

dti

**ENTERPRISE ACT 2002:  
PUBLIC INTEREST INTERVENTION  
IN MEDIA MERGERS**

Guidance on the operation  
of the public interest  
merger provisions relating  
to newspaper and other  
media mergers

GUIDANCE DOCUMENT

MAY 2004



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# Executive Summary

Merger law was reformed by the Enterprise Act 2002, which came into force on 20 June 2003. This took Ministers out of the decision-making process for the vast majority of merger cases and left them to be dealt with by the competition authorities – the Office of Fair Trading and the Competition Commission – on the basis of a competition test. However, the Act allows Ministers to intervene in merger cases which raise public interest considerations specified in the Act. The only consideration specified at that time was national security.

The Communications Act 2003 amended the Enterprise Act 2002, specifying new public interest considerations which can be applied to mergers involving newspaper enterprises and broadcasting enterprises (as well as, amongst other things, repealing the newspaper merger provisions of the Fair Trading Act 1973 and making changes to the media ownership and regulation rules). The Enterprise Act procedures allowing for intervention by Ministers can now therefore be used where the media public interest considerations may be relevant to a merger. The assessment of mergers on competition grounds will continue to be the responsibility of the competition authorities.

The Secretary of State may publish advice and information explaining the media public interest considerations specified in sections 58(2A) to (2C) of the Act and indicating how these provisions are expected to operate. Accordingly, this guidance seeks to explain the media public interest considerations and provide an indication of how the Secretary of State expects the provisions to operate in relation to mergers involving newspapers or broadcast media enterprises, and to cross-media mergers involving both broadcast media enterprises and newspaper enterprises.

This guidance sets out the background to the new regime, explains when intervention in media mergers by the Secretary of State is possible, and the process for considering mergers on media public interest grounds. The newspaper sections of the guidance emphasise the continuity of assessment of newspaper mergers on public interest grounds between the current regime and the old regime (the Fair Trading Act 1973), notwithstanding the fact that the procedures are very different. As regards the broadcasting and cross-media public interest considerations, the guidance confirms that, as Ministers indicated to Parliament when bringing forward the relevant amendments to the Communications Bill, intervention will only normally take place where media ownership rules have been completely removed by the Communications Act 2003.

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## SECTION 1

# Introduction

**1.1.** This guidance gives advice and information on how certain media mergers may be considered by the Secretary of State in so-called media public interest cases.

**1.2.** The framework for the assessment of mergers under UK domestic law is set out in the Enterprise Act 2002 (the Act), which came into force on 20 June 2003. The Act requires the Office of Fair Trading (the "OFT") to obtain and keep under review information relating to its functions, including its merger functions, and imposes a duty on the OFT, except in certain specified circumstances, to refer to the Competition Commission (the "CC") for further investigation any relevant merger situations that it believes have resulted, or may be expected to result, in a substantial lessening of competition. Guidance on the roles of the OFT and the CC in relation to mergers is given in the OFT's publications "Mergers: Procedural Guidance (May 2003)" and "Mergers: Substantive Assessment Guidance (May 2003)" (available at <http://www.offt.gov.uk/>) and in the CC's publications "Rules of Procedure (June 2003)" and "Merger References: Competition Commission Guidelines (June 2003)" (available at <http://www.competition-commission.org.uk/>), amongst others.

**1.3.** The Act also permits intervention by the Secretary of State (in practice, the Secretary of State for Trade and Industry) in certain mergers. For mergers which meet the standard jurisdictional criteria for investigation on competition grounds the Secretary of State may issue an "intervention notice". 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. The Secretary of State is also able to intervene in special public interest cases where the standard merger jurisdictional thresholds relating to share of supply and turnover are not satisfied. She does this by issuing a "special intervention notice". There is no competition assessment in these special public interest cases. The Secretary of State can also intervene on public interest grounds in cases which fall to the European Commission under the provisions of the EC Merger Regulation. In this case she issues a "European intervention notice" (see chapter 11 for further details). The only public interest considerations that the Secretary of State may take into account are specified in the Act. The Secretary of State retains the power to add further public interest considerations by statutory instrument.

**1.4.** The only public interest consideration specified when the Act completed its Parliamentary passage was national security, which includes public security (section 58(2)). However, the Communications Act 2003 amended the Act by adding further public interest considerations relating to mergers involving media and newspaper enterprises. These new public interest considerations (referred to collectively in the legislation as the "media public interest considerations") are set out in section 58(2A) to (2C) of the Act. The public interest considerations set out in section 58(2A) and (2B) may apply in the context of mergers involving newspapers; these considerations are

referred to in this guidance as the “newspaper public interest considerations”. The public interest considerations set out in section 58(2C) may apply in the context of mergers involving broadcast media enterprises or cross-media mergers involving both broadcast media enterprises and newspaper enterprises. For present purposes these public interest considerations are referred to as the “broadcasting and cross-media public interest considerations”. The term “media public interest considerations” is used, as in the legislation, to cover all the new public interest considerations.

**1.5.** The new regime also provides an advisory role for the Office of Communications (“OFCOM”) after the Secretary of State intervenes in a case on the grounds of media public interest considerations. OFCOM does not advise the Secretary of State on whether to intervene in a merger on media public interest grounds.

**1.6.** New section 106A of the Act provides for the publication by the Secretary of State of advice and information explaining the media public interest considerations specified in sections 58(2A) to (2C) of the Act and indicating how the Secretary of State expects these provisions to operate. Accordingly, the policies and procedures that will apply to mergers raising media public interest considerations form the subject matter of this guidance.

**1.7.** Although it is provided under statutory provisions and has authority as such, this guidance is not a substitute for the provisions of the Act or the Communications Act 2003. Anyone in any doubt about whether and how they may be affected by the legislation should seek legal advice. It should also be borne in mind that, whilst the guidance is intended to provide an indication of how the media public interest merger regime will operate in practice, and the approach the Secretary of State is likely to adopt in considering cases, each transaction will be looked at on its merits on a case-by-case basis. The guidance may be revised from time to time in the light of experience in operating the media public interest regime.

## SECTION 2

# Background to the media public interest considerations

### Newspaper mergers

**2.1.** A regulatory system for newspaper mergers was first introduced by the Monopolies and Mergers Act 1965, following the Report of the Royal Commission on the Press in 1962<sup>1</sup>, which concluded that control of the Press was a matter of particular public sensitivity and that the increasing concentration of newspaper ownership in too few hands could stifle the expression of opinion and argument and distort the presentation of news. The Secretary of State considers that these concerns continue to underlay the special consideration that can be given to newspaper mergers.

**2.2.** The regime in the Monopolies and Mergers Act 1965, which was largely replicated in the Fair Trading Act 1973 (the “FTA”), subjected most newspaper mergers to a stricter system of control than other mergers. 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 transfers without a reference to the CC<sup>2</sup>. Criminal penalties attached to breach of the consent requirements.

**2.3.** The FTA newspaper merger regime imposed significant costs on the industry and yet the vast majority of cases considered by the Secretary of State were given unconditional consent, whether following or without a CC reference<sup>3</sup>. Nonetheless, there have been a small number of cases where Ministers have intervened in newspaper mergers over concerns other than competition. These cases indicate a continued need, now met by the new newspaper public interest considerations, to address these concerns.

### The new regime for newspaper mergers

**2.4.** The new regime for newspaper mergers<sup>4</sup> takes elements from the FTA newspaper merger regime whilst integrating the assessment of newspaper mergers into the general merger regime of the Act. The new regime seeks to secure the continued protection of the particular public interests related to newspapers while lifting much of the regulatory burden on the industry and on the regulatory authorities.

**2.5.** In consequence, whilst the newspaper merger procedures under the new regime are radically different from the old, the Secretary of State expects there to be considerable continuity in the substantive assessment of the public interest issues.

<sup>1</sup> Cmnd 1811.

<sup>2</sup> The Competition Commission replaced the Monopolies and Mergers Commission on 1 April 1999.

<sup>3</sup> Of the 191 applications considered under the FTA regime between November 1973 (when the FTA came into force) and December 2003, only ten were refused consent or were granted subject to conditions.

<sup>4</sup> Introduced into the Enterprise Act 2002 by the Communications Act 2003.

Indeed, the newspaper public interest considerations now specified in the Act are based on public interest detriments that have been found to exist in previous newspaper mergers examined under the FTA regime. Consequently, decisions under the old regime and previous reports of the CC or Monopolies and Mergers Commission (the “MMC”) are expected by the Secretary of State often to be relevant to the consideration of public interest issues under the new regime.

## **Other media mergers**

**2.6.** In common with other modern democracies, the UK has for some time regulated the communications industry. Media ownership rules have applied because market forces alone, even regulated by competition law, cannot necessarily provide the market-place of ideas<sup>5</sup> that enables democracy to prosper. Nevertheless, developments in technology and the desire to promote a more competitive communications industry that will attract greater investment have encouraged the deregulation of the industry. The broadcasting and cross-media public interest considerations were introduced into the Act by the Communications Act 2003, which at the same time relaxed certain ownership rules that have applied to broadcast media and to cross-media ownership. Notwithstanding this relaxation, the media and cross-media public interest regime provides a safeguard to prevent media mergers bringing about undue concentrations of ownership, which may operate against the public interest. It will enable the Secretary of State to intervene in certain mergers involving media enterprises 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.

<sup>5</sup> The phrase is usually traced to Justice Holmes’ dissenting opinion in *Abrams v. United States*, in 1919.

## SECTION 3

# Establishing jurisdiction

### “Standard” jurisdiction

**3.1.** In order to provide consistency with the procedures and scope of the mainstream merger provisions of the Act, the jurisdictional criteria established in that Act are also used to identify the scope of the standard jurisdiction for the media public interest merger regime.

**3.2.** Under the Act, the Secretary of State is able to intervene under the public interest regime where she believes a merger may raise a public interest consideration specified in section 58 of the Act and the transaction constitutes a “relevant merger situation”<sup>6</sup>. A “relevant merger situation” is created where two or more enterprises cease to be distinct<sup>7</sup> and where at least one of the following thresholds is met, namely:

- the value of the turnover in the UK of the enterprise being taken over exceeds £70 million (the “turnover test”); or
- the merger would result in the creation or enhancement of at least a 25% share of supply of goods or services of any description in the UK or in a substantial part of the UK (the “share of supply test”).

**3.3.** Thus, the Secretary of State will be able to intervene where she believes that a media public interest consideration is or may be relevant to the “relevant merger situation”. If she intervenes then the merger will be looked at on competition grounds and against the specified public interest grounds.

### Extension of special public interest regime for media mergers

**3.4.** The jurisdictional thresholds of the mainstream merger regime in the Act focus on transactions that (a) involve acquisitions of enterprises with relatively high overall economic significance (the turnover test) and/or (b) will have a consolidating impact which could reduce direct competition (the share of supply test).

