

Review of the local and regional media merger regime

Discussion paper

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1 INTRODUCTION

- 1.1 In its Digital Britain Interim Report,¹ the Government stated that in order to inform whether any change to the merger regime is desirable or necessary, it would invite the Office of Fair Trading (OFT) to undertake an exploratory review across the local and regional media sector and make appropriate recommendations. This was in the context of concerns raised by local media groups that the media merger regime may be preventing or deterring consolidation seen as necessary for the transition of such groups to digital business models.
- 1.2 It has also been widely noted that structural and cyclical factors are contributing to significant declines in both the circulation levels and advertising revenues obtained by the local and regional press. Some reports suggest that total regional newspaper advertising revenues fell by around 15 per cent in 2008, and could fall by over 25 per cent in 2009.
- 1.3 The OFT launched its review on 13 February 2009 by inviting interested stakeholders to submit initial views on the scope of the key issues that the review should focus on.² More than 25 responses and expressions of interest were received from a range of different stakeholders. The OFT has, to date, also met with the Newspaper Society (the trade association which represents the local and regional newspaper industry) to discuss the scope of the review, and with the Local Media Alliance (representing the largest seven UK regional publishers).
- 1.4 This discussion paper briefly sets out how the media merger regime operates, and then focuses on areas where the Government and/or stakeholders have identified potential issues of relevance to the review, including possible questions which stakeholders may wish to consider in framing responses. The discussion is ordered under three broad themes:

¹ BERR/DCMS, Digital Britain: The Interim Report, January 2009.

² www.oft.gov.uk/news/press/2009/14-09

Competitive Assessment Issues; Guidance Issues; and Media Public Interest Considerations. Competition arising from public sector news and information sources is also discussed.

- 1.5 As noted in the OFT's initial press release, the review's focus is very much on how the merger regime applies to local and regional print media. However, there may well be read-across to other media (particularly radio and magazines) in relation to many aspects, and the OFT notes the initial comments received from radio and magazine industry stakeholders.
- 1.6 Responses to this discussion paper are invited by **31 March 2009**.

2 SUMMARY OF THE MEDIA MERGER REGIME

- 2.1 We provide here a brief overview of the UK merger regime as it applies to media mergers, together with a table of the most recent relevant media merger situations considered by the competition authorities.
- 2.2 The general framework for the assessment of mergers under UK law is set out in the Enterprise Act 2002 (the Act). In essence, the UK merger regime is enforced by two sister authorities, the OFT and the Competition Commission (CC). The OFT carries out a relatively short 'first phase' examination of mergers, at the end of which a decision is taken on whether a more detailed 'second phase' examination by the CC is warranted.
- 2.3 More formally, the Act imposes a duty on the OFT, except in certain specified circumstances, to refer to the CC for further investigation any relevant merger situation if it believes there is a realistic prospect that the merger will result in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services. The OFT's usual administrative timetable to reach a decision on reference is 40 working days from receipt of a satisfactory submission.³ The OFT has stated publicly that it may be possible to accelerate the treatment of cases for referral to the CC where this corresponds with the wishes of the merging parties and where there is sufficient evidence available to meet the OFT's statutory threshold for reference. In such 'fast track reference' cases, the OFT would expect that the overall time taken from formal notification to reference decision could be as little as 10 working days.

³ The timetable is twenty working days (with a maximum extension of a further 10 working days) in the case of anticipated mergers where the statutory voluntary pre-notification merger notice procedure is used.

- 2.4 A merger must meet all three of the following criteria to constitute a relevant merger situation for the purpose of the Act:
- two or more enterprises (broadly speaking, business activities of any kind) must cease to be distinct, or there must be arrangements in progress or in contemplation which will lead to enterprises ceasing to be distinct
 - the merger must not yet have taken place or must have taken place within four months of the reference being made (subject to specified exceptions), and
 - **either** the UK turnover associated with the enterprise being acquired exceeds £70 million (the turnover test), **or** the enterprises ceasing to be distinct each supply or acquire goods or services of any description and after the merger will together supply or acquire at least 25 per cent of all those goods or services of that kind supplied in the UK as a whole or in a substantial part of it (the share of supply test).
- 2.5 As is shown in the table below, the majority (four out of six) of newspaper mergers investigated by the OFT over the past five years have been cleared at the OFT stage (at least in terms of the newspapers element). Another was found to give rise to an SLC, but referral to the CC was avoided through acceptance of a partial divestment. Only one of these six mergers therefore reached the CC for investigation, and was subsequently cleared.
- 2.6 On reference, the CC has 24 weeks to prepare and publish its report. It also applies an SLC test but against a 'balance of probabilities' standard (that the merger has resulted, or may be expected to result, in an SLC), rather than the OFT's lower 'realistic prospect' standard. On this basis, the CC determines the outcome (clearance, prohibition, or remedies) of merger cases referred to it by the OFT.
- 2.7 The Act also permits intervention by the Secretary of State in certain mergers. In these cases the Secretary of State may take into account public interest factors specified in the Act other than the OFT's

competition assessment in deciding whether or not to refer a merger to the CC or to remedy any adverse effects of a merger.

