

History of the newspaper ownership regime

Before 2003 Communications Act

1965 A regulatory system for newspaper mergers first introduced by the Monopolies and Mergers Act 1965, following the Report of the Royal Commission on the Press in 1962 (the “Shawcross report”). Shawcross 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. **These concerns continue to justify the special consideration that can be given to newspaper mergers.**

1973 The Fair Trading Act 1973 (the “FTA”) subjected most newspaper mergers to a stricter system of control than other mergers.

The FTA required the Competition Commission (CC) to look at whether the transfer in question might be expected to operate against the public interest, taking into account all matters which appear in the circumstances to be relevant. Any such transfer would be automatically void without the written consent of the Secretary of State.

Proprietors had to obtain prior consent from the Secretary of State for Trade and Industry (as was) before acquiring a newspaper (or newspaper assets) where the total paid-for daily circulation of the newspapers involved was 500,000 or more.

The Secretary of State was required to refer newspaper applications to the CC for a detailed report before deciding whether or not to consent to the transfer. Exceptions to this rule meant the Secretary of State:

- (a) could consent to a transfer without a CC reference if he was satisfied that the newspaper was not economic as a going concern and that, if it was to continue as a separate newspaper, the case was urgent (section 58(3)(a) of the Act).
- (b) had to consent to a transfer without a CC reference if he was satisfied that the newspaper concerned was not economic as a going concern and that it was not intended to continue as a separate newspaper (section 58(3)(b) of the Act).
- (c) could consent to a transfer without a reference to the CC if he was satisfied that the newspaper being taken over has average daily sales of 50,000 or less (section 58(4) of the Act).

Newspaper transfers to companies or individuals who had no existing interests, either directly or indirectly, in newspapers circulating in the United Kingdom were not caught by the newspaper mergers legislation. Neither were transfers to newspaper proprietors whose newspapers, taken with those to be transferred, had an average paid-for circulation of less than 500,000 copies. Such transfers could, however, be subject to the general merger provisions of the Fair Trading Act.

- 1981 The purchase of *The Times* and *Sunday Times* by News International was allowed under heading (a). However, the acquisition was made subject to a number of conditions, the most significant of which were that the number of independent directors be increased for 4 to 6 and there be certain safeguards of the editors' independence: editors could not be sacked without the agreement of the majority of the independent directors, editors retained control over political comment; only they could give instructions to journalists and had control over recruitment and dismissals. The full conditions were set out in a letter from DTI dated 28 January 1981 (attached)

Communications Act 2003

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. Nonetheless, there had been a small number of cases where Ministers had intervened in newspaper mergers over concerns other than competition. These cases indicated a continued need to address these concerns. The Communications Act was therefore designed to replace the FTA regime with a streamlined and less burdensome regime that focused regulatory action on those newspaper transfers that appeared to raise competition or plurality concerns.

The main provisions in the Communications Act 2003 are:

- There is no longer a requirement for the Secretary of State's prior consent to newspaper transfers.
- The new regime applies to all transfers that satisfy the jurisdictional criteria for mergers in the