**3.5.** However, media public interest concerns are not necessarily so limited. For example, where the concern relates to the likely impact of a change of owner of a newspaper on accurate presentation of the news or free expression of opinion, it may not be relevant whether the acquisition has a consolidating effect. Similarly, change of ownership of broadcast media enterprises may give rise to concerns regarding the commitment of the new owner to a broad range of high quality programming even if there is no consolidation. It is also the case that a £70 million turnover threshold in the context of the newspaper industry is a relatively high one; many local newspapers fall below this level and yet such newspapers can be of key significance for their local communities, which if small may not be able to support a great diversity of newspaper titles.

<sup>6</sup> Section 23(1) and (2) Enterprise Act 2002 – see OFT guidance “*Mergers: Substantive Assessment Guidance*”, Chapter 2.

<sup>7</sup> See section 26 Enterprise Act 2002.

**3.6.** As a result, the legislation provides that mergers that may raise media public interest considerations can be scrutinized on these grounds under the special public interest regime in circumstances where the standard jurisdictional criteria (set out in paragraph 3.2) are not met. In such “special merger situations”<sup>8</sup>, the review will be on specified public interest grounds only – there will be no assessment of competition issues. However, it is also important that regulatory burdens are not imposed on the very smallest transactions, where any impact on competition or plurality would be de minimis.

**3.7.** Accordingly, in order to strike a balance between looking at transactions of concern and not imposing regulatory burdens on the very smallest transactions, the media public interest considerations are not restricted to transactions leading to the *creation* or *enhancement* of a 25% share of supply (as is the case under the mainstream share of supply provisions). So long as one of the parties to the merger has an existing 25% or more share of supply of newspapers of any description in the UK or in a substantial part of the UK, the Secretary of State may intervene in order to protect a newspaper public interest consideration<sup>9</sup>. Similarly, the Secretary of State can only intervene under the public interest regime to protect broadcasting and cross-media public interest considerations where one of the parties to the merger has an existing share of provision of broadcasting of any description of at least 25% in the UK or in a substantial part of the UK<sup>10</sup>.

**3.8.** Transactions where the UK turnover of the company acquired does not exceed £70 million and there is neither an existing share of supply of newspapers or provision of broadcasting of 25% or more in the UK or in a substantial part of the UK<sup>11</sup>, nor is such a share created by the merger, are completely excluded from merger scrutiny in the UK. In these circumstances the Secretary of State is not able to intervene.

**3.9.** It should be noted that no consequences will flow from the fact that a merger falls within the special public interest regime unless and until the Secretary of State exercises her discretion to intervene in a particular case.

## **Share of supply in the special public interest regime for media mergers**

**3.10.** In order to avoid too many transactions falling within the scope of the special merger regime for media mergers the generic sector to which the special merger jurisdiction applies is specified – i.e. the supply of newspapers<sup>12</sup> or provision of broadcasting<sup>13</sup>. This may be broken down more specifically by identifying the category of goods or services in relation to which the 25% share of supply is held in any particular case. This is consistent with, and calculated in the same way as, the share of

<sup>8</sup> Section 59(1) Enterprise Act 2002.

<sup>9</sup> Section 59(3C) Enterprise Act 2002.

<sup>10</sup> Section 59(3D) Enterprise Act 2002.

<sup>11</sup> In the context of the Fair Trading Act 1973, the meaning of “a substantial part of the UK” has been clarified by case law as meaning the part must be of “such a size, character and importance as to make it worthy of consideration for the purposes of the Act” (Nourse LJ in *South Yorkshire Transport Ltd v. MMC* [1983] 1 All. E.R. 289). In the first instance it is for the OFT to determine jurisdiction; additional guidance can be found at paragraph 2.25 of their publication “Mergers – Substantive Assessment Guidance (May 2003)”.

<sup>12</sup> As defined in section 44(10) Enterprise Act 2002.

<sup>13</sup> As defined in section 44(9) Enterprise Act 2002.

supply test applied under the mainstream merger regime of the Act. Thus, the criteria for determining whether the share of supply has been fulfilled would be up to the decision-making authorities to determine in each case and could, for example, be based on circulation, share of viewers or listeners, value, cost or advertising revenue<sup>14</sup>.

## Concept of a “newspaper”

**3.11.** The scope of the term “newspaper” is set out in the legislation<sup>15</sup> and is the same as that applied in the, now repealed, FTA newspaper merger regime<sup>16</sup>. A newspaper is defined as “a daily, Sunday or local (other than daily or Sunday) newspaper circulating wholly or mainly in the United Kingdom or in a part of the United Kingdom”. The effect of this is that the newspaper public interest considerations potentially apply to mergers involving daily and Sunday newspapers, whether national or local, and local periodical newspapers (subject of course to the jurisdictional criteria described above applying). The regime does not apply to newspapers circulated predominantly outside the UK.

**3.12.** Whether or not a publication is a “newspaper” will depend on an examination of the particular publication. The Secretary of State takes the view that the definition of “newspaper” starts with the ordinary and a natural meaning of the word and includes a publication regardless of whether or not it is paid for. To be a newspaper, the publication should contain some news content. Publications consisting wholly or almost wholly of advertising are not, in the Secretary of State’s view, newspapers.

**3.13.** In considering whether or not a publication is a “newspaper” for the purposes of the newspaper public interest considerations, the following questions are in the opinion of the Secretary of State relevant:

- Is there any real attempt at news coverage? News coverage is not limited to actual reporting of events but includes editorials and articles of interest.
- Does it contain advertisements that should properly appear in a newspaper? For instance certain statutes require matters to be advertised in a newspaper and not in an advertising free sheet.
- What is the proportion of the publication that contains advertisements or advertorials as compared with news content?

**3.14.** In considering whether a newspaper is a *local* newspaper for the purposes of the newspaper public interest regime, the factors to which the Secretary of State will have regard include the geographic distribution of the newspaper and the nature of the news content and whether it deals with local issues. The definition of a newspaper may be changed by order<sup>17</sup>.

**3.15.** As noted in paragraph 2.5 above, the Secretary of State expects there to be considerable continuity between the assessment of the substantive issues under the FTA regime and under the new regime.

<sup>14</sup> Section 59A Enterprise Act 2002. In the first instance it is for the OFT to determine jurisdiction; additional guidance can be found at paragraph 2.24 of their publication “Mergers – Substantive Assessment Guidance (May 2003)”.

<sup>15</sup> Section 44(10) Enterprise Act 2002.

<sup>16</sup> Section 57(1)(a) Fair Trading Act 1973.

<sup>17</sup> Section 44(11) Enterprise Act 2002

## Concept of “broadcasting”

**3.16.** Broadcasting is defined in the legislation<sup>18</sup> as the provision of services the provision of which is required to be licensed under Part 1 or 3 of the Broadcasting Act 1990 or Part 1 or 2 of the Broadcasting Act 1996 or would be required to be so licensed if provided by a person subject to licensing under the Part in question.

**3.17.** The latter part of the definition is intended to include services provided by the BBC or the Welsh Authority, or by broadcasters established abroad and broadcasting into the UK under European Union licences. This broad definition allows the Secretary of State to take account of the existence of, for example, the services of the BBC or the Welsh Authority when carrying out the assessment of the sufficiency of plurality of controllers of media enterprises in new section 58(2C).

## Acquisitions of “control” of newspapers

**3.18.** The FTA newspaper merger regime applied only to direct or indirect acquisitions of a 25% voting interest<sup>19</sup>, whereas the standard merger provisions of the Act apply where enterprises come under common ownership or common control<sup>20</sup> (so long as the share of supply or turnover thresholds are satisfied). This includes acquisitions of “material influence” over an enterprise<sup>21</sup>, which can arise at lower levels of interest and conceivably in the absence of an equity interest<sup>22</sup>.

## No pre-notification requirement

**3.19.** Under the FTA newspaper merger regime a transfer of a newspaper or newspaper assets to a newspaper proprietor required the prior written consent of the Secretary of State where the newspapers of the proprietor to whom the transfer is made (including the titles being acquired) have an average paid for circulation of 500,000 copies or more per day. Subject to certain statutory exceptions, the Secretary of State could not give this consent without a CC report. Under the new merger regime, merger parties will have the option to proceed to close the transaction before clearance is obtained (albeit at their own risk). As is the case with all UK relevant mergers situations, the merger may be referred to the CC after the completion of the transaction. In the event of an adverse public interest finding in such a case, the transaction may have to be unwound if no other remedies are appropriate. The power to refer a completed media merger to the CC on competition or public interest grounds (under the standard, special or European intervention schemes) is subject to the standard longstop on reference of four months<sup>23</sup>.

<sup>18</sup> Section 44 (9) Enterprise Act 2002. The definition of broadcasting may be amended by order pursuant to section 44(11) of the Act.

<sup>19</sup> Section 57 Fair Trading Act 1973.

<sup>20</sup> Section 26(1) Enterprise Act 2002.

<sup>21</sup> Section 26(3) Enterprise Act 2002.

<sup>22</sup> On this subject, see in particular OFT Mergers: Substantive Assessment Guidance (paragraphs 2.9 to 2.12), the OFT press release on BSkyB/Leeds Sporting (PN8/00, 3 February, 2000) and the Competition Commission report on NTL Communications Corporation/Newcastle United (Cm 4411, July 1999).

<sup>23</sup> From the date on which the enterprises cease to be distinct, or, if later, the date on which material facts about the transaction under which they ceased to be distinct is made public – section 24 Enterprise Act 2002. For the time when enterprises are to be regarded as ceasing to be distinct, see section 27 Enterprise Act 2002.

## SECTION 4

# Procedures

**4.1.** The procedure for examination of transactions raising media public interest considerations is largely aligned with the mainstream merger provisions in the Act, with certain modifications to take account of OFCOM's advisory role where the Secretary of State has intervened on media public interest grounds. The processes and possible timescales are set out in diagrammatic form in Annexes A and B.

### **Market monitoring**

**4.2.** Consistent with its obligations as the body responsible for the operation of the mainstream merger provisions, the OFT has responsibility for carrying out the initial market monitoring activity in relation to media merger cases, with the obligation to inform the Secretary of State of cases that it believes raise any specified media public interest considerations<sup>24</sup>. In addition, the Secretary of State retains the ability to look at cases on her own initiative, and it would equally be open to OFCOM or anyone else to draw cases to her attention.

### **Notification of merger situations involving newspapers and broadcasting**

**4.3.** Parties to a merger which potentially raises media public interest considerations have a number of options for approaching OFT, OFCOM and DTI to discuss the merger.

**4.4.** Parties may make OFT, OFCOM and DTI aware informally of an anticipated transaction ahead of its announcement. By doing so they can ensure that any notification is more focused on the information OFT, OFCOM and DTI will require to make their assessments of the merger.