- 2.8 The Communications Act 2003 amended the Act by adding public interest considerations relating to mergers involving media and newspaper enterprises. These media public interest considerations are divided into two tests: a newspaper test for mergers involving newspaper enterprises, and a broadcasting and cross media test for mergers involving broadcasting enterprises or mergers involving broadcasting enterprises and newspaper enterprises. The regime is intended to provide a safeguard to prevent media mergers bringing about undue concentrations of ownership, which may operate against the public interest. It enables the Secretary of State to intervene so as to ensure a sufficient plurality of media ownership, to protect the availability of a wide range of high quality broadcasting and to ensure that those with control of media enterprises have a genuine commitment to the broadcasting standards objectives set out in the Communications Act 2003. It is important to note that both the newspaper and the broadcasting and cross-media public interest considerations may be relevant to newspaper mergers.
- 2.9 The regime provides an advisory role for the Office of Communications (Ofcom) after the Secretary of State intervenes in a merger on the grounds of media public interest considerations. In such circumstances, Ofcom has a duty to provide the Secretary of State with advice and recommendations on the specified media public interest considerations, and to do so within a deadline specified by the Secretary of State. The Secretary of State decides on whether to refer the merger to the CC, based on advice from Ofcom on the public interest considerations and the OFT's decision on the competition aspects of the merger.
- 2.10 In public interest references the CC will deliver a report to the Secretary of State, who will then decide whether to make an adverse public interest finding. The Secretary of State must accept the CC's determination on the competition aspects of the merger, but can reach his own view on the public interest issues, whether the merger results overall in an adverse public interest finding, and if so what remedies to

impose. Ofcom may also give advice to the Secretary of State as it considers appropriate in relation to either the CC's report or the taking of enforcement action by the Secretary of State (remedies).

- 2.11 The Act also provides for an exceptional category of media mergers which can be referred on public interest consideration grounds alone when the normal jurisdictional thresholds relating to turnover or share of supply in the Act are not satisfied (referred to as a 'special merger situation').
- 2.12 A media merger is categorised as a special merger situation if either:
- in relation to the supply of newspapers of any description, at least one-quarter of all the newspapers of that description which were supplied in the UK, or in a substantial part of it, were supplied by the person or persons by whom one of the enterprises concerned was carried on, or
 - in relation to the provision of broadcasting of any description, at least one-quarter of all broadcasting of that description provided in the UK, or in a substantial part of it, was provided by the person or persons by whom one of the enterprises concerned was carried on.
- 2.13 Similar procedures to those in public interest cases apply. The Secretary of State must issue a special intervention notice; the OFT makes a report as to whether it is or may be the case that a special merger situation has been or will be created, and Ofcom is required to produce a report on the effect of the relevant media public interest consideration. The Secretary of State may refer the case to the CC where he believes that, taking account of the relevant public interest consideration, it is or may be the case that the merger operates or may be expected to operate against the public interest. Where a special merger situation is referred to the CC, the CC cannot consider the question of whether the merger will result in an SLC.
- 2.14 If the CC considers that the merger operates or may be expected to operate against the public interest, it makes recommendations as to the action the Secretary of State or others should take to remedy any

adverse effects. It reports on those matters to the Secretary of State, who then makes the final decision on the public interest test and takes whatever remedial steps he considers necessary.

- 2.15 In practice, no media merger has yet been categorised as a special merger situation, and the media public interest provisions have been invoked only once, in relation to BSkyB's acquisition of a 17.9 per cent stake in ITV. The public interest provisions have not been used with respect to any newspaper-on-newspaper acquisitions.

Table 1.1: Selected relevant cases considered by the competition authorities under the Enterprise Act 2002

Merger parties	Case decided by:	Year	Outcome
Newspapers			
Dunfermline Press / Berkshire Regional Newspapers	OFT	2008	SLC. Partial divestment remedy accepted.
Johnston Press / Archant Scotland	OFT	2007	Cleared
DC Thomson / Aberdeen Journals	OFT	2006	Cleared
Johnston Press / Scotsman Publications	OFT	2006	Cleared
Johnston Press / Local Press	OFT	2006	Newspaper aspects cleared. ⁴
Archant / Independent News & Media	CC	2004	Cleared
Radio			
Global Radio / GCap Media	OFT	2008	SLC. Partial divestment remedy accepted.
Capital / GWR	OFT	2004	SLC. Partial divestment remedy accepted.
Other broadcasting			
BSkyB / ITV	Secretary of State	2008	Adverse public interest finding (on competition grounds only).

⁴ The OFT decided that the reference test was met in relation to farming publications in Northern Ireland. The OFT accepted divestment of one such title as a remedy, such that a reference to the CC was not necessary.

3 COMPETITIVE ASSESSMENT ISSUES

Introductory overview of local and regional newspapers

- 3.1 According to Newspaper Society data, local and regional media accounts for around 1,300 core newspapers, which vary in relation to frequency and pricing model. The large majority (around 90 per cent) are weekly titles, with a fairly even split between paid-for and free titles. Amongst regional daily titles (which can be distributed in the morning or evening) and Sunday titles, the great majority are paid-for. In terms of readership, some 82 per cent of all British adults read a regional newspaper.
- 3.2 A key characteristic of newspaper markets is that they are two-sided, in that the publications provide both editorial content and carry advertising, with publishers receiving revenues from both advertisers and (in the case of paid-for titles) readers. Publishers consider the impact of circulation levels on revenues from both advertisers and readers when setting cover prices. Publishers have an additional incentive to hold down cover prices (or to distribute newspapers for free) in order to increase circulation because advertisers are often willing to pay more for advertisements in newspapers that have higher levels of circulation.
- 3.3 Regional press is the largest print advertising medium in the UK, with revenues of £2.8 billion in 2007 accounting for 16 per cent of all advertising revenues. Advertising in local and regional press takes two key forms: classified and display. Within each there are a number of discrete customer groups, of which the most significant include estate agents, car dealers, employers engaged in recruitment, retail and leisure companies, and local public bodies. The development of the internet has provided a wider range of advertising opportunities, including on local newspapers' own associated websites, for a number of advertiser customer groups. The current negative trends in circulation and advertising revenues for the local and regional press were noted above.

