

Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/02/2006

London-wide newspaper distribution

1 March 2006

(Case CE/2479/03)

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## INTRODUCTION

### The OFT's investigation

1. On 14 February 2003, the Office of Fair Trading (OFT) received a complaint from Northern & Shell plc (N&S) alleging that Associated Newspapers Limited (ANL) had breached the Chapter II prohibition of the Competition Act 1998 (the Act). N&S alleged that this had arisen from ANL's entry into exclusive contracts with London Underground Limited (LUL),<sup>1</sup> Network Rail (NR)<sup>2</sup> and a number of train operating companies<sup>3</sup> (TOCs) for access to their stations to distribute its free, morning newspaper, *Metro*, in London. N&S claimed that, as a consequence of such exclusive contracts, it was unable to launch a competing free, evening newspaper in London and that the market for London daily newspapers, both paid for and free, had therefore been foreclosed.
2. The OFT opened a formal investigation on 19 March 2003, under section 25 of the Act, on the basis that it had reasonable grounds to suspect that the Chapter II prohibition of the Act had been infringed. In particular, the OFT suspected that ANL had infringed the Chapter II prohibition of the Act by abusing a dominant position on the market for the sale and/or distribution of free and/or paid-for newspapers in the London area, by entering into the exclusive distribution agreements described above, with the effect of foreclosing the market to new entry.
3. On 1 May 2003, the OFT issued section 26 Notices under the Act to ANL, N&S, NR, LUL and several TOCs, requesting certain information in relation to its investigation. Section 26 Notices were subsequently sent to the remaining TOCs that had entered into contracts with ANL. The OFT also sent a section 26 Notice to Maiden Outdoor Advertising Limited, which had been retained originally by NR to assist it in the award and organisation of newspaper distribution contracts for NR and several of the TOCs, and which was a party to the contract eventually awarded to ANL.<sup>4</sup>

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<sup>1</sup> The agreement with LUL was actually entered into by Associated London Metro Limited (ALML). The OFT notes that ALML was the original publisher of *Metro* but this role has now been taken over by ANL since 4 October 2004.

<sup>2</sup> The agreement was originally entered into with Railtrack plc. The functions and obligations of Railtrack, including those relating to the contract with ANL, have now been transferred to NR. References in this document to NR should therefore be read as referring to Railtrack to the extent that they relate to the situation before this transfer took place.

<sup>3</sup> See paragraph 14 below for a full list of the TOCs included in the OFT's investigation.

<sup>4</sup> For example, one contract was entered into between ANL, NR (as Railtrack), South Central Limited, Connex South Eastern Limited, Silverlink Train Services Limited and Maiden Outdoor Advertising Limited. This contract was the basis for various other TOCs agreeing, by way of letters of adherence, to allow ANL to distribute *Metro* from their stations.

4. In addition, the OFT sought the views, through information requests, meetings, telephone conferences and other correspondence, of certain UK and foreign newspaper publishers and advertising agencies to assist it in forming a view as to whether the suspected infringements had indeed occurred.
5. On 9 March 2004, the OFT wrote to ANL indicating that in addition to its proceeding under Chapter II of the Act, it was also considering taking enforcement action against ANL under the Chapter I prohibition of the Act, upon the repeal of the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (LVEO) becoming effective in May 2005.<sup>5</sup> The OFT wrote on similar terms to LUL, NR and the TOCs during May 2004.<sup>6</sup>
6. By a letter dated 28 May 2004, ANL indicated formally to the OFT that it wished to offer binding commitments in order to address the OFT's competition concerns. On the 11 June 2004, the OFT wrote to ANL, setting out a summary of its competition concerns, in accordance with paragraph 4.17 of the OFT Guideline 407, *Enforcement*.<sup>7</sup>
7. Under cover of a letter dated 9 July 2004, ANL supplied an initial draft of its proposed commitments. With the consent of ANL, the OFT contacted LUL and NR on 15 July 2004 to seek appropriate confidentiality undertakings to enable the OFT to disclose the draft commitments to LUL and NR for comment on the workability of the proposed commitments. Such comments were received from both NR and LUL by October 2004. Following further discussion with the OFT, the proposed commitments were subsequently revised by ANL and were formally offered to the OFT on 31 March 2005 (Proposed Commitments).
8. Having considered the Proposed Commitments in detail, the OFT reached the provisional view that they addressed its competition concerns and that, as a result, it was appropriate for the OFT to exercise its discretion, under section 31A (2) of the Act, to close its investigation by way of a formal decision accepting the Proposed Commitments. This provisional conclusion was subject to the outcome of the consultation process initiated by the Notice dated 15 July 2005 (the

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<sup>5</sup> Although it was common ground that the agreements in question were excluded from the Chapter I prohibition at the time of the investigation, by virtue of the LVEO, the protection provided by the LVEO for vertical agreements was to end altogether on 1 May 2005, when it was to be replaced with a narrower exclusion covering land agreements only (see Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004). In addition, the OFT was able to withdraw the protection afforded by the LVEO from particular agreements under paragraph 4 of Schedule 1 of the Act and later considered taking this procedural step. The OFT also considers that the parallel exemption that arises by virtue of Commission Regulation (EC) No 2790/1999 would not apply to these agreements due to ANL's high market shares in the provisional relevant markets.

<sup>6</sup> These letters focussed on the OFT's consideration of whether to withdraw the protection afforded by the LVEO under paragraph 4 of Schedule 1 of the Act.

<sup>7</sup> At the time of writing it was still a draft Guideline.

'Notice'), which the OFT was required to undertake by paragraph 2 of Schedule 6A of the Act. The Proposed Commitments were duly annexed to the Notice.

9. The consultation process officially concluded on 26 August 2005. The response to the consultation process is summarised at paragraphs 60-107. Based on the responses received during the consultation process and after further consultation and negotiation with ANL, the OFT has sought limited amendments to the Proposed Commitments annexed to the Notice, by way of clarification. ANL has agreed to provide such amendments. The amended version of the Proposed Commitments is annexed to this Decision (the Commitments).

## **THE PARTIES**

### **Associated Newspapers Limited (ANL)**

10. ANL publishes the *Daily Mail*, the *Mail on Sunday*, *Ireland on Sunday* and the *Evening Standard* newspapers and has recently become the publisher of the *Metro* newspaper. ANL is a subsidiary of the Daily Mail and General Trust plc (DMGT). DMGT reported turnover of £2,138 million in the financial year ending 2 October 2005, of which £878 million was generated by ANL.

### **Northern & Shell plc (N&S)**

11. N&S publishes the *Daily Express*, *Sunday Express*, *Daily Star* and *Daily Star Sunday* and *Daily Star of Scotland* newspapers. It also publishes certain magazine titles, including *OK!*, *New!* and *Take 5* and owns a wide range of adult satellite channels. N&S's holding company is Northern & Shell Properties Limited and its ultimate holding company is RCD1 Limited. N&S's latest filed accounts show a turnover of nearly £ 54 million with a pre-tax profit of approximately £1.62 million.

### **London Underground Limited (LUL), Transport for London (TfL) and the Mayor of London**

12. LUL is responsible for operating the London Underground network. It was the principal subsidiary of the Board of London Regional Transport until it merged, on 15 July 2003, with TfL and came under the control of the Greater London Authority. The 1999 Greater London Authority Act established the post of Mayor of London, who is responsible for London's transport strategy. TfL is the executive body that runs most of London's transport. It reports to the Mayor of London.

### **Network Rail (NR)**

13. NR owns and is responsible for maintaining the UK's rail infrastructure. It owns 2,500 stations, of which 17 'major stations' are directly managed by NR. The

major stations include those central London stations covered by the Commitments (i.e. Cannon Street, Charing Cross, Euston, Fenchurch Street, Kings Cross, Liverpool Street, London Bridge, Paddington, Victoria and Waterloo). NR is a company limited by guarantee without shareholders but is run along commercial lines. It took over its responsibilities from Railtrack plc in October 2002.