### **Informal Advice and Confidential Guidance**

**4.5.** Parties may seek informal advice or confidential guidance from the OFT on competition issues and (in certain circumstances) DTI, on likelihood of intervention, and OFCOM, for a likely view on public interest issues. Informal advice or confidential guidance on public interest grounds will only be offered in broadcasting and cross-media mergers where media ownership rules have been removed, as the Secretary of State has said she will only consider intervening in these cases save in exceptional circumstances (see paragraph 8.8 below). It will be open to the parties to put a case to officials as to why their merger might be an "exceptional circumstance", in which case officials would offer views on the parties' reasoning. Informal advice or confidential guidance will also be available for newspaper mergers where a party to the merger thinks that a media public interest issue arises.

<sup>24</sup> Sections 5, 57 and 119B Enterprise Act 2002.

## Informal Advice

**4.6.** The informal advice process basically follows the procedure set out in the OFT's Merger Guidance<sup>25</sup>. This involves submitting a paper outlining the anticipated transaction at least 48 hours ahead of a meeting with officials, who then give their non-binding and confidential view, based purely on the information provided. In such cases the OFT will act as the primary contact point for parties. The paper should be submitted to OFT, and copied to OFCOM and DTI.

**4.7.** In cases for which informal advice is available, DTI officials will advise on the likelihood of intervention in the merger on public interest grounds. Informal advice is given by officials, and not by the Secretary of State or any other Minister. If officials indicate they would be likely to recommend intervention, OFCOM officials will offer advice on the likely media public interest considerations arising out of the prospective media merger situation<sup>26</sup>. OFT officials will provide their usual view of the competition aspects of the prospective merger situation.

## Confidential Guidance

**4.8.** Parties may also seek confidential guidance on anticipated transactions that have yet to be announced. Again this follows the procedure set out in the OFT's Merger Guidance and OFCOM's guidance<sup>27</sup>. The Secretary of State will provide confidential guidance on whether, on the information available to her, she would be minded to intervene on public interest grounds, on the case. If she concluded that she would be minded to intervene then OFCOM would advise on whether it is likely to recommend referral on media public interest grounds should the Secretary of State at the public stage issue an intervention notice. None of these views, which are sent to parties as a letter stating the conclusion reached and offering a joint meeting in which the OFT, OFCOM and DTI can expand upon their conclusion, is binding. The OFT will relay its views, along with those of DTI and (if appropriate) OFCOM, within a specified administrative timetable.

## Notification of a merger

**4.9.** Once a merger has been announced, and before it is completed, the parties can notify it using a merger notice (also known as a formal submission) to the OFT and copying it to OFCOM. The procedures for this are outlined in the OFT Merger Guidance and the information should be supplemented with such details as required by OFCOM (see their guidance for further details). The parties have the alternative of making an informal submission.

**4.10.** A merger notice can only be used if the merger qualifies under the standard merger regime. If an intervention notice is not issued the OFT will make a decision on the competition aspects within the statutory deadline of 20 working days, although the OFT can extend this by 10 working days, and the Secretary of State's ability to issue an

25 See OFT publication "Mergers: Procedural Guidance (May 2003)" paragraphs 3.4-3.10.

26 See OFCOM publication "Ofcom Guidance For The Public Interest Test For Media Mergers (May 2004)" paragraphs 28-34.

27 See OFT publication "Mergers: Procedural Guidance (May 2003)" paragraphs 3.11-3.18, and OFCOM publication "Ofcom Guidance For The Public Interest Test For Media Mergers (May 2004)" paragraphs 35-44.

intervention notice will lapse once the OFT makes a reference decision within that statutory deadline. If an intervention notice is issued the statutory deadline for the Secretary of State to make a decision on reference following advice from OFT and OFCOM may be extended by the OFT by a further 10 working days- so if the Secretary of State intervenes in a case subject to a merger notice the maximum timescale for a decision on reference is 40 working days<sup>28</sup>.

**4.11.** Parties can also choose to make an informal submission for anticipated or completed mergers, sent to OFT, and copied to OFCOM and DTI if the parties think media public interest issues may arise. If an intervention notice is issued the Secretary of State will aim to make a decision on reference (or to seek undertakings in lieu of a reference) within 10 working days of receiving the OFT and OFCOM reports.

## **Intervention by the Secretary of State**

**4.12.** Where a transaction is identified as giving rise to a media public interest consideration, the Secretary of State will be able to intervene through issuing an “intervention notice”, or a “special intervention notice”, or a “European intervention notice”, specifying the relevant public interest consideration(s)<sup>29</sup>.

**4.13.** A merger may come to the Secretary of State’s attention or it may be brought to her attention as set out in paragraph 4.2 above. If the Secretary of State is going to take a view on whether or not to intervene in the case on public interest grounds, the parties to the merger will be informed of this and invited to submit any views they have on this in writing. In taking a view on whether to intervene the Secretary of State will have regard to all available information which, depending on the case, may include:

- submissions from the parties to the merger (as invited by the Secretary of State);
- complaints made to the Press Complaints Commission and judgments made;
- any previous regulatory decisions which include relevant information or judgments;
- published articles raising matters of relevance; and
- any third party representations received; but
- she will not receive advice from OFCOM on whether to intervene (though she may receive and / or seek information from them in order to inform her decision).

**4.14.** The Secretary of State can issue an intervention notice at any time until the OFT makes a reference decision, and can issue a special intervention notice at any point up to 4 months after completion of the merger. However, as a matter of policy, in order to prevent undue uncertainty, the Secretary of State will aim to take an initial decision on whether to intervene within 10 working days of the later of: the transaction being notified to the OFT, or the transaction being brought to her attention. Because of this timescale, parties to the merger will only be given typically 3-4 working days to make a written representation on whether the Secretary of State should intervene. The

28 The OFT can also extend the statutory timetable for a merger subject to a merger notice – and for a completed merger – if additional information is requested by statutory notice but not received by the deadline stipulated in the notice – see paragraph 5.3 of the OFT publication “Mergers: Procedural Guidance (May 2003)”. A further extension can also be made if the OFT or the Secretary of State is seeking undertakings in lieu of a reference – see section 97(7) Enterprise Act 2002.

29 Section 42(2), 59(2), 67(2) Enterprise Act 2002.

Secretary of State will not normally conduct a public consultation on whether she should intervene in a case, but will welcome and take account of any representations she receives. She may also seek the views of a few interested parties if time permits.

**4.15.** If the Secretary of State decides to intervene, she will make this fact known by issuing a press notice announcing her decision, and publishing the intervention notice or special intervention notice. If her initial decision is not to intervene, the parties will be informed of this in a non-confidential letter; this letter will be without prejudice to her ability to intervene (within the timescales set out in the Act) if new or additional information subsequently comes to her attention. However, she will not herself make public any decision not to intervene, as this might cause uncertainty as to her role in mergers on which she has not made a public announcement because they have not been brought to her attention.

**4.16.** If she intervenes, the Secretary of State will then be able to consider whether to:

- refer the transaction to the CC for examination of any media public interest considerations together with any competition issues that are identified by the OFT (in the case of mergers meeting the standard jurisdictional criteria);
- clear the merger; or
- direct the OFT to seek undertakings in lieu of a reference.

**4.17.** Both the OFT and OFCOM must provide advice to the Secretary of State within the deadline set by the Secretary of State<sup>30</sup> and, in the context of a merger notice<sup>31</sup>, in sufficient time for an informed decision to be made within the statutory timetable<sup>32</sup>.

## Intervention Notice

**4.18.** OFCOM will carry out the consultation seeking third party views on the impact of the transaction on the media public interest considerations specified in the intervention notice<sup>33</sup>, with OFT taking responsibility only for the competition and jurisdiction aspects of the transaction (although if representations are made to the OFT relating to any of the media public interest considerations, it may include a summary of these representations in its report). The Secretary of State will publish a non-confidential version of any such report made by the OFT or OFCOM<sup>34</sup>.

**4.19.** If the Secretary of State wishes to add a further public interest consideration to the list in section 58 of the Act, she must bring forward an order specifying the consideration in section 58 and seek Parliament's approval of it ('finalise' the consideration) as soon as practicable.

**4.20.** The Secretary of State may, where she believes there is a realistic prospect of the new public interest consideration being finalised, delay taking the decision on reference for up to 24 weeks from the date of the intervention notice so that she might be able to

<sup>30</sup> Sections 44 and 44A Enterprise Act 2002.

<sup>31</sup> The merger notice may only be used to notify relevant merger situations and is not appropriate in the case of special merger situations.

<sup>32</sup> See OFT Publication "Mergers: Procedural Guidance (May 2003)" Annex A.

<sup>33</sup> See OFCOM publication "Ofcom Guidance For The Public Interest Test For Media Mergers (May 2004)" paragraphs 58-70 for further information on OFCOM's role.

<sup>34</sup> Section 107(3) Enterprise Act 2002.

take a newly approved consideration into account in making that decision. There are currently no plans to introduce additional public interest considerations

**4.21.** In the event that the Secretary of State decides that the specified media public interest considerations are not relevant to a transaction, the case will revert to a competition-only assessment and the OFT will make the reference decision, which will be published<sup>35</sup>. Otherwise the Secretary of State will balance any competition detriment identified along with the specified media public interest considerations in making the decision as to reference<sup>36</sup>, whether to accept undertakings in lieu of a reference<sup>37</sup>, or whether to clear the merger.

**4.22.** The Secretary of State will not be able to dispute the OFT's finding as to jurisdiction or competition<sup>38</sup>. If no competition concerns are identified the Secretary of State will not be able to make a competition reference, but she will still be able to make a reference to the CC on the media public interest consideration aspects alone.

**4.23.** Where a competition problem has been identified by the OFT this must be treated as being adverse to the public interest unless the Secretary of State considers this to be outweighed in the overall assessment<sup>39</sup>. However, the Secretary of State may not clear a merger where the OFT has identified competition concerns if the public interest consideration that she wishes to base that decision on has not been approved by Parliament<sup>40</sup>.

## Special Intervention Notice

**4.24.** In relation to special merger situations, broadly the same procedures will apply as for media mergers under the standard jurisdiction<sup>41</sup>. The Secretary of State can issue a special intervention notice specifying a media public interest consideration, and the OFT and OFCOM will provide her with advice within a timescale specified by the Secretary of State. However, in the context of a special merger situation the OFT will assess only jurisdiction and will not carry out any competition analysis<sup>42</sup>. In addition, unlike the case for relevant merger situations, it is not possible for the Secretary of State to specify new public interest considerations in a special intervention notice whilst a case is being considered. She can only invoke those public interest considerations specified in section 58 of the Act at the time the special intervention notice is given.

35 Section 56 Enterprise Act 2002

36 Section 45 Enterprise Act 2002.

37 Paragraph 3 of Schedule 7 Enterprise Act 2002.

38 Section 46(2) Enterprise Act 2002.

39 Section 45(6) Enterprise Act 2002

40 Section 46(4) Enterprise Act 2002

41 Sections 59 to 66 Enterprise Act 2002 – note that sections 96 to 102 concerning merger notices do not apply in relation to special merger situations.