Initial comments from stakeholders

- 3.4 Local and regional publishers have generally submitted that print media markets are no longer self-contained and face competition for both readers and advertisers from other media platforms such as TV, radio, cinema and the internet. Consequently, they argue that the relevant market is now likely to be wider than that considered in previous merger cases as a result of technological developments. In this regard, publishers also referred to the recent *Dunfermline Press/BRN* decision of the OFT,⁵ and the need for clear guidance from the OFT on the types of evidence it would view as persuasive in a particular case.
- 3.5 Radio industry stakeholders too have submitted that narrow sector definitions of media markets are no longer appropriate, given the increasing opportunity for consumers to substitute one media platform for another.
- 3.6 On the other hand, certain other parties have submitted that other media platforms are complements rather than substitutes to newspapers. They have argued that while other forms of media may compete with newspapers for advertising revenues, they do not provide an appropriate substitute for newspaper readers for the provision of 'any time any place' news. One publisher noted it does not believe that local community newspapers are under serious threat from the internet.
- 3.7 Advertising industry stakeholders commented that there needs to be adequate competition amongst media owners for advertising business at national, regional and local levels. They have also suggested that any general proposals to relax treatment of local media ownership concentration should be approached with extreme caution.
- 3.8 One stakeholder suggested that consolidation between publishers would lead to the creation of local monopolies, to the detriment of local

⁵ Completed acquisition by Dunfermline Press Limited of the Berkshire Regional Newspapers business from Trinity Mirror plc, 4 February 2008.

communities and advertisers. It was suggested that where publishers hold a local monopoly, advertising rates are considerably higher than in areas where publishers face competition from other titles.

- 3.9 It has been suggested to the OFT that a key area of the scope of the review should include assessment of the current economics of the print media industry. As already noted, the structural and cyclical challenges currently facing the local media industry were identified by many stakeholders.
- 3.10 Some stakeholders highlighted that the dramatic loss of advertising revenues is threatening the viability of a number of local and regional newspapers, and one submitted that there could potentially be a large scale loss of titles and/or publishers from the local, regional and national UK press, with serious potential consequences for the provision of news.
- 3.11 In addition, some stakeholders emphasised that the fall in revenues is limiting the ability of publishers to invest in strong local investigative journalism. It was also put to us that creating a successful web presence for local newspapers requires substantial upfront investment in a basic architecture, which can then be used across different titles. As such, scale is important for publishers to be able to move online successfully.
- 3.12 Some publishers noted that the OFT accepted efficiency arguments in another media sector merger (*Global/GCap*).⁶ They submitted that the OFT should provide written guidance on how efficiencies and customer benefits would be assessed specifically in relation to print and other local media consolidation.

Market definition and competitive assessment

- 3.13 In the local and regional newspaper mergers that have been assessed to date, the parties have not been able (or have not needed)⁷ to provide

⁶ Completed acquisition by Global Radio Ltd of GCap Media plc, 8 August 2008.

⁷ Because the merger did not raise a concern even on a narrow market definition.

compelling evidence that the newspapers in question faced a sufficient competitive constraint from other media, and in particular the internet, to include these other media within the relevant market. Nevertheless, this is clearly a sector which has already changed significantly, and is continuing to change at a fast pace, and therefore the OFT remains open to receiving evidence on this point going forward.

- 3.14 It is important to emphasise, however, the view of the competition authorities that market definition is not an end in itself, but a framework for analysing the direct competitive pressures faced by the merged firm.⁸ When markets contain differentiated products⁹ there may not be a clear cut off point delineating the boundary of the market, and hence no clear distinction between products that are 'in' the market and those that lie outside it. The 'closeness' of competition between the merging parties is then a key consideration.
- 3.15 The market definition process starts with identification of the overlap(s) between the merging parties' activities, and considers the strength of constraints from the closest substitute products. Where direct evidence on the extent of competitive interaction between merging parties is available, the OFT may not need to reach a firm conclusion on market definition. Hence in *Dunfermline Press/BRN*¹⁰ the OFT's competitive assessment took into account 'the likely constraint of the parties' titles on one another – lost by the merger – in a context in which both parties' titles also compete with other media sources such as internet and direct mail/leaflet options.'

⁸ In defining markets, the OFT will have regard to previous OFT, CC and European Commission decisions concerning the same industry sectors and take due account of them. However, it is not bound by past decisional practice, in particular because markets may change over time. Also, relevant market definitions may vary according to the facts of the specific case and the parties involved.

⁹ That is, products that are differentiated by features such as brand, quality, or other identifiable characteristics.

