, Internet access and television. Allowing them to be engaged in broadcasting under the current rules – which permit ownership of one television station and two radio stations in each of the FM and AM bands – would potentially give them

considerable power. Influence over the advertising market might also be taken into account.

Several international statements refer to the need to take ownership into consideration in licensing. Section 51 of the ECA, which sets out the criteria to be taken into account when licensing commercial broadcasters, does not refer to concentration of ownership over and beyond the threshold provisions in sections 64-66. Indeed, it only refers explicitly to section 64 (in contrast to the IBA Act, which in its section 46, the equivalent of ECA 51, refers to all three ownership provisions). Consideration should be given to including concentration of ownership as a general criterion to be taken into account when issuing a licence.

One of the characteristics of the South African commercial radio sector is a concentration of stations in the more profitable urban centres to the detriment of poorer, lower density areas. In the telecommunications sector, universal service obligations are often imposed on providers, so that as a condition for gaining access to the more profitable urban areas, they are also required to provide coverage to less profitable areas. An analogous idea could be explored in South Africa for broadcasting, namely to link access to a profitable urban licence to establishing a station in a less well-serviced area. This is not something that has been tried in many countries, and careful thought would have to be given to it to make sure a) that it was not done in a way that undermined freedom of expression and b) that it did not result in tokenism, in the sense that the second, 'dependent' station was not properly resourced. But it could be a way to increase investment in broadcasting around the country.

A key driver for multiple media ownership is to exploit the efficiencies that this makes possible, for example in administration. But where such efficiencies extend to the core function of providing news, for example through the syndication of stories to different outlets, this impacts negatively on diversity. One solution is to require integrated media outlets to maintain separate news desks. This approach has, for example, been employed in Canada with some success.

An alternative, proposed in the Council of Europe Recommendation on Media Pluralism,[41] is to require media outlets to produce minimum levels of original programming (whether in-house or through independent producers), particularly in the area of news and current affairs programming. This is different from local content, which may be syndicated between media outlets.

A more structural approach is to put in place a framework of rules to ensure that content providers have fair access to electronic communications systems, recommended by both the Council of Europe and the special international mandates on freedom of expression. These can range from rules on interoperability of both distribution and reception technologies, to open software standards, to non-discriminatory access to support services, to must-carry rules for cable providers. Fair access is particularly important as the transition to digital broadcasting is made. In addition to must-carry rules,

[41] Clause II.3.1.

consideration should be given to must-offer rules (so that broadcasters are required to make their channels available to networks that wish to carry them), where this is relevant.

Finally, media literacy, along with transparency regarding media ownership, is important. Where consumers are aware of owners' political and/or commercial connections, as well as the implications of this, they are more able to take this into account when consuming media output.