#### **Train Operating Companies (TOCs)**

14. TOCs used to be appointed by the Strategic Rail Authority<sup>8</sup> to provide passenger train services within the UK under fixed-term franchises. They also operate and maintain railway stations served by their services, apart from the major stations operated directly by NR. The OFT's investigation covered only those TOCs that serve the Greater London commuter sector and entered into exclusivity agreements with ANL, namely:

- South Central Limited (now replaced by the New Southern Railway Limited)
- Silverlink Train Services Limited
- South West Trains Limited
- Great Eastern Railway Limited (replaced by London Eastern Railway Limited, which in turn was replaced by One Railways)
- Connex South Eastern Limited (now replaced by South Eastern Trains Limited)
- Great Western Trains Company Limited
- The Chiltern Railway Company Limited
- LTS Rail Ltd (now renamed as C2C Rail Limited)
- West Anglia Great Northern Railway Limited

#### **THE AGREEMENTS**

15. ALML<sup>9</sup> and LUL entered into an agreement on 20 November 1998 granting ALML the exclusive right to distribute a free morning newspaper from LUL's premises for

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<sup>8</sup> Following Royal Assent for the Railways Act 2005, the Strategic Rail Authority is being wound up, with many of its functions passing to the Department for Transport's new Rail Group.

<sup>9</sup> Associated London Metro Limited; see footnote 1.

a 10<sup>10</sup> year period commencing on the first date of publication<sup>11</sup> of *Metro*.

16. ANL and NR entered into a similar agreement covering NR operated stations in London on 20 May 1999 (the NR Agreement). This agreement had an initial duration of three years and was subsequently renewed for a further 10 years from 20 May 2002, with an option, subject to NR's absolute discretion, to renew for an additional 10 years.
17. ANL has also entered into exclusive agreements with the TOCs listed above as well as with London & Continental Stations & Property Limited in relation to St. Pancras mainline railway station (the TOC Agreements). Each of these agreements originally granted ANL exclusive rights, lasting for periods of less than five years, to distribute free newspapers on stations operated by the parties concerned. These TOC Agreements have on expiry (where applicable) been renewed by the relevant parties for further periods of up to 10 years (but less than five years in most cases).
18. Aside from the agreements covering overland railway and underground stations, ANL also entered into exclusive distribution agreements for various periods between three years and five years and nine months<sup>12</sup> with:
  - a. Serco Docklands Limited;
  - b. Arriva Buses;<sup>13</sup>
  - c. London Bus Services;<sup>14</sup>
  - d. FirstGroup plc;<sup>15</sup> and

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<sup>10</sup> By a letter of variation dated 22 September 1999, the duration of the contract was increased to 11 years.

<sup>11</sup> This was March 1999.

<sup>12</sup> These agreements are referred to in this document as the Other Transport Agreements. The LUL Agreement, NR Agreement, TOC Agreements and Other Transport Agreements are referred to collectively as the Agreements.

<sup>13</sup> This contract does not give any direct rights over London and the only possibility ANL has to distribute in London is if the relevant Arriva bus company offers rights to a third party, in which case ANL has a right to extend distribution to cover that bus company. ANL also has the right, for 12 months following expiry of the agreement, to match offers made by third parties to Arriva for the distribution rights.

<sup>14</sup> This agreement has now expired and has not been renewed by London Buses, although ANL continues to supply newspapers to London Buses on an informal basis.

<sup>15</sup> Under this contract, ANL has the right to extend the distribution of *Metro* to cover other local FirstGroup companies, including Croydon Trams and certain local bus companies operating in the London Area. ANL also has the right, during the agreement and for 12 months after its expiry, to match offers received by FirstGroup from third parties for those distribution rights.

- e. Stagecoach Holdings plc.<sup>16</sup>

## THE OFT'S COMPETITION CONCERNS

19. As noted above, the OFT provided ANL with a summary of its competition concerns by a letter dated 11 June 2004, following ANL's indication that it wished to offer the OFT binding commitments. As noted by paragraph 4.17 of the OFT's *Enforcement* Guideline, this was required in this case as no Statement of Objections had been issued. The OFT was also obliged to set out its competition concerns in the Notice, to enable it to discharge its duty under paragraph 2(2) (b) of Schedule 6A of the Act to state 'the way in which the commitments ... meet the OFT's competition concerns'.
20. The OFT confirmed in its summary of competition concerns letter that it considered that ANL's entry into the Agreements raised competition concerns that gave it reasonable grounds to suspect that ANL had thereby infringed the Chapter II prohibition. It also confirmed that the OFT suspected that, were they not excluded by the LVEO, the LUL Agreement and the NR Agreement would infringe the Chapter I prohibition.
21. The OFT based this view on its provisional conclusion that the relevant markets affected by ANL's conduct are the market for the supply of advertising space in London-wide newspapers<sup>17</sup> (both free and paid for) and the London-wide newspaper readership market (both free and paid for).<sup>18</sup> In reaching this provisional conclusion, the OFT also relied on the information obtained by it in the

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<sup>16</sup> Under this contract, ANL has the right to extend the distribution of *Metro* to cover other local Stagecoach bus companies, including some operating in the London area. ANL also has the right, for 12 months following expiry of the agreement, to beat offers made by third parties to Stagecoach for the distribution rights.

<sup>17</sup> By 'London-wide newspapers' the OFT means newspapers which are distributed across the Greater London region and which are specifically targeted at London readers and those advertisers wishing to reach those readers.

<sup>18</sup> For example, in its merger investigations, the Competition Commission has considered morning and evening newspapers to be close substitutes in terms of editorial and advertising content, frequency of publication, and area of circulation and has noted that they are often owned by the same publisher in a given area. In this regard, the *Metro* and *Evening Standard* have similar editorial and advertising content, the same frequency (i.e. daily), similar areas of circulation and are owned by the same publisher. In one case, the Competition Commission concluded that '*...morning and evening titles (in any particular area) generally fall within the same economic market in terms of both readers and advertising*' (*Competition Commission report into Johnston Press/Trinity Mirror*, Cm 5495, May 2002, at para 5.7). Based on what the Competition Commission has said with regard to newspaper market definition, the OFT believes it is likely that there is a readership market for London-wide free and paid for, morning and afternoon/evening newspapers. Whilst there is some anecdotal evidence that the *Metro* has impacted on sales of national daily newspapers, it is not clear whether this has been sufficient to suggest that they are part of the same market. In addition, the OFT notes that the *Metro* was deliberately targeted at people who did not previously read newspapers on their way to work.

course of its investigation, previous decisions made by the OFT under the Act<sup>19</sup> and a judgment made by the Competition Appeal Tribunal.<sup>20</sup>

22. The OFT notes that, since ANL is the publisher of both of the London-wide newspapers currently published, i.e. the *Metro* and *Evening Standard*<sup>21</sup>, it is the only player in each of these markets<sup>22</sup>.
23. The OFT also reached a further provisional conclusion that timely access to a critical mass of LUL and/or other railway stations is a vital element in the success of a free, London-wide newspaper, due to the need to reach commuters through the transport network. Whilst alternative methods of distribution exist, such as street merchandising (i.e. people standing in the street handing out the newspaper to pedestrians), the OFT's provisional view was that these are inferior methods of distribution that complement, rather than substitute for, station distribution. This is particularly the case for a new entrant wishing to compete against an established and successful incumbent which has already secured the prime distribution method for its sole use.
24. Given the above, the OFT was concerned that the Agreements:
  - a. had both the individual effect (in the case of the LUL and NR Agreements) and the cumulative effect (in respect of the TOC Agreements and the Other Transport Agreements, when combined with the LUL and NR Agreements) of preventing potentially competing publishers of free newspapers gaining access to distribution within London; and
  - b. thereby substantially foreclosed the market for the supply of advertising space in London-wide newspapers (both free and paid for) and thus, by extension the London-wide newspaper readership market, both of which are currently dominated by ANL's publications.
25. The OFT accepted that a certain degree of foreclosure is inherent in an exclusive agreement, and may be justifiable for a limited period to permit the launch of a new and innovative product.<sup>23</sup> However, in this instance, the OFT was concerned

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<sup>19</sup> In particular, Decision by the Director General of Fair Trading; No CA98/14/2002. *Predation by Aberdeen Journals Limited (Remitted Case)*, 16 September 2002.

