

# **Review of the local and regional media merger regime**

Final report

June 2009

OFT1091

© **Crown copyright 2009**

This publication (excluding the OFT logo) may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as crown copyright and the title of the publication specified.

# CONTENTS

<i>Chapter/Annexe</i>	<i>Page</i>
1 Executive summary	4
2 Background to review	7
3 The UK merger regime	17
4 Merger assessment	31
5 Media public interest considerations	51
6 Competition from public sector sources	57
7 Other issues	62
A List of respondents	64
B LMA advertiser survey	66
C Types of evidence	71
D Selected media merger case studies	72
E US DoJ statement on newspaper mergers	104

# 1 EXECUTIVE SUMMARY

- 1.1 The local and regional press is facing very significant structural and cyclical challenges to its traditional business model. Local and regional newspaper advertising revenues have been in steady decline, in particular due to traditional advertisers moving to online and innovative platforms, and the current economic downturn has exacerbated this decline. The situation is worse still for some of the larger newspaper groups who are highly leveraged, as a result of heavily debt-financed past consolidation.
- 1.2 In this context and at the request of the Secretary of State for Business, Innovation and Skills, the OFT has carried out a review of the merger regime as it applies to the local and regional media sector, with a particular focus on the press. This review has involved significant consultation with interested parties.
- 1.3 The existing UK merger regime is designed to protect competitive rivalry between firms to the benefit of consumers. Whilst the vast majority of mergers will be beneficial or neutral in their effects on competition, mergers can sometimes enable firms to raise prices, lower quality, reduce innovation, or otherwise offer poorer value for money to customers.
- 1.4 The regime is evidence-based and is therefore already capable of reflecting market developments, such as increasing competitive constraints between media, when assessing local or regional media mergers. It is quite possible that print advertising faces sufficient competitive pressure from advertising on other media, especially the internet, to protect consumers (readers and advertisers) in the face of a merger. **However**, this will depend on the specific facts of the case.
- 1.5 The regime is also flexible, in that it is capable of taking account of valid 'failing firm' arguments, efficiencies and customer benefits. For example, if there is clear and compelling evidence that the merger will be beneficial (or neutral) for the market, and therefore consumers, it will normally be cleared. Opinion from stakeholders was divided on whether

regional press consolidation would in fact deliver efficiencies or customer benefits. It is important that the merged entity should have the incentive, as well as the ability, to deliver potential customer benefits arising from the merger. This may be unlikely if competitive pressures are substantially reduced.

- 1.6 Since evidence on the closeness of competition between the merging parties and the strength of countervailing constraints will vary by case, the OFT considers there would be limited value to be gained from 'blue skies' work, carried out without any particular merger in mind.
- 1.7 This review therefore recommends that no further OFT research is currently warranted in this area in the absence of a notified merger. This report, however, provides relevant guidance to market participants and interested parties.
- 1.8 Any merger or transaction involving local or regional press may well benefit from pre-notification discussion with the OFT in order, for example, to discuss the type of evidence that would help in assessing the relevant market definition. Alternatively the parties to such a merger may consider requesting the OFT to 'fast-track' the merger to the Competition Commission in order to allow a more detailed investigation into the issues raised, whilst reducing the length of time taken for the OFT's Phase I review. It is possible under the combination of a longer review, and a different legal test, that a more advantageous outcome could be achieved by merging parties at second phase.
- 1.9 In addition, and notwithstanding the fact-specific nature of any given merger, there may be some lessons that could be learnt from a detailed inquiry into a specific merger or transaction involving the local and regional press. For example, the analytical methodologies employed are likely to be similar across mergers within the same sector.
- 1.10 Given all the above, this review also recommends that no legislative change is required to the existing merger regime under the Enterprise Act 2002.

- 1.11 In media mergers involving newspaper publishing and/or commercial radio or television broadcasting, and raising competition issues, the OFT will ask Ofcom to provide views, arising from its understanding of media markets, on factors relevant to the OFT's decision. The OFT will confirm this in its forthcoming revised guidance on merger jurisdiction and procedure.
- 1.12 Media public interest provisions have so far played no role in local and regional newspaper consolidation under the current regime. Indeed, media plurality considerations might tend to be expected to point in the same direction as competition considerations. Nevertheless, various representations were received that they should be altered, for example to include 'independent investigative journalism' as a consideration. We recommend that the Department for Business, Innovation and Skills (BIS) should consider these representations, as well as take account of the ongoing Ofcom review of Media Ownership Rules.
- 1.13 We note broad concern amongst stakeholders about the potential impact on commercial publishers of local authority publications. We recommend that BIS and/or DCMS<sup>1</sup> should consider the costs, benefits and effects of any intervention or guidance on the scope of local authority publications.

---

<sup>1</sup> The Department for Culture, Media and Sport.

## 2 BACKGROUND TO REVIEW

### Digital Britain context

- 2.1 The Digital Britain Review is a joint BIS<sup>2</sup>/DCMS project, described as 'An action plan to secure the UK's place at the forefront of innovation, investment and quality in the digital and communications industries'.<sup>3</sup>
- 2.2 In its Digital Britain Interim Report<sup>4</sup> in January 2009, the Government stated that in order to inform whether any change to the merger regime was 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.
- 2.3 The OFT launched its review on 13 February 2009,<sup>5</sup> and issued a Discussion Paper on 10 March<sup>6</sup> inviting submissions from interested parties. Submissions were received from around 30 respondents, listed at Annexe A. The OFT review team also held meetings with a range of key stakeholders, including groups representing publishers, advertisers and journalists.
- 2.4 We received a detailed submission from the Local Media Alliance (LMA), which represents seven of the largest UK regional publishers. In preparing its submission the LMA commissioned surveys of local

---

<sup>2</sup> Formerly the Department for Business, Enterprise and Regulatory Reform (BERR)

<sup>3</sup> [www.culture.gov.uk/reference\\_library/media\\_releases/5548.aspx](http://www.culture.gov.uk/reference_library/media_releases/5548.aspx)

<sup>4</sup> BERR/DCMS, Digital Britain: The Interim Report, January 2009.

<sup>5</sup> [www.of.gov.uk/news/press/2009/14-09](http://www.of.gov.uk/news/press/2009/14-09)

<sup>6</sup> [www.of.gov.uk/shared\\_of/business\\_leaflets/general/of1069.pdf](http://www.of.gov.uk/shared_of/business_leaflets/general/of1069.pdf)

advertisers in a number of local catchment areas, and collated a range of specific examples and qualitative evidence in relation to its members' publications.

- 2.5 In accordance with the Government's original invitation to undertake the review, the primary focus of this review has been on local and regional print news media. However, we also received submissions in relation to radio, magazines, and national newspapers. We expect that many of our findings and recommendations are also broadly applicable to commercial radio, and potentially to other media.
- 2.6 High level conclusions and recommendations from this review were discussed with and submitted to Government during April and May 2009, to fit in with the timetable for publication of the final Digital Britain Report.
- 2.7 The OFT would like to thank all those who have participated in the review process. We are particularly grateful to the Newspaper Society for giving us access to relevant data sources.

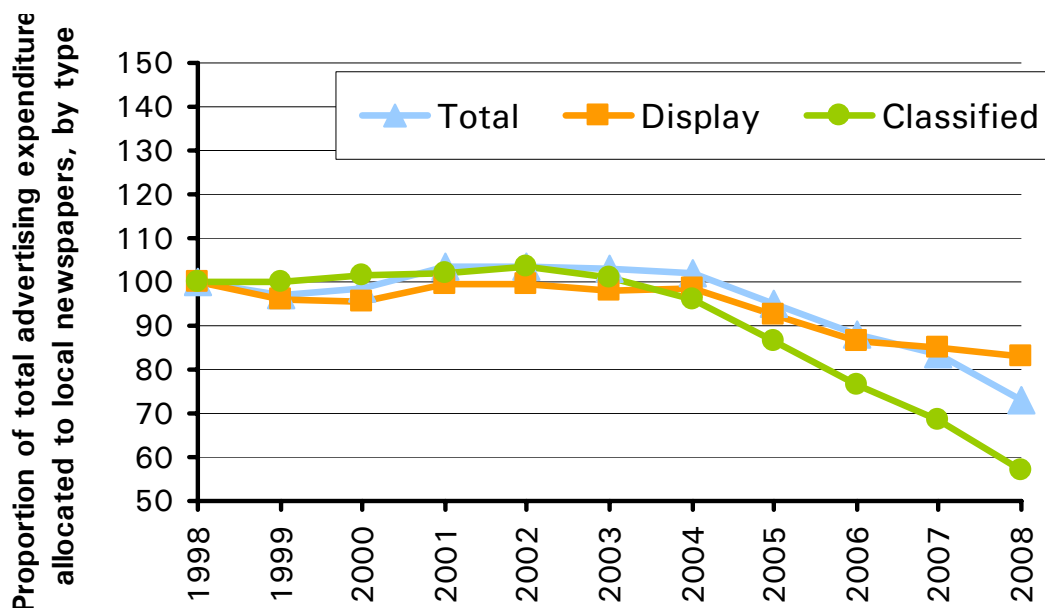
### **Market developments in local and regional press**

- 2.8 Recent trends in the advertising revenues of local newspapers have raised questions about the commercial future of the local and regional press. Local newspaper revenues have fallen by 29 per cent in real terms from their peak in 2004. This decline has gathered pace in the past year, and has brought into question the long-term viability of the advertising-funded business models on which the industry has traditionally relied. In this section, a brief review of some of the key developments in the local and regional newspaper sector is provided, with the intention of giving some perspective on the wider context surrounding the OFT's review of the local and regional media merger regime.
- 2.9 The local newspaper industry is of significant scale, employing over 30,000 people. Approximately three billion local and regional newspapers were distributed in 2008, generating around £3 billion in combined advertising and copy-sale revenues. At the start of 2009,

approximately 1,145 weekly local or regional publications and 124 dailies were published in the UK, and there were over 1,200 local newspaper websites. Local newspaper markets are typically highly concentrated, and in nearly 37 per cent of local authorities a single publisher accounts for over 90 per cent of total circulation. At the national level, the five largest publishing groups supply about 72 per cent of total circulation.

- 2.10 More than 80 per cent of local newspaper revenues are derived from advertising, and this proportion has been increasing over time. Figure 2.1 illustrates the trend in expenditures on advertising in local and regional newspapers over the past ten years, as a proportion of total advertising expenditures. It is clear that the years since 2004 have seen a large-scale shift in advertising spending away from local newspapers.

**Figure 2.1: Indices charting the trend in relative advertising expenditures on local and regional newspapers since 1998<sup>7</sup>**



Source: Advertising Association's *Advertising Statistics Yearbook 2008* and Newspaper Society.

2.11 One factor contributing to this trend has been the decline in the popularity of local newspapers, which has decreased the attractiveness of the medium to advertisers. The past 20 years have seen sustained decline in the number of local and regional publications. Estimates from the Newspaper Society suggest that, on average, the number of local newspaper buying points has fallen by about 23 per year on average in the past 20 years.<sup>8</sup> Readership too has been falling – particularly for

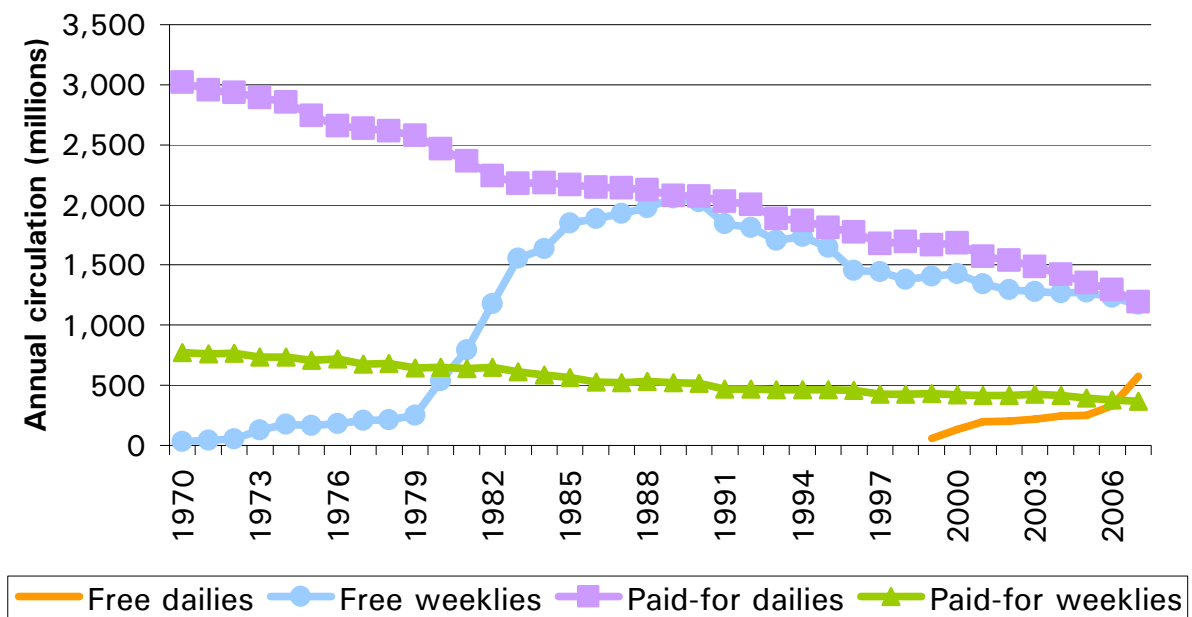
<sup>7</sup> Here (and in Figure 2.3) classified expenditures on directories for 2008 have been estimated by averaging the trend in the proportion of classified spending accounted for by directories over the past five years, and then using this to extrapolate 2007 expenditure. Spending on online advertising services offered by local newspapers has been allocated to the internet category, rather than being counted as local and regional newspaper advertising expenditures.

<sup>8</sup> A 'buying point' is defined by the Newspaper Society as 'the lowest level at which an audited circulation certificate is available and national run-of-paper advertising can be bought'. Buying

daily publications, for which the average readership per issue fell by over 20 per cent between 2001 and 2009.

2.12 The combined average circulation per issue of all audited local and regional newspaper titles fell by nearly 40 per cent between January 1989 and January 2009. As Figure 2.2 - which shows the long-term trend in annual circulations - makes clear, this decline has been particularly strongly felt amongst paid-for publications (which account for about half of the total circulation). The annual circulation of free weekly newspapers has followed a similar downwards trend since the early 1990s. Only free daily newspapers have grown in circulation in the past two decades.

**Figure 2.2: The trend in the annual circulation of local and regional newspapers since 1970**



Source: Advertising Association's *Advertising Statistics Yearbook 2008*

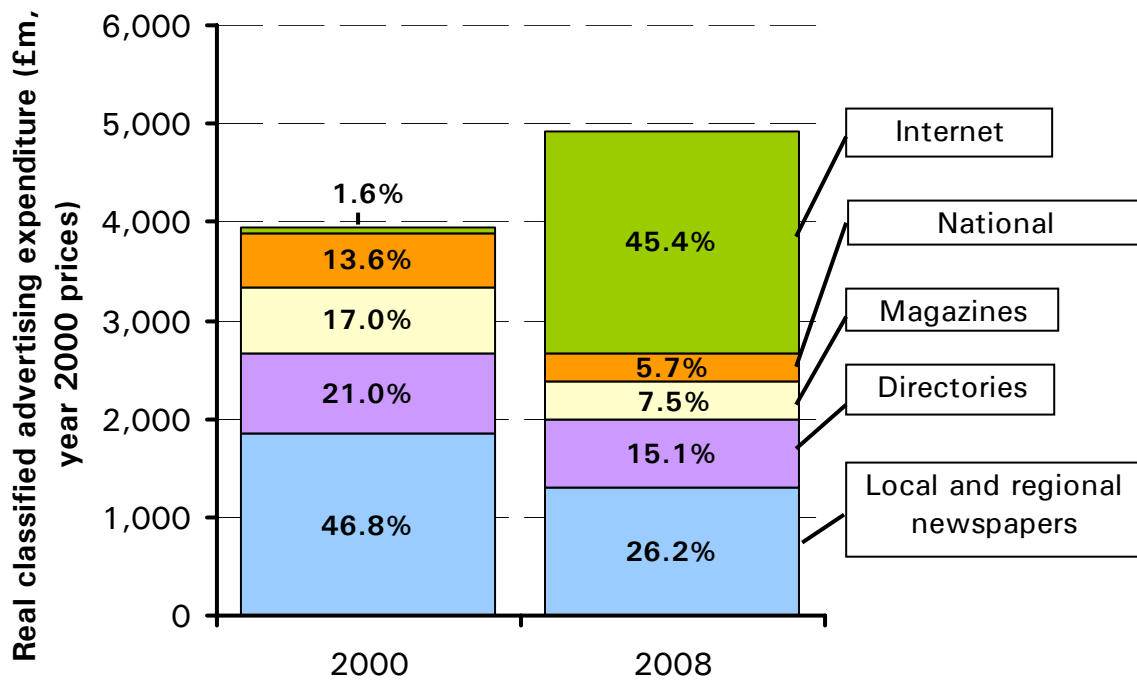
points are usually counted instead of titles because different titles in a series will often essentially comprise the same newspaper.