42 Section 61 Enterprise Act 2002.

## Competition Commission procedures

**4.25.** Once a merger where a media public interest consideration has been specified in the reference has been referred to it, the CC will be required<sup>43</sup>:

- to decide whether a “relevant merger situation” within the mainstream merger regime has been or will be created or, in the alternative, whether a “special merger situation” has been or will be created;
- where specified in the reference, to consider whether the merger has resulted or may be expected to result in a substantial lessening of competition;
- taking account only of competition aspects (if referred) and the identified public interest consideration, to decide whether the transfer operates or may be expected to operate against the public interest;
- if the CC has decided that the merger operates or may be expected to operate against the public interest, to decide (a) whether any action should be taken by the Secretary of State or (b) whether to recommend the taking of any action by the Secretary of State or by others to remedy the identified effects adverse to the public interest;
- if the CC has decided there is or may be a substantial lessening of competition, to decide whether it should take action, or whether it should recommend the taking of action by others, to remedy the substantial lessening of competition, or any adverse effects resulting from it.

**4.26.** As indicated above, in cases falling to the standard merger regime the Secretary of State has the power to add additional public interest considerations to those specified in section 58. However, if a new public interest consideration mentioned in the reference is not approved by Parliament within 24 weeks of the intervention notice having been served, the CC must disregard that consideration when drawing up its report.

**4.27.** Where the CC investigates a special merger situation, it may have regard only to the public interest considerations specified in the reference – no competition assessment is carried out.

**4.28.** On completion of its investigation, the CC will deliver the report to the Secretary of State, and at the same time will supply a copy to OFCOM<sup>44</sup>.

## Consultation obligations

**4.29.** In general, the CC will be able to adopt its own procedures, within the limits prescribed for public interest consideration cases in the Act. However, where a reference is made to the CC specifying a media public interest consideration there is a specific requirement on the CC to have regard to the need to consult with a view to obtaining a representative cross section of opinion of those who may be affected by the media merger<sup>45</sup>.

<sup>43</sup> Sections 47 and 63 Enterprise Act 2002.

<sup>44</sup> Sections 50(2A) and 65(2A) Enterprise Act 2002.

<sup>45</sup> Section 104A Enterprise Act 2002.

## Newspaper Panels

**4.30.** The CC has a specialist newspaper panel<sup>46</sup>. The Chairman of the CC must appoint one or more members from the newspaper panel to the group constituted to deal with a newspaper merger reference where the reference is made specifying a newspaper public interest consideration. If the Chairman selects three such members, the group may consist entirely of those members<sup>47</sup>.

**4.31.** The Chairman cannot select a newspaper panel member to be a member of the group where a reference is made which does not specify a newspaper public interest consideration (unless the newspaper panel member in question is also a member of the general reporting panel<sup>48</sup>). Cases that are not subject to intervention will therefore be dealt with under the general merger regime in the same way as any other transaction.

## Secretary of State's obligations

**4.32.** On receipt of the report, the Secretary of State will:

- publish her decision on whether to make an adverse public interest finding, or make no finding at all (in which case the case will revert back to the CC who will make the final decision), within 30 working days of receipt of the report<sup>49</sup>. She will accept the CC's conclusions on jurisdiction and competition (where applicable)<sup>50</sup>. OFCOM can advise the Secretary of State following the receipt of a CC report<sup>51</sup>;
- consider the question of remedies where the decision made is that there is an adverse public interest (see chapter 9 for more details on remedies). She must have regard to the report of the CC, but the final question on remedies will rest with her<sup>52</sup>; and
- publish the report<sup>53</sup>, subject to any excisions that may be required<sup>54</sup>.

## Mixed Transactions

**4.33.** An acquisition may involve both newspaper/broadcasting and non-newspaper/non-broadcasting assets and once the Secretary of State intervenes in relation to a merger on the basis of a media public interest consideration, the whole transaction (not just the newspaper or broadcasting aspects) will be examined under the public interest consideration procedures. However, because the Secretary of State will be bound by the findings of both the OFT and the CC as to the competition analysis, it is anticipated that the substantive outcome for the non-newspaper/non-broadcasting aspects of the transaction will be unchanged<sup>55</sup>.

**4.34.** In the case of a cross-media merger involving both a newspaper enterprise and a broadcast media enterprise, both the newspaper public interest considerations and the broadcasting and cross-media public interest considerations may be relevant.

<sup>46</sup> Paragraph 22 of Schedule 7 to the Competition Act 1998 as amended and see the definition of "newspaper merger reference" in paragraph 1 of the Schedule.

<sup>47</sup> Paragraph 15(5) of Schedule 7 to the Competition Act 1998 as amended.

<sup>48</sup> Paragraph 2 Schedule 7 Competition Act 1998 as amended.

<sup>49</sup> Sections 54(5) and 66(3) Enterprise Act 2002.

<sup>50</sup> Section 54(7)(a) Enterprise Act 2002.

<sup>51</sup> Section 106B Enterprise Act 2002.

<sup>52</sup> Sections 55 and 66 Enterprise Act 2002.

<sup>53</sup> Section 107(3) Enterprise Act 2002

<sup>54</sup> Section 118 Enterprise Act 2002

<sup>55</sup> But note that as regards remedies following a reference, the Secretary of State will be able to balance competition and public interest aspects in deciding on the appropriate remedies.



## SECTION 5

# Scope of the newspaper public interest considerations

**5.1** Relevant merger situations and special merger situations in relation to which an intervention notice specifying a newspaper public interest consideration is served will be assessed by reference to the newspaper public interest considerations specified in that notice<sup>56</sup>.

**5.2** The newspaper public interest considerations set out in section 58 (2A) and (2B) Enterprise Act 2002 encompass the public interest in the need for:

- accurate presentation of the news in newspapers;
- free expression of opinion in newspapers; and
- to the extent 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** These newspaper public interest considerations are derived from concerns identified in particular cases examined by the CC and MMC under the FTA newspaper merger regime. Under that regime, the CC was required to look at “whether the transfer in question may be expected to operate against the public interest, taking into account all matters which appear in the circumstances to be relevant and, in particular, the need for accurate presentation of the news and free expression of opinion”<sup>57</sup>. As explained in paragraph 2.5 above, for the purposes of assessing the newspaper public interest considerations under the Act, the Secretary of State expects there to be considerable continuity between the analysis of cases under the FTA newspaper regime and under the new regime. The following section of this guidance therefore draws out precedents from the treatment of newspaper mergers under the FTA as a guide to how similar cases are likely to be looked at under the new regime. However, although in practice the CC considers its previous relevant cases when making a decision on a matter referred to it, it is not under an obligation to do so and is not bound by precedent.

**5.4** Of the 50 newspaper cases referred to it since 1973 under the FTA special newspaper merger regime, the CC<sup>58</sup> has made adverse findings (in relation to all or part of the transfers in question), in ten published reports<sup>59</sup>. Of these, editorial issues relating to free expression of opinion and the accurate presentation of news were relevant to five decisions. Further details of the way in which these tests have been applied in practice in the past are set out below.

<sup>56</sup> A special intervention notice may only specify public interest considerations that have been approved by Parliament and are set out in section 58 of the Enterprise Act 2002 at the time of intervention.

<sup>57</sup> Section 59(3) Fair Trading Act 1973.

<sup>58</sup> The CC replaced the Monopolies and Mergers Commission with effect from 1 April 1999.

<sup>59</sup> Bristol United Press/West Somerset Free Press (April 1980); Reed International/Berrows Organisation (April 1981); George Outram & Company Ltd/The Observer (June 1981); TR Beckett Ltd/EMAP plc (February 1989); Century Newspapers/TRN (April 1989); Bristol Evening Post/David Sullivan (May 1990); DMGT/T Bailey Forman Ltd (October 1994); Trinity plc/Mirror Group plc (March 1999); Johnston Press/Trinity Mirror (May 2002); Newsquest (London)Ltd/Independent News and Media (October 2003). Note that conditions were also attached to the consent for transfer of The Times and the Sunday Times to News International in 1981, without a reference to the MMC.

## Accurate presentation of the news

**5.5** The impact of a relevant merger situation on accurate presentation of the news is likely to be assessed by reference to evidence of past behaviour by the enterprises in question, or by the persons with control of such enterprises, in relation to that or other enterprises, including but not limited to newspapers. However, the Secretary of State expects that behaviour in sectors more closely related to newspapers, such as magazines, is likely to be more relevant than behaviour in sectors with a less direct connection.

**5.6** In the 1990 case of David Sullivan and the *Bristol Evening Post* the MMC concluded that evidence of David Sullivan's connection with the *Daily Star* (plus his holdings in the *Sport* and the *Sunday Sport*) suggested that he would seek to influence editorial policy and the character and content of the newspapers in a manner which would harm both the accurate presentation of news and the free expression of opinion.

## Free expression of opinion

**5.7** In considering the impact of a newspaper merger on free expression of opinion, the CC (and before it the MMC) has focused on the potential impact on editorial decision-making of the transfer of newspapers in question i.e. the extent to which the transaction would affect the freedom of editors to operate without interference from the proprietor.

**5.8** The CC (and before it the MMC) has generally been of the view that to maintain or increase circulation, regional or local newspapers must reflect the views and concerns of readers in their area, and that local editors are best placed to judge this<sup>60</sup>. Market forces therefore tend to ensure a significant degree of independence for local editors, whether the owner is a national publisher or a local publisher. However, there are exceptional cases – for example the Sullivan case referred to above – where the CC has been of the view that these forces were insufficient to prevent a newspaper proprietor from seeking to influence editorial policy.

**5.9** Similarly, in *George Outram & Company Ltd/The Observer* (June 1981) the MMC recommended that conditions be attached to the Secretary of State's consent to safeguard editorial independence against a potential conflict of interest arising out of the extensive business interests of Lonrho (the parent company of the purchaser George Outram & Company Ltd).

**5.10** Issues of editorial interference were also examined in the CC report on *Johnston Press plc/Trinity Mirror plc* (May 2002), where an allegation of editorial interference was raised part way through the reference and was investigated by the CC. Although the concern was ultimately not upheld (the partial block was on the basis of competition concerns) paragraphs 2.122 – 2.136 of the CC's report on that case describe the manner in which it conducted this aspect of the inquiry and illustrate how they concluded whether there was evidence of editorial interference rather than normal management issues and relationships.

<sup>60</sup> See paragraph 2.22 of the *Trinity/Mirror Group/ Regional Independent Media Holdings* Competition Commission report.

## Plurality of views

**5.11** The concept of “a sufficient plurality of views” is in the Secretary of State’s view intended to encompass the need for a diversity of viewpoints exhibited in the relevant sector of the press. In particular, it allows consideration of the structural impact of a transaction on the overall range of views and distribution of voice within the relevant market. The test of a sufficient plurality of views is intended to enable regard to be had not only to the need for a sufficient number of views to be expressed, but also to the need for variety in those views and for there to be a variety of outlets and publications in which they can be expressed. There is a qualitative element to the plurality assessment that requires account to be taken of the context in which titles circulate and the nature of those titles – for example, one title in a particular area may be of greater significance for plurality purposes than another.