<sup>20</sup> See *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11.

<sup>21</sup> The OFT also notes that ANL is also the publisher of *Standard Lite* which has been distributed in central London since December 2004 and is available free of charge between 11.30am - 2.30pm every weekday.

<sup>22</sup> The OFT notes the launch of *City A.M.* on 5 September 2005. As the launch was after the end of the consultation period, the OFT has not received any responses to its consultation apropos the impact of its launch on this investigation. Further, the OFT believes it is too early to tell what impact (if any) it will have in respect of this investigation.

<sup>23</sup> By way of explanation, the OFT generally understands that it may be in the interests of both contracting parties to reach an exclusive agreement. For the station owners and

that the combined effect of the long periods of exclusivity conferred by the Agreements and the 24 hour exclusivity granted went beyond what could be objectively justified.

26. In reaching this provisional conclusion, the OFT noted that the period of exclusivity enjoyed by ANL under the LUL and NR Agreements had already exceeded five years at the time of writing. Second, the OFT noted that ANL used only a portion of the day (i.e. the morning) to distribute the *Metro* via stations and that its rights to distribute newspapers in the afternoon and evening therefore remained unexploited. The OFT was concerned that this fact reduced the potential grounds for justifying the overall foreclosure effect arising from the agreements. As far as the TOC Agreements and the Other Transport Agreements were concerned, the OFT was concerned that, whilst they may not have given rise to significant concerns on an individual basis, the duration and temporal scope of the exclusivity contained in those agreements, taken as whole, further aggravated the foreclosure effect of the LUL and NR Agreements.

## THE COMMITMENTS

27. As noted above, ANL formally offered the proposed commitments to address the OFT's competition concerns on 31 March 2005. Following the consultation process, announced in the Notice, ANL offered to revise the Proposed Commitments by way of clarification. A signed copy of the full text of the Commitments is annexed to this Decision. In outline, ANL has offered:
- a. to amend, within six weeks of a commitments decision, the LUL and NR Agreements to release its exclusive rights relating to the afternoon and evening distribution slot;<sup>24</sup>
  - b. to waive, within six weeks of a commitments decision, its afternoon and evening rights in respect of the TOC stations from which editions of *Metro* are distributed;
  - c. to make arrangements for third party access to its distribution racks on commercially reasonable and non-discriminatory terms; and
  - d. to afford reasonable space and prominence to third parties' branding on such racks.

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operators this is due to the operational simplicity derived from dealing with only one party. For the publisher this is down to a desire to protect its investment and prevent another party free-riding on its product.

<sup>24</sup> This is expressed in terms of an unconditional and irrevocable offer to both LUL and NR to amend the agreements to provide for afternoon and evening distribution rights to third parties.

28. Should LUL, NR and/or the TOCs choose to re-tender the rights to be surrendered by ANL pursuant to the Commitments, ANL is not prevented from re-bidding for any such rights. Should ANL choose to re-bid in such circumstances, however, it will be subject to a commitment that it will not offer: (i) more than the 'fair economic value'<sup>25</sup> of those rights; or (ii) any premium conditional on it securing distribution rights from any other station owners or operators. This is designed to prevent ANL from offering a strategic premium for such rights, i.e. an additional payment that would reflect any incremental benefit that ANL may expect to obtain from excluding competition from rival publishers by securing these rights.
29. Furthermore, should ANL be awarded any new rights following a re-tender, it will be obliged, subject to certain conditions, to exploit the same by commencing distribution of a free newspaper in a reasonable proportion<sup>26</sup> of stations concerned within six months.
30. ANL will also provide information and/or documentation that the OFT considers necessary to monitor compliance with the Commitments.
31. The Commitments will expire five years after their acceptance by the OFT.

#### **THE APPROPRIATENESS OF ACCEPTING COMMITMENTS**

32. The decision whether to accept binding commitments under section 31A (2) of the Act is at the discretion of the OFT. The OFT is obliged under section 31D of the Act to publish guidance as to the circumstances in which it may be appropriate to exercise this discretion, to which it must have regard when deciding whether to accept any proposed commitments offered to it. The current form of this guidance (the 'Guidance') is published as an annex to the OFT's Enforcement Guideline.<sup>27</sup>
33. As noted at paragraph A.13 of the Guidance, the OFT is likely to consider it appropriate to accept commitments only in cases where:
  - a. the OFT's competition concerns are readily identifiable;
  - b. the competition concerns are fully addressed by the commitments offered;  
and
  - c. the commitments are capable of being implemented effectively and, if necessary, within a short period of time.

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<sup>25</sup> This term is defined in the Commitments as 'the value to ANL from winning, and subsequently exploiting, the Afternoon Distribution Rights excluding any additional value that might arise from such rights given ANL's ownership of other newspaper titles'.

<sup>26</sup> This term is defined in the Commitments as 'in respect of LUL Stations, at least 60 per cent of the relevant LUL Stations located in Zone 1 and, in respect of Network Rail Stations, at least 60 per cent of the relevant Network Rail Stations'.

<sup>27</sup> OFT 407.

34. The OFT considers that these conditions are met in this case. First, the OFT has identified its competition concerns, as summarised at paragraphs 19 to 26 above, which relate to the foreclosure effect generated by the Agreements.
35. Second, the OFT has reached the conclusion that the Commitments offered by ANL fully address these competition concerns, on the basis that they are likely substantially to alleviate the foreclosure effects identified. (Further reasoning for this conclusion is set out at paragraphs 41-53 below.)
36. Third, the OFT is satisfied that the Commitments can be implemented effectively, and is also satisfied that the timescale for the implementation is appropriate and proportionate. In this regard, the OFT notes that the principal elements of the Commitments will be implemented within six weeks of their formal acceptance by the OFT.
37. Paragraph A.16 of the Guidance notes that the OFT will not accept binding commitments in circumstances:
  - a. where compliance with and the effectiveness of any binding commitments would be difficult to discern; and/or
  - b. where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.
38. The OFT considers that it will not be unduly difficult to assess ANL's compliance with, and the effectiveness of, the Commitments. The primary purpose of the Commitments is to remove the contractual bar that currently prevents LUL, NR and the TOCs from re-tendering the right, acquired by ANL but so far unexploited, to distribute free newspapers in their stations in the afternoon and evening, should they wish to do so. This will be achieved once and for all through ANL's surrender of these rights under the LUL, NR and TOC Agreements, respectively. It will be relatively easy for the OFT to assess whether this has taken place, as the OFT would expect LUL, NR and/or the TOCs to inform it if they continued to be prevented from re-tendering their distribution rights, notwithstanding the Commitments.
39. The OFT considers that compliance with, and the effectiveness of, the remaining Commitments will be sufficiently clear to make the Commitments as a whole workable and therefore acceptable to the OFT. In particular, the OFT expects that potential new entrants, LUL, NR and/or the TOCs will be well placed to observe any failure by ANL not to implement and/or adhere to the Commitments and to raise any concerns they may have with the OFT. The Commitments allow for the OFT to seek and ANL to provide information and/or documentation necessary for the OFT to monitor compliance with the Commitments.

40. Finally, the OFT considers that its acceptance of the Commitments in this case will not undermine deterrence. This does not create an expectation that the OFT will be willing to accept commitments in all cases of foreclosure arising from exclusive agreements.