- 2.13 A second factor which has contributed to the structural decline in local newspaper advertising has been the rapid expansion of internet advertising. Expenditures on internet advertising have grown dramatically in the current decade – rising from representing about one per cent of total advertising spending in 2000 to about a fifth in 2008. Advertising expenditures that would previously have been allocated to traditional media types, including the press, have been diverted to online services. While local newspapers have seen rapid growth in their own digital revenues, advertising revenues generated by their websites still only account for a small proportion of overall revenues<sup>9</sup>, and the increases have not been sufficient to offset the decline in the proportion of expenditures allocated to local and regional newspapers.
- 2.14 The internet has been particularly effective at capturing classified advertising spending, which accounts for over two thirds of local newspapers' advertising revenues (recruitment, property and motors being the most important categories). Figure 2.3, which shows the proportion of expenditure allocated to different media types in 2000 and 2008, illustrates how dramatic the rise of internet advertising has been.

---

<sup>9</sup> For example, while Northcliffe Media's digital revenues rose by 42% on a like-to-like basis in 2008, they still only accounted for approximately 4% of total revenues.

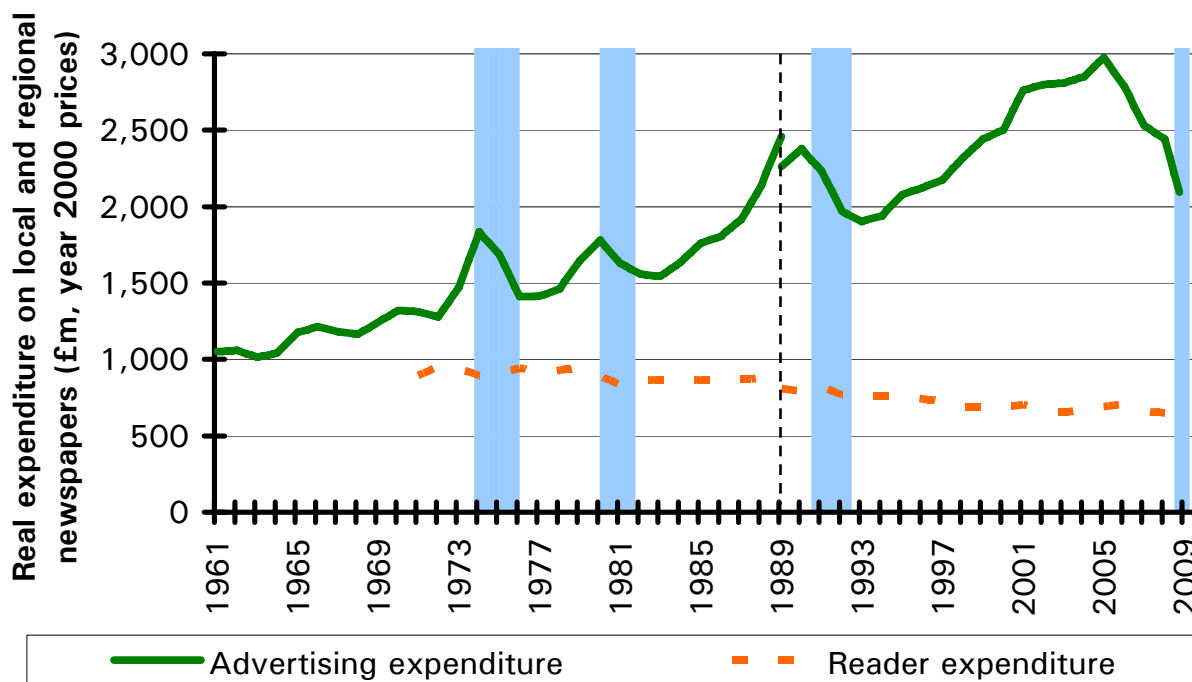
**Figure 2.3: Real classified advertising expenditure, 2000 and 2008**



Source: Advertising Association's *Advertising Statistics Yearbook 2008* and Newspaper Society.

2.15 The structural decline in spending on advertising in local newspapers has been exacerbated by recent events in the wider economy. Figure 2.4 shows advertising spending in the local and regional press since 1961. Economic downturns are marked by the blue shaded bars. As with advertising spending more generally, previous recessions have been accompanied by falls in the amount spent on advertising in local newspapers.

**Figure 2.4: The trend in real annual advertising and reader expenditures on local and regional newspapers since 1961**



Source: ONS *Quarterly National Accounts* and Advertising Association's *Advertising Statistics Yearbook 2008*.

The blue shaded bars represent zero or negative seasonally-adjusted GDP growth in the highlighted quarter relative to the same quarter in the previous year. Expenditures do not include advertising expenditures on local and regional newspaper's websites. Advertising expenditure data to the left of the dashed line have been adjusted using the Retail Price Index, data to the right using the Consumer Price Index.

2.16 The depth of the current downturn has put substantial and increasing pressure on local and regional newspapers' advertising revenues. In absolute terms, advertising expenditure on local and regional newspapers is estimated to have fallen by over £400m in 2008 - a year-on-year decline of nearly 19 per cent after accounting for inflation. Indications suggest that the decline has been even more marked this year, with the largest four publishers all reporting drops in advertising revenues of over 30 per cent in the first quarter of 2009. The effect of this has been to

drive down the revenues and margins of the large publishing groups (although the large publishing groups all retained relatively large operating margins in 2008).

- 2.17 Given current predictions there seems little reason to expect these pressures to ease in the immediate future. Even when advertising expenditure picks up again – Enders Analysis predict a return to growth in 2011<sup>10</sup> – it appears unlikely that spending on local and regional newspapers will return to previous levels. There is little reason to expect a reversal in the downwards trend in the proportion of advertising expenditures allocated to local and regional newspapers, and there is consensus amongst industry commentators that, given current business models, increases in the newspapers' digital revenues will not be sufficient to offset the decline in print revenues. Analysis prepared by Enders Analysis as part of the Digital Britain Interim Report forecast that the revenues of local newspapers would decline by over 20 per cent in 2009, and by a significant proportion – around 5 per cent per annum – from 2010 to 2013.<sup>11</sup> Given this, further title closures - and so increased concentration in local newspaper markets - appear probable.
- 2.18 These revenue challenges for publishers are further compounded by the fact that some of the larger local and regional newspaper groups are highly leveraged as a result of past consolidation that was heavily debt-financed. These groups are required to make substantial debt repayments.
- 2.19 The past 18 months have been marked by title closures by regional publishers. Estimates vary, but the number of titles closed in 2008 was over 50. The majority of these closures were amongst weekly free titles (which are of course entirely reliant on advertising revenues). As noted

---

<sup>10</sup> See Annex 1 to the Digital Britain Interim Report; *Key Trends and Issues in UK Media and Telecoms to 2012*, Enders Analysis.

<sup>11</sup> *Ibid.*

in a recent market research report,<sup>12</sup> the free weekly sector has always been the most liable to fluctuation in response to changing market conditions, not least because the set-up and operating costs for a free title are far lower for an already established publisher. There have also been some instances of paid daily titles converting to less frequent publication schedules.

---

<sup>12</sup> Mintel, *Regional Newspapers*, Market Intelligence, May 2009.

### 3 THE UK MERGER REGIME

#### Overview

- 3.1 The general framework for the assessment of mergers (including media mergers) under UK law is set out in the Enterprise Act 2002 ('Enterprise Act' or 'the Act'), which came into force in 2003. 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 Competition Commission (CC) is warranted, or whether the merger should instead be cleared by the OFT (with or without remedies). The CC determines the outcome (clearance, prohibition or remedies) of merger cases referred to it by the OFT.
- 3.2 Whilst the vast majority of mergers will be beneficial or neutral in their effects on competition (as the merger outcome statistics provided above demonstrate), mergers can sometimes reduce competitive constraints and thereby enable firms to raise prices, lower quality, reduce innovation, or otherwise offer poorer value for money. This is detrimental for customers, and potentially also for productivity over the longer term. The primary objective of the merger regime is to protect against such harm.
- 3.3 There are five main outcome scenarios for qualifying mergers which are decided through the OFT and/or CC investigation process under the Enterprise Act.<sup>13</sup> These are:

---

<sup>13</sup> Merger proposals can also be withdrawn.

## OFT

- Phase 1 unconditional clearance<sup>14</sup>,
- Phase 1 clearance subject to remedies (often referred to as undertakings in lieu of reference),

## CC

- Phase 2 unconditional clearance,
- Phase 2 clearance subject to remedies,
- Phase 2 prohibition of the merger.

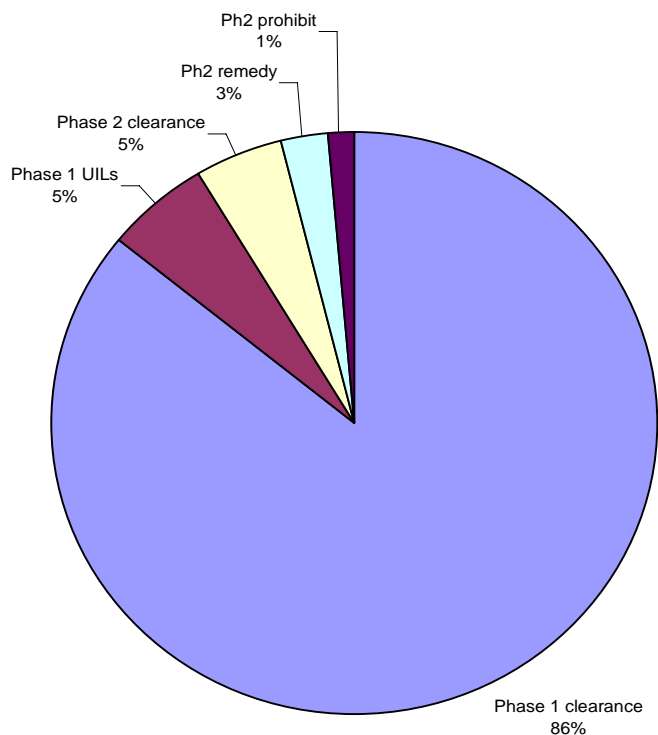
3.4 The great majority of qualifying mergers examined by the OFT are cleared (unconditionally or subject to remedies) at the end of its first phase investigation. Of cases referred to the CC the majority are ultimately allowed to proceed – either unconditionally or with certain conditions attached (such as partial divestment or behavioural remedies). As a proportion of all qualifying cases that are examined under the regime, only around one to two per cent result in an outright prohibition.

3.5 Approximate proportions of cases falling into each of these five categories are shown in the chart below:

---

<sup>14</sup> This includes cases where the OFT's duty to refer is triggered but the OFT exercises its discretion not to refer on the basis that the affected market(s) is of insufficient importance to justify a reference to this CC (often referred to as the '*de minimis*' exception to the duty to refer).

**Figure 3.1: Enterprise Act merger case outcomes (approximate; excludes cancelled references)**



Source: OFT estimates

### Legal framework applicable to media mergers

3.6 As is shown in the table below, the majority (four out of six) of qualifying 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 this was subsequently cleared.

**Table 3.2: Selected relevant cases considered by the competition authorities under the Enterprise Act 2002**

Merger parties	Case decided by:	Year	Outcome
<b>Newspapers</b>			
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. <sup>15</sup>
Archant / Independent News & Media*	CC	2004	Cleared
<b>Radio</b>			
Global Radio / GCap Media*	OFT	2008	SLC. Partial divestment remedy accepted.
Capital / GWR	OFT	2004	SLC. Partial divestment remedy accepted.
<b>Other broadcasting</b>			
BSkyB / ITV*	Secretary of State	2008	Adverse public interest finding (but on competition grounds <b>only</b> ).

\* Reviewed in Annexe D

<sup>15</sup> 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.

3.7 The merger control regime applicable to newspaper mergers was significantly scaled back in 2003 to make it less burdensome.<sup>16</sup> For the most part, therefore, UK newspaper-on-newspaper mergers are now subject to the same general merger regime (the same 'merger rules') as most other industries in the economy.

### **OFT's duty to refer**

3.8 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.<sup>17</sup> 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.

3.9 The OFT can (and does) seek views from other government departments or sectoral regulators where appropriate as part of its merger assessment process. Other government departments and regulators with sectoral expertise may be given, in confidence, information relevant to the merger so that the OFT can take account of their views on any competition issues and about a possible reference to the CC.

---

<sup>16</sup> Under the previous (Fair Trading Act 1973) regime a transfer of a newspaper that met the criteria for the application of the regime was unlawful and void if it proceeded without the prior consent of the Secretary of State. With certain limited exceptions, the Secretary of State could not consent to qualifying newspaper transactions without a reference to the CC.

<sup>17</sup> 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.

## A relevant merger situation

3.10 A merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes 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).

3.11 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.<sup>18</sup> 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

---

<sup>18</sup> 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.<sup>19</sup>

- 3.12 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.<sup>20</sup>
- 3.13 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.

### **Public interest considerations**

- 3.14 The Act also permits intervention by the Secretary of State for Business, Innovation and Skills ('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.

---

<sup>19</sup> 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).

<sup>20</sup> 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.

- 3.15 The Communications Act 2003 amended the Enterprise 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.
- 3.16 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.
- 3.17 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).

## Special merger situations

- 3.18 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').
- 3.19 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 one of the parties to the merger, 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 one of the parties to the merger.
- 3.20 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.
- 3.21 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.

- 3.22 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 since the current arrangements were put in place in 2003.

### **OFT approach to the 'markets of insufficient importance' exception**

- 3.23 Under the Act,<sup>21</sup> the OFT may exceptionally decide not to refer a merger to the CC 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.
- 3.24 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.
- 3.25 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

---

<sup>21</sup> Sections 22(2)(a) and 33(2)(a).

merger;<sup>22</sup> 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.

- 3.26 The OFT may determine not to exercise its discretion to apply the exception on the basis of any one of these considerations, or on more than one of them.<sup>23</sup>
- 3.27 In the *Dunfermline Press/Berkshire Regional News*<sup>24</sup> (DPL/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 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.

---

<sup>22</sup> 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.

<sup>23</sup> For recent cases involving the consideration of the 'de minimis' exception, see Anticipated acquisition by Spectris plc of Lochard Ltd, 29 January 2009, Anticipated acquisition by Orbital Marketing Services Group Ltd of Ocean Park Ltd, 14 November 2008, and Anticipated acquisition by Prince Minerals Limited of Castle Colours Limited, 6 May 2009.

<sup>24</sup> Completed acquisition by Dunfermline Press Limited of the Berkshire Regional Newspapers business from Trinity Mirror plc, 4 February 2008.