¹⁰ www.of.gov.uk/shared_of/mergers_ea02/2008/dunfermline.pdf

- 3.16 The key question in the analysis of horizontal mergers is the likely effect in the market of the loss of competition between the merging parties. A merged firm may find it profitable to raise prices (or reduce output or quality) as a result of the merger since lost sales which would previously have diverted to the other merging party are no longer foregone. In differentiated product markets, mergers between close competitors are more likely to generate such 'unilateral' effects. The OFT will consider whether a merger may have such effects and, in light of this assessment, whether sufficient post merger competitive pressure is expected to remain (whether from within or outside the 'market') to be confident that the merged entity is not able to raise prices or reduce output profitably, or otherwise restrict choice or innovation. In *Dunfermline Press/BRN* the OFT was not sufficiently confident that the identified wider constraints from other media, including direct mail and the internet, would prevent a substantial merger effect from the loss of close competition between the parties.
- 3.17 New entry and the threat of entry can represent important competitive constraints on the behaviour of merging firms. Consideration of entry conditions is therefore always part of the competitive assessment process in merger analysis in cases that would otherwise raise concerns. To remove potential concerns prospective new entry must be timely, likely, and sufficient to restore the loss of competition arising from the merger. In *Dunfermline Press/BRN* the OFT was not satisfied that barriers to entry were sufficiently low to prevent the identified merger effects.

Relevant evidence

- 3.18 We now turn to the types of evidence that the OFT can draw upon for its market definition and competitive assessment analyses. Merger submissions submitted to the OFT for assessment need to contain general background information, jurisdictional information, and information relevant to the substantive assessment. The OFT's published guidance sets out the types of information needed in each of these categories. Equally importantly, the OFT is willing in each case to engage in pre-notification discussion with parties on the appropriate content of merger submissions.

3.19 In addition to general information about the transaction, merger submissions on local and regional newspaper mergers will normally include detailed evidence concerning the degree of product overlap and geographic overlap between the parties' activities, their respective market position in overlap circulation areas (usually in terms of shares of total circulation of the relevant type(s) of newspaper), and the positions of competing publishers. In some cases this evidence (and corroborating input from third parties) will be largely sufficient for the OFT to reach a clearance decision. For example, in both *DC Thomson/Aberdeen Journals* and *Johnston Press/Scotsman Publications* evidence of this type enabled the OFT to reach a clearance decision.

3.20 In more complex or potentially problematic cases a wider range of evidence will be considered. Evidence of particular potential relevance in local media cases, in relation to both market definition and the competitive assessment, may include:

- internal documents – including those providing evidence on customer bargaining and threats to switch to other media; competitor monitoring; SWOT analyses; evidence on the transaction rationale and expected cost/pricing implications; business plans for the post-merger entity
- advertiser and/or reader surveys (subject to quality assurance on methodology)
- evidence of advertisers switching, or threatening to switch, spend between different newspaper titles, to achieve better prices
- evidence of customer (advertisers or readers) switching in response to relative price changes between newspapers, from newspapers to other media, or from other media to newspapers
- elasticity estimates
- pricing and margin data for relevant business units

- evidence on whether or not advertisers consider the merging parties' publications to be close substitutes (for example, their first and second best choices), and
- evidence on entry conditions, such as any history of, or prospects for, new entry in the market under consideration, including where one of the merging parties is the only publisher present in a particular area.

3.21 In any merger case the OFT will also seek views on potential merger effects from relevant third parties likely to have knowledge of the market concerned.¹¹ This will typically include competitors and customers of the merging parties, and may also include suppliers. Generally, the OFT will give more weight to the views of customers than competitors, though this partly depends on the quality of the opinions given.

3.22 The Competition Commission will typically be able to undertake more detailed market analysis given the longer timescale of its merger inquiries. This will include detailed questionnaires issued to the merging parties, their competitors and customers. The CC may also commission its own customer surveys carried out by market research specialists to obtain detailed relevant data.

Questions

- What are your views on substitutability between (a) local newspapers, (b) regional newspapers and (c) other media from the perspective of (i) advertisers and (ii) readers? Note that views supported by evidence are likely to have greater weight attached to them.
- Are there specific types of advertisers likely to be particularly loyal to local and regional print media?

¹¹ Using both a general 'Invitation to Comment' and targeted enquiries.

- Which of the types of evidence mentioned above would parties, or third parties, to a newspaper acquisition be likely to be able to provide in the timescale of a phase one investigation?
- Are there other types of evidence that parties or third parties may be able to provide to assist the analysis?
- Would potential merger parties value the availability of a template advertiser survey questionnaire for possible use in gathering relevant evidence?
- What factors are relevant to entry conditions in local and regional print media, and how often does entry occur in practice (please provide any relevant evidence)? Does the current economic climate render new entry less likely?
- Has the withdrawal of local and/or regional titles already resulted in significantly increased newspaper concentration at a local and/or regional level? What impact has this had on advertising rates (please provide any relevant evidence)?

Other potential issues under competitive assessment

Counterfactual - failing firm defence

3.23 Inherent in determining whether any lessening of competition is actually caused by the merger is a consideration of what would otherwise happen (or have happened) to the assets and business of that firm without the merger (that is, the 'counterfactual' to the merger). In particular, this may involve consideration of whether any lessening of competition would have occurred regardless of the merger because the target in question was failing and would therefore have exited the market in any event. The OFT has recently restated its position¹² on when failing firm considerations may be relevant in merger cases, and

¹² www.of.gov.uk/shared_of/business_leaflets/general/of1047.pdf

the evidence requirements which would need to be satisfied in such situations. In short, both the OFT and CC will consider in relevant cases (a) the inevitability of exit of the firm in question (including the absence of any prospect of reorganisation of the firm); (b) whether there was a substantially less anti-competitive alternative buyer for the firm; and (c) whether failure of the firm would be a substantially less anti-competitive outcome than the merger. Failing firm evidence was determinative in the CC's recent examination of a merger between cheese manufacturers.¹³