**5.12** The plurality consideration in section 58 (2B) of the Act is qualified by the reference to reasonableness and practicability. In the Secretary of State’s view, this reflects the fact that although plurality of views in each and every market is the ideal goal of the regime, it may not be reasonable to require this in relation to a particular part of the market, for example because of associated costs. Moreover the level of plurality of views that may be considered reasonable in a large urban area may differ from the level practicable in a small rural community. In making this assessment the Secretary of State expects to take into account all relevant circumstances, for example the size and nature of the relevant area, and the extent to which other newspapers in the same area contribute to the level of plurality of views.

**5.13** The plurality newspaper public interest consideration is aimed at identifying issues such as those arising in the MMC’s report on the proposed merger of Century Newspapers and TRN (April 1989). In that case, the merged entity would have owned both the *News Letter* (a publication with a strong Unionist emphasis) and the *Belfast Telegraph* (which also expressed Protestant views but was considered to be a more middle of the road publication read by both Protestants and Roman Catholics). Consent was refused by the then Secretary of State as the merger would lead to the *News Letter* joining the *Belfast Telegraph* in the middle ground, leading to a loss of a distinctive viewpoint in representing Unionist opinion in Northern Ireland.

**5.14** Similar concerns were raised in the context of the merger of the CC’s report on Trinity plc/Mirror Group plc and Regional Independent Media Holdings Ltd/Mirror Group plc (July 1999). In relation to the proposed acquisition of Mirror plc by Trinity plc, the CC was concerned that the common ownership of two Northern Irish publications with a unionist stance was likely to lead to convergence in the perspectives of the two papers and the loss of a distinctive voice in representing unionist opinion. The CC recommended that the two newspapers should remain in separate ownership, so that the existing distinctness of view and opinion would be maintained. The then Secretary of State accepted this but also considered that the transfer would damage the ability of the *Irish News* (the Roman Catholic title) to generate advertising revenue, which would threaten the viability of that title and the

expression of a Roman Catholic viewpoint in the press<sup>61</sup>. The then Secretary of State's consent to the transfer merger was conditional on the disposal of certain titles in Northern Ireland, including the *Belfast Telegraph*.

**5.15** Whilst plurality concerns may be more likely to arise in relation to mergers between existing newspaper proprietors, when assessing the impact of a merger on the newspaper public interest considerations it is not intended to replicate or import aspects of the substantial lessening of competition test that applies in relation to mergers raising competition concerns. This test will be applied separately by the competition authorities, where appropriate. An example of concerns regarding the impact of consolidation on the need for a plurality of views in newspapers in the UK can be seen in the MMC's report on the proposed acquisition by Daily Mail & General Trust of *Nottingham Evening Post*<sup>62</sup>. In that case, the CC concluded that the increase in regional concentration of ownership could be expected to pose a risk to the maintenance of diversity of opinion in the region and would in turn jeopardize accurate presentation of news and free expression of opinion.

<sup>61</sup> The CC considered this issue but did not believe that the risk was likely to materialise. The Secretary of State disagreed with this. Unlike the general merger regime, under the FTA special newspaper merger regime the Secretary of State was not bound by the findings of the CC as to whether or not the merger would operate against the public interest. This remains the case under the public interest merger process set out in the Enterprise Act 2002 where the final decision on whether a merger gives rise to public interest issues rests with the Secretary of State.

<sup>62</sup> DMGT/T Bailey Forman Ltd (October 1994).

## SECTION 6

# Policy on intervention in newspaper public interest cases

**6.1.** The approach the Secretary of State will take in deciding whether or not to intervene in a particular case will develop in the light of experience in operating the new newspaper public interest merger regime. This is not an area suited to generalisation; each case will need to be considered on its own facts and merits. However, the Secretary of State can give some indications of the general approach she expects to adopt.

**6.2.** The initial decision to intervene will inevitably be taken when only basic information is known about a given transaction. It will be informed by general knowledge and experience as to the types of transaction that can raise newspaper public interest concerns and any third party comments that may be available. OFCOM will not have an advisory role at this stage, but will be obliged to provide any relevant information the Secretary of State may need to reach her decision. The Secretary of State will also have regard to the intention that the new regime should be no more burdensome than necessary.

**6.3.** The rationale for having a special regime to deal with public interest considerations arising in the context of newspaper mergers is that historically there have been a small number of cases that have raised issues beyond those that would be considered as part of a competition assessment. Such cases have generally been fairly easily identifiable from the outset: – the contentious acquirer (e.g. David Sullivan’s proposed acquisition of the *Bristol Evening Post*), the contentious case involving national newspapers (*The Times, The Observer*) or cases involving areas of particular cultural or political sensitivity (such as the cases involving newspaper titles in Northern Ireland<sup>63</sup>). The small number of cases that have resulted in adverse public interest findings other than on competition grounds under the FTA newspaper merger regime suggests that the number of cases in which the Secretary of State will find it necessary to intervene on the basis of newspaper public interest considerations under the new regime is likely to be small.

**6.4.** The Secretary of State has considered a range of factors that might be identified in a particular case, and the weight that these should carry in deciding whether or not to intervene. Set out below is a summary of these factors with an indication of the approach that the Secretary of State is currently minded to take. However, this is no more than a preliminary and general analysis that may need to be refined in the light of further experience in operating the regime. It should also be noted that fewer newspaper mergers will be referred to the CC than are initially reported on by OFCOM as a reference would only be made where, having received relevant reports from the

63 Century Newspapers/TRN (April 1989), Trinity plc/Mirror Group plc and Regional Independent Media Holdings Ltd/Mirror Group plc (July 1999).

OFT and OFCOM, the Secretary of State had concerns regarding the impact of a merger on the newspaper public interest considerations that warranted further investigation.

### **Acquisition of a non-newspaper business by an existing newspaper owner.**

**6.5.** Although this type of transaction may qualify for intervention, that is likely to be extremely rare. Circumstances which may lead the Secretary of State to *consider* intervention in such cases include those where for corporate structuring or tax reasons the form of a transaction does not reflect the reality of the situation (i.e. the transaction really involves a change of control of a newspaper), or cases where a transaction has unusual features raising particular plurality issues.

### **Third party comments**

**6.6.** Where a transaction gives rise to a significant volume of adverse third party comments regarding the impact or potential impact of the transaction on newspaper public interest considerations, it may be appropriate to *consider* intervention. However, the specificity of the concerns raised in such cases and evidence in support of the concerns will be significant factors. Intervention is more likely where comments are received raising and substantiating a *specific* newspaper public interest concern.

### **Newspaper to newspaper mergers**

**6.7.** The likelihood of intervention in a newspaper to newspaper merger will depend upon the identity of the parties and the extent and nature of any overlaps between their newspaper activities (although the competition effects of the merger can be examined by the OFT if the standard jurisdictional tests are satisfied). However, there is a recognisable correlation between high levels of concentration and the potential for newspaper ownership concerns to arise. Thus, where a merger leads to market overlaps (e.g. a merger of two newspapers in the same market, in neighbouring markets, or within a cluster) it may be appropriate for the Secretary of State to *consider* in more detail whether newspaper ownership concerns may arise. Whilst no firm indication can be given regarding the level of consolidation that might in itself lead to intervention by the Secretary of State to protect the newspaper public interest considerations, such intervention is likely in local newspaper transfers at a threshold above the level at which a potential competition issue would commonly be identified. However, for a transfer of a national newspaper to another newspaper proprietor, intervention may be appropriate at a lower threshold, depending on a number of factors including how the market may be defined for competition purposes.

## **Acquisitions of newspapers by persons with existing interests in other (non-newspaper) media**

**6.8.** The mere fact that a newspaper would come into common ownership with other media in the relevant area is not of itself an issue for the purposes of the newspaper public interest considerations. Nonetheless, there are circumstances in which the fact that a newspaper would become part of a group with other media interests in the same geographic market as the newspaper in question might be a relevant factor in assessing the impact of the transaction on the newspaper public interest considerations (for example, this may provide an indication of the likely editorial policy of the new owner in relation to newspapers). Where such geographic cross media overlaps occur, and the newspaper in question has a significant market share, the Secretary of State may wish to *consider* whether the transaction potentially gives rise to newspaper public interest concerns that would merit intervention.

**6.9.** In such cases, it is possible that the broadcasting and cross-media public interest considerations set out in section 58(2C) of the Act may also be relevant.

## **Acquisitions by persons with no existing newspaper interests**

**6.10.** Such acquisitions are only likely to raise newspaper public interest concerns in exceptional circumstances where the identity of the acquirer gives rise to concerns (as was the case in relation to the proposed acquisition of *Bristol Evening Post* by David Sullivan in 1990, although in that case Mr Sullivan did have existing newspaper interests) or where the acquirer is already present in other media in the same geographic area as the newspaper(s) in question (see above). However, in the absence of a significant volume of third party comments raising newspaper public interest concerns, or evidence of previous conduct that gives rise to such concerns (such as editorial interference in a periodical that is not a newspaper for the purposes of the newspaper public interest regime), the Secretary of State is unlikely to intervene in relation to acquisitions of local newspapers by persons with no existing newspaper interests. Where a national newspaper is being acquired, the same circumstances – the contentious acquirer, or the acquirer’s presence in other media in the same geographic area – may well give rise to concerns, and might lead to intervention, even in the absence of a significant volume of third party comments.



## SECTION 7

# Scope of the broadcasting and cross-media public interest considerations

**7.1** The broadcasting and cross-media public interest considerations specified in section 58(2C) of the Act are:

- the need, in relation to every different audience in the UK, or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of media enterprises serving that audience;
- the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

**7.2** For these purposes, a media enterprise is an enterprise consisting of or involved in broadcasting. However, where a relevant merger situation or special merger situation involves both a broadcast media enterprise and a newspaper enterprise, the newspaper enterprise is also considered to be a media enterprise for the purposes of the plurality public interest consideration specified in section 58 (2C)(a) (that is the first consideration above). Thus plurality can be considered across a wide range of newspaper and media audiences, which may include readership, and shares held by an enterprise through ownership of broadcasting and newspaper enterprises may be aggregated for the purpose of making the assessment of sufficiency of plurality. Considerations of range and quality, and of standards specified in 58(2C)(b) and (c), relate to broadcasting only. However, in considering how such a merger may impact on the range and quality, or the standards, of UK broadcasting, the Secretary of State considers it is reasonable to have regard to any relevant information as to the track record both of the enterprise seeking to acquire a broadcaster and of those who control it. In particular, where a relevant merger or special merger situation involves a broadcast media enterprise and a newspaper enterprise, she may look at any relevant information as to how either the broadcasting or newspaper enterprise have run their affairs. Examples of information that may be relevant are given later on in this guidance.