## Guidance and Informal Advice

### Published merger guidance

3.28 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. These include:

- **OFT** – Mergers: Procedural guidance, and Mergers: Substantive assessment guidance (as revised);<sup>25</sup>
- **CC** – Merger References: Competition Commission Guidelines;<sup>26</sup>
- **BIS** – Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers;<sup>27</sup>
- **Ofcom** – Ofcom guidance for the public interest test for media mergers.<sup>28</sup>

3.29 The OFT and CC guidance is of general application across sectors, whereas the BIS 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 mergers<sup>29</sup> 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

---

<sup>25</sup> [www.ofcom.gov.uk/advice\\_and\\_resources/resource\\_base/Mergers\\_home/guidelines/](http://www.ofcom.gov.uk/advice_and_resources/resource_base/Mergers_home/guidelines/)

<sup>26</sup> [www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/pdf/cc2.pdf](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc2.pdf)

<sup>27</sup> [www.berr.gov.uk/files/file14331.pdf](http://www.berr.gov.uk/files/file14331.pdf)

<sup>28</sup> [www.ofcom.gov.uk/tv/ifi/guidance/pi\\_test/pi\\_test.pdf](http://www.ofcom.gov.uk/tv/ifi/guidance/pi_test/pi_test.pdf)

<sup>29</sup> [www.ofcom.gov.uk/shared\\_ofcom/consultations/oft526con.pdf](http://www.ofcom.gov.uk/shared_ofcom/consultations/oft526con.pdf)

competitive assessment of mergers. Draft joint OFT/CC Merger Assessment Guidelines were issued for consultation in April 2009.<sup>30</sup>

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

### **Informal advice arrangements**

- 3.31 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, where relevant, jurisdictional issues) arising out of a prospective merger situation that has not yet been made public, where certain conditions are met.<sup>31</sup>
- 3.32 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.
- 3.33 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

---

<sup>30</sup> [www.of.gov.uk/shared\\_of/consultations/OFT1078con.pdf](http://www.of.gov.uk/shared_of/consultations/OFT1078con.pdf)

<sup>31</sup> The OFT revised its Informal Advice procedures in 2006 to replace previous arrangements for both Informal Advice and Confidential Guidance.

provided in an Informal Advice application: any advice given is based on the assumed accuracy of that information.

- 3.34 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.

## 4 MERGER ASSESSMENT

4.1 In this chapter we discuss submissions and findings in relation to the basic merger regime applicable to mergers between local or regional newspaper titles.

### Arguments put forward by the major publishers

4.2 Several regional publisher groups believe that consolidation is required to ensure the long term survival and success of local and regional newspapers. In this context, they have concerns that the media merger regime is outdated, and is preventing or deterring consolidation seen as necessary for the transition of such groups to digital business models. They argue therefore that changes must be made to the regime for it to apply more effectively in the 21<sup>st</sup> Century.

4.3 There are a number of strands to the publishers' argument.

4.4 **First**, they argue that the merger regime should recognise that local and regional newspapers no longer compete for advertising solely with other print media, but increasingly compete in a wider market, facing competition from other media platforms such as TV, radio, cinema and, most importantly, the internet. The publishers are not, in this respect, asking for a change to the legislation, but rather for the merger regime to be applied differently, to reflect changed market conditions.

4.5 **Second**, they argue that the merger regime should recognise that consolidation will sometimes be the only way to ensure the continued viability of a particular group of local newspapers.

4.6 **Third**, they argue that consolidation is required to achieve much-needed efficiencies, such as centralised production, or other customer benefits, such as the development of effective and attractive online offerings. They argue that this will improve the overall proposition to customers, and that the merger regime should recognise this.

4.7 **Fourth**, they argue that they currently face substantial uncertainty as to the workings of the merger regime, which makes deal planning difficult.

They argue that this uncertainty is compounded by the length of time and costs (such as management time and adviser fees) associated with a merger inquiry.

- 4.8 **Fifth**, they argue that consolidation will deliver additional benefits, such as the preservation of strong local investigative journalism or local media plurality, which are in the public interest, and that this should be recognised within the public interest element of the current media merger regime.
- 4.9 **Finally**, the publishers highlight the increasing competitive pressure that local newspapers face from public sector bodies setting up their own local media platforms, and selling advertising space on these platforms.
- 4.10 In its review, the OFT has examined each of these arguments. The first four strands are discussed in the section below. The remaining two are discussed later in dedicated chapters.
- 4.11 We also note that several smaller local newspaper publishers submitted views that regional title consolidation would damage existing competition between large and small operators, and that it remains appropriate for the merger regime to protect against excessive regional concentration of newspaper ownership.

### **Applying the merger regime to local and regional media**

- 4.12 The primary objective of the merger regime is to protect against harm to consumers from mergers. In the context of print media mergers, two sets of customers are considered: readers and advertisers.
- 4.13 On the reader side of the market, cover prices account for a limited proportion of local newspaper revenues (around 20 to 25 percent for paid-for titles), with the great majority of revenue derived from advertising. The incentive to maximise circulation or readership due to the positive impact this has on advertising revenues might be expected to mitigate some concerns that a reduction in competition might result in cover price increases or lower quality for readers. That said, where there are competing titles, competition for readers based on cover price and

editorial quality would typically be expected to deliver additional benefits. Even if a single player would have a larger scale and ability to generate efficiencies and quality improvements, it may have less incentive to do so if direct competitive pressures from a rival have been dampened.

4.14 In practice, though, media mergers are more usually found to raise concerns on the advertiser side (that is, if concerns arise at all), and the OFT's review therefore focussed in particular on effects on advertisers. Advertising is a key input to the competitive process in other markets, and so if advertising rates increase, then the increase in costs will tend to be passed on by the advertisers to their customers. As such, harm to advertisers will typically also generate harm to end-consumers in those other markets. We note, in particular, that advertisers in the local press will include a large proportion of SMEs, which are themselves facing significant challenges in the current economic climate.

4.15 The key findings of the OFT's review in respect of the merger regime are as follows.

**Print advertising may face sufficient competitive pressure from other media to protect consumers in the face of a merger, but an OFT view can only be reached on a case by case and area by area basis**

4.16 Advertisers allocate their spending across a portfolio of different platforms in order to achieve their objectives in the most cost-effective way. The development of the internet has changed the advertising options available, and there has been a significant shift of spending away from local and regional press advertising towards the internet, especially for classified advertising. Local and regional newspapers' (print editions) share of classified advertising spending fell from nearly 50 per cent in 2000 to a little over 25 per cent in 2008, while the internet's share rose from below two per cent to around 45 per cent over the same period (see Figure 2.3 above). Display advertising in local and regional newspapers has held up somewhat better, but has also experienced long-term decline.

- 4.17 The key question for merger analysis, however, is the extent to which the potential for advertisers to switch spend to these other media acts to constrain the prices that the local and regional press can charge for advertising. If this constraint is strong, then consolidation in the local and regional press, whether through swapping titles or full merger of publisher groups, would not be likely to have a substantial detrimental impact on advertisers (and ultimately end-consumers).
- 4.18 The LMA, representing seven of the largest publishers, submitted that there are a broad range of competitive media in each of the core local newspaper advertising categories across all catchments in the UK, and more specifically that:
- Competing media are increasingly taking share of local advertising spend as they become increasingly relevant and affordable versus local newspapers.
  - As technology and functionality has improved (for example, internet classified, display or search advertising) the range of options for local advertisers has increased.
  - Competing media are more affordable for local advertisers as advertising prices have fallen significantly and media have started to focus on serving more localised businesses (for example, radio, TV or outdoor).
  - Barriers to entry have fallen for new entrants, and advertising outside recognised third party media (for example, print self-publishing or investing in your own website) has created a credible alternative for local advertisers.
- 4.19 In support of these arguments, the LMA provided evidence of numerous specific examples where its publisher members had responded to competitive threats from other media. A range of alternative advertising options were identified and described for each of the key classified segments (property, motors, jobs) and for display advertising. Examples given of local newspapers changing their pricing strategy in reaction to other media included:

- reduced cost per page in response to the launch of a local property magazine
- reduced rate in response to a local radio price promotion, and
- reduced cost of listing motors, and increased number of titles in which the advert would appear, in response to a price reduction by a print/online motor-specific competitor.

4.20 Results from advertiser surveys undertaken on behalf of the LMA in four local areas indicated that, amongst newspaper advertisers, the internet is typically the preferred alternative advertising option from the range of options available, and that, for certain customer groups, print media does seem to be constrained by other media. The LMA submitted that its survey evidence, albeit based on limited sample sizes, showed that demand for local newspaper advertising is 'relatively elastic', such that advertising price increases would lead to a more than proportionate reduction in advertising volume. While this evidence was broadly supportive of the case for a wider market, it is worth highlighting that in the context of a normal merger inquiry the OFT would need carefully to consider the strength of this evidence in the specific circumstances of the case and the local area, market test the evidence with third parties, and assess it against other sources of evidence from the parties (for example, internal documents) and third parties. The OFT was not able to do this fully here.

4.21 Other stakeholders in this review provided contrasting arguments and evidence suggesting that print advertising may face only limited constraints for some customers (particularly for display advertising), thereby potentially enabling a local newspaper to leverage its position with advertisers. In relation to online options, one advertiser group submitted that online represents an alternative in some instances, but penetration and site development varies across the country, the user profile is narrower and younger than local press, and it does not have the immediate localness of local press (or where it does, it is likely to be the website owned by the local print publication).

- 4.22 One way to test whether the internet is as strong a constraint as another publisher is to compare multi-publisher areas with single publisher areas. The LMA submitted that achieved advertising yields do not systematically vary with the presence or absence of multiple print publishers in a local area. If true, this would suggest that other media were as strong a constraint on prices as another publisher. However, there was insufficient data to test this robustly.
- 4.23 We also note that comparison of LMA survey sample results for single and multiple operator catchment areas suggested that the elasticity of demand for newspaper advertising was typically higher in single operator catchments. This would be consistent with the existing exercise of market (pricing) power in single operator areas, which in turn would suggest that competition between publishers is stronger than that across media. However, again, the data was not sufficiently robust to conclude on this point. In addition, one advertiser representative group supplied some pricing data that suggested systematically lower advertising rates in areas where there is direct newspaper competition between local publishers, but this was again based on a limited sample.
- 4.24 Some smaller publishers also put forward the view that high (or increased) levels of local or regional newspaper concentration do (or would) result in local market power, reflected in local newspaper advertising rates. However, they provided little or no evidence to substantiate these claims.
- 4.25 Finally, some smaller publishers argued that increased regional consolidation would provide larger regional publishers with an unfair advantage in remaining areas where they compete with smaller local publishers. This might suggest that there may potentially be regional concerns arising from mergers – not just local.
- 4.26 In this exploratory review, the OFT did not reach a final conclusion on the competitive constraint placed on local and regional press advertising by other media. This is not least because the extent of this constraint may well differ by local area, and thus findings relevant to one local market would not necessarily carry over to another. In those areas

surveyed for the LMA's submission, the evidence was broadly supportive of a wider market<sup>32</sup> although, as noted, the OFT did not carry out a full analysis to reach a definitive view even in these areas. As recognised by the LMA, its survey obtained limited sample sizes for current newspaper advertisers in each local area.

- 4.27 More detail on the surveys commissioned by the LMA in support of its submission, and some of their outputs, is provided at Annexe B.
- 4.28 Given its statutory duties under the Enterprise Act, the OFT cannot prejudge the outcome of cases which have not yet been considered, and would need to assess the strength of the constraint from other media on local and regional press advertising on a case by case (and area by area) basis.

**The existing merger regime is evidence-based, and capable of reflecting market developments**

- 4.29 The existing merger regime is evidence-based, and capable of reflecting developments in markets over time, such as the growth of the internet as an advertising medium. There is no binding precedent on the OFT or CC to apply a particular market definition (that is, the economic market in which the merging parties are considered to operate), or to carry out its competition assessment in a particular way, for a merger in a sector which has been looked at before. This flexibility can result in different market definitions being applied in different cases, with the market definition being determined by the evidence.
- 4.30 Further, while market definition is a useful tool, it is not an end in itself. For example, competition concerns arising from a 'horizontal' merger (that is, between two players operating at the same level of the supply chain) will typically still arise regardless of whether the merger is framed as one resulting in a high concentration of suppliers within a narrow

---

<sup>32</sup> Subject to the data issues and caveats discussed above and in Annexe B.

market, or as one involving the loss of close, direct competition between two suppliers but within a broader market of many players.

- 4.31 An example of the latter is the *Dunfermline Press/Berkshire Regional News* case in 2008 (the most recent newspaper merger to be reviewed by the OFT),<sup>33</sup> in which the OFT focused on the closeness of competition between the parties' newspaper titles from an advertiser's perspective, and the extent to which the titles represented the best alternative to the other for a substantial volume of advertising business. In that case, while survey evidence indicated that the internet and advertising via direct mail and leaflets did provide some constraint (such that the relevant market might have been wider than just print media), other evidence (such as views of advertisers and the parties' internal documents) suggested that the parties had been each other's closest competitor in Slough and Windsor and that the identified constraints from other media were not sufficient to rule out a realistic prospect of an SLC.
- 4.32 Because the regime is evidence-based, the OFT's finding in the *Dunfermline* case does not mean that the OFT or CC would come to the same conclusion in relation to a different merger involving two competing newspaper titles in a different local area.<sup>34</sup> The issue would largely depend on the strength of evidence regarding the level of competition between the merging titles and the closeness of alternative options (including the internet) for readers and advertisers – evidence that would, in the main, be provided by the merging parties and tested with third parties.
- 4.33 The evidence that is used by the competition authorities to define relevant markets in mergers (and to apply a competition assessment) can

---

<sup>33</sup> Completed acquisition by Dunfermline Press Limited of the Berkshire Regional Newspapers business from Trinity Mirror plc, 4 February 2008.

<sup>34</sup> For example, the CC cleared the Archant/INM transaction on the basis of the evidence reviewed in that case.

take a variety of forms. Generally, evidence based on actual behaviour (of firms or customers) will usually carry more weight than that based on speculative or hypothetical responses.

4.34 Evidence of how customers have actually reacted to price, or other, changes that have previously occurred can provide **direct** evidence of customer behaviour. Although in practice this evidence is often difficult to gather in sufficient detail, it can potentially be a very powerful source of information about the relevant market. Examples of this type of evidence include:

- evidence of customers switching in response to past price changes
- customers' responses to survey questions asking how they reacted to a previous, actual, price increase
- evidence of customers threatening to switch and achieving price reductions as a consequence, and
- econometric analysis of demand based on firms' sales data.

4.35 In addition to direct evidence of customer behaviour, the OFT and CC may draw evidence of likely customer behaviour by inference through the behaviour of firms. This can be a powerful source of evidence since if customers view another product as an alternative this will be reflected in how the relevant firms react to each other. Examples of evidence of this type include:

- evidence that firms monitor and react to each other
- evidence that firms deliberately target and seek to win their rivals' customers with price offers or other promotions, and
- evidence that firms have responded to a rival offer in order to retain customers.

4.36 In addition to direct evidence of customer or firm behaviour, the authorities may also draw on other sources of evidence about customer

preferences or likely behaviour. This might provide information about the ranking of customer preferences, or customers' opinions about their likely behaviour in response to a price increase. Examples of this type of evidence include:

- assessments of product characteristics
- responses to survey questions asking where customers would divert their demand if the product they currently use were no longer available, and
- survey responses on customers' likely behaviour in response to a price increase.

4.37 Care needs to be taken when interpreting evidence based on opinion about likely behaviour, as it may be influenced by a range of biases. For example, customers may exaggerate or be over-optimistic about the extent of their response or their negotiating power, and how a question is phrased can affect the results obtained. Sample selection (the process used to identify and select survey respondents) can also raise issues. Interpretation of responses to particular questions, and survey evidence generally, therefore need to be placed in the context of the whole of the evidence available, some of which may be more informative than the survey evidence.

4.38 Some of these potential problems with survey evidence might be overcome, or controlled for, with careful survey design. It is therefore advisable for parties to discuss survey proposals in some depth with the authorities before commissioning their own surveys, if the evidence obtained is to be relied upon significantly.

4.39 The OFT's March Discussion Paper identified some types of evidence of particular potential relevance to local or regional newspaper cases. See Annexe C for this (non-exhaustive) list. As discussed above, amongst these potential sources, direct evidence of actual customer or firm behaviour will typically carry more probative weight than inferences based on opinion.

- 4.40 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.<sup>35</sup> 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.
- 4.41 The OFT has not in the past specifically sought views from Ofcom in considering newspaper transactions. However, it recognises that Ofcom has expertise and knowledge in this area, and intends to do so in future. This mirrors existing practice for transactions in broadcasting and telecommunications markets.
- 4.42 The CC 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.
- 4.43 By way of further guidance on how different sources of evidence are used by the competition authorities to carry out market definition and competitive assessment in media sector transactions, Annexe D contains a number of case studies drawn from OFT and CC decisions. The majority of these case studies concern media sectors other than local or regional newspapers, but they are mainly fairly recent, and hence reflect current application of the merger regime.