Efficiencies and customer benefits

- 3.24 While mergers can harm competition, they can also give rise to efficiencies. The Act allows the OFT to take any efficiency gains arising from a merger into account at two separate stages. First, efficiencies may be taken into account where they prevent a merger giving rise to an SLC: that is, by lowering prices, improving quality, promoting greater choice, fostering innovation and so forth. Efficiencies in this sense are taken into account as part of the competitive assessment of the merger and may be broadly characterised as supply-side (such as cost savings) or demand-side (such as increased network size). To prevent an SLC, such efficiencies must be clear, timely and merger-specific. Demand-side efficiencies were found by the OFT to prevent an SLC in the London region in the recent Global/GCap radio merger. The OFT has not to date found supply-side efficiencies to avert an SLC in any horizontal merger.
- 3.25 Second, efficiencies may also be taken into account where they do not avert an SLC but nonetheless outweigh it to the benefit of customers. In this case, the OFT may apply its 'relevant customer benefits' exception to the duty to refer the merger to the CC. As with efficiencies, situations where customer benefits might be weighed against an identified loss of competition are when the merger results in lower prices, higher quality, greater choice or greater innovation (although in this context such benefits need not be in the same market as that, or those, in which the

¹³ The CC's analysis of the counterfactual took account of failing firm evidence and led to it clearing the Long Clawson Dairy/Millway merger in January 2009.

SLC has or will occur). Also as with efficiencies, for the OFT to exercise its discretion not to refer a merger on this basis, the claimed customer benefits must be clear, timely, and merger-specific. The OFT has not, to date, decided not to refer a case to the CC on this basis. The claimed customer benefits must accrue to direct or indirect customers of the merging parties.

- 3.26 The CC takes account of relevant customer benefits if it finds an SLC resulting from a merger. If it concludes that there is a relevant customer benefit the CC will consider whether it should amend its proposed remedy with the aim of retaining the customer benefit.¹⁴ Similar to the assessment at the OFT stage, in order to be taken into account, the claimed benefits must be verifiable, merger-specific (that is, would not arise absent the merger) and expected to accrue within a reasonable period following the merger. As for the OFT, the benefits must be expected to accrue to customers of the merging parties (or their customers in turn).

Questions

- Is there any reason why the failing firm criteria described above are not appropriate for local and regional media markets?
- Is there any evidence that more concentrated local newspaper markets, or larger scale regional operations, lead to: (i) better quality printed or digital news content; (ii) a better advertising proposition (for example, bundles of differentiated products); or (iii) any other improvements which might be considered relevant customer benefits?
- Is there any evidence of merger-related cost reductions, or other efficiencies, being passed on to customers in the form of lower (advertising or cover) prices or higher quality products?

¹⁴ See: Competition Commission, *A report on the completed water merger of South East Water Limited and Mid Kent Water Limited*, 1 May 2007.

4 GUIDANCE ISSUES

Initial comments from stakeholders

- 4.1 Some publishers have stressed the importance to them of clarity early in the merger process, particularly in cases where smaller parties are unsure as to whether they fall within the merger regime. They submitted that the informal advice process offered by the OFT in relation to individual prospective transactions is somewhat unhelpful as it is non-binding and can be as time consuming as the formal review process. Instead, they argued that detailed published guidance on the OFT and CC approach to the merger regime in the media sector would be more helpful, particularly in relation to the economic evidence and methodology required. Indeed, some parties hoped that this review would result in such guidance on the media sector.
- 4.2 On the other hand, other publishers stated that they welcome the ability to receive informal advice (in addition to guidance) in order to assist in predicting the outcome of a potential merger investigation. In addition, stakeholders from the radio industry have stated that the ability to obtain informal guidance in sector specific merger cases is useful, particularly in the current economic climate.
- 4.3 Finally, one trade association told the OFT that further guidance on the OFT's application of the 'markets of insufficient importance' (or de minimis) exception to the duty to refer and on the definition of 'substantial part of the UK' in the share of supply test would be useful given the potential applicability of these concepts in this area.

Published merger guidance

4.4 There is a considerable amount of published guidance on both the general merger regime and the media merger regime, reflecting the roles of different organisations in applying the regime:

OFT – Mergers: Procedural guidance, and Mergers: Substantive assessment guidance (as revised)¹⁵

CC – Merger References: Competition Commission Guidelines¹⁶

BERR – Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers¹⁷

Ofcom – Ofcom guidance for the public interest test for media mergers.¹⁸

4.5 The OFT and CC guidance is of general application across sectors, whereas the BERR and Ofcom guidance relates specifically to media mergers. Some of this guidance is in the process of being updated. The OFT published in 2008 draft revised jurisdictional and procedural guidance on mergers¹⁹ which it expects to finalise shortly. The OFT and CC are also currently in the process of developing new joint substantive assessment guidance on mergers, which will include an updated explanation of their approaches to both market definition and competitive assessment of mergers.

4.6 The OFT also publishes detailed, fully reasoned decisions on merger cases considered, and this too provide an extensive source of guidance as to how it assesses competition issues arising in mergers.