**7.3** These media public interest considerations invoked by the Secretary of State are distinct from the competition-based test applied by the competition authorities. The aim of this competition analysis is to prevent a level of concentration of ownership

which could give rise to a substantial lessening of competition. However, there is a recognisable overlap between this competition assessment and at least the first of the broadcasting and cross-media public interest considerations, which posits the need for there to be a sufficient plurality of persons controlling media enterprises.

**7.4** Although she will remain conscious of the distinctions between the competition and the public interest regimes, the Secretary of State anticipates that in some cases she may take the view that action to safeguard competition in a market will by itself be likely to provide a sufficient plurality of control. Such a view would be unlikely to be taken in cross-media mergers if the competition authorities considered that advertising in newspapers and in the broadcast media did not represent a sufficient competitive restraint on each other – that is, they are not in the same market.

**7.5** This view of the relationship between competition control and the public interest regime may also inform the Secretary of State's exercise of her powers of intervention (for more details of which see the following section). At that point, however, information on the approach of the competition authorities to the relevant markets may be limited, so the Secretary or State may err on the side of caution in deciding to issue an intervention notice where the definition of the relevant markets are unclear.

**7.6** The Secretary of State recognizes that, in applying the broadcasting and cross-media public interest considerations, it will be necessary to analyse and consider all the relevant circumstances at the time, on a case-by-case basis. Analysis of these considerations is different from the economic analysis of competition issues, notwithstanding the overlap mentioned above. Nevertheless, the Secretary of State will expect OFCOM's report following an intervention notice, the role of which is explained in paragraphs 4.10 – 11 above, to be evidence based, to reflect market research and to take account of stakeholders' views. The Secretary of State will then take this report, together with the OFT's report on the competition issues, into account in deciding whether to refer the particular media merger to the CC.

## **Plurality of persons with control of media enterprises**

**7.7** The first of the broadcasting and cross-media public interest considerations set out in section 58(2C) refers to the need for a sufficient plurality of persons with control of media enterprises serving the same audience in any given area of the UK. This public interest consideration is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality.

**7.8** In considering the impact of a merger on this consideration, the Secretary of State may assess the effect of the merger on a range of factors.

**7.9** First and foremost, the Secretary of State may consider the impact of the merger on the number of persons controlling media enterprises serving the relevant audiences in

any given area of the UK, with the object of securing that control of media enterprises continues to be spread across a sufficient number of persons. When assessing the number of persons controlling media enterprises post-merger, it would be relevant to take into account the number of other players serving that audience. This would include BBC and the Welsh Authority, where relevant, as well as owners of broadcasters established abroad and broadcasting into the UK under European Union licences.

**7.10** However, bare numbers may not tell the whole story. It might be relevant to consider the audience shares of the media enterprises brought under common control by the merger and the audience shares of other media enterprises. This is because the Secretary of State considers that what constitutes a sufficient number of owners controlling media enterprises in a given case may be affected by the relative audience shares that these enterprises hold. Audience shares can be assessed in relation to every different audience in the UK or locality of the UK served by these media enterprises. In assessing audience shares, it might also be relevant to consider the audience shares of other players serving the same audience.

**7.11** Thus, the Secretary of State considers that sufficient plurality in this context refers to the number of persons controlling media enterprises, taking into account as appropriate relative audience shares. The Secretary of State will assess whether there is likely to be a significant reduction in plurality in relation to any relevant audience as a result of the merger.

**7.12** For these purposes, the Secretary of State may define an audience in relation to a media enterprise in the manner she considers appropriate. In particular, she can define an audience: as any one of the audiences served by that enterprise, taking them separately; as all of the audiences served by that enterprise, taking them together; as a number of those audiences taken together in such group as the Secretary of State considers appropriate; or as any part of any of these audiences.<sup>64</sup> This enables the Secretary of State to treat different audiences as separate or group them together. The audience could, therefore, include cross media coverage and could include newspaper readership<sup>65</sup>. The criteria for deciding the composition of an audience shall be such as the Secretary of State considers appropriate and may include potential members of that audience<sup>66</sup>.

**7.13** When assessing plurality, where a merger situation (i.e. a relevant merger situation or a special merger situation) involves two media enterprises serving the same audience as defined by the Secretary of State, then there is deemed to be a reduction in the number of media enterprises serving that audience for the purposes of the plurality assessment in subsection (2C)<sup>67</sup>. All such mergers, including those involving an increase in levels of control of such media enterprises, may be examined for the purposes of subsection (2C). This means that the Secretary of State can assess whether, as a result of the merger, there will still be a sufficient plurality of persons with control

<sup>64</sup> Section 58A(6) Enterprise Act 2002.

<sup>65</sup> Section 59A(8) Enterprise Act 2002.

<sup>66</sup> Section 58(A)(7) Enterprise Act 2002

<sup>67</sup> Section 58A(4) Enterprise Act 2002

of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged.

**7.14** Where a number of media enterprises would fall to be treated as under common ownership or common control for the purposes of section 26 of the Act<sup>68</sup>, they are treated as being controlled by one person for the purpose of determining whether there is sufficient plurality of control of media enterprises<sup>69</sup>. This is because in assessing the effect of a merger on the sufficiency of plurality of persons with control of media enterprises, the Secretary of State needs to assess the total number of persons with control of media enterprises and what effect the merger will have on the plurality of media as a whole. Apart from the merging media enterprises, when looking across the spectrum to assess who has control of the remaining media enterprises, it is important to be able to look not just at the owners of those entities, but the controllers of those entities to get an accurate picture in relation to plurality in order to carry out the assessment relating to sufficiency of plurality.

**7.15** A person can have common control over two or more enterprises under section 26 of the Act if, in respect of each of the enterprises, he (amongst other things) owns the enterprise; he has a controlling interest in the enterprise (i.e. more than 50 % of the voting rights); he has control of the policy of the enterprise; or he has material influence over the policy of the enterprise.

**7.16** When determining whether enterprises are under common control for the purposes of section 58(2C) of the Act, associated persons are treated as one person<sup>70</sup>. This provision enables interests held by family members, business partners etc to be aggregated<sup>71</sup>.

## Range of broadcasting

**7.17** The second of the broadcasting and cross-media public interest considerations specified in section 58(2C) relates to the impact of a merger on broadcasting content in the UK. It refers to the need for the availability, throughout the UK, of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests.

**7.18** This consideration is concerned with safeguarding the quality and range of broadcasting when mergers take place in order to ensure a diversity of programming and protect the interests of viewers and listeners. Assessment of whether a particular merger will reduce the range and quality of broadcasting in the UK may take into account a range of factors.

**7.19** It might involve an assessment of the impact of the merger on the availability of broadcasting services which secure programmes dealing with a wide range of subject matters; which are likely to meet the needs and satisfy the interests of as many different audiences as practicable; which are properly balanced in nature and subject

68 See OFT publication "Merger: Substantive Assessment Guidance" (May 2003) paragraphs 2.6 to 2.12

69 Section 58A(5)

70 Section 127(1)(aa) Enterprise Act 2002.

71 See OFT publication "Mergers: Substantive Assessment Guidance" (May 2003) paragraphs 2.16 and 2.17

matter for meeting the needs and satisfying the interests of the available audiences; and which maintain high general standards with respect to the contents of the programmes included in them, the quality of the programme making and the professional skill and editorial integrity applied in the making of the programmes<sup>72</sup>. The primary focus of the test will be on an assessment of future plans of the acquirer. The media owner's plans for the broadcasting enterprise, including proposals for programme origination, programme content, genre or style of programming, as well as the overall innovation and ambition of the media owner's plans might all be considered relevant.

**7.20** In making this assessment, the Secretary of State may nevertheless also wish to take into account the media owner's past compliance with requirements on his other broadcasting enterprises to deliver a sufficient range and/or quality of broadcasting services in the UK. For example, she might consider compliance with qualitative public service broadcasting rules and radio format or localness obligations where relevant. The assessment might also include the media owner's record in respect of more quantitative obligations such as independent origination and European quotas. In particular, the media owner's past compliance with programme origination obligations might be relevant. All other material factors will also be taken into consideration.

## **Commitment to the broadcasting standards objectives**

**7.21** The third broadcasting and cross-media public interest consideration specified in section 58(2C) refers to the need for those carrying on media enterprises and those with control of such enterprises to have a genuine commitment to the broadcasting standards objectives set out in the Communications Act 2003. Under that Act OFCOM is required to secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public.

**7.22** In the Secretary of State's view, the intention behind this consideration is to assess whether persons controlling or carrying on media enterprises post-merger are likely to comply with the spirit as well as the letter of the broadcasting standards set down in the Communications Act 2003. These standards objectives relate to the protection of minors; the prohibition of material likely to encourage crime or disorder; the due impartiality and accuracy of television and radio news services, and impartiality requirements more generally; the exercise of responsibility with respect to the content of religious programmes; the protection of the public from offensive and harmful material; the exclusion of prohibited political advertising; the prevention of misleading, harmful or offensive advertising and unsuitable sponsorship; the fulfillment of the international obligations of the United Kingdom in respect of broadcast advertising; the prevention of undue discrimination between advertisers; and the prohibition of broadcasts of subliminal material<sup>73</sup>.

<sup>72</sup> of section 264(4), Communications Act 2003.

<sup>73</sup> Section 319(2) Communications Act 2003.

**7.23** In considering the effect of a merger on the genuine commitment to broadcasting standards of those controlling or carrying on media enterprises, the Secretary of State may take into account a range of factors. They include the following.

**7.24** First and foremost, the Secretary of State will consider the likelihood that there will be a genuine commitment to broadcast standards by the person or persons who will control the merged media enterprise. The Secretary of State may wish to consider the past compliance of any other broadcasting enterprises controlled by this media owner with broadcasting standards in the UK; an assessment of this would be qualitative rather than focusing simply on the question of how many infringements, however minor, may have occurred. The media owner's previous compliance with OFCOM's broadcasting standards might therefore be relevant. In particular, it might be appropriate to consider the due impartiality and accuracy of news offered by the media owner's other broadcasting enterprises. Evidence of breaches of UK broadcasting standards may be taken into account. Another factor relevant to the acquiring media owner's commitment to standards objectives might be the compliance of any other broadcasting enterprises it controls with broadcasting standards in other geographic regions or jurisdictions. This may add usefully to the overall assessment of the extent to which an enterprise is truly committed to broadcasting standards, wherever it operates. Similarly, the record of any non-broadcasting media enterprise's compliance with standards applicable to those media enterprises might also be considered, as adding to the overall assessment of an enterprise's commitment to standards in markets where it operates. This would include standards imposed under self-regulatory regimes.

**7.25** All other material factors will also be taken into account. This might include comments, statements and any other plans made by the acquiring media owner which give an indication as to its commitment to UK broadcasting standards post-merger.