**The existing merger regime is already able to take account of valid 'failing firm' arguments**

- 4.44 Some publishers argue that consolidation should be allowed on the basis that the 'target' title(s) is failing and therefore would have exited the

---

<sup>35</sup> Using both a general 'Invitation to Comment' placed on its website and the London Stock Exchange Regulatory News Service (RNS), and targeted enquiries.

market in any event. Thus, there is no reduction in competition relative to the true 'counterfactual' – what would have happened absent the merger. The OFT recognises that the local and regional newspaper sector is going through difficult times and that a significant number of titles have closed.

- 4.45 The existing regime is already able to take account of such arguments, and to clear mergers where the evidence strongly supports the supposition. Where a firm's exit from the market is inevitable in any event (for example, for reasons of financial distress), then the merger itself will not cause a reduction in the number of competitors, and therefore will not itself reduce competition. It is, however, also important for the OFT to assess whether there were any alternative realistic options that would have been less anti-competitive, such as the purchase of the 'failing' title by an alternative publisher.
- 4.46 In December 2008 the OFT restated its approach to such so-called 'failing firm' merger cases,<sup>36</sup> in particular highlighting that it will take account of current economic and market conditions in its assessment, and confirming that it will provide informal advice in appropriate 'failing firm' cases. 'Failing firm' arguments may apply to an entire business, or to divisions or stand-alone business units. For example, they have been applied by the OFT in respect of individual retail stores (such as in the Homebase/Focus case in 2008).<sup>37</sup>
- 4.47 Failing firm considerations were central to the OFT's recent clearance of the acquisition of a number of Zavvi stores by HMV,<sup>38</sup> which was the first application of failing firm considerations to clear a transaction since the OFT's restatement of its approach. Given the strong evidence

---

<sup>36</sup> [www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/oft1047.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/oft1047.pdf)

<sup>37</sup> OFT, *Completed acquisition by Home Retail Group plc of 27 leasehold properties from Focus (DIY) Ltd*, 15 April 2008.

<sup>38</sup> Anticipated acquisition by HMV of 15 Zavvi stores, 28 April 2009

pointing in favour of a failing firm defence in that case, the OFT did not consider it necessary to undertake a detailed market analysis, enabling it to carry out its investigation in a more proportionate and timely manner.

**The existing regime is already capable of taking into account any efficiencies and customer benefits, if supported by evidence**

- 4.48 Some publishers also argue that consolidation should be allowed on account of the efficiencies and customer benefits that would be created.
- 4.49 Again, the existing merger regime is already capable of taking account of, and in some cases clearing mergers on the basis of, these factors, so long as there is clear and compelling evidence in their support. Hence mergers which clearly deliver net benefits to customers can be allowed (although there may be conditions attached).

*Efficiencies*

- 4.50 In some mergers, the existence of merger efficiencies can prevent a merger from resulting in an SLC. For example, a merger can generate cost synergies that are passed on to consumers in the form of lower prices.
- 4.51 Efficiencies on the demand-side were used by the OFT to support clearance of the *Global Radio/GCap Media* radio merger in the London regional media market.<sup>39</sup> Here, the OFT found that the London radio stations of Global and GCap were largely complementary—appealing to different listener demographics — and not substitutable, meaning there were 'economies of scope' in operating them jointly. On this basis, the OFT concluded that advertisers would be able to purchase airtime on a bundle of radio stations more cheaply from the merged firm than they had from Global and GCap individually pre-merger. As a result, the OFT

---

<sup>39</sup> Completed acquisition by Global Radio Ltd of GCap Media plc, 8 August 2008 (decision by OFT to suspend its duty to refer while undertakings in lieu being considered).

did not find an SLC in London, and cleared the London part of the merger.

- 4.52 In the context of print media, publishers claim that previous consolidation has enabled them to make substantial cost savings, for example in gaining economies of scale in printing.

### *Customer benefits*

- 4.53 In other mergers, efficiencies may not prevent an SLC but nonetheless represent 'relevant customer benefits'<sup>40</sup> that can outweigh the adverse effect of the SLC. In these circumstances, the OFT has the discretion to decide not to refer the merger to the CC for a detailed investigation. Alternatively, at the CC stage, the CC may take these relevant customer benefits into account by considering the extent to which alternative remedies may preserve such benefits.
- 4.54 For example, although the CC concluded that Macquarie UK Broadcast Ventures' acquisition of National Grid Wireless<sup>41</sup> resulted in an SLC, it allowed the merger subject to certain safeguards on the merged firm's behaviour, rather than forcing Macquarie to divest all or part of National Grid Wireless. In doing so, the CC sought to preserve the merger's beneficial effect in reducing risks to the UK's Digital Switch Over programme; a beneficial effect that would have been lost without the merger. Customer benefit considerations have also been applied by the CC in the case of a water merger.<sup>42</sup>
- 4.55 Situations where customer benefits might be weighed against an identified loss of competition are when the merger results in lower

---

<sup>40</sup> Defined in Section 30 of the Enterprise Act.

<sup>41</sup> Macquarie UK Broadcast Ventures Limited / National Grid Wireless Group: Completed acquisition, 11 March 2008.

<sup>42</sup> Competition Commission, *A report on the completed water merger of South East Water Limited and Mid Kent Water Limited*, 1 May 2007.

prices, higher quality, greater choice or greater innovation. 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. Claimed customer benefits must accrue to customers of the merging parties, but need not necessarily arise in the market(s) where SLC concerns have arisen. It is conceivable, given clear and compelling evidence, that sufficient customer benefits might accrue in one market as a result of the merger that would outweigh an SLC finding in another market(s). However, it is important that the merged entity has the incentive to deliver benefits to customers as well as simply the ability. This may be unlikely if competitive pressures are reduced.

- 4.56 It should be noted that the customer benefits exception has not thus far been used as a reason to clear a merger (and not insist on remedies) at the OFT (phase 1) stage under the Enterprise Act merger regime. The CC has more flexibility in this regard than the OFT, in that it may adopt a remedy, short of prohibition or complete divestment, which reduces the detrimental effects of the merger's SLC while preserving all or most of the customer benefits. In circumstances where the OFT applies the customer benefits exception to its duty to refer, it would not be able to remedy the identified SLC.

**Opinion from stakeholders was divided as to whether consolidation in this sector would in fact deliver efficiencies or customer benefits**

- 4.57 Opinion from stakeholders was divided on whether further local newspaper consolidation would deliver efficiencies of either kind discussed above.
- 4.58 Some publisher groups suggested further consolidation would deliver customer benefits, with scale economies making more local newspaper titles viable and leading to enhanced investment in the new digital era. It was argued that mergers help create scale to support investment in building a more competitive online proposition for both audience and advertisers. Some advertisers also noted that previous consolidation has produced benefits in terms of print and production costs and quality,

although they were unsure of the extent to which further consolidation would be able to add to this.

- 4.59 Another body of opinion suggested, however, that the same consolidation would cause customer detriment from the 'de-localisation' of editorial resources and coverage that could follow from increased centralisation, with a particular adverse impact on local investigative journalism, and therefore the newspapers' quality.
- 4.60 Journalist groups submitted that consolidation would extend a recent trend of closure of local offices, and the centralisation of production to regional hubs, leading to pooled news and less localised coverage for readers. We note that Guardian Media Group's decision to close local satellite offices and centralise production in the Manchester area, for example, has generated significant concerns of this type in some quarters, including in parliament.<sup>43</sup> Journalist respondents also doubted whether any cost savings arising from consolidation would be used by publishers to invest in quality journalism, given their need to meet debt repayments. The Campaign for Press and Broadcasting Freedom also voiced concerns about publisher consolidation, and submitted that more concentrated local newspaper markets have had a negative impact on the quality of news content.

**Publishers are currently uncertain about the application of the merger regime, which makes deal planning difficult**

- 4.61 There appears to be some lack of understanding amongst local newspaper publishers around the workings of the media merger regime. This may stem in part from changes made to the regime in 2003, in the form of the Enterprise Act. Under this Act, the rules applicable to newspaper mergers are now broadly the same as those which apply to most other industries across the economy. There are no longer any fixed maximum market share thresholds above which a reference to the CC is automatically triggered; each case is assessed on its merits.

---

<sup>43</sup> For example in the House of Commons debate on local and regional news on 19 March 2009.

4.62 The uncertainty faced by publishers about the regime may also stem from the lack of recent case precedent in this sector. Over recent years, most local and regional newspaper mergers examined under the Enterprise Act have been cleared. As already noted above, out of only six newspaper-on-newspaper mergers assessed under the Act, five have been cleared unconditionally (one by the CC, the rest by the OFT). The sixth (the *Dunfermline* case) was cleared by the OFT subject to a divestment remedy, an outcome which may have been a catalyst for the arguments from publishers that the regime needs to be amended to reflect changed market conditions. Overall, though, there have been few complex newspaper cases reviewed by the OFT or CC to provide guidance.

**There would be only limited value in further 'blue skies' work in this area**

4.63 In assessing a given merger, the authorities will draw upon evidence from the particular markets involved in order to assess the closeness of competition between the merging parties and the strength of any countervailing competitive constraints, as well as any failing firm or efficiency arguments. Since such evidence can vary between cases, a 'one-size-fits-all' approach to mergers in a particular sector may not be appropriate.

4.64 This means that there would be limited value gained from a piece of 'blue skies' market definition work, carried out without any particular merger in mind – given the lack of specific evidence, in a clear context, to assess.

4.65 Nonetheless, there may still be some general lessons that could be learnt from a detailed inquiry into a specific proposed merger in this sector. The analytical methodologies employed are likely to be similar across mergers within the same sector. As such, additional research by the OFT and CC in this area is likely to be most beneficial in the context of an actual merger, then giving the sector a clearer picture of how the OFT will consider local media mergers in practice.

- 4.66 It is also worth highlighting the different roles of the OFT and CC within the merger regime. The OFT is the first phase merger authority in the UK. It has a relatively short period to assess a merger; typically four to eight weeks, although this could be shortened substantially under its 'fast track procedure', to as little as two weeks, to the extent that the merging parties considered this would be appropriate. However, although the OFT's actual review process is short, merging parties sometimes seek to maximise their prospects of a first phase outcome by engaging with the OFT in 'pre-notification' contact and correspondence. This generally takes the form of review by the OFT of a draft submission from the parties; this often assists parties in identifying key evidence which they may wish to gather and prepare before notification takes place.
- 4.67 The CC, as the UK's second phase authority, has longer to assess the merger (typically 24 weeks), and is therefore able to carry out a fuller analysis. It also adopts a different threshold in its SLC assessment. The OFT is required to take a relatively cautious approach, referring a merger to the CC if it considers there to be a 'realistic prospect' that it will substantially lessen competition.<sup>44</sup> The CC's 'balance of probabilities' standard for assessing mergers is higher than this 'realistic prospect' reference threshold. Hence the design of the UK merger regime is entirely consistent with an outcome where a transaction is referred by the OFT and subsequently cleared by the CC based on the same set of facts. The combination of a longer review, and a different legal test, can therefore sometimes mean that a more advantageous outcome can be achieved by merging parties at second phase.<sup>45</sup>

---

<sup>44</sup> For the avoidance of doubt, the OFT can only refer a merger to the CC where it is under a statutory duty to do so (sections 22 and 33 of the Enterprise Act).

<sup>45</sup> This could include application of the failing firm defence, as in the CC's recent clearance of the Long Clawson Dairy/Millway merger (January 2009). The OFT referred this merger, on the basis of the evidence it had at Phase I and its 'realistic prospect' standard. The OFT cleared it, within 15 weeks, on the basis of further assessment and a different standard.

- 4.68 Some stakeholders asked for specific guidance on the application of the merger regime to the media sector. This report aims to meet some of the industry's needs in this respect by including case studies and commentary on some of the more complex aspects of the merger regime, and the types of evidence which may be valuable. In addition, as noted above, the OFT already offers Informal Advice for appropriate mergers. This can encompass advice on specific narrow issues (for example, 'failing firm' cases, or the 'de minimis' exception).
- 4.69 The OFT and CC also have in preparation revised and new guidance on the general merger regime, including on OFT jurisdictional and procedural aspects,<sup>46</sup> guidance on substantive assessment,<sup>47</sup> and guidance on the various exceptions to the OFT's duty to refer.<sup>48</sup> The latter will include revised guidance on the *de minimis* exception, reflecting experience since introduction of the OFT's revised approach in late 2007,<sup>49</sup> since which eight mergers have been cleared on the basis of this exception.<sup>50</sup>

## The US approach to newspaper mergers

- 4.70 The Antitrust Division of the United States Department of Justice recently set out its approach to newspaper mergers in a statement to a Congressional Committee by Carl Shapiro.<sup>51</sup> Some key extracts are reproduced at Annexe E. The approach outlined on the part of the US competition authorities is in very large part consistent with the UK

---

<sup>46</sup> [www.of.gov.uk/shared\\_of/consultations/oft526con.pdf](http://www.of.gov.uk/shared_of/consultations/oft526con.pdf)

<sup>47</sup> [www.of.gov.uk/shared\\_of/consultations/OFT1078con.pdf](http://www.of.gov.uk/shared_of/consultations/OFT1078con.pdf)

<sup>48</sup> Forthcoming.

<sup>49</sup> [www.of.gov.uk/news/press/2007/156-07](http://www.of.gov.uk/news/press/2007/156-07)

<sup>50</sup> There have also been a number of other cases where the discretion to apply the *de minimis* exception was considered but was not applied.

<sup>51</sup> Deputy Assistant Attorney General for Economics, Antitrust Division.

merger regime as described above. The statement emphasises a forward-looking flexible approach, founded on evidence-based case-by-case analysis.

## **Merger regime – Recommendations**

4.71 On the basis of the above:

- **This review recommends that no legislative change is required to the existing merger regime under the Enterprise Act.** The existing merger regime is flexible and evidence-based. It can reflect market developments such as to take account of constraints arising from competition between media when assessing local or regional media merger transactions. A merger can also be cleared due to efficiencies, customer benefits or failing firm arguments. If there is compelling evidence that the merger will be beneficial (or neutral) for consumers, then the merger is likely to be allowed.
- **This review recommends that no further OFT research is warranted in this area in the absence of a notified merger.**
- **In media mergers involving newspaper publishing and/or commercial radio or television broadcasting, and raising competition issues, the OFT will ask Ofcom to provide views, arising from its understanding of media markets, on factors relevant to the OFT's decision.** The OFT will confirm this in its forthcoming revised guidance on merger jurisdiction and procedure.

## 5 MEDIA PUBLIC INTEREST CONSIDERATIONS

### Current arrangements

- 5.1 While media mergers fall under the general merger rules of the Enterprise Act, the Act also provides for intervention by the Secretary of State in media mergers where there are public interest considerations which he considers should be taken into account (for newspapers, these are: accurate presentation of news, free expression of opinion, and plurality of views).<sup>52</sup> Intervention was anticipated as being an exception rather than the norm. This has been reflected in practice – the Secretary of State has only intervened once in a media merger under the Enterprise Act (in relation to BSkyB plc's acquisition of a 17.9 per cent shareholding in ITV plc). This was under one of the broadcasting (as opposed to newspaper) public interest considerations.
- 5.2 There are three elements to the newspaper public interest considerations under the Enterprise Act. The considerations specified are:<sup>53</sup>
- 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.
- 5.3 Further to the introduction of the Act, the then Department of Trade and Industry (now BIS) published guidance on public interest intervention in media mergers under the Act in May 2004 (BIS guidance).

---

<sup>52</sup> For broadcasting and cross-media transactions, the considerations are plurality, range and quality of broadcasting, and commitment to broadcasting standards.

<sup>53</sup> Section 58(2A) and (2B).

- 5.4 As well as providing guidance on jurisdictional and procedural issues in media mergers, the BIS 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.
- 5.5 Under section 58(3) of the Enterprise Act, the Secretary of State may by order modify section 58 for the purpose of specifying a new public interest consideration, or removing or amending any specified consideration. Under section 57(2) of the Act, the OFT has a duty to bring to the attention of the Secretary of State any representations about exercising his powers under section 58(3) which have been made to it.