¹⁵ www.oft.gov.uk/advice_and_resources/resource_base/Mergers_home/guidelines/

¹⁶ www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc2.pdf

¹⁷ www.berr.gov.uk/files/file14331.pdf

¹⁸ www.ofcom.org.uk/tv/ifi/guidance/pi_test/pi_test.pdf

¹⁹ www.oft.gov.uk/shared_of/consultations/oft526con.pdf

Informal advice procedures

- 4.7 In order to assist the planning and consideration by companies and their advisers of future mergers, the OFT's Mergers Group offers extra statutory advice on an informal basis on competition issues (and/or, where relevant, jurisdictional issues) arising out of a prospective merger situation that has not yet been made public, where certain conditions are met.²⁰
- 4.8 In brief, the OFT will provide Informal Advice where (i) there is a good faith intention to proceed with the transaction (that is, it is not hypothetical) and it is confidential (not in the public domain), and (ii) the transaction raises a genuine competition issue. Notably, Informal Advice can encompass specific advice on the potential application of the failing firm defence (in the context of the counterfactual) and the applicability of the markets of insufficient importance (or 'de minimis') exception to the duty to refer.
- 4.9 The OFT's Informal Advice procedures and caveats are set out in its 2006 note on Informal Advice procedures and its draft jurisdictional and procedural guidance. The most important caveat - which explains why Informal Advice cannot be binding on the OFT - is that the OFT is unable to test with third parties the parties' submissions to verify information provided in an Informal Advice application: any advice given is based on the assumed accuracy of that information.
- 4.10 Since the introduction of the OFT's revised procedures on Informal Advice in 2006, the OFT has not been approached in writing for Informal Advice on any potential local or regional newspaper transactions.

²⁰ The OFT revised its Informal Advice procedures in 2006 to replace previous arrangements for both Informal Advice and Confidential Guidance.

OFT approach to the 'markets of insufficient importance' exception

- 4.11 Under the Act,²¹ the OFT may exceptionally decide not to refer a merger to the Competition Commission if it believes that the market(s) to which the duty to refer applies are not of sufficient importance to justify a reference (commonly referred to as the 'de minimis' exception). By precluding a reference, use of this provision has the same effect as an exemption that clears the merger unconditionally. Its purpose is to avoid references being made where the costs involved to the public purse would be disproportionate to the potential harm caused to consumers by the merger.
- 4.12 The OFT is generally likely to consider the affected market(s) to be of sufficient importance to justify a reference (such that the exception will not apply) where their annual value in the UK, in aggregate, is more than £10 million.
- 4.13 Below the £10 million market size threshold, the OFT will consider whether a reference, overall, would be proportionate. In making this determination of proportionality, it will consider three issues: first, whether undertakings in lieu could in principle be offered by the merging parties to remedy in a clear-cut way any SLC concerns created by the merger;²² second whether the impact of the merger is likely to be particularly significant in the market(s) in question; and third whether a reference would be proportionate given its deterrence effect, potentially outside the individual market(s) in question.

²¹ Sections 22(2)(a) and 33(2)(a).

²² This is because the costs of a reference – in any given case where undertakings in lieu are in principle available but are not in fact offered by the parties – is outweighed by the long-run and recurring benefit of remedial and/or deterrent action at the OFT stage that, in aggregate, has resulted and would continue to result in substantial welfare savings for consumers and which would itself result from the deterrence effect of the reference in the case in question.

- 4.14 The OFT may determine not to exercise its discretion to apply the exception on the basis of any one of these considerations, or on several of them.²³
- 4.15 In the *Dunfermline Press/BRN* case, the OFT concluded that the SLC (in relation to the supply of weekly local newspapers and the supply of advertising space in local newspapers in Slough and Windsor) could be remedied in a clear-cut way because it was open to Dunfermline Press (DPL) to divest either BRN's *Express* series or DPL's *Observer* series to a suitable purchaser, thus removing the problematic overlap created by the merger. Accordingly, the OFT determined in that case that it would not be appropriate to exercise its discretion to apply the 'de minimis' exception.

Definition of 'substantial part of' the UK for jurisdictional purposes

- 4.16 The Act provides that the share of supply test (on which the OFT may assert jurisdiction over a merger) may be applied to the UK as a whole or to 'a substantial part' of it. There is no statutory definition of 'a substantial part'. The House of Lords ruled in the context of similar provisions in the Fair Trading Act 1973 (FTA) that, while there can be no fixed definition, the area or areas considered must be of such size, character and importance as to make it worth consideration for the purposes of merger control.²⁴ The OFT will take the following factors into account in determining whether an area should properly be regarded as a substantial part of the UK in this context: the size, population, social, political, economic, financial and geographic significance of the

²³ For recent cases involving the consideration of the 'de minimis' exception, see Anticipated acquisition by Spectris plc of Lochard Ltd, 29 January 2009 and Anticipated acquisition by Orbital Marketing Services Group Ltd of Ocean Park Ltd, 14 November 2008.

²⁴ See *Regina v Monopolies and Mergers Commission* and another ex parte South Yorkshire Transport Limited [1993] 1 WLR 23.

specified area or areas, and whether it is (or they are) special or significant in some way.²⁵

4.17 In line with the approach taken previously by the CC and OFT, there is no need for the substantial part of the UK for application of the share of supply test to constitute an undivided geographic area. This interpretation gives effect to the purposes of the Act. The economic significance of a merger, in terms of an SLC, does not necessarily depend on whether several localities are contiguous or separated.²⁶

Questions

- How could the current published BERR and Ofcom guidance on the operation of the media merger regime be made more useful?
- Are stakeholders aware of, and do they have views on, the current Informal Advice arrangements offered by the OFT for merger transactions?
- Have stakeholders considered but decided against seeking OFT Informal Advice for specific potential transactions and, if so, why?
- Would it be useful to provide guidance on how potential merger parties can get the best out of the Informal Advice process?