## SECTION 8

# Policy on intervention in broadcasting and cross-media public interest cases

**8.1** In principle, the Secretary of State may intervene in any relevant or special merger situations involving media enterprises, including cross media mergers, where she believes that the broadcasting and cross-media public interest considerations are relevant.

**8.2** The Secretary of State's policy is that, save in exceptional circumstances, she will consider intervention only in cases where media ownership rules have been removed by the Communications Act 2003. These are:

- mergers involving national newspapers with more than 20% of the market and the Channel 5 licence holder;
- mergers involving national newspapers with more than 20% of the market and a national radio service;
- mergers involving a change in control of one or more Channel 3 licences such that the acquirer would control licences accounting for an audience share of greater than 15% (though such acquisitions are less likely to raise concerns where the acquirer is already an existing ITV licence holder in view of ITV's proven track record as a public service broadcaster);
- mergers involving two Channel 3 licences for the same area;
- mergers involving a Channel 3 licence holder and the Channel 5 licence holder;
- mergers involving the national ITV licence holder and the Channel 5 licence holder;
- mergers involving the national Channel 3 licence holder and a national radio service;
- mergers involving the Channel 5 licence holder and a national radio service;
- mergers involving two or more national radio services;
- mergers involving owners from outside the European Economic Area (except where prior to the Communications Act 2003 there were no restrictions on non-European Economic Area ownership).

**8.3** If some of the remaining restrictions on media ownership were to be lifted in future, the Secretary of State would expect to consider intervention in these areas as well.

**8.4** In addition, the Secretary of State's policy is that, save in exceptional circumstances, she will not intervene in respect of mergers in areas where there are no media ownership restrictions and none were removed by the Communications Act 2003 (e.g. mergers involving satellite and cable television and radio services).

**8.5** In relation to areas where there continue to be media ownership rules, the Secretary of State's policy is as follows.

**8.6** For media owners within the European Economic Area, it would not normally be sensible or desirable to intervene on the grounds of the broadcasting and cross-media public interest considerations since the continuing rules will protect plurality (e.g. ownership of local sound broadcasting licences).

**8.7** However, for media owners from outside the European Economic Area, the Secretary of State believes it would be sensible to consider intervening on the grounds of the broadcasting and cross-media public interest considerations, even where media ownership rules continue to apply, since foreign media ownership rules have now been removed completely.

**8.8** In exceptional circumstances, the Secretary of State may consider it necessary to intervene in mergers in areas where there continue to be media ownership rules or where there have never been such rules. The Secretary of State will only consider intervening in such a merger where she believes that it may give rise to serious public interest concerns in relation to any of the three considerations. During Parliamentary debate of these provisions, Ministers suggested that these might include circumstances where a large number of news or educational channels would be coming under single control, or if someone were to take over all the music channels. The Secretary of State may consider intervention if a prospective new entrant to local radio ownership has not shown a genuine commitment to broadcasting standards in other media or countries. The Secretary of State is not currently aware of any other types of cases in which exceptional circumstances might arise. She has also taken the view that an adverse public interest finding by a previous regulatory authority into a proposed merger is not necessarily in itself an exceptional circumstance meriting intervention; such cases should be considered in light of the reasons for the adverse finding and if the law has been changed to allow the sort of concentration resulting from the merger.

## SECTION 9

# Enforcement

**9.1** Under the FTA newspaper merger regime, the primary means of enforcement was through the requirement for prior consent, with criminal sanctions and nullity of the transaction applying in the event of a breach. With the removal of prenotification requirements and criminal sanctions, more extensive provision has been made in relation to remedies and enforcement powers in relation to the newspaper mergers. However, for the most part, the enforcement powers of the Secretary of State in relation to media public interest cases mirror the powers of the decision-making authority in relation to the mainstream merger regime.

### Interim measures

**9.2** The OFT and the Secretary of State have interim powers that are intended to ensure that the effectiveness of a reference or subsequent remedies is not prejudiced by action taken by the parties in the period of consideration of a merger<sup>74</sup>.

### Final measures

**9.3** Where the Secretary of State has made an adverse public interest finding, the final decision on remedies will be hers, although the CC must make recommendations in its report where it has decided that the merger operates, or may be expected to operate against the public interest<sup>75</sup>, and OFCOM may also give advice to the Secretary of State<sup>76</sup>.

**9.4** The powers that will be available to the Secretary of State in the event of an adverse public interest finding are essentially equivalent to those applying to the mainstream Enterprise Act 2002 merger regime<sup>77</sup>. However, remedies to an adverse finding on the basis of a newspaper public interest consideration, or a broadcasting and cross-media public interest consideration in the case of cross media mergers involving newspapers, may be different in character to the remedies directed at competition detriments with which the Act provisions are principally concerned. As a result, specific provision has been made to allow all remedies that have been considered appropriate in the past in cases involving newspapers to continue to be used in the future<sup>78</sup>. The non-exhaustive list of such remedies<sup>79</sup> includes provisions:

- altering the constitution of a body corporate (whether in connection with the appointment of directors, the establishment of an editorial board or otherwise);
- requiring the agreement of the Secretary of State before the taking of a particular action (including the appointment or dismissal of an editor, journalist or directors or acting as a shadow director);

<sup>74</sup> Paragraph 2, Schedule 7 Enterprise Act 2002.

<sup>75</sup> Section 47(7) Enterprise Act 2002.

<sup>76</sup> Section 106B(1) Enterprise Act 2002.

<sup>77</sup> See Schedule 8 to the Enterprise Act 2002.

<sup>78</sup> See for example the conditions imposed on the consent given following the 1994 DMGT plc/T Bailey Forman Ltd Report (P/94/730, 5 December, 1994). See also the press release P/2002/203 of 28 March 2002 announcing the revocation of all but one of the conditions. The provisions relating to the editorial board were retained.

<sup>79</sup> See Paragraph 20A(4) of Schedule 8 to the Enterprise Act 2002.

- attaching conditions to the operation of a newspaper;
- prohibiting consultation or co-operation between subsidiaries.

## **Appeals**

**9.5** Any person aggrieved by a decision of the Secretary of State in relation to a merger raising a media public interest consideration may appeal to the Competition Appeal Tribunal, which must apply the same principles as would be applied by a court on an application for judicial review<sup>80</sup>.

<sup>80</sup> Section 120 Enterprise Act 2002.

## SECTION 10

# Transitional provisions for newspaper mergers

**10.1** The newspaper merger provisions of the Act, introduced by the Communications Act 2003, came into force on 29th December 2003. The transitional arrangements that will apply to newspaper mergers are set out in paragraphs 59 to 62 of Schedule 18 to that Act.

**10.2** Paragraph 59 provides that the new provisions will not apply to any transfer of a newspaper or of newspaper assets that has already taken place as at the commencement date of these provisions.

**10.3** Paragraph 62 sets out provisions applying to conditional consents that have been given under the FTA. Existing consents are unaffected and will continue in effect as consents given under the FTA. However, where these consents have conditions attached to them, such that the party concerned is subject to ongoing obligations, paragraph 62 provides that the Secretary of State may accept undertakings in lieu of the conditions on the consent. Acceptance of an undertaking will be at the Secretary of State's discretion but, if accepted, any such undertaking would then be treated as equivalent to an undertaking given to the Secretary of State in a public interest case under the Act. Such undertakings could relate to competition or to general public interest obligations or both and so in deciding whether to accept such undertakings the Secretary of State can, in particular, consult with the OFT or OFCOM or both.



## SECTION 11

# EC Merger Regulation

**11.1** The assessment of the competition aspects of large international mergers which satisfy certain jurisdictional criteria falls to be considered by the European Commission's Competition Directorate under the EC Merger Regulation<sup>81</sup>. In any such qualifying case involving newspapers or broadcast media enterprises, therefore, the competition assessment would be made by the European Commission, rather than by the UK competition authorities under the merger provisions of the Act. However, Member States may take appropriate measures to protect their legitimate interests, including plurality of the media<sup>82</sup>, and accordingly the public interest merger regime set out in the Act may still apply in relation to the assessment of the impact of such transactions on the media public interest considerations<sup>83</sup>.

**11.2** A European intervention notice may be issued by the Secretary of State if the merger meets the standard jurisdictional thresholds and she believes that a specified public interest consideration is relevant to the case<sup>84</sup>.

**11.3** If a European intervention notice is issued citing a media public interest consideration the competition aspects of the case remain with the European Commission, but OFCOM will report to the Secretary of State on the relevant media public interest consideration and OFT on jurisdiction<sup>85</sup> within the time period specified by the Secretary of State. The Secretary of State can only refer the merger to the CC, or seek undertakings in lieu of reference, on public interest grounds.

**11.4** The Secretary of State may issue a European intervention notice where the case has been referred to the European Commission under article 4(5) of the EC Merger Regulation. If there is no relevant merger situation, and the case falls to the EC Merger Regulation, the Secretary of State may nevertheless issue a special intervention notice if the relevant jurisdictional criteria are satisfied; again, the Secretary of State does not receive a report on the competition aspects of the case, which remain with the European Commission.

**11.5** In deciding whether to intervene on media public interest grounds in a case which falls to the European Commission the Secretary of State will consider the factors set out in the section "Intervention by the Secretary of State" in Chapter 4 above. She will aim to take an initial decision on intervention in the timescale set out in chapter 4.

**11.6** In certain circumstances the OFT can seek the repatriation of the competition aspects of a case, using Article 9 of the EC Merger Regulation<sup>86</sup> and the parties to the merger may also ask for the merger to be considered domestically notwithstanding

81 Council Regulation 139/2004/EC

82 Article 21(4) Council Regulation 139/2004/EC

83 See in particular section 67 Enterprise Act 2002 and the Enterprise Act 2003 (Protection of Legitimate Interests) Order 2003, as amended by the Enterprise Act 2002 and Media Mergers (Consequential Amendments) Order 2003 which will apply where there is a relevant merger situation.

84 Section 67(1) and (2).

85 See the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003, as amended.

86 See OFT Publication "Mergers: Procedural Guidance (May 2003)" paragraph 9.11

the fact that it falls to the EC Merger Regulation, under article 4(4) of that Regulation. If an article 9 or 4(4) request is successful, the OFT will be carry out the competition assessment under the Act.

**11.7** If a European intervention notice is in force in a case where an article 9 or 4(4) request is successful, it will no longer be applicable (as a reference under either section 22 or 33 of the Enterprise Act is now possible)<sup>87</sup>. The Secretary of State would then be able to issue an intervention notice which would trigger a competition and public interest report.

**11.8** If the OFT is considering whether to seek repatriation of the case under Article 9 the Secretary of State may consider delaying intervention to avoid issuing both a European intervention notice and an intervention notice on the same case.