### **Summary of submissions**

- 5.6 The OFT's Discussion Paper asked whether the newspaper public interest considerations, set out in section 58 of the Enterprise Act, remain appropriate in their current form. We received various representations that the newspaper public interest considerations should be either removed or amended.
- 5.7 The LMA submitted that the public interest considerations as presently drafted arguably focus unduly on concentration of ownership and do not give sufficient weight to the need to maintain vibrant independent news provision in each local area.
- 5.8 The question was raised whether the Secretary of State could in principle intervene to clear a media merger which would otherwise be referred to the CC (as the Secretary of State did on October 2008 in the acquisition of HBOS plc by Lloyds TSB plc on financial stability public interest grounds). The LMA suggested that intervention to clear a merger that might otherwise be referred could be warranted in cases where, absent consolidation, the ability of the titles in question to continue as independent providers of local news content is at risk. Although media

plurality considerations might tend to be expected to point in the same direction as competition considerations, it was argued that such consolidation may actually serve to maintain plurality of views.

- 5.9 Although we received no specific evidence that the newspaper public interest considerations had deterred potential merger transactions, one respondent did state that, in their view, public interest considerations had deterred potential transactions from being pursued in the past.
- 5.10 Several stakeholders submitted that the public interest considerations should be expanded to incorporate provisions related to the impact of a merger on news-gathering. Journalists' groups cited the House of Lords Communications Committee's 2008 report on 'The ownership of the news'<sup>54</sup> which recommended, amongst other things, 'that the public interest considerations for newspaper mergers and broadcasting and cross-media mergers are amended to refer specifically to a need to establish whether a merger will impact adversely on news gathering.'<sup>55</sup> One stakeholder suggested that any takeovers sanctioned through the merger regime should be subject to clear and enforceable conditions related to plurality of views and quality journalism.
- 5.11 One respondent submitted that the public interest considerations are unnecessary, and that the best way to guarantee plurality and diversity is to protect competition in the media market. They also suggested that the considerations, in their current form, lack clarity. The same respondent submitted that the newspaper-specific public interest considerations should be widened to take account of the contribution to plurality of public sector and other news sources available on the internet. A number of other stakeholders agreed that the public interest considerations are too narrow, and should be widened to reflect the growing importance of digital media and online news sources.

---

<sup>54</sup> [www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/122i.pdf](http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/122i.pdf)

<sup>55</sup> Ibid (p70)

- 5.12 Stakeholders in the commercial radio sector were concerned that the focus of the OFT's review on the local press could lead to an asymmetric outcome and inconsistency across local media markets. They urged that any proposed changes to the local media merger regime should be approached in conjunction with reform of the radio-specific and cross-media ownership rules.
- 5.13 One association of commercial radio groups submitted that the current regulation of local radio is disproportionate to the size of the sector, and restricts the activities of local radio more severely than the television and newspaper industries. They suggested that the justifications for specific radio ownership rules - such as those included in the Communications Act – were not apparent, and that it would be more appropriate to rely on the public interest considerations to safeguard competition and plurality of ownership. The same argument was made in the submission of a large commercial radio group, who put it to the OFT that the public interest considerations which apply to media mergers, combined with the general application of competition law, are sufficient to ensure media plurality.
- 5.14 Finally, one respondent suggested to the OFT that any relaxation of the public interest considerations or media ownership rules should seek to avoid allowing the emergence of dominant firms in the radio sector. They argued that dominant firms are able to use their size to disadvantage secondary players, and that because of this they posed a threat to the diversity and quality of the overall radio offering.

## **OFT Assessment**

- 5.15 On the question of whether plurality in (small) local newspaper markets is a realistic or desirable objective, we note that BIS's stated policy on intervention is already flexible with respect to the realistic scope for plurality in smaller local areas.<sup>56</sup> It is plausible that some areas will only be capable of supporting one printed title. However, plurality in some

---

<sup>56</sup> [www.berr.gov.uk/files/file14331.pdf](http://www.berr.gov.uk/files/file14331.pdf) , paragraph 5.12

'parts of the UK' may in fact be considered of particular importance (for example, Northern Ireland<sup>57</sup>), which may argue against strictly limiting plurality considerations to national (UK-wide) newspapers. More generally, it is not clear that there is a trade-off between competition and plurality considerations in circumstances where intervention to retain competition appears justified (since this would usually also be expected to maintain plurality). A further general point is that using public interest considerations to override review of otherwise potentially anti-competitive mergers should only be done sparingly, in the interests of maintaining the independence of the competition regime.

- 5.16 BIS's published guidance in this area dates from 2004, and would benefit from updating to reflect experience (albeit limited) of applying the media public interest considerations, and also some of the practical changes made in the merger review process (such as in relation to revised Informal Advice arrangements<sup>58</sup>).
- 5.17 This part of the OFT's report also fulfils its statutory duty under section 57(2) of the Act to inform the Secretary of State of representations received about the public interest considerations.

### **Media Ownership Rules (Communications Act 2003)**

- 5.18 In addition to the newspaper and broadcasting public interest considerations, there are further media ownership rules, which govern the ownership of television, radio and newspapers in the UK. The OFT has no role in enforcing these rules. Ofcom is required to review these rules 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 rules are needed. Ofcom is in the process of undertaking its latest

---

<sup>57</sup> From BIS's guidance, it appears that previous merger cases relating to newspaper titles in Northern Ireland provided important background to the 'plurality of views in newspapers' consideration.

<sup>58</sup> And to the discontinuation of Confidential Guidance arrangements.

review, and is expected to make its recommendations to the Secretary of State by the autumn. The OFT understands that Ofcom will include the newspaper and broadcasting public interest considerations in its review.

5.19 We received some comments about the cross-media ownership rules set out in the Communications Act 2003. As discussed above, these are subject to Ofcom's review. In cross-media merger proposals, it could be the case that it is these rules rather than the merger regime which are preventing significant consolidation. If cross-media ownership rules were to be relaxed, however, the merger regime may then have a more active role in considering cross-media transactions.

## Recommendations

5.20 In the light of above:

- **This review recommends that BIS should consider the representations received on the media public interest considerations, and any case for legislative change.** This process should take account of Ofcom's wider review of Media Ownership Rules, the scope of which will encompass the media public interest considerations.
- **This review recommends that BIS should review, and may wish to restate, its published guidance on its anticipated public interest intervention policy.** This should include whether it foresees any scope for intervention to permit media mergers on public interest grounds. Again, this should be carried out in light of Ofcom's findings.

## 6 COMPETITION FROM PUBLIC SECTOR SOURCES

### Overview

- 6.1 Local authority publications can potentially impact on commercial providers in a number of ways, including:
- withdrawal of council advertising revenue from commercial papers where the relevant material is placed in a council publication instead
  - competition for third party local advertising revenues (such as from local retail and leisure outlets), and
  - competition for audience attention (readership).
- 6.2 We asked stakeholders for views and evidence relating to public sector news and information sources.
- 6.3 Publishers submitted that local commercial newspapers are facing increasing competitive pressure from public sector bodies that develop their own media platforms, and sell advertising space on them. They provided a number of examples. There was broad concern amongst stakeholders about the potential threats to commercial newspapers' revenues from such publications. There was also general consensus that local authority publications should not be treated as contributing to plurality of independent news sources.
- 6.4 Submissions from local government sources expressed concerns about reduced newspaper coverage of council activities, and explained their objective of informing local populations about the services provided by, or available from, local authorities. Practice appears to vary as to whether local authority publications compete directly for local advertising revenues (in order to defray the cost to local taxpayers of producing their publications).

## Summary of submissions

- 6.5 The LMA submitted that in many areas competition is increasingly coming from council operated publications, which it argues may be a threat to plurality if they divert advertising revenues away from independent commercial publishers. The Newspaper Society has itself been active in making previous submissions on this issue to Government and to relevant consultations (for example<sup>59</sup> to the DCLG consultation<sup>60</sup> on the Local Authority Publicity Code).
- 6.6 This concern was also raised by a number of other stakeholders – including a number of smaller publishers and a journalists' association. An advertising group agreed that the rise of local authority publications has increased pressure on the advertising rates and volumes achieved by local newspaper groups.
- 6.7 One respondent submitted that in Scotland the newspaper industry's problems are being exacerbated by the loss of local authority recruitment advertising to the CoSLA (Convention of Scottish Local Authorities) electronic portal and the prospective loss of public notices going online.
- 6.8 A number of stakeholders argued that local authority publications do not contribute to plurality in local media. For instance, the NUJ submitted that local authority publications contain public relations materials rather than news, and so do not add to plurality. An advertising group questioned whether local authority publications are likely to have the journalistic talent or political inclination to act as an independent voice.
- 6.9 Some publishers suggested that while public media services should be permitted, local authorities should be required to conduct – similar to the requirements on the BBC – a Public Value Test (PVT) and Market Impact Assessment (MIA) prior to introducing new services.

---

<sup>59</sup> [www.newspapersoc.org.uk/Docs/Local-Authority-Publicity-Code\\_16-March-2009.doc](http://www.newspapersoc.org.uk/Docs/Local-Authority-Publicity-Code_16-March-2009.doc)

<sup>60</sup> [www.communities.gov.uk/publications/localgovernment/publicitycodeconsultation](http://www.communities.gov.uk/publications/localgovernment/publicitycodeconsultation)

- 6.10 The Local Government Association (LGA) submitted that it supported a vibrant local and regional press as being essential for local democracy. While the LGA has actively encouraged local authorities to operate their own publications as part of a campaign to increase residents' knowledge of their local government, the LGA submitted that local authority publications are typically distributed only four or six times during a year and do not operate as rivals to the local press. They pointed out that local authorities spend substantial sums of money advertising in the local media – particularly at times of the year when they are not producing a publication of their own. In the LGA's view, public value tests or market impact assessments would be unnecessary, as local councils are accountable to voters.
- 6.11 Other local government stakeholders submitted that the recent decline in the readership of local newspapers, combined with the less than universal coverage of local titles, meant that local authorities had to produce their own publications in order to communicate effectively with their constituency. They stated that local authorities have an obligation both to place their own advertisements and to produce their own publications in the most cost-effective way possible. Not every local authority sells advertising space in their publications – one council that responded to our discussion paper told us that it sees a distinction between directly competing for third party advertising revenues - a practice in which it did not engage - and redirecting its own advertising and public notices to its own publication.
- 6.12 Radio stakeholders commented on the BBC's share of radio audience, and the impact that this has on commercial operators' ability to generate advertising revenues.

### **Interaction with the merger regime**

- 6.13 Submissions on this issue did not generally relate to the merger regime.
- 6.14 The merger regime does not distinguish between public and private competition. That is, the authorities will take account of all competitive constraints in their competition assessment regardless of whether they

originate from a public or private undertaking. For example, local authority titles were explicitly considered and taken account of by the CC in its *Archant/INM* inquiry<sup>61</sup>. Indeed, the CC found in that case that some local authority titles were more significant competitors (in terms of how effective they were as substitutes for local advertisers) than others.

## OFT Assessment

- 6.15 We note the comments made by stakeholders about the potential impact on commercial publishers of local authority publications.
- 6.16 There are potentially conflicting public policy agendas in this area: the promotion of effective local authority communications, and the provision of independent commercial newspapers. It is possible that the encouragement of local engagement and innovative (cost-effective) approaches in local authority communications (including moving public services or notices online) could conflict with the desire to support the provision of quality independent commercial local news and journalism. One possible approach would be the specific regulation of local authority activity. However, this would impose its own costs, whereas new or revised guidance may have limited impact if it is not enforceable.
- 6.17 Generally, where the public sector provides services (such as the supply of advertising space) in competition with the private sector, it needs to be alive to the possibility that its activities might distort wider markets.

## Recommendations

- 6.18 In the light of the above:
- **This review recommends no change in respect of the existing merger regime to take account of local authority publications. Merger**

---

<sup>61</sup> 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, 22 September 2004.

assessment would already take account of them to the extent that they represent competition with commercial providers (for readers or advertisers).

- **This review recommends that BIS and/or DCMS<sup>62</sup> review this area further, and consider the costs, benefits and effects of potential intervention or regulation, or of appropriate guidance.**

---

<sup>62</sup> And devolved governments where appropriate.

## 7 OTHER ISSUES

- 7.1 We received several submissions from commercial radio stakeholders, and have noted some of their specific comments above. More generally, commercial radio sector respondents called for the merger regime to allow strong local multi-media companies to be created. It was argued that radio consolidation would create efficiencies via increased investment in content, which would drive up audience figures and be more attractive to advertisers. The ability of consumers and advertisers to substitute across different media, together with the radio activities of the BBC, were cited as sufficient external constraint on commercial radio.
- 7.2 As with newspapers, radio mergers are assessed on a case-by-case basis, in light of evidence relevant to the specific circumstances of a transaction. This approach was reflected in the OFT's consideration of the Global Radio/GCap Media merger in 2008. A second phase detailed investigation of that merger by the CC was not required since the parties chose to offer a partial divestment remedy which was accepted by the OFT.
- 7.3 In addition to submissions relating to newspaper publishing and commercial radio, we also received submissions relating to national newspapers and magazine publishing. The common position held in these submissions was that merger assessment should take account of a broad range of constraints in advertising and media markets.
- 7.4 The Periodical Publishers Association, which represents magazine publishers, submitted that scrutiny of transactions by the competition authorities had created uncertainty and stifled merger and acquisition activity in the magazine sector.
- 7.5 We note these comments from radio, magazine, and national newspaper industry stakeholders. Whilst our primary focus in this review has been on local and regional newspapers, many of the issues raised and discussed are likely to apply more widely to other media sectors.

# ANNEXE(S)

---

## LIST OF RESPONDENTS

A.1 The following interested parties provided submissions or comments to the OFT's review:

- Bauer Media
- Baylis Media
- Blackburn with Darwen Borough Council
- Campaign for Press & Broadcasting Freedom
- Chartered Institute of Journalists
- Central Office of Information
- David Hutchison (Glasgow Caledonian University)
- Global Radio
- Google
- Institute of Practitioners in Advertising
- Incorporated Society of British Advertisers
- Kent Messenger Group
- LGCommunications
- Local Government Association

- Local Media Alliance<sup>63</sup>
- London Borough of Hammersmith & Fulham
- News International
- The Newspaper Society
- National Union of Journalists
- Northwest Regional Development Agency
- Observer Standard Newspapers
- Odey Asset Management
- Periodical Publishers Association
- RadioCentre
- Scottish Daily Newspaper Society
- Society of Editors
- Space and Time
- ThinkBDW
- Tindle Newspapers
- UTV Radio

---

<sup>63</sup> Comprising: Johnston Press, Newsquest, Trinity Mirror, Northcliffe, Archant, Guardian Media Group, DC Thomson, and the Newspaper Society.

## **B LMA ADVERTISER SURVEY**

B.1 The LMA and its advisers, OC&C Strategy Consultants (OC&C), commissioned Ugam, a market research company, to carry out a telephone-based survey of 800 local advertisers in four catchment areas. 200 respondents were sourced from each catchment, which were chosen to reflect a range of competitive scenarios for the relevant local newspapers and their advertising customers:

- Worcester – small city, multiple publishers
- Brighton – small city, sole publisher
- Coventry – large city, multiple publishers
- Newcastle – large city, sole publisher.

B.2 Within each catchment area, 50 respondents were sourced from each of four advertising categories – property, recruitment, motors, and retail/leisure – giving 200 respondents from each advertiser category in total. The sample of respondents included advertisers who do not currently advertise in local newspapers.

B.3 The main questions that the survey sought to address were:

- How is local advertising split across media currently?
- How might advertising spend on newspapers change if the price of newspaper advertising increased? This can generate estimates of demand elasticities.
- Where would advertising customers switch to if their main current newspaper closed? This can generate estimated diversion ratios.

B.4 Across all the main advertising categories there were relatively few local advertisers who currently only use local newspapers for their advertising (a range of 6 to 16 per cent as a proportion of advertisers, or 4 to 12 per

cent when weighted by amount of spend). This is consistent with the idea that most advertisers use a portfolio of advertising options.