#### **THE OFT'S ASSESSMENT OF THE COMMITMENTS**

41. When assessing the competitive impact of ANL's conduct and the Commitments, the OFT had first to consider what options were available for an entrant wishing to launch a new London-wide newspaper, in competition with ANL's existing titles. Clearly, the more the exclusivity provisions of the Agreements foreclosed entry, the greater the OFT's competition concerns. If the exclusivity was the primary factor in preventing market entry by rivals, then removing that exclusivity would remove those concerns.
42. The OFT's provisional view is that the only credible way a rival publisher can enter the London-wide newspaper markets, given current market conditions, is by launching a free newspaper. In reaching this provisional view, the OFT was influenced by comments made by the Competition Commission in merger investigations in this sector.<sup>28</sup> Furthermore, the OFT notes that, for London-wide newspapers, there has been no new entry by a paid-for London-wide newspaper for nearly 20 years.<sup>29</sup> In addition, sales of paid-for newspapers, including those for the *Evening Standard*, are declining across the sector, further discouraging entry by such a publication.
43. The OFT then considered what options exist for a new entrant wishing to distribute a free newspaper. As noted above, the OFT's provisional view is that the only credible way for a new entrant to distribute a free paper is by using racks/bins placed on underground and railway stations.
44. Whilst alternative distribution methods exist, the OFT's provisional view is that these are inferior methods of distribution on their own, particularly for a new entrant having to enter the market on a sufficient scale to enable it to compete against an established and successful monopolist incumbent which has secured the prime distribution method, namely distribution on stations, for its sole use.
45. In considering alternative distribution methods, the OFT first considered whether distribution bins/racks placed in alternative locations that see significant footfall,

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<sup>28</sup> See, for instance, Competition Commission Report, *Johnston Press plc and Trinity Mirror plc*, Cm 5495, May 2002, at para 5.63. In this Report the Competition Commission noted that there are few, if any, examples of a local area in the UK supporting more than one paid for newspaper and that entry into monopoly markets occupied by '*forceful and alert incumbents*' which already own several titles may be much more difficult and it concluded that '*the prospects for entry into the territory of a strong and efficient publisher with a monopoly of existing titles are highly uncertain*' (see paragraphs 2.62 and 2.67).

<sup>29</sup> Robert Maxwell launched the (short-lived) London Daily News in 1987.

such as shopping centres, offices, cinemas, coffee shops, gyms etc. could provide an alternative effective distribution method to stations. The OFT's provisional view was that they do not. In order to achieve a critical mass of distribution sufficient to attract target advertisers, it is likely that the number of distribution points would have to be significantly greater than that provided by station distribution, given the uniquely concentrated footfall experienced on stations. This would have an impact on viability. Therefore, the OFT provisionally concluded that such distribution does not, by itself, therefore offer an effective alternative to distribution using stations and at best could only be used to complement such distribution.

46. The OFT then considered whether street merchandisers or bins/racks placed directly outside underground and railway stations could provide a viable alternative distribution method. The OFT's provisional view is that it does not. Street merchandising is logistically more complex, requiring 300 to 400 merchandisers daily, handing out newspapers, to achieve the critical mass circulation. This makes it a more expensive option than using racks and would be unsustainable as a long term distribution method. Additionally, the OFT was told that handing out newspapers via street merchandising is not valued as highly by advertisers as distribution via racks. This is because of the element of reader choice in taking a newspaper from a rack, rather than having something thrust into their hands, which is often disposed of immediately afterwards, thus making it difficult to judge actual readership of the newspaper. Even though using bins outside stations provides the element of reader choice, the OFT provisionally concluded that the use of racks on the streets remains an inferior option.<sup>30</sup> For example, there may be issues with maintaining the racks and protecting the newspapers contained within them from bad weather.
47. Given the above provisional conclusions, the OFT had to consider whether the benefits of on-station distribution could be shared, i.e. whether different publications could be distributed from stations at the same time. On the basis of the information received from LUL and NR, the OFT accepts that it is only possible to distribute one London-wide free newspaper at any one time on stations operated by LUL, NR and the TOCs, respectively, in the quantities required to make such a product viable.<sup>31</sup>

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<sup>30</sup>Further, in this regard, the OFT notes that the key points outside London underground and overground stations are often already taken by street vendors selling ANL's *Evening Standard* thus potentially depriving others of the pole positions outside London underground and overground stations.

<sup>31</sup> Both LUL and NR separately submitted to the OFT that each could not allow more than one free newspaper to be distributed from its stations at any one time, due to space and health and safety constraints. These would be particularly apparent for any distribution in the afternoon and evening, due to the predominant passenger flows of large numbers of commuters leaving from a limited number of major stations.

48. The two key periods for distributing such a newspaper are in the morning and afternoon/evening, due to the importance of reaching commuters on their journeys to or from work. It would therefore appear that only two free newspapers can be distributed on the same stations in any 24 hour time period, i.e. one in each distribution period.<sup>32</sup>
49. Following its provisional conclusions above, the OFT considers that advertising in a morning newspaper and advertising in an afternoon/evening newspaper is likely to fall within the same market, at least for the purposes of analysing competition between London-wide newspapers. As a result, by opening up afternoon/evening distribution, as is envisaged in the Commitments, the OFT is satisfied that foreclosure on the London-wide newspaper advertising market will be substantially alleviated and that ANL's continued exclusivity in the morning for the remaining duration of the Agreements will not raise significant competition concerns in the market for the supply of advertising space in London-wide newspapers.
50. Since the OFT takes the provisional view that the London-wide newspaper advertising market encompasses advertising in both morning and afternoon/evening titles, (whether free or paid), it is satisfied that the emergence of a new free London-wide title in the afternoon/evening, made possible by opening up afternoon/evening distribution via stations, has the potential to constrain advertising rates in both the *Evening Standard* and the *Metro*.
51. As regards the readership market, the OFT believes that the Commitments will provide for the real prospect of a new entrant, competing with ANL's titles, which would increase choice for readers, reducing substantially the degree of foreclosure on the London-wide readership market.
52. The OFT is satisfied that the Other Transport Agreements do not individually raise any appreciable competition concerns.<sup>33</sup> In particular, it should be noted that they are of generally shorter duration and will therefore be contestable in the near future,<sup>34</sup> and are less significant in terms of access to the market.
53. With the above in mind, the OFT has provisionally concluded that the Commitments are likely substantially to alleviate the foreclosure effects currently

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<sup>32</sup> The OFT notes that, in light of the Proposed Commitments, it will be possible, and indeed desirable, for LUL and NR to re-tender their Afternoon Distribution Rights (as defined in the Commitments) independently of each other, potentially enabling (for example) one free newspaper to be distributed from LUL stations and one from NR stations.

<sup>33</sup> It should be noted that the OFT's provisional conclusion is that the cumulative effect of the TOC Agreements when combined with the LUL and NR Agreements was greater than that of the Other Transport Agreements when combined with the LUL and NR Agreements.

<sup>34</sup> The durations of most of these contracts suggest that they are due to terminate shortly or will have been available for renewal recently.

experienced on these markets. This is because the OFT's competition concerns revolved around the combined effect of the long periods of exclusivity conferred by the Agreements when taken together with the 24 hour exclusivity granted. By tackling the problem of 24 hour exclusivity, the OFT has negated this combined effect. As a result, if the Commitments are accepted by the OFT and implemented by ANL, the OFT will no longer have competition concerns to warrant a continued investigation into the Agreements. In particular, it takes the provisional view that ANL's continued exclusivity for the morning distribution period will not raise sufficient concerns to justify continuation of its investigation, on the basis that it considers that a sufficiently resourced new entrant in the evenings should be able materially to constrain advertising pricing in the (free, morning) *Metro*, as well as the (paid-for, afternoon/evening) *Evening Standard*. Such a new entrant should also increase competition for readers.

#### **APPLICATION OF ARTICLES 81 and/or 82**

54. Under the provisions of Article 3(1) of the Modernisation Regulation,<sup>35</sup> the OFT is obliged to apply Articles 81 and/or 82 of the EC Treaty when it applies national competition law to agreements between undertakings or decisions by associations of undertakings that may affect trade between EC Member States. A decision by the OFT to accept formal commitments under section 31A of the Act involves the application of national competition law. As a result, the OFT is required to consider whether the conduct investigated in this case may affect trade between EC Member States.<sup>36</sup>
55. In this case, the OFT notes that:
- a. ANL's entry into the Agreements has had the effect of potentially foreclosing the relevant markets to competitors in the UK for as long as the Agreements are in place. It follows that the potential also exists for the foreclosure to prevent entry into the relevant markets by competitors from other Member States, and
  - b. the geographical scope of the relevant markets affected (i.e. Greater London region) represents a substantial part of the EC.