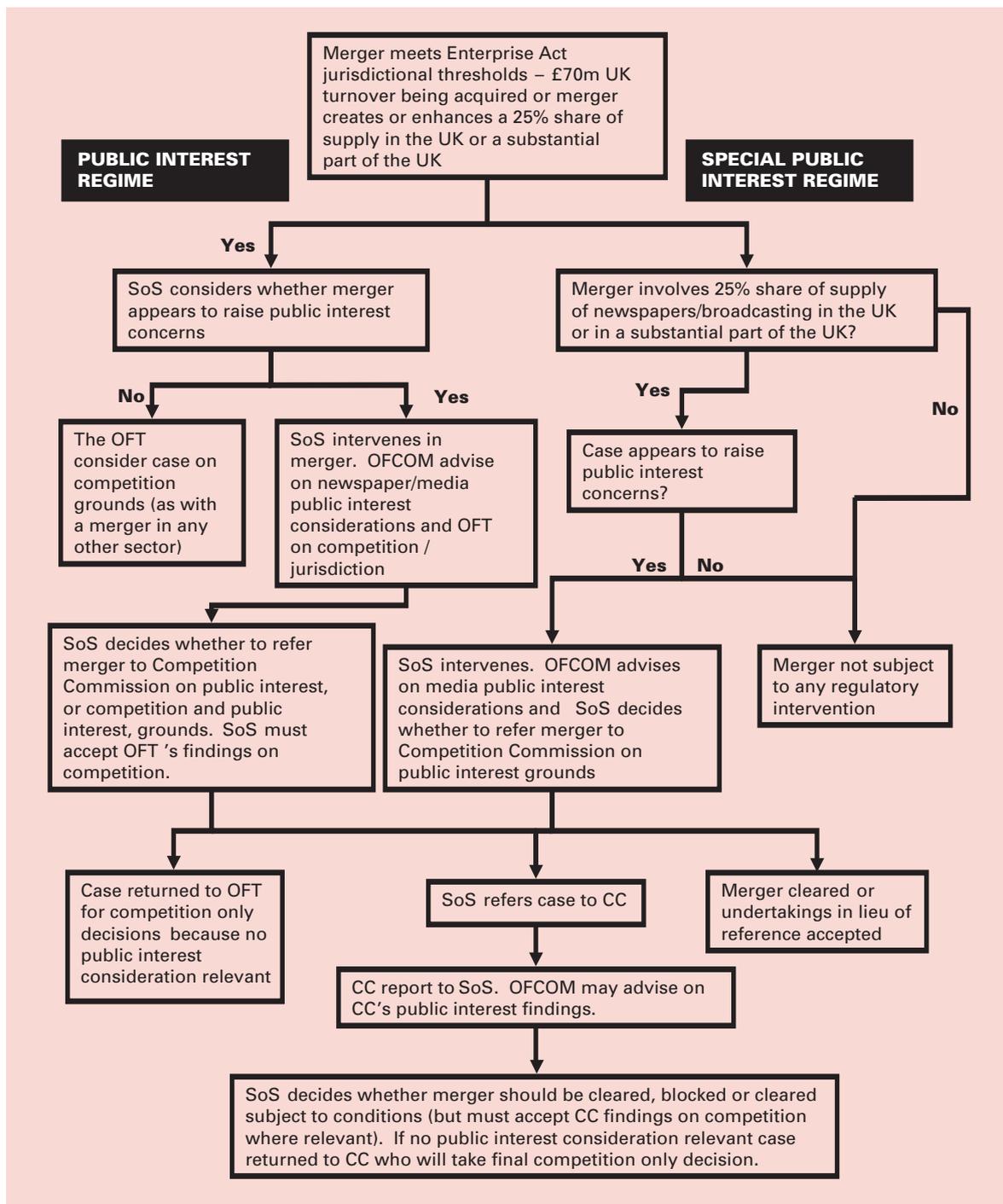
**11.9** If the case has been referred back to the UK under article 9 or article 4(4) and an intervention notice is in force the Secretary of State will decide whether to make a reference or seek or accept undertakings in lieu of a reference within 45 European Commission working days<sup>88</sup>.

<sup>87</sup> Section 67(1)(b) Enterprise Act 2002.

<sup>88</sup> See section 46A Enterprise Act 2002, as inserted by the EC Merger Control (Consequential Amendments) Regulations 2004.

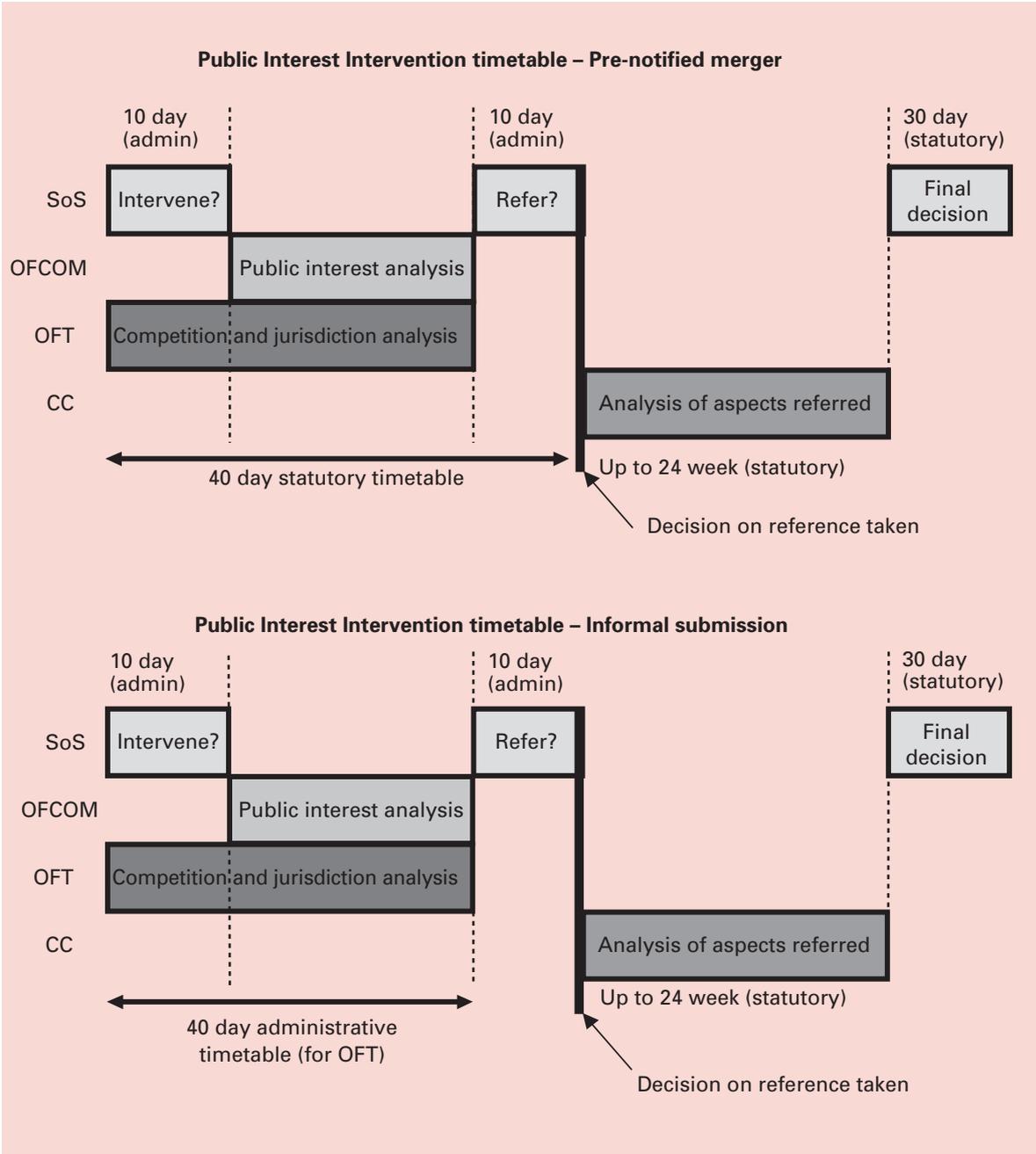
# ANNEX A

## Public interest intervention on media public interest grounds – process

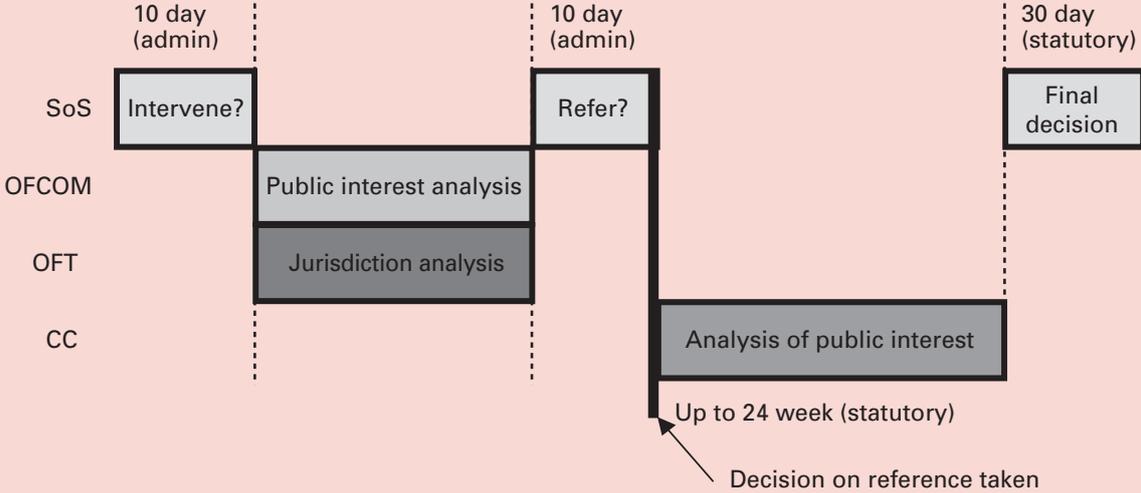


# ANNEX B

# Timetables for Intervention



**Special Public Interest Intervention timetable**



## ANNEX C

# Contact details

For further information about the media mergers public interest regime, contact:

Consumer and Competition Policy Directorate,  
Department of Trade and Industry,  
1 Victoria Street  
London SW1H 0ET

Tel: 020 7215 6954/5009

Fax: 020 7215 6565

DTI switchboard: 020 7215 5000

DTI website: <http://www.dti.gov.uk/ccp/topics2/mergers.htm>

*or*

Head of Market Intelligence  
Office of Communications  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Tel: 020 7981 3476

Fax: 020 7981 3406

Ofcom website: <http://www.ofcom.org.uk/>

For ordinary merger inquiries, or to obtain copies of the merger notice form or common notification form, contact:

The Mergers Branch  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London EC4Y 8JX

Tel: 020 7211 8915/8917/8918

Fax: 020 7211 8916

OFT switchboard: 020 7211 8000

OFT website: <http://www.of.gov.uk>









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