²⁵ The CC has found, applying the House of Lords' test as to whether an area was of such size, character and importance as to make it worth consideration, that the Borough of Slough represented a substantial part of the UK. In reaching this conclusion, the CC had regard to such considerations as population and economic factors, as well as the fact that the markets in which the merging parties competed were local in nature (CC: A report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough, by Tesco plc 28 November 2007).

²⁶ See CC Report - Archant Limited and the London newspapers of Independent News and Media Limited: A report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited (2004), Appendix C paragraph 28.

- Would it be useful to provide additional guidance on the application of the 'de minimis' exception now that it has been applied in several cases since the revised guidance in November 2007?
- Given the case law on this point, is there any justification for the OFT and CC interpreting 'substantial part of the UK' differently from their normal approach in the context of media mergers?

5 MEDIA PUBLIC INTEREST CONSIDERATIONS

Initial comments from stakeholders

- 5.1 Some stakeholders have argued that maintaining media plurality and enhancing quality local journalism should be the main priority of this review.
- 5.2 Publishers have stated that newspapers play an important role in local democracy and accountability. However, they argue that, without consolidation, local newspaper titles will be forced to close, thereby necessarily reducing media plurality. Publishers argue that print media consolidation would not affect the independence of individual titles, as local titles within publishing groups each have editorial independence and publishers value this independence.
- 5.3 One advertising trade body suggested that a key area for debate is the extent to which existing cross media ownership rules (regulating the continued separation of local newspaper and radio ownership) remain necessary to ensure local viewpoint neutrality.
- 5.4 Local authorities have submitted that local media continue to play an important role in holding public bodies to account and pursuing open and transparent government, a role which cannot be duplicated by public sector media and communications. Consequently, they have argued that public sector information should not be considered to contribute to a plurality of views when assessing media markets.
- 5.5 Two stakeholders questioned whether, in appropriate circumstances, the public interest considerations should be used to permit a transaction on public interest grounds in circumstances where competition concerns would otherwise prohibit it.

Newspapers: Current arrangements

- 5.6 There are three elements to the newspaper public interest considerations under the Enterprise Act. The considerations specified are:²⁷
- the need for accurate presentation of news in newspapers
 - the need for free expression of opinion in newspapers, and
 - the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK.
- 5.7 Further to the introduction of the Act, the then Department of Trade and Industry (now BERR) published guidance on public interest intervention in media mergers under the Act in May 2004 (BERR guidance).
- 5.8 As well as providing guidance on jurisdictional and procedural issues in media mergers, the BERR guidance provides (i) guidance on the scope of newspaper and broadcast public interest considerations, and (ii) some indications of the general approach that the Secretary of State will adopt in deciding whether or not to intervene in a particular case. The guidance also states that this approach will develop in the light of experience in operating the new newspaper public interest merger regime.
- 5.9 The guidance indicates that the likelihood of intervention in a newspaper to newspaper merger will depend upon the identity of the parties and the extent and nature of any overlaps between their newspaper activities. It states that 'there is a recognisable correlation between high levels of concentration and the potential for newspaper ownership concerns to arise. Thus, where a merger leads to market overlaps (for example, a merger of two newspapers in the same market, in neighbouring markets, or within a cluster) it may be appropriate for the Secretary of State to consider in more detail whether newspaper ownership concerns may

²⁷ Section 58(2A) and (2B).

arise. Whilst no firm indication can be given regarding the level of consolidation that might in itself lead to intervention by the Secretary of State to protect the newspaper public interest considerations, such intervention is likely in local newspaper transfers at a threshold above the level at which a potential competition issue would commonly be identified.¹²⁸ This statement has proved consistent with practice, in that the Secretary of State has not intervened in any local newspaper acquisitions under the Enterprise Act regime.

- 5.10 As noted in BERR's guidance, the plurality consideration in section 58(2B) of the Act is qualified by the reference to reasonableness and practicality. Hence, 'In the Secretary of State's view, this reflects the fact that although plurality of views in each and every market is the ideal goal of the regime, it may not be reasonable to require this in relation to a particular part of the market, for example because of associated costs. Moreover the level of plurality of views that may be considered reasonable in a large urban area may differ from the level practicable in a small rural community. In making this assessment the Secretary of State expects to take into account all relevant circumstances, for example the size and nature of the relevant area, and the extent to which other newspapers in the same area contribute to the level of plurality of views.'¹²⁹
- 5.11 The BERR guidance suggests that there is a considerable degree of flexibility and discretion built into this public interest consideration, which allow for local factors and relevant market developments to be taken into account.
- 5.12 The newspaper public interest considerations specified in the Act were based on public interest detriments that had been found to exist in previous newspaper mergers. The BERR guidance explains that the rationale for having a special regime to deal with public interest

²⁸ Paragraph 6.7

²⁹ Paragraph 5.11

considerations arising in the context of newspaper mergers was that historically there were a small number of cases that raised issues beyond those that would be considered as part of a competition assessment.³⁰ The BERR guidance does not envisage a situation where newspaper public interest intervention would occur in order to allow a merger that may otherwise be referred to the CC on competition grounds (positive intervention).³¹

Broadcasting and cross-media: Current arrangements

5.13 The Communications Act 2003 amended the Act, specifying new public interest considerations applicable to mergers involving newspaper enterprises and broadcasting enterprises. As noted earlier in this discussion paper, the broadcasting and cross-media public interest considerations may be relevant to newspaper mergers. This is because in mergers involving a broadcast media enterprise and a newspaper enterprise, the newspaper enterprise is also considered to be a media enterprise for the purposes of the plurality public interest consideration specified in section 58 (2C)(a).³²