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<sup>35</sup> Council Regulation (EC) No. 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>36</sup> If such an effect is found, as well as being obliged to apply EC law, the OFT is also obliged to comply with certain procedural requirements. In this case, Article 11(4) of the Modernisation Regulation requires the OFT to inform the Commission of its intention to accept the commitments at least 30 days before adoption of a final decision. This consultation will take place concurrently with the wider consultation initiated by this Notice.

56. It is therefore possible to foresee with a sufficient degree of probability that the exclusive agreements may have an appreciable, albeit potential, effect on the pattern of trade between Member States.<sup>37</sup>
57. As trade between Member States may be affected by ANL's conduct and by the agreements themselves, the OFT takes this decision accepting the Commitments by reference to Articles 81 and 82, as well as Chapter II of the Act.<sup>38</sup>
58. Since the Chapter II prohibition was closely modelled on Article 82, and given the duty already imposed upon the OFT (by section 60 of the Act) to apply the Act consistently with Community law, the OFT's substantive analysis of its competition concerns under Articles 81 and 82 is not materially different from its substantive analysis of the competition concerns it identified when applying the Act.<sup>39</sup>
59. The OFT considers therefore, that since the Commitments offered by ANL address the OFT's competition concerns under the Act, they will also (subject to the same proviso) address its concerns when analysed in the context of Articles 81 and 82.

#### **THE CONSULTATION RESPONSE (RESPONDENTS' VIEWS AND THE OFT'S RESPONSE)**

60. The OFT received various responses to the consultation process and the main germane points are summarised below. Overall, the responses differed markedly in their assessment of the Proposed Commitments.

##### **Issue: The Commitments need to address the OFT's competition concerns**

61. One party made the general point that the Proposed Commitments did not address the competition concerns identified in the Notice and were not capable of effective implementation. To address this, it argued for the need for further commitments, including commitments from LUL and NR.
62. This party argued that the need for commitments from other parties was because:

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<sup>37</sup> The OFT notes paragraph 97 of the European Commission's Notice *Guidelines on the effect on trade concept in Articles 81 and 82* (2004/C101/07), which states that '*If the dominant position covers part of a Member State that constitutes a substantial part of the common market and the abuse makes it more difficult for competitors from other Member States to gain access to the market where the undertaking is dominant, trade between Member States must normally be considered capable of being appreciably affected.*'

<sup>38</sup> The OFT notes that, although the agreements benefited from the protection from the Chapter I prohibition provided by the LVEO until the repeal of the LVEO became effective on 1 May 2005, this did not provide protection from Article 81.

<sup>39</sup> Although the OFT did not formally investigate the status of the Agreements under the Chapter I prohibition, due to the protection provided by the LVEO, it did conduct a Chapter I analysis of the Agreements, in anticipation of the benefit of the LVEO being withdrawn.

- a. Station operators<sup>40</sup> are parties to the agreements, parties to the OFT's investigation and it is the long term 24 hour exclusivity granted by the station operators which forecloses the market;
  - b. the OFT concerns in the recitals extend to breach of the Chapter II prohibition of the Act by the station operators - this is because access to stations is a vital element in the success of a London-wide newspaper;
  - c. the foreclosure effects of the Agreements are due not only to the fact that they provide for long term exclusivity but also to the effect of such long term exclusivity where ANL and the station operators are dominant in their respective markets;
  - d. the fact that ANL has had afternoon distribution rights for six years and has failed to launch an evening paper is in itself evidence that ANL uses these rights as a foreclosure technique to prevent new entry;
  - e. the station operators have abused their dominant position by entering into agreements granting ANL all day exclusivity over a long term period without giving any competing publisher an opportunity to bid for the relevant distribution rights, thereby foreclosing competition for London-wide newspapers; and
  - f. the Proposed Commitments will bind only ANL and accordingly provide no guarantee that the de facto long term exclusivity of the Agreements will be brought to an end. Despite the fact that the station operators have been on notice since July 2004 that ANL is willing to give commitments to give up its afternoon distribution rights only LUL has indicated any intention to invite tenders for such rights.
63. This party also believed that the Proposed Commitments did not address the OFT's concern about the long period of exclusivity conferred by the Agreements (in terms of years of duration), rather they deal only with the OFT's separate concern about the 24 hour scope of their exclusivity. Consequently, this party argued, ANL should be made to terminate the Agreements in their entirety.

**OFT response:**

- 64. The OFT considers that for the reasons stated below its competition concerns will be met by the Commitments and that there is no reason to seek additional commitments from LUL and NR.
- 65. As expressed in paragraph 25 above, the OFT was concerned that the combined effect of the long periods of exclusivity conferred by the Agreements together

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<sup>40</sup> The term 'station operator(s)' in this Decision applies to LUL, NR and the TOCs.

with the 24 hour exclusivity granted went beyond what could be objectively justified. It was the foreclosure effect of this combination that was the prime concern. The Commitments, in effect, substantially alleviate this foreclosure effect by providing for ANL to offer:

- a. to amend, within six weeks of a commitments decision, the LUL and NR Agreements to release its exclusive rights relating to the afternoon and evening distribution slot<sup>41</sup>; and
  - b. to waive, within six weeks of a commitments decision, its afternoon and evening rights in respect of the TOC stations from which editions of *Metro* are distributed.
66. In the absence of this contractual exclusivity, station operators may tender their afternoon/evening distribution rights<sup>42</sup> and award contracts to companies other than ANL should they wish to do so.
67. Having lifted the contractual bar which prevented the station operators from inviting any other publisher to distribute its free paper from the stations covered by the Commitments and which allowed ANL to prevent them from doing so, the OFT considers that it would be too interventionist to compel station operators to re-tender their afternoon/evening distribution slots. Indeed, there is an argument that such compulsion may well not be proportionate and could even be interpreted as going beyond the OFT's powers under the Act in the given circumstances. In any event, the Act contains no power for the OFT to impose commitments on parties or to compel third parties to offer commitments.
68. While the OFT had reasonable grounds to suspect at the outset of the investigation a breach of Chapter II prohibition of the Act by the station operators, it became apparent later on that that these grounds to suspect were not warranted in the circumstances. The OFT wrote to the station operators to indicate that it no longer had reasonable grounds to suspect an infringement of the Chapter II prohibition. As such, the OFT has not made a finding that the station operators are dominant during its investigation.

**Issue: The definition of LUL Stations needs to be clearer**

69. One party questioned whether the definition in the Proposed Commitments of LUL Stations included all stations in the LUL network as if it does not, the party claims that the Proposed Commitments' effectiveness would be reduced.

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<sup>41</sup> This is expressed in terms of an unconditional and irrevocable offer to both LUL and NR to amend the agreements to provide for afternoon and evening distribution rights to third parties.

<sup>42</sup> In this regard, the OFT notes that LUL has stated its intention publicly to tender its afternoon/evening distribution rights.

**OFT response:**

70. The definition of 'LUL Stations' in the Commitments has been amended to take this concern into account.

**Issue: The duration of the Proposed Commitments is too short**

71. Certain respondents commented that the duration of the Proposed Commitments set out in Proposed Commitment 2.1 was too short. One respondent argued that the NR agreement has an unexpired term exceeding five years (running until May 2012) and also contains an option on the part of NR to renew the agreement for a further 10 years. In addition, it remarked that some TOC Agreements also have more than five years to run.
72. A second respondent stated that the Proposed Commitments should be amended to last for five years from the date the new contract was awarded, rather than five years from when the OFT notifies ANL of acceptance of the Commitments. This was because it believed that up to a year may elapse between the acceptance of the Commitments and the final award of the contract. In these circumstances, the successful contract holder would only have four years rather than five in which to achieve a return on its investment in the new newspaper. This respondent believed that, given the size of the start up investment required, four years represents too short a timeframe for the contract holder in which to make a return.