B.5 Other survey questions asked about the share of local advertising allocated to different media for the different advertising categories. Responses suggested some significant variation across categories in terms of the share allocated to local newspapers. According to the responses, local newspapers were a relatively less important medium for motors and recruitment advertising (where online sources had a larger share) than they were for property and display advertising (where local newspapers accounted for more spend than online).<sup>64</sup>

**Table B.1: Survey results on media shares of local advertising spend by advertising category**

	Property	Motors	Jobs	Display
Local newspapers	48%	22%	26%	34%
Internet	34%	42%	48%	16%
Radio	n/a	5%	n/a	5%
Other	18%	30%	27%	46%

Source: LMA survey

B.6 OC&C used responses to a combination of questions to try to derive estimates of an implied (own price) elasticity of demand for local

---

<sup>64</sup> Reported shares (from LMA advertiser survey) of local advertising spend allocated to local newspapers for each advertising category: Property 48%, Motors 22%, Jobs 26%, Display 34%.

newspaper advertising for the different advertising categories. Results were also reported separately for single operator and multiple operator catchment areas. The relevant questions asked whether the respondent would switch advertising spend away from local newspapers in response to a given percentage increase in the cost of advertising, and if so, the proportion of spend which they would reallocate.

- B.7 Around 40 per cent of surveyed local newspaper advertisers said that they would switch (some) advertising spend to other media in response to a 10 per cent increase in newspaper advertising rates. For single operator catchment areas, implied elasticities reported by OC&C ranged (across the different advertising categories) from 2.9 to 6.1 for a 5 per cent price increase, and from 1.6 to 3.7 for a 10 per cent price increase. For multiple operator catchment areas, the implied elasticities ranged from 1.9 to 3.1 for a 5 per cent price increase, and from 1.2 to 2.8 for a 10 per cent price increase. In the context of a merger analysis the authorities may use elasticity estimates combined with margin data to consider whether a hypothetical monopolist of the products under consideration could profitably raise its prices.
- B.8 While much of the implied elasticity data suggested significant switching, relevant cost and margin data was not available in this exercise to calculate whether the implied loss of business would render the hypothetical advertising price increases unprofitable. In the context of this exercise, the LMA also noted that the limited sample sizes achieved meant that the estimates obtained were not statistically rigorous.
- B.9 The survey also asked local newspaper advertisers where they would advertise if the main local paper they use was not available. This type of question may be useful in generating information about the closeness of competition between alternative options in a differentiated product market. Significant diversion ratios<sup>65</sup> between products owned by the merging parties will typically indicate scope for unilateral merger effects

---

<sup>65</sup> The proportion of switched demand accounted for by each alternative product.

(internalisation of pre-merger competition generating an incentive to raise prices or worsen non-price factors).

B.10 Results from this survey question were difficult to interpret, partly because most advertisers use a portfolio of advertising sources. Hence if forced to switch spending away from a current local newspaper they may switch part to another paper and part to other media. Also, the reported response data was aggregated across multi-publisher and sole publisher local areas, and this could be biased by limited available newspaper switching options in sole operator areas.<sup>66</sup> Nevertheless, for each advertising group the proportion of respondents which said they would switch to other (non-newspaper) media was at least as high as the proportion who said they would place all their switched spend with another local newspaper instead. For those who said they would switch to other media, online alternatives were comfortably the most popular alternative identified.

### **Caveats in relation to elasticity estimates derived from survey evidence**

B.11 As discussed in Chapter 4, care needs to be taken when interpreting inferences of likely customer behaviour based on opinion, such as some survey results. The range of potential problems with such evidence include:

- Customers may exaggerate the extent to which they would respond to a price increase to appear virtuous, as they may be reluctant to appear vulnerable to exploitation, or reluctant to admit to an irrational decision.
- The responses may measure a short run reaction with customers switching back to the product over time.

---

<sup>66</sup> In sole operator areas, advertisers in free weekly local newspapers may not have had a similar frequency alternative local paper available to switch to. This may tend to bias the reported aggregated results for the combined catchment areas.

- Customers may be over-optimistic about their ability to negotiate to ensure that they would not be faced with higher prices.
- How the question is phrased, for example whether the price increase is expressed as a percentage of the total price or as an absolute increase, can affect the results of the survey.

B.12 Some potential problems with survey evidence can be overcome, or controlled for, with careful survey design. It is therefore advisable for parties to discuss survey proposals in some depth with the authorities before commissioning their own surveys, if the evidence obtained is to be relied upon significantly. In any case, the OFT would usually use survey results alongside other evidence, with more weight being given to survey evidence where it is not contradicted by other available evidence.

## C TYPES OF EVIDENCE

C.1 As noted in Chapter 4, the OFT's March Discussion Paper identified types of evidence of particular potential relevance to local media cases as including the following:

- 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.

## **D SELECTED MEDIA MERGER CASE STUDIES**

### **OFT**

- Dunfermline Press / Berkshire Regional News
- Global Radio / GCap Media
- Amazon / LOVEFiLM

### **Competition Commission**

- Project Kangaroo
- BSkyB / ITV
- Archant / INM

### **Dunfermline Press Limited and Berkshire Regional Newspapers (2008)**

- D.1 In 2008, the OFT examined the acquisition of Berkshire Regional Newspapers (BRN) – a division of Trinity Mirror plc - and its portfolio of free and paid-for local and regional newspaper titles by Dunfermline Press Limited (DPL). The two parties overlapped in the supply of weekly local newspapers and the supply of advertising space within them in a number of areas in Berkshire.
- D.2 In assessing the relevant markets and the existence of competitive constraints, the OFT considered a range of evidence. This included responses to a questionnaire issued to local advertisers, evidence from previous CC and OFT local newspaper merger investigations, circulation data, the submissions of DPL and third parties, cost data, and the internal documents of DPL (including a report by DPL on the estimated impact of the merger on revenues and profits). In addition, DPL commissioned two surveys, which focused on market definition

questions, and involved 337 advertisers and around 300 readers from the area.

- D.3 Following the investigation, the OFT decided that its reference test was met in relation to the supply of weekly local newspapers and advertising space in weekly local newspapers in Slough and Windsor. DPL offered undertakings in lieu of a reference to the CC, consisting of the sale of the *Express* series component of BRN, and these undertakings were later accepted.

### **Product Market**

- D.4 The OFT began by considering the relevant product market. The first question addressed was whether the market should include regional and national titles in addition to local newspapers. The evidence on this point was mixed. Almost all of the advertisers that the OFT contacted advertised only in local media, with only a small minority saying that they use or would consider using the regional or national press. On the other hand, the DPL survey suggested that regional and national newspapers may confer some constraint on local newspapers in the area, although the strength of that constraint was unclear due to the way the questionnaire had been drafted. Taking previous local newspaper cases as a starting point, the OFT decided that the evidence was insufficient to merit a departure from the approach taken in the past, and so excluded regional and national newspapers from the relevant market definition.
- D.5 The OFT decided that newspapers of frequencies other than weekly should not be included in the relevant product market on the basis of submissions from advertisers, none of whom agreed that publications of different frequency were directly substitutable for a particular advertising campaign.
- D.6 DPL put it to the OFT that a wide range of other media provided a viable alternative to those advertising in local newspapers, including the internet, locally distributed magazines, advertising-only publications, local radio, classified directories and direct mail. Although DPL argued

that advertisers refer to other media when seeking to negotiate prices, no conclusive evidence was provided to the OFT on this point, and responses from third parties were mixed. The survey evidence and OFT questionnaires suggested that most advertisers did not consider magazines, advertising-only publications or local radio to be effective substitutes, and these media types were excluded from the relevant product market, in keeping with previous cases.

- D.7 The results of the survey were more supportive of the idea that direct mail and the internet should be included in the product market. Questions asked in the OFT questionnaire and the DPL surveys, along with management accounts provided by DPL, were used to prepare a critical loss analysis. This analysis showed that whether other media types should be included in the relevant product market was finely balanced. As such, the question of whether the relevant product market should include online advertising services and direct mail was left open.

### **Geographic market**

- D.8 In considering the geographic market, the OFT took as a starting point the area covering those JICREG<sup>67</sup> areas where the parties' titles overlapped significantly – as had been used to delineate geographic markets in previous local newspaper merger investigations – and then considered the need to depart from this definition. One area (Ascot) where the increment in share of circulation as a result of the merger was very small was excluded from the analysis. Other than this, the OFT decided to define the geographic market as all overlapping JICREG circulation areas, resulting in a contiguous area consisting of Slough, Windsor, Maidenhead, Eton, Bourne End, Datchet Colnbrook and Iver.

---

<sup>67</sup> Joint Industry Committee for Regional Press Research. JICREG is an industry body which collates data on its paying members' publications.

## Competitive Assessment

- D.9 The theory of harm underlying the investigation was based on the concern that the merger would lead to higher prices or lower quality services for readers or advertisers as a result of the removal of a direct competitor for readers and advertising revenues.
- D.10 This concern was substantiated by the observation of very high post-merger shares of supply of weekly local newspapers for the resulting enterprise (estimated to be 75% aggregated across the geographic area, and nearly 100% in Slough and Windsor), and the perception that the two providers were each other's closest competitor prior to the merger. It was not possible to calculate shares of supply including local advertising expenditures on the internet and direct mail from the data available.
- D.11 Evidence from DPL on its post-merger plans, as well as internal documents - including an early version of the merger's estimated revenue and profit implications – led the OFT to reach the conclusion that readers would likely be worse off as a result of the merger.
- D.12 DPL argued that the merger would not result in a detriment for advertisers because of the competitive constraint presented by direct mail and internet advertising, and the possibility of entry or expansion in the market. However, the OFT's advertiser questionnaire and third party comments suggested that the parties were each other's closest competitor in the overlap areas, a contention that was supported by diversion ratio estimates and some internal DPL documents. Survey evidence, supported by comments from third parties, indicated that demand-side substitution amongst advertisers may not occur to an extent sufficient to constrain the behaviour of the merging parties. As a result of this evidence, the OFT was not able to reach the conclusion that the constraint imposed by other media types would prevent the merger from resulting in adverse effects.
- D.13 With regards entry and expansion, DPL (as well as other publishing groups) submitted to the OFT that the barriers to entry and expansion

were low in the relevant market. However, the OFT found little evidence of entry occurring in the past - either in the market in question, or local newspaper markets in the UK more generally – and third party remarks attested to the existence of a large incumbency advantage. The OFT were not able to identify any third parties with intentions or plans to enter into the relevant local markets.

## **Conclusion**

- D.14 As a result of the analytical steps set out above, and the evidence reviewed, the conclusion was reached that there was a realistic prospect of a substantial lessening of competition in the supply of weekly local newspapers and advertising space in weekly local newspapers in Slough and Windsor.

## Global Radio UK Ltd and GCap Media plc (2008)

- D.15 In 2008, the OFT investigated the acquisition of GCap Media – a publicly-listed commercial radio company with 71 local analogue radio licences, one national licence and a number of digital licences - by Global Radio UK, a privately-owned UK radio group. Prior to the merger, Global accounted for approximately ten percent of all UK commercial radio revenues, and GCap around a third.
- D.16 Four relevant overlaps were identified – the supply of regional radio advertising in the East Midlands, the West Midlands, London and at a national level. Because of the heterogeneity in the parties' product offerings, the OFT concentrated on the existence or otherwise of competitive constraints in the market, rather than focusing unduly on reaching a firm conclusion on market definition. In assessing the extent to which the parties' exerted a competitive constraint on each others' stations, the OFT used a variety of different evidence, including the submissions of the parties, customers and third-parties, evidence on the demographics served by the parties' stations and their competitors, margin data, customer surveys, customer overlap and buy-around analyses and evidence from previous local radio merger investigations.
- D.17 The OFT concluded that, in the Midlands, there existed a realistic prospect of a substantial lessening of competition in the supply of airtime for regional radio advertising campaigns as a result of the merger. In the London region, the OFT determined that concerns about competition in the market would be outweighed by efficiencies associated with the merger, and so did not reach the conclusion that the merger would result in a SLC. Evidence in the form of empirical research from the US radio market, documents outlining the parties' plans subsequent to the merger, customer responses, survey data, and examples provided by the parties of where efficiencies had been achieved in the past was used to substantiate the existence and relevance of these efficiencies.

## **The competitive constraints affecting regional local radio advertising services in the East and West Midlands**

- D.18 The parties' radio stations overlapped significantly in the Midlands, where GCap owned a number of local radio stations, and Global ran three regional stations – one in the East Midlands and two in the West Midlands. The overlaps were such that, prior to the merger, the radio stations of Global and GCap might have competed for customers purchasing regional advertising campaigns – either on Global's regional stations, or as a package spread across a number of GCap's local radio stations. The OFT calculated that Global and GCap's stations received 60-70 percent of non-contracted advertising agency expenditure on local radio in both the East and West Midlands regions, and 70-80 percent of direct customer advertising expenditures.
- D.19 The OFT considered whether or not sufficient competitive constraints existed in the two areas to assuage concerns about the impact of the merger on competition in the East and West Midlands local radio markets. Although the two regions were considered separately by the OFT, the types of evidence used in forming a view on competitive constraints in the two areas were similar.
- D.20 A number of pieces of evidence indicated that the merger might be problematic. First, the OFT observed that, in both of the regions the radio stations of the two parties appeared to be targeted at the same demographic, strengthening the argument that they were competitors prior to the merger.
- D.21 Second, diversion ratios were estimated using customer surveys carried out by the British Marketing Research Board (BMRB), and these suggested that, for regional advertising customers, the merging parties were the preferred alternative to each other. This supported the idea that they were close competitors prior to the merger. The results of the surveys were used to produce a critical loss analysis, which did not support a product market defined to include advertising on media types other than radio in either the East or the West Midlands.

- D.22 Third, advertisers in the region expressed their concern to the OFT about the impact of the merger on prices, given the absence of equivalent alternatives. In the East Midlands, some advertisers were able to give examples of instances when they had played off Global and GCap against each other in the past to obtain better prices than they would otherwise have been able to. Customer overlap analyses from both of the areas showed that a material proportion of Global customers also advertised on GCap's stations, and bought adverts on a selection of GCap stations as part of regional packages.
- D.23 The parties submitted that there was significant competition from other radio stations, and that this would prevent any of the unilateral effect concerns from being realised. Buy-around analyses were submitted by the parties for both regions, and these were argued to show that advertisers had substitutes available to them. However the results of the analyses were questioned by the OFT, given the generic weaknesses of this type of evidence, and the fact that they were contradicted by other evidence. In the East Midlands, a number of third parties indicated that some customers considered the parties' stations as the only two alternatives for advertisers seeking to operate regional campaigns. Customers in the West Midlands argued that the parties owned the main stations, and that the only alternatives served different audience profiles.
- D.24 The parties also proposed that other media would provide a competitive constraint, and gave a number of examples of customers switching to different media in both the East and West Midlands. The OFT considered that there was too little evidence to conclude that other media types would constrain the merged enterprise, and this was supported by estimates of the diversion ratio from Global to other media, derived using the results of the BMRB survey.
- D.25 The OFT considered the possibility that countervailing factors could constrain the merged entity. However, insufficient evidence was found to sustain the contention that buyer power was strong enough to act as a constraint and, further, the OFT did not consider that entry would be sufficient to present a competitive constraint to the parties, given the existence of regulatory barriers to entry in the market, and analysis from

past local radio merger investigations, which had not highlighted entry as a likely constraint in regional radio markets.

- D.26 As a result of the above, the OFT concluded that there existed a realistic prospect of a substantial lessening of competition in the supply of airtime for regional radio advertising campaigns in the East and West Midlands as a result of the merger.

### **The competitive constraints affecting regional local radio advertising services in Greater London**

- D.27 The OFT also considered the competitive impact of the merger in London, where both Global and GCap Media owned regional radio stations prior to the merger. As before, the share of total local radio advertising expenditures flowing to the stations of the merging parties was high, and advertisers voiced concerns about the consequences of the merger. There was again little evidence that entry or countervailing buyer power would be sufficient to place a constraint on the merged entity. For this reason, the OFT felt that the merger raised prima facie unilateral effects concerns.
- D.28 However, unlike in the Midlands, the parties' London stations served different demographics and did not appear to have been close competitors prior to the merger. The differences in the target audience of the parties' radio stations in London, as well as survey evidence, suggested that the greater competitive constraint on the parties' prior to the merger was derived from the London stations of another commercial radio group, Bauer.
- D.29 A number of potential customer benefits related to the merger were identified. One such efficiency followed from the idea that advertising prices could be set more efficiently subsequent to the merger, as the complementarity between advertising on Global and GCap's radio stations could be taken into account, preventing the problem of double marginalisation. At the same time, the transaction costs of only having to deal with a single supplier were expected to be lower than those involved in dealing with two. Survey evidence indicated that a material

proportion of advertisers would be in a position to benefit from efficiencies of this type. The parties also submitted evidence of instances where Global had lowered its prices for multi-station campaigns in London in the past, suggesting that the price savings could be substantial. The OFT determined that the efficiencies would be passed on to consumers because the parties, in seeking to maximise their profits, would have the incentive to do so.