5.14 As a result, the broadcasting and cross-media public interest test assesses the relevance of, in relevant newspaper mergers, the need for there to be a sufficient plurality of persons with control of the media

³⁰ Paragraph 6.3, BERR guidance which goes on to state: 'Such cases have generally been fairly easily identifiable from the outset: – the contentious acquirer (e.g. David Sullivan's proposed acquisition of the *Bristol Evening Post*), the contentious case involving national newspapers (*The Times*, *The Observer*) or cases involving areas of particular cultural or political sensitivity (such as the cases involving newspaper titles in Northern Ireland'. (Century Newspapers/TRN (April 1989), Trinity plc/Mirror Group plc and Regional Independent Media Holdings Ltd/Mirror Group plc (July 1999).

³¹ Although such positive intervention is provided for in public interest cases under the Act – sections 46(2) and 45(6).

³² Whereas the public interest considerations in sections 58(2C)(b) and (c) relating to range, quality and standards of broadcasting relate to broadcasting only.

enterprises serving that audience in relation to every different audience in the UK or a particular area/locality of the UK.

- 5.15 The BERR guidance notes the distinction between the competition and public interest merger regimes, yet recognises that in some cases the Secretary of State anticipates that safeguarding competition in a market will by itself be likely to provide a sufficient plurality of control. However, the guidance states that such an approach would be unlikely in cross-media mergers where the competition authorities considered that advertising in newspaper and broadcast media did not form part of the same relevant market. In deciding whether to exercise the Secretary of State's powers of intervention, the BERR guidance notes that where the market definition is unclear, the Secretary of State may take a cautious approach in deciding whether to issue an intervention notice.
- 5.16 In applying the broadcasting and cross-media public interest considerations, the BERR guidance indicates that it is necessary to analyse and consider all the relevant circumstances at the time, on a case-by-case basis. In this regard, in the event of an intervention notice being issued, the advice that Ofcom is duty bound to provide will be evidence based, reflect market research and take account of stakeholders' views.

The Media Ownership Rules

- 5.17 In addition to the public interest considerations discussed above, there are further media ownership rules (MO rules) which govern the ownership of television, radio and newspapers in the UK. The OFT has no role in enforcing these rules. Section 391 of the Communications Act requires Ofcom to review the MO rules at least every three years, and, as a result of that review, make recommendations to the Secretary of State if in Ofcom's view changes to the MO rules are needed.
- 5.18 The MO rules are designed to strike a balance between ensuring a degree of plurality on the one hand and providing freedom to companies to expand, innovate and invest on the other.

5.19 Ofcom's last review of the MO rules took place in 2006. Ofcom recommended that no changes should be made to the MO rules at that time. Ofcom's next review of the MO rules is due this year.

Questions

- Are the newspaper public interest considerations still appropriate for local and regional newspaper mergers in their current form?
- Should they be amended to incorporate reference to other news sources, such as online news sources?
- Have the newspaper public interest considerations deterred potential transactions from being pursued? In this regard, has one particular consideration had a greater effect than the others?
- Does the current flexibility/discretion in the plurality considerations (under both the newspaper, and broadcast and cross media arrangements) cater sufficiently for market developments?
- Should the newspaper public interest considerations be used for positive intervention, and if so in what circumstances?

6 PUBLIC SECTOR COMPETITION

- 6.1 Publishers have submitted that local commercial newspapers are facing increasing competitive pressure from public sector bodies that develop their own media platforms to compete directly for advertising revenue. Two examples given were local authority print media publications and local web-based community sites produced by the BBC. Some publishers suggested that while public sector media services should be permitted, they should always conduct a Public Value Test and Market Impact Assessment prior to introducing such services.
- 6.2 Local authorities have argued that public sector media platforms are necessary for a number of reasons, including: the need to communicate directly with the public to ensure accountability, the responsibility of public bodies to obtain value for money in their communications spending and the decreasing effectiveness of local print media due to declining circulation. It was also submitted that a distinction should be drawn between public sector bodies reducing their own local advertising spending, and directly competing with local media for all advertising revenue.
- 6.3 The radio industry has submitted that local and regional radio services are impacted significantly by competition from the BBC for radio listeners. They argue that the increasing listening share of the BBC ultimately detracts from the ability of local and regional radio stations to generate advertising revenues.
- 6.4 Local authority titles were explicitly considered by the CC in its *Archant/INM*³³ inquiry, and the extent to which they were effective substitutes for local advertisers was included in the competitive analysis (paragraph 5.18 of the CC report). The CC found, in that case, that

³³ CC, Archant Limited and the London newspapers of Independent News and Media Limited: A report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited, September 2004.

some local authority titles were more significant competitors (in terms of how effective they were as substitutes for local advertisers) than others.

Questions

- Do you have further views or evidence relating to public sector news and information sources, with particular regard to their interaction with the merger and media public interest regimes?

7 NEXT STEPS

- 7.1 Responses to this discussion paper are invited by **31 March 2009**. They should be sent to:

Local Media Review
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Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

or localmediareview@oft.gsi.gov.uk

Tel: (020) 7211 5864

- 7.2 The OFT intends to submit key findings and any recommendations arising from its review to Government in mid-April. A more detailed report will subsequently be published.
- 7.3 The OFT may wish to publish a non-confidential summary of submissions. Respondents should therefore clearly identify any elements of their submission which they regard as confidential.