**OFT response**

73. The OFT considers that five years is a sufficient period of time to potentially change the dynamics of the market. In addition, the OFT considers that the length of time the Commitments are in place (which are only binding on ANL in any case) does not impact on the duration of any agreement entered into between a station operator and a publisher. The OFT considers that it is for the contracting parties to determine the duration of their contract and the duration of the Commitments need not determine directly the length of that contract.
74. In any event, once the Commitments have lapsed, the OFT could investigate any agreement, with objectionable terms, which continued after the Commitments or came into effect after the duration of the Commitments.

**Issue: The deadline to amend the agreements is too long**

75. Certain respondents commented that the six week deadline stipulated in Proposed Commitments 3.1 and 3.2 were too long and proposed shorter deadlines (for instance, between one and four weeks).

**OFT response**

76. The OFT understands that there may be a range of views as to the appropriate deadlines in the circumstances. However, the OFT considers that the deadlines detailed in the Commitments are proportionate and also sufficient to ensure that its competition concerns are addressed.

**Issue: There is no obligation on ANL to vary the LUL or NR Agreement**

77. Certain respondents have remarked that there is no obligation on ANL actually to agree a variation in Proposed Commitments 3.1 and 3.2.

**OFT response**

78. ANL has agreed to amend its Proposed Commitments to oblige it to use its reasonable endeavours to reach a contractual variation with each of LUL and NR as set out in Commitments 3.1 and 3.2. The OFT considers that it takes two parties to agree a contractual variation, therefore imposing an obligation on ANL regarding action over which it does not have sole control would be unduly onerous and not proportionate in the circumstances.

**Issue: The form of the variation is unclear**

79. Again, on Proposed Commitments 3.1 and 3.2, a few respondents have also suggested alternative methods of contractually relieving ANL of the afternoon/evening distribution rights such as an unilateral waiver by ANL or a Deed of Variation. The OFT considers that there are various ways to achieve this goal. However, by accepting the Commitments offered by ANL, including Commitments to make an unconditional and irrevocable offer to relinquish its afternoon rights, the OFT's competition concerns are met and therefore there is no need for the OFT to seek an amendment to the pertinent Commitments.

**Issue: No consideration payable**

80. One respondent claimed that it should be made clear that no consideration is payable by LUL or NR for the contract termination or variation to be offered by ANL (or by the TOCs for the contract waiver to be so offered) so that the station operators will have no disincentive to release themselves, in whole or in part as the case may be, from their agreement with ANL.

**OFT response:**

81. The OFT notes that, as far as Commitments 3.1 and 3.2 are concerned, ANL's offer is to be unconditional and therefore the OFT considers that no consideration could be attached to an offer which is described as being unconditional.

82. With regard to Commitment 3.3, ANL's commitment is unilaterally to waive its rights. Such unilateral waiver is not expressed as being conditional or contingent on consideration passing to ANL. As such, the OFT believes that it is clear that no consideration is payable pursuant to the Commitments.

**Issue: Commitment on sharing distribution racks**

83. On Proposed Commitment 4, one respondent stated that the requirements concerning access to ANL's distribution racks are not adequate. Some objective criterion for establishing whether ANL has offered non-discriminatory and commercially reasonable terms is required, such as charging the holders of afternoon distribution rights no more than ANL's cost incurred in providing access, or no more than ANL's internal records show that it charges itself for such access.

**OFT response**

84. The OFT considers that this is not appropriate as cost is only one of a number of different forms of discrimination which could arise. By accepting a limited definition, the OFT would not be able to hold ANL to account in respect of other harmful forms of discrimination not covered by the definition should they arise.

**Issue: ANL is only obliged to offer to enter into agreements to allow access to distribution racks**

85. Regarding Proposed Commitment 4.1, respondents have noted that ANL is only obliged to offer to enter into agreements to allow access to distribution racks. It is not obliged to agree to do so. Some respondents suggested making ANL's offer irrevocable and imposing a deadline on ANL to make such an offer.

**OFT response:**

86. The OFT considers that it takes two parties to enter into an agreement and therefore it would be unduly onerous to oblige ANL to enter into an agreement when that is not within its sole control. The OFT considers that it is not necessary to request that ANL make this offer irrevocable or subject it to a deadline because there is a clear obligation to offer which should be activated by a request from a third party. It is also important to note that negotiations may take longer than the suggested deadline through no fault of ANL. However, if ANL delayed matters unreasonably this could be caught by the obligation not to discriminate. Given these factors the OFT considers that this Commitment addresses its competition concerns.

**Issue: ANL is not obliged to permit branding by an afternoon newspaper on its distribution racks, or to give that branding equal prominence**

87. With regard to Proposed Commitment 4.2, respondents have noted that it requires ANL to adjust its own branding but does not require it to permit branding by an afternoon newspaper on its distribution racks, or to give that branding equal prominence.

**OFT response:**

88. The OFT considers that the Commitments have the effect of requiring ANL to permit another publisher's branding onto its racks. Following the consultation process, ANL has agreed to afford 'reasonable prominence' to third party branding. This coupled with Commitment 4.1 (not to discriminate as to how ANL allows access) provides the OFT with the necessary comfort that the OFT's competition concerns will be addressed.

**Issue: Access to the stations covered by the Proposed Commitments**

89. One respondent sought clarity as to the time at which access to the stations covered by the Proposed Commitments will be made available as distribution will be a complex a matter.

**OFT response:**

90. The Commitments define the afternoon as being 12 noon to 12 midnight (or when the station closes) but in practical terms the OFT considers this is a matter for the relevant station operator and publisher.

**Issue: Removal of *Metro* from distribution racks**

91. The same respondent sought guarantees as to the time by which all remaining copies of *Metro* would be removed from the shared distribution racks and a guarantee from ANL that it would have responsibility for the removal of all copies of *Metro*.

**OFT response:**

92. The OFT considers that such measures are not necessary given that both ANL and any new entrant would have surplus copies to clear away at the end of their slot and therefore would have a mutual interest in agreeing a workable solution for clearing out the racks.

**Issue: If ANL wins the afternoon rights, it should be further restricted**

93. A respondent argued, on Proposed Commitment 5.1, that if ANL won any re-tendered afternoon rights, the Proposed Commitments should oblige ANL not to enter into any exclusive arrangement in excess of five years.

**OFT response:**

94. While the Commitments deal with conduct in respect of certain future arrangements which the OFT considers are imperative for the functioning of the Commitments as a whole (such as preventing ANL from bidding more than a 'fair economic value'), the OFT considers that further regulation of commercial conduct is not necessary in a self-assessment regime. As such, it is generally for the parties and their advisers to assess whether future arrangements that they enter into comply with competition law. If ANL won a particular tender, ANL and the party tendering the contract would have to satisfy themselves that their contract was competition law compliant.<sup>43</sup>

**Issue: If ANL wins the afternoon rights the foreclosure effect would not be alleviated**

95. The same respondent also suggested that if ANL won the afternoon slot then it would be questionable if this would alleviate the foreclosure effect.

**OFT response:**

96. The foreclosure effect that concerned the OFT was the combination of the long periods of exclusivity conferred by the Agreements, when taken together with the 24 hour exclusivity granted, which went beyond what could be objectively justified. To remedy this, it is important that there is periodic competition for such contracts. However, if ANL wins a contract for a relevant afternoon slot there would still be alleviation of the foreclosure effect as, in any event, this would result in the launch of a new afternoon/evening newspaper, benefiting both readers and advertisers. This follows from Commitments 5.1 and 5.2, taken together, as ANL would have to bid at a fair economic value<sup>44</sup> for the afternoon distribution rights<sup>45</sup> alone, it would be in ANL's commercial interest to launch a newspaper to cover the costs incurred.

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<sup>43</sup> In this regard, the OFT considers that it would be advisable for all relevant parties to consult the EC Commission Notice *Guidelines on Vertical Restraints* (2000/C291/01) and the OFT Guideline on Vertical Agreements (OFT 419) with regard to the duration of exclusive agreements.

<sup>44</sup> As defined in the Commitments.

<sup>45</sup> As defined in the Commitments.

97. In addition, it should be noted that there could be more than one tender<sup>46</sup> so if ANL failed to win one of them then there could be alleviation of the current foreclosure.