- D.30 A second efficiency was also highlighted, connected to the proposition that the merger would lead to a change in the positioning or format of the radio stations post-merger, increasing the audience of the stations, and so increasing the value of the service to advertisers. In considering the likelihood of an efficiency of this type being realised, the OFT examined the merging parties' post-merger plans regarding brand reposition (and Global's track record in brand re-positioning), customer responses regarding the merger - which were generally favourable - and the submission of the parties illustrating the need for GCap to restructure, giving motivation for brand repositioning. Evidence on product repositioning of radio stations in the US following mergers was also considered, and substantiated the proposition.
- D.31 Although, like in the Midlands, the share of total advertising expenditures flowing to the stations of the merging parties in the area was high and there was little evidence supporting the existence of countervailing constraints, the parties did not appear to be close competitors prior to the merger. Because of this, the OFT judged that whether or not there was a realistic prospect of a substantial loss of competition resulting from the merger in terms of unilateral effects was finely balanced.
- D.32 However, the OFT determined that there were demonstrable, merger-specific, rivalry-enhancing demand-side efficiencies in London, that were likely to be passed on to customers. These efficiencies were judged to be much stronger than those likely to arise in the Midlands, where the effect of the merger was to combine close substitutes, and brand re-positioning efficiencies were unlikely to be realised because of the geographical coverage of the stations involved. The OFT determined that

the efficiencies would 'tip the balance', and so determined that there was not a substantial lessening of competition in the London regional radio advertising market as a result of the merger.

### **Effects of the merger at a national level**

- D.33 The parties submitted that the relevant market at the national level extended beyond local radio to other media, such as a press and television. As evidence of this, they referred to critical loss analyses based on the two BMRB surveys referred to above, both of which indicated that a sufficiently large number of customers would switch all or some of their advertising expenditure away from radio to render a 10 per cent increase in the price of radio advertising unprofitable.
- D.34 The OFT had concerns about the probative weight of the analysis for three reasons. First, the critical loss used a minute of advertising as the increment of business lost, but evidence submitted by the parties elsewhere indicated that their prices were charged for whole campaigns, rather than per minute. Second, the specifics of the survey question used to estimate the impact of a ten per cent price increase on demand was of questionable robustness. Third, it seemed possible that a hypothetical monopolist would price discriminate, and, rather than raising prices universally by ten per cent, increase different prices by different amounts. After these factors were taken into account, the OFT concluded that the critical loss analysis indicated that a product market no wider than radio advertising was appropriate. On this basis, the parties share of national radio advertising revenues amounted to a [40-50] per cent, too high to rule out prima facie competition concerns.
- D.35 Nevertheless, considering the possibility of unilateral effects, the OFT did not find it necessary to conclude whether the merger gave rise to a realistic prospect of a substantial lessening of competition at a national level, via the creation of market power in the East and West Midlands. Even if this were the case, remedies offered in the East and West Midlands areas that were sufficient to address the substantial lessening of competition in those regions would alleviate any issues arising from the merger at a national level.

D.36 The OFT considered the possibility of non-horizontal national effects. In particular, some third parties expressed concern that the merged entity could practice conditional selling, tying sales of advertising space on less desirable stations to its must-have stations, while some rival radio stations raised concerns about the possibility of foreclosure. However, the OFT did not consider that the evidence available showed that the parties had stations to which there was no alternative, that the merger would exacerbate any instances where the parties had strong positions in local regions pre-merger, or that the parties would be able to foreclose competitors at the national level as a result of the merger.

## **Amazon Inc. and LOVEFiLM International Ltd, 2008**

- D.37 In February 2008, the OFT investigated the anticipated acquisition of Amazon's online DVD rental (ODR) subscription service by LOVEFiLM International (LF), a European online DVD and games rental subscription service with UK sales of £41m in 2007. As part of the transaction, LF would acquire Amazon's DVD rental service together with a cash payment and certain marketing commitments in return for a shareholding in LF.
- D.38 The parties overlapped in the supply of ODR subscription services – whereby customers pay a fixed monthly fee entitling them to receive DVDs through the post. Internal documents provided by the parties played a major role in determining the decision reached by the OFT regarding the nature of the relevant product market, the extent to which the parties' ODR services competed with each other, and the existence of countervailing constraints. Other evidence used in the investigation included two surveys commissioned by the parties prior to the merger, margin data and submissions from the parties' customers.

### **Geographic market**

- D.39 The relevant geographic market was taken to be UK-wide, as both parties, and all ODR suppliers, were observed to operate a national pricing structure, national advertising campaigns, and national websites. Additionally, the OFT did not observe any evidence of price discrimination between areas, and customers were not able to import services from abroad.

### **Product market**

- D.40 The OFT determined that, post merger, LF would enjoy a near monopoly in the provision of ODR in the UK. In order to assess competition between ODR and other delivery channels, the OFT considered two surveys commissioned by the parties prior to notification of the merger to the OFT, and used the results of these surveys to carry out a critical loss analysis. The analysis suggested that the relevant market was wider

than just ODR, but not substantially. Alternatively, when the effect on the merged enterprise of a price rise for LF's ODR service but not Amazon's was considered (the parties indicated that one of the pre-conditions of the sale was that LF would be required to offer the acquired Amazon subscribers their same existing rates and packages post merger), the critical loss analysis suggested that the market was not wider than ODR.

### **Competitive assessment**

- D.41 The OFT determined that, based on volume, the merged enterprise would have a combined share of 92 per cent share of ODR, with an increment of 13 per cent. The shares of supply when other DVD rental services, pay per view services and DVD retail were included in the market were also calculated.
- D.42 In determining the likelihood of unilateral effects as a result of the merger, the OFT first considered LF and Amazon's gross margins, and the diversion ratios between the two parties, which were estimated using the parties' survey data. The combination of high diversion ratios and gross profit margins can give a strong indication of the potential for unilateral effects concerns. This exercise suggested that a presumption of unilateral effects should be applied in this case unless there was sufficient other contrasting evidence to rebut it.
- D.43 The parties submitted that this analysis significantly overstated the competitive constraints that the parties placed on each other prior to the merger, and that the merged entity would face competitive constraints from a range of current and future sources. They provided a large volume of internal documents created in the ordinary course of business to substantiate this, including presentations, reports and email exchanges. The OFT noted that documents such as these carried much greater probative weight than qualitative assertions of the constraints.
- D.44 Internal documents were submitted which supported the contention that Amazon placed a relatively weak constraint on LF prior to the merger. These included monthly board reports, which contained updates on the

competitive environment in the provision of video content services, and showed that LF did not seem to monitor Amazon more closely than other providers. References to Amazon always occurred in the context of broader comments or comparisons relating to other providers of video content, indicating that Amazon's competitive behaviour rarely gave LF cause for concern. There was no evidence that LF had responded to any of Amazon's promotions. It was also clear that LF had not promoted its activities by reference to Amazon, and that Amazon focused its marketing activities on its own website, primarily promoting its service to existing Amazon retail customers. LF actively competed with other ODR providers for marketing partnerships, while Amazon did not.

- D.45 Internal documents were also used to support the contention that, post merger, LF would continue to face a constraint from rival ODR providers other than Amazon. Board reports suggested that LF was concerned with other providers, and an email exchange was provided showing evidence of LF responding to a new marketing scheme of another competitor in the ODR market in the past. A number of internal emails were provided showing LF actively competing for marketing partnerships with other parties in the ODR market (but not Amazon).
- D.46 LF argued that it monitored changes in the strategy, marketing activities, product launches and prices changes of a number of non-ODR suppliers. This was supported by board reports, email exchanges, a report on brand communication and a study by a media agency, who were commissioned by LF to track the marketing spend and activity of a wide range of video providers.
- D.47 Additionally, LF presented evidence that it had taken action on the basis of this monitoring. First LF showed that its day-to-day operations took place in the context of a wider video content market. Email exchanges showing that LF were advised not to share information with a non-ODR provider were presented, as was documentation showing plans to run an advertising campaign expressly targeting the customers of two non-ODR providers' customers and contractual conditions that LF did not sell advertising space to any satellite or cable broadcasters, DVD rental/retailers, or any VOD or download providers.

- D.48 Second, LF provided evidence that actions had been taken aimed at addressing the competitive constraint imposed by non-ODR providers. This included emails which referred to partnership agreements which had been contemplated by LF in reaction to the competitive pressure posed by non-ODR providers, a draft business plan showing how prices for a new pay-as-you-go service should be set with reference to bricks-and-mortar DVD rentals, and flyers which had been produced which specifically compared LF with the service of Sky and cable TV.
- D.49 Next, LF submitted a competitor impact analysis which suggested that non-ODR video content providers' TV advertising campaigns were associated with reduced LF's subscriptions, compared to the previous year. They also argued that non-ODR suppliers had changed their prices and advertising strategies in response to the competitive constraint presented by LF.
- D.50 LF put it to the OFT that they were also constrained by the characteristics of their customers. First they argued that their customers were well-informed and likely to shop around, comparing product quality and prices, citing the degree of customer churn in the ODR market as evidence of this. Evidence from customer exit surveys was presented to show that a significant proportion of customers leaving LF's service gave price as the primary reason for doing so. Further, LF submitted that a significant proportion of their new sign-ups came from either word-of-mouth or via a referral, ensuring that LF is dependent on its reputation as a means of winning customers. Evidence from Norway was cited to show that high prices are not sustainable, even where there is only one ODR provider. Finally, LF submitted that ODR is seen as a way to develop its brand, widen its customer base and improve its reputation, with the aim of becoming a large-scale platform and expand its business into online video content delivery. LF contended that this provided a further incentive for them to maintain their reputation amongst customers.

## Other countervailing constraints

- D.51 Approximately [10-30] per cent of LF's sales were seen to be via white label operators, such as Tesco. The OFT identified a number of alternative ODR suppliers which were capable of providing a similar service to LF, and LF submitted that negotiations with white label operators in the past had led to LF revising its offering. As such, the OFT considered that buyer power from white label suppliers would represent a relevant additional constraint subsequent to the merger.
- D.52 The OFT also considered the ability of existing ODR providers to expand their services, or new firms to enter the market. Evidence of expansion in the US indicated that this would be possible for Blockbuster - an established player in the bricks-and-mortar DVD rental market - although the OFT noted that Blockbuster had lost share in the ODR market in the past couple of years. The OFT was made aware of 12 instances of entry into the ODR market, and did not consider that the barriers to entry were insurmountable. Despite this, they noted that very few entrants had managed to develop and sustain much market share, consistent with the idea that barriers to entry in the form of sunk customer acquisition and retention costs were high. For this reason, it was thought unlikely that large scale entry would take place unless from entrants that already had substantial existing customer website traffic and a strong brand, or were sponsored by large white label operators (a possibility that was considered to be material).
- D.53 Finally, the OFT contacted numerous companies active in the provision of video content delivery services during its investigation, but none raised any concern in relation to the anticipated transaction. Four unsolicited customer complaints were received, identifying concerns regarding the lack of consumer choice that could arise as a result of the merger, as well as potential service quality reductions for Amazon customers.
- D.54 Following the above, the OFT reached the conclusion that competition from both competing ODR providers and from other forms of non-ODR supplier (and other countervailing constraints such as buyer power from

white label suppliers) were such that it did not believe it to be the case that the merger would be expected to result in a substantial lessening of competition within a market or markets in the UK.

## 'Project Kangaroo', CC inquiry, 2009<sup>68</sup>

- D.55 In 2008, the proposed joint venture between BBC Worldwide, ITV and Channel 4 to provide a video on demand (VOD) service was referred to the CC. The joint venture proposed to supply VOD content to consumers with a PC and to third party retailers in the UK.
- D.56 In defining the market, the CC considered the market definition for the supply of VOD content at the retail and wholesale level. Within that the CC considered what content should be included in this market, and whether the market should be further segmented. The CC then considered the market definitions for advertising on online VOD services and content acquisition.
- D.57 The CC concluded that the joint venture would lead to a substantial lessening of competition for the supply of UK television VOD content at the retail and wholesale levels.

### **The supply of VOD content at the retail and wholesale level**

- D.58 The CC considered arguments that consumers were willing to substitute between different forms of VOD content and the technologies and platforms used to deliver that content. Three empirical studies were submitted by the parties to the CC:
- an analysis of consumer viewing patterns on UK linear TV to illustrate the proportion of consumers that watched both UK and non-UK content and that watched both film and TV content,
  - an analysis of the DVD sector to illustrate the proportion of people who bought UK and non-UK DVD content and the proportion that bought TV and film DVD content,

---

<sup>68</sup> The full report is available at:

[www.competition-commission.org.uk/inquiries/ref2008/kangaroo/index.htm](http://www.competition-commission.org.uk/inquiries/ref2008/kangaroo/index.htm)

- a consumer survey aimed at illustrating likely substitution patterns for VOD consumers. This survey concluded that consumers would be willing to switch between UK and US content.
- D.59 The CC considered that the first two studies did not illustrate the extent of substitution between UK TV content and other forms of content as they did not illustrate how viewers would react to a small but significant change in the relative price of UK TV content. In relation to the survey, the CC considered that it overestimated actual switching because consumers were asked about relatively high increases in the price of UK content relative to other options; in addition, the price points used in the survey were considered to exceed those that the parties actually proposed to set and therefore did not reflect current market conditions.
- D.60 The CC then examined the key characteristics that make VOD content attractive in the UK, and concluded that an important characteristic is that VOD content has previously been broadcast on linear TV. The CC then considered a number of consumer surveys indicating content preferences by examining the importance consumers placed on linear channels and consumer VOD content preferences by broadcast channel.
- D.61 The CC also considered internal strategy documents from the parties which indicated the importance of different content types, and analysed VOD viewing data to assess consumer substitution patterns by looking at the effect of availability of content on the demand of content from another provider. The CC also considered the patterns of viewer substitution between UK and non-UK content and concluded that in general, UK content was a good substitute for non-UK content but not vice versa, and therefore all UK TV VOD content should be included in the same market.
- D.62 The CC then examined whether other types of VOD content provided a constraint on a hypothetical monopolist of UK TV VOD content. In doing so, it considered third party views, consumer surveys and internal documents which indicated the importance of UK content for successful VOD. In conclusion overall, the CC found that non-UK VOD content was not a good substitute for UK content, although some non-UK content

might be substitutable, for example content from the same genre, or non-UK content that has been broadcast on linear TV. In drawing this conclusion, the CC also considered the negotiations for the supply of wholesale content as an indicator of the preferences of VOD viewers.

- D.63 The next stage of the CC's approach considered whether film, short form and user generated content were good substitutes for UK TV VOD content. Third party views on substitutability indicated that film content was not a close substitute due to differing demand and pricing structures, and that short form and user generated content were not close substitutes due to differences in production quality and programme length.
- D.64 The CC also considered whether the market should be further segmented according to delivery mechanism. Consumer research illustrated that consumers' preference was to watch VOD on a TV rather than a PC. However, the CC also considered that the devices accessed via PC for watching VOD are improving and VOD could become available via a TV without subscription. The CC concluded that different delivery mechanisms reflect commercial choices driven by providers' business models and considered it was not appropriate to segment the UK TV VOD market according to delivery method or business model.
- D.65 Finally, the CC examined the extent to which TV content from sources other than VOD provided a constraint on a hypothetical monopolist of UK TV VOD content. In doing so, the CC considered that these other forms of TV content provision were restricted in flexibility and therefore substitutability. Evidence from third party views also suggested a lack of substitutability, and the CC therefore concluded that alternative sources of content were not sufficiently close substitutes to provide a competitive constraint to a UK TV VOD content provider.
- D.66 The CC therefore concluded that the market for the retail and wholesale supply of VOD content included long form VOD content delivered by either internet or TV based services, but excluded film, short form and user generated content, illegal content, DVDs, Personal Video Recorders and linear broadcast TV and non-UK content. In terms of the geographic

market, the CC concluded it should be no wider than the UK as UK VOD targeted UK based consumers and the relevant VOD rights applied to the UK.