**Issue: The concept of fair economic value is unenforceable**

98. With respect to Proposed Commitment 5.2, one respondent stated that the Proposed Commitment that ANL must not bid more than its reasonable assessment of the fair economic value of the afternoon distribution rights was unenforceable as it is not based on objective criteria but on ANL's subjective assessment of value and therefore cannot realistically be challenged by the OFT or a third party. This respondent further argued that the concept of 'fair economic value' is, in any event, difficult to measure and hence enforce.

**OFT response:**

99. ANL has agreed to insert in the Commitments a definition of fair economic value to mean the value to ANL from winning, and subsequently exploiting, the afternoon distribution rights<sup>47</sup> excluding any additional value that might arise from such rights given ANL's ownership of other newspaper titles. As such, it is no longer ANL's subjective assessment but an objective one. In particular, separation of value from different newspapers means that ANL will not be able to factor in protection of value from its other newspapers into its calculation. Further, on the basis of this definition, the OFT believes that it could assess whether the Commitments had been breached. The Commitments also oblige ANL to provide the OFT with the information and/or documentation the OFT considers necessary to monitor compliance with the Commitments which would facilitate any such assessment.

**Issue: If ANL wins the afternoon rights, how is it possible to calculate a reasonable proportion of stations?**

100. With regard to Proposed Commitment 5.3, a respondent questions, in the event that ANL won the afternoon slot, how it would be possible to gauge what is a reasonable proportion of stations from which ANL would need to distribute in order not to relinquish its rights to the slot.

**OFT response:**

101. ANL has agreed to amend Proposed Commitment 5.3 such that reasonable proportion as defined in the Commitments means at least 60 per cent of the relevant LUL stations located in Zone 1 and, at least 60 per cent of the relevant

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<sup>46</sup> If LUL, NR and/or the TOCs choose to re-tender the Afternoon Distribution Rights (as defined in the Commitments), each could have a separate tender.

<sup>47</sup> As defined in the Commitments.

Network Rail Stations (as defined in the Commitments). From the information in its possession, it would appear to the OFT that this requirement represents arguably the likely minimum coverage required to launch a viable free paper, is proportionate and can be easily measured.

**Issue: If ANL wins afternoon rights six months is too long a timeframe in which to commence distribution**

102. Also with regard to Proposed Commitment 5.3, another respondent stated that the six month deadline to distribute was too long and that three months should be sufficient given ANL's incumbent position in the market.

**OFT response:**

103. The OFT appreciates that there may be a broad range of views as to what constitutes the appropriate period in the circumstances. However, the OFT is satisfied that six months is proportionate and sufficient to ensure that its competition concerns are addressed.

**Issue: OFT's role in monitoring the Commitments**

104. One respondent called for a more active role in monitoring ANL's compliance with the Commitments than was suggested in the Notice. The respondent stated that the OFT appears to assume compliance by ANL unless otherwise notified but the respondent would prefer active monitoring by the OFT to ensure that an appropriate timetable is being followed. In particular, a number of respondents had concerns as to which body would assess whether ANL was adhering to the Commitments. In particular, respondents asked which body would be responsible for assessing whether terms offered by ANL were non-discriminatory and commercially reasonable (Proposed Commitment 4.1) or whether ANL paid more than the 'fair economic value' (Proposed Commitment 5.2).

**OFT response:**

105. The OFT is satisfied that if there are suitably justified concerns that the Commitments have been infringed then affected parties will report them to the OFT. In addition, Commitment 6.1 now requires that ANL provides such information and documentation to the OFT as it requires to ensure the Commitments are being adhered to and if the OFT has any concerns it will make use of this term as it considers appropriate.

**Issue: Undertakings bound by the Commitments**

106. One respondent noted that the Proposed Commitments will not bind the entire undertaking of which ANL forms part, namely Daily Mail and General Trust plc and its subsidiaries, including both ANL and Northcliffe.

**OFT response:**

107. ANL has agreed to amend the Proposed Commitments such that ANL shall procure that each group company (as defined in the Commitments), from time to time, shall comply with the Commitments as if such group company had given them.

**Issue: Other Transport Agreements**

108. One respondent stated that there is very limited information in the Notice about ANL's distribution agreements with bus operators and no explanation is given as to why ANL is not being required to give up any distribution rights with the bus operators.

**OFT response:**

109. As stated in paragraph 52 above, the OFT is satisfied that the Other Transport Agreements do not individually raise any appreciable competition concerns that need remedying.

**Issue: Pertinent miscellaneous response**

110. Another respondent was concerned about the impact that a new afternoon newspaper distributed exclusively from travel points in London might have on paid-for London regional newspapers.

**OFT response:**

111. The OFT considers that the Commitments remedy the competition concerns identified by the OFT in its investigation. No evidence has been presented to the OFT in this instance to suggest that the competitive process<sup>48</sup> will be harmed as a result of the Commitments offered.

**THE OFT'S CONCLUSION**

112. The OFT has carefully considered the responses to the consultation and ANL's subsequent amendments to the Commitments to ensure that the OFT's competition concerns as set out in paragraphs 19-26 have been fully addressed.

113. The OFT believes that the amendments put forward by ANL adequately clarify the Commitments such that they meet the OFT's competition concerns. Accordingly, the OFT does not consider that any further amendments are required in respect of the Commitments in order for the OFT's competition concerns to be addressed.

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<sup>48</sup> The OFT is concerned with the protection of the competitive process not potential competitors.

114. The OFT considers that the changes made to the Commitments following the consultation response were not sufficiently material to require further consultation and has consequently decided to accept the Commitments as they now stand.

115. ANL was therefore asked by the OFT on 23 February 2006 to confirm its offer of the Commitments by duly executing them and submitting a signed copy to the OFT. The OFT received a signed copy of the Commitments under cover of a letter from ANL dated 27 February 2006.

#### **THE OFT'S DECISION**

116. On the above basis, the OFT hereby accepts the Commitments as offered by ANL in the duly executed form attached. Accordingly, the OFT has closed its file in respect of this investigation.

**Case CE/2479-03**

**Competition Act 1998 investigation into London-Wide Newspaper Distribution**

**Commitments given by Associated Newspapers Limited to the Office of Fair Trading pursuant to section 31A of the Competition Act 1998**

***Whereas:***

- a) On 1 May 2003, the Office of Fair Trading (the **OFT**) informed Associated Newspapers Limited (**ANL**) by a notice under section 26 of the Competition Act 1998 (the **Act**) that it had reasonable grounds to suspect, and had therefore launched an investigation pursuant to section 25 of the Act (the **Investigation**) into allegations that, ANL had infringed the Chapter II prohibition by entering into exclusive agreements (the **Agreements**) with each of London Underground Limited (**LUL**), Network Rail Infrastructure Limited (**Network Rail**) and certain train operating companies (**TOCs**) relating to the distribution of ANL's *Metro* newspaper in London.
- b) The OFT also alleged that each of Network Rail, LUL and the TOCs had infringed the Chapter II prohibition by entering into the Agreements.
- c) On 28 May 2004, ANL wrote to the OFT offering to give binding commitments under section 31A(2) of the Act in order to meet the OFT's competition concerns in relation to the Agreements.
- d) On 11 June 2004, the OFT wrote to ANL setting out a summary of its competition concerns in relation to the Agreements, in accordance with paragraph 4.17 of the then draft OFT Guidance on Enforcement (407a). Those concerns are summarised in the OFT's commitments notice dated 15 July 2005.
- e) Having undertaken the consultation required by paragraph 2 of Schedule 6A to the Act, the OFT has indicated to ANL that if ANL gives the commitments set out below (without ANL accepting that it has infringed or does infringe competition law in any way), the OFT will close the Investigation, on the basis that its competition concerns have been addressed.

**NOW THEREFORE** ANL gives to the OFT, without in any way accepting any infringement of competition law by ANL, the following commitments (the **Commitments**) under section 31A(2) of the Act in order to meet the OFT's competition concerns in respect of the Agreements. The Commitments are given on the basis that they meet the OFT's competition concerns and that, pursuant to section 31B(2) of the Act, the OFT shall therefore not continue the Investigation nor make any finding in respect of the Agreements or conduct which were the subject of the Investigation, subject to the provisions of sections 31B(3) and (4) of the Act.

ANL shall procure that other Group Companies (as defined below) also adhere to the Commitments.

## 1. INTERPRETATION

For the purpose of the Commitments, the following terms shall have the meaning ascribed to them below:

**Afternoon** means any time from 12 noon each day until the time at which the relevant LUL Station, Network Rail Station or TOC Station closes each evening or 12 midnight, whichever is the earlier.

**Afternoon Distribution Rights** means a right granted to a publisher by the relevant station owner or operator to distribute a free newspaper by means of Distribution Racks in Network Rail Stations, TOC Stations and/or LUL Stations (as the case may be) in the Afternoon.

**ANL** means Associated Newspapers Limited and its wholly owned subsidiary Associated London Metro Limited.

**Distribution Racks** means bins, racks or other containers, whether fixed or mobile, used to distribute free newspapers inside or on the curtilage of LUL Stations, Network Rail Stations and TOC Stations.

**Fair Economic Value** means the value to ANL from winning, and subsequently exploiting, the Afternoon Distribution Rights excluding any additional value that might arise from such rights given ANL's ownership of other newspaper titles.

**Group Company and/or Group Companies** means ANL, any other body which is its holding company or subsidiary and any other body corporate which is a subsidiary of that holding company where the terms 'holding company' and 'subsidiary' have the meaning given by section 736 of the Companies Act 1985.

**LUL** means London Underground Limited.

**LUL Agreement** means the agreement between ANL and London Underground Limited dated 20 November 1998 (as amended by an agreement dated 22 September 1999).

**LUL Stations** means all those London Underground railway stations owned or operated by LUL.

**Network Rail Agreement** means the agreement between ANL, Railtrack plc, Maiden Outdoor Advertising Limited and The Maiden Group plc of 15 April 2002 relating to the distribution by ANL of *Metro* in the Network Rail Stations.

**Network Rail** means Network Rail Infrastructure Limited.

**Network Rail Stations** means the London mainline railway stations owned by Network Rail at each of Cannon Street, Charing Cross, Euston, Fenchurch Street, Kings Cross, Liverpool Street, London Bridge, Paddington, Victoria and Waterloo.

**Reasonable Proportion** means, in respect of LUL Stations, at least 60 per cent of the relevant LUL Stations located in Zone 1 and, in respect of Network Rail Stations, at least 60 per cent of the relevant Network Rail Stations.

**Station Owner** means each of LUL and Network Rail and each of the TOCs.

**TOC Agreements** means ANL's distribution agreements relating to the London edition of *Metro* with each of the TOCs.

**TOCs** means each of LTS Rail Limited (now renamed C2C Rail Limited), Great Eastern Railway Limited (now part of One Railways), Silverlink Train Services Limited, South West Trains Limited, Great Western Trains Company Limited, Chiltern Railway Company Limited, West Anglia Great Northern Railway Limited, South Central Limited (now renamed New Southern Railway Limited), Connex South Eastern Limited (now replaced by South Eastern Trains Limited) and, for the purposes of these Commitments, London and Continental Stations & Property Limited (in relation to St. Pancras mainline railway station).

**TOC Stations** means each of the London overland railway stations covered by the TOC Agreements.

## 2. COMMENCEMENT AND DURATION

Having been signed by ANL, the Commitments shall commence from the date that the OFT's acceptance of such Commitments is notified to ANL in writing and shall expire five years after that date.

## 3. REMOVAL OF ANL'S AFTERNOON DISTRIBUTION RIGHTS UNDER THE LUL AGREEMENT, THE NETWORK RAIL AGREEMENT AND THE TOC AGREEMENTS

3.1 ANL shall, within a period of 6 weeks from commencement of the Commitments, write to LUL unconditionally and irrevocably offering to enter into a contractual variation of the LUL Agreement with LUL in order to amend that contract such that LUL may grant to one or more third parties exclusive or non-exclusive Afternoon Distribution Rights in relation to some or all of the LUL Stations. In addition, ANL will use its reasonable endeavours to bring about such an amendment of the LUL Agreement.

3.2 ANL shall, within a period of 6 weeks from commencement of the Commitments, write to Network Rail unconditionally and irrevocably offering

to enter into a contractual variation of the Network Rail Agreement with Network Rail in order to amend that contract such that Network Rail may grant to one or more third parties exclusive or non-exclusive Afternoon Distribution Rights in relation to some or all of the Network Rail Stations. In addition, ANL will use its reasonable endeavours to bring about such an amendment of the Network Rail Agreement.

- 3.3 ANL shall, within a period of 6 weeks from the commencement of the Commitments, waive in their entirety all its distribution rights under the TOC Agreements in relation to the Afternoon, such that the TOCs may grant to one or more third parties exclusive or non-exclusive Afternoon Distribution Rights in relation to some or all of the TOC Stations.

#### **4. ANL TO ALLOW ACCESS TO ITS DISTRIBUTION RACKS**

- 4.1 ANL shall offer to enter into agreements with each of LUL, Network Rail, the TOCs and, if necessary, any third party acquiring Afternoon Distribution Rights in LUL Stations, Network Rail Stations or TOC Stations, providing for such third party to have access, for the purpose of Afternoon newspaper distribution only and on non-discriminatory and commercially reasonable terms, to ANL's Distribution Racks in the relevant stations.
- 4.2 Further to paragraph 4.1, ANL shall ensure that all branding on its Distribution Racks in the relevant stations is adjusted as soon as reasonably practicable so as to allow reasonable room and prominence for branding of an Afternoon newspaper.

#### **5. ANL TO RETAIN RIGHT TO BID FOR AFTERNOON DISTRIBUTION RIGHTS**

- 5.1 In the event that a Station Owner decides to make available any Afternoon Distribution Rights in respect of some or all of the LUL Stations, the Network Rail Stations and/or the TOC Stations (as the case may be), whether on an exclusive or non-exclusive basis, ANL shall be entitled to participate in any such tender, sale or auction, with a view to acquiring those Afternoon Distribution Rights.
- 5.2 Where, pursuant to paragraph 5.1, ANL participates in a tender, sale, auction or other process by a Station Owner for the acquisition of Afternoon Distribution Rights:
- a) ANL shall not offer or pay that Station Owner in excess of a reasonable assessment of the Fair Economic Value of those Afternoon Distribution Rights arising solely from their exploitation in accordance with paragraph 5.3 below; and

b) the price ANL offers to that Station Owner shall not include any premium conditional on ANL being awarded exclusive Afternoon Distribution Rights by any other Station Owner.

- 5.3 Should ANL acquire Afternoon Distribution Rights in respect of any of the LUL Stations, the Network Rail Stations and/or the TOC Stations, ANL shall, subject to paragraph 5.4 below, exploit the Afternoon Distribution Rights acquired within 6 months of the date of acquisition so as to distribute a free newspaper from a Reasonable Proportion of the relevant LUL Stations, Network Rail Stations and/or a reasonable proportion of TOC Stations (as the case may be) in accordance with ANL's distribution strategy from time to time, formulated and undertaken in commercial good faith.
- 5.4 Failure by ANL to comply with the 6 month time limit set out in paragraph 5.3 shall not constitute a breach of the Commitments if (a) the OFT reasonably considers that it is attributable to circumstances outside the control of ANL; or (b) the OFT otherwise reasonably considers the failure to be justified by reason of objective factors.

#### **6. PROVISION OF INFORMATION/DOCUMENTATION**

Upon receipt of a written request from the OFT, ANL shall, within 28 days of receipt of the OFT's request, provide such information and/or documentation to the OFT as the OFT considers necessary to monitor compliance with the Commitments.

#### **7. COMPLIANCE OF GROUP COMPANIES WITH THE COMMITMENTS**

ANL shall procure that each Group Company, from time to time, shall comply with the Commitments as if such Group Company had given them.

Signed for and on behalf of ANL by:

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Kevin Beatty  
Managing Director