### **Advertising on online VOD services**

- D.67 The CC identified two types of advertising that would be sold by the joint venture: static display (non-video) and video advertising. It considered whether online video and online non-video advertising should be considered separate markets, whether online VOD non-video and video advertising was a separate market and whether TV advertising should be included in the same market as online advertising.
- D.68 In relation to non-video and video advertising, evidence from the parties and third parties informed the CC that advertisers regarded the formats as largely interchangeable, and that suppliers readily switched between different advertising formats. The CC also considered third party views suggesting that it was not appropriate to define a separate market for online advertising, and also noted that previous decisional practice of the European Commission did not distinguish separate markets according to format.<sup>69</sup>
- D.69 In relation to the question of whether online advertising on VOD websites constituted a separate market, the CC formed the view that the ability of online VOD retailers to target particular audiences was not unique, based on a lack of evidence to suggest that the targeting capabilities of UKVOD were valued by advertisers over that of other websites.
- D.70 In examining whether the relevant market should include TV advertising as well as online advertising, the CC considered the views of the parties (who stated that the markets were distinct on the basis of the separate advertising buying teams, budgets and pricing models), third parties

---

<sup>69</sup> Commission Decision of 11/03/2008: Case No. COMP/M.4731 *Google/DoubleClick*, available at: [http://ec.europa.eu/competition/mergers/cases/decisions/m4731\\_20080311\\_20682\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf)

(who argued that these forms of advertising were similar), and views obtained from the *BSkyB/ITV* inquiry that whilst online advertising was the closest substitute for TV advertising, it was generally used for different purposes. The CC further noted the specific targeting capabilities of online advertising compared to other media, and previous decisional practice of the European Commission and itself,<sup>70</sup> which concluded that online advertising was a distinct market. The CC therefore concluded that in relation to the advertising customers of the parties, the relevant market was online advertising (including both video and non-video advertising) in the UK.

### **Content acquisition**

- D.71 The CC identified three main sources of acquiring audiovisual content for UK broadcasters: in house production, commissioning production from third party companies and licensing rights to exploit existing content in the UK. The CC examined evidence illustrating that the parties had in house production facilities and/or obligations to commission a proportion of relevant content from independent producers. The CC considered third party UK production to be likely to be in the same market as in house production on the basis that third party producers compete with in house production services. The CC also concluded that the geographic scope of the content acquisition market would not be likely to be wider than the UK.

---

<sup>70</sup> EC, *Google/DoubleClick* (see previous footnote).

Competition Commission Inquiry *Classified Directory Advertising Services*, available at: [www.competition-commission.org.uk/inquiries/ref2005/classdirec/index.htm](http://www.competition-commission.org.uk/inquiries/ref2005/classdirec/index.htm)

## **BSkyB/ITV, CC inquiry, 2007-08<sup>71</sup>**

- D.72 In 2007, the then Secretary of State for Trade and Industry referred the acquisition by British Sky Broadcasting (BSkyB) of 17.9 per cent of the shares in ITV plc (ITV) to the CC. The CC concluded that BSkyB had acquired the ability to materially influence the policy of ITV such that it would be able to block special resolutions proposed by ITV management and would be able to influence ITV's strategy so as to substantially lessen competition. Therefore, the CC concluded that the acquisition was likely to operate against the public interest.
- D.73 The CC considered market definition in respect of three different aspects: the market for audiovisual services, the market for advertising and the market for national television news programme supply.

### **The market for audiovisual services**

- D.74 ITV argued that the relevant product market for audiovisual services should comprise all television; BSkyB, on the other hand, argued that the product market should include: free to air (FTA) services, Pay-TV packages, Video on Demand (VOD) services, TV services over the internet and DVD sales and rentals.
- D.75 The CC examined each of the areas that BSkyB argued should be included in the market in addition to whether the market should be segmented by distribution platform and whether the possibility of supply side substitution existed. In defining the market, the issues considered by the CC were as follows:
- whether all Pay-TV services were in the same market,
  - whether FTA and Pay-TV services were in the same market,

---

<sup>71</sup> The full report is available at:

[www.competition-commission.org.uk/inquiries/ref2007/itv/index.htm](http://www.competition-commission.org.uk/inquiries/ref2007/itv/index.htm)

- whether the market should be segmented by distribution platform,
- whether VOD should be included in the market,
- whether television over the internet should be included in the market, and,
- whether DVD sales and rentals should be included in the market.

D.76 The CC's approach to each of these issues is outlined below.

D.77 In examining whether all Pay-TV services should be included in the same market, the CC considered evidence of customer switching, including internal reports from BSkyB and evidence drawn from BSkyB documents and advertising campaigns. This evidence suggested that BSkyB and Virgin actively targeted each other's customers. Therefore, the CC concluded that all Pay-TV packages were reasonable substitutes for each other and formed part of the same market.

D.78 The CC then considered whether FTA services formed part of the same product market as Pay-TV packages and concluded that they should be included in the product market. In reaching this conclusion, the CC considered evidence including:

- internal reports from the main parties,
- internal analysis by BSkyB on the effect of the availability of digital terrestrial television on their own demand,
- evidence of pricing and innovation in response to competition,
- BSkyB subscriber numbers and how these had changed over time, and,
- third party evidence on the closeness of competition between FTA and Pay-TV services.

D.79 In considering the segmentation of the market by distribution platform (for example, distribution by satellite, or cable), the CC observed that

distribution platform was a very weak differentiating factor, and therefore concluded the market should not be segmented in this way.

- D.80 The CC then considered whether the market should include VOD content, television via the internet and DVD sales and rentals. In relation to VOD content, the CC observed that as many retailers provide linear and VOD content, and that most content is suitable for both forms of delivery, providers can choose the means of delivery that suits their commercial offer best. Therefore, the CC concluded that VOD content should be in the same relevant market as linear TV.
- D.81 In terms of whether television via internet should be included in the relevant market, the CC drew on Ofcom research into the usage of television via internet and the proportion of households with broadband internet connections. It also considered that factors such as demand and the quality of the picture provided by television via internet, and concluded that providers of TV services would not be constrained by television via internet, and therefore it should not form part of the relevant product market.
- D.82 In relation to DVD sales and rentals, the CC considered that while the content available on DVD is the same as content available on in the 'all TV' market, it noted that DVDs do not provide an alternative to much of the content available in the all TV market, for example, live content. Therefore, the CC considered that DVDs did not form part of the relevant product market.
- D.83 Finally in relation to the product market for audiovisual services, the CC considered the impact of supply side substitution on the market definition, and concluded that new entrants would not be able to supply competing services and therefore supply side substitution should not alter the definition of the market to that concluded by the CC in terms of demand side substitution. In reaching this conclusion, the CC drew on evidence including:
- evidence of firms recently starting to provide TV services in the UK, and,

- third party evidence on the investments required to supply television services in the UK.

D.84 On the issue of the geographic market, the CC concluded that it should be no wider than the UK. In reaching this conclusion, the CC considered the presence of channels owned by companies active outside the UK in the UK, and the technical and licensing restrictions preventing platforms in the UK providing services in other countries. Additionally, the CC considered that language barriers prevented consumers switching to non-UK television services.

### **The market for advertising**

- D.85 The key issue for the CC to consider in terms of the product market for advertising was whether the market for television advertising should be widened to include internet advertising. On the basis of evidence on audience sizes and third party evidence on competition between the sales houses of television providers, the CC concluded that the relevant market should be at least as wide as the market for television advertising.
- D.86 However, third party evidence presented to the CC suggested that while internet advertising was a close substitute for television advertising, it was generally used for different purposes. Furthermore, the CC received third party evidence to suggest that the internet had not been used to build non-internet brands in the same way as television advertising, and faster moving consumer goods companies had yet to advertise extensively on the internet. In light of this evidence, the CC concluded that internet advertising was not a constraint on the pricing of television advertising and nor was it likely to be in the future. Therefore, the product market was defined by the CC as the market for television advertising.
- D.87 In terms of the geographic market, the CC considered that the operating sphere of the parties' advertising houses and the process for selling advertising. It concluded that as the process for selling differs in

countries outside the UK, and the majority of suppliers operate in the UK, the appropriate geographic market was the UK.

### **The market for national television news programme supply**

- D.88 The CC began its analysis by considering the retail provision of news. It received evidence suggesting that news programming was not a decisive factor in driving subscriptions, and that news programmes represented a small proportion of overall television viewing for most viewers. Consequently, it concluded that television news was not a distinct area of programming that attracted a premium from viewers, but rather part of the overall range of programmes on offer.
- D.89 The CC then examined the wholesale provision of national news, and concluded, in light of evidence demonstrating that public service broadcasting (PSB) obligations preventing providers from substituting other forms of content for the news service they provide, that there was a distinct economic market for the wholesale supply of news to channels with PSB obligations.
- D.90 In relation to the geographic market, the CC defined the market as the UK, given that BSkyB only provided news at the national level.

## **Archant Limited and the London newspapers of Independent News and Media Limited, CC inquiry, 2004<sup>72</sup>**

D.91 This CC investigation concerned the acquisition by Archant Limited (Archant) of a series of local weekly newspapers from Independent News and Media Limited (INM) in the Greater London area. This is the most recent example of a local newspaper merger which has been investigated by the CC. The CC concluded that the merger was not expected to result in a substantial lessening of competition and the merger was cleared. The CC examined the geographic market for local newspapers and the relevant product market, and noted that there was a particular interdependence between the product and geographic dimensions of the markets.

### **Geographic market**

D.92 In assessing the extent of the geographic market, the CC looked at two key sources of evidence. Initially, the CC conducted an advertiser survey which demonstrated that a large proportion of respondents (76 per cent) said that they would switch to another newspaper title in the same area in the absence of the main or only Archant or INM title. This evidence suggested that the relevant geographic market for advertising was local; while not definitive in terms of the extent of the geographic market, it did suggest that it was no wider than the area of former INM publishing units.

D.93 The CC then conducted a price concentration analysis to determine whether there was a systematic relationship between advertising yields and a range of concentration across narrowly defined geographic markets. A positive relationship would have suggested that the market was no wider and that additional competitive constraints were not operating. However, the CC found no positive relationship.

---

<sup>72</sup> The full report is available at:

[www.competition-commission.org.uk/inquiries/completed/2004/archant/index.htm](http://www.competition-commission.org.uk/inquiries/completed/2004/archant/index.htm)

D.94 In light of this evidence, the CC concluded that the geographic market appeared to be wider than the circulation footprint of any individual former INM title acquired by Archant, but was nonetheless local and no wider than the area of the former INM publishing units.

### **Product market**

D.95 In defining the relevant product market, the CC considered a wide range of evidence on the extent of substitutability within different categories of local newspapers, and between local newspapers and other forms of news and advertising media (both generally and for specific categories of advertising). On the basis of this evidence the CC concluded that the relevant product market included free and paid-for weekly local newspapers, but could also extend to some other publications, such as advertising-only publications.

D.96 In its investigation, the CC noted that there were a number of features that distinguished local newspapers from other printed and non-printed media which might affect the extent to which they could be regarded as effective substitutes. These features included differences in characteristics such as penetration rates, geographic coverage, advertising mix, target audience and publication and publishing frequency. The CC also noted that there was little evidence of switching between local newspapers and other media, and that there were different prices for different media, reflecting differences in characteristics.

D.97 In terms of advertising, the CC concluded that, although there appeared to be little demand side substitution between different categories of advertising, (for example, between recruitment, property and motoring), supply side substitution may broaden the market to include all categories of advertising.

D.98 The CC considered the extent to which other types of printed media provided an alternative to advertisers, in particular national newspapers, regional newspapers and advertising only publications:

- in terms of national newspapers, the CC considered that, with some exceptions, national newspapers were distinct from local newspapers, serving different needs for advertisers, and therefore they did not constitute an effective substitute for advertisers in local weekly newspapers,
- in terms of regional newspapers providing an effective substitute for local newspapers in terms of some of the requirements of advertisers, the constraint provided was viewed as insufficient to include regional newspapers within the relevant product market, and,
- in terms of advertising only publications, the CC considered that some titles (such as niche titles with some editorial content) might provide effective substitutes, particularly in relation to property, motor and recruitment advertising. However, other forms of publications (such as classified directories) exhibited differences from local weekly newspapers, for example, less frequent publication, which made them less effective substitutes.

D.99 The CC also considered the impact of competition from local authority owned titles. In doing so, it looked carefully at each title before concluding as to whether it could be regarded as an effective substitute to local weekly newspapers. The CC found that some local authority titles were more significant competitors (in terms of how effective they were as substitutes for local advertisers) than others.

D.100 Other potential substitutes for local weekly newspapers were also considered, including the impact of non-print media, such as radio, television, internet or non-print advertising. Survey evidence available to the CC suggested that a significant proportion of customers (53 per cent) did perceive such forms of non-print media as an effective substitute to local weekly newspapers.

D.101 However, the CC noted that the customer survey responses needed to be interpreted with caution, as survey responses to questions regarding hypothetical price rises may not necessarily reflect how customers would react in practice, given the work involved in switching, the

uncertainties over the performance of alternatives and respondents' desire to appear rational to the surveyor. Furthermore, the CC noted that these survey results did not provide any indication of what price rise might induce switching, nor whether customers would in practice switch. In this regard, the CC noted that when asked where respondents would advertise absent their main Archant/INM title, only 16 per cent said that they would advertise in a different medium or not advertise at all. Consequently, the CC concluded that non-print media did not provide a sufficient constraint to warrant inclusion in the relevant product market in this case.

## E US DOJ STATEMENT ON NEWSPAPER MERGERS

- E.1 Extracts from statement by Carl Shapiro (US Department of Justice, Antitrust Division) of 21 April 2009 to the House of Representatives Judiciary Committee (Subcommittee on Courts and Competition Policy):<sup>73</sup>

'In past newspaper merger investigations, the Division has performed a factual analysis to determine whether other media outlets, such as radio, television, and new media, are in the same relevant market as local daily newspapers. In those past investigations, we have found sufficiently strong competition among local daily newspapers to define these products as a relevant market. These conclusions are perfectly consistent with the observation that newspapers have been losing subscription and advertising revenues to other media. A relevant market consists of products that could profitably be monopolized; some degree of competition across market boundaries is the norm. But changes in technology, and in consumer preferences for their sources for news and entertainment, may well make it possible that the facts surrounding a particular future merger or acquisition involving two local newspapers could lead us to conclude that consumers' preferences are such that other media outlets provide a sufficient competitive constraint to alleviate concerns raised by that merger.

Even if we find that local daily newspapers form a relevant antitrust market, that conclusion certainly does not end the analysis. Before concluding that a merger between the two remaining local daily newspapers in a given community should be enjoined, we still need to investigate further to determine if the merger will significantly harm competition. The Division is in general receptive to the argument that a proposed merger generates sufficient synergies to benefit consumers, notwithstanding the resulting loss of competition. That receptivity certainly applies to newspaper mergers.

---

<sup>73</sup> Full text at [www.usdoj.gov/atr/public/testimony/245063.htm](http://www.usdoj.gov/atr/public/testimony/245063.htm)

Especially in today's economic environment, we may be faced with the contention that the newspaper being acquired is a failing firm and thus the merger should be allowed to proceed. In that case, we would analyze the extent to which the assets of the weaker local newspaper, including reporting staff, innovative features, or other valuable attributes of the paper, would exit the market if not acquired by the stronger local newspaper, or whether they could go to other competitors, or support a new competitor.

The Division has considerable experience evaluating claims by merging parties that one of them qualifies for the failing firm defense. Strict requirements must be met for that defense to be invoked, and rightly so. For a free market economy to work to harness the power of competition, rivals must not be able to short-circuit the competitive process, to the detriment of consumers, unless the alternative is imminent exit, which would also involve a loss of competition. Unfortunately, this type of 'tough love' may come into play with increasing frequency during the current economic challenges, simply because we are likely to see an uptick in the number of mergers in which the acquiring firm asserts that the acquired firm (or division) is failing.

Newspapers play a vital role in our society. The Antitrust Division continues to work to protect competition in the newspaper industry. We believe that antitrust analysis is forward-looking and flexible enough to take into consideration the economic and technological pressures facing newspapers as we continue to make market-by-market and case-by-case factual determinations pursuant to the antitrust laws. Vigorous antitrust enforcement will guarantee that this important industry will be as competitive as possible, and that American consumers will have available to them more, rather than fewer, options for getting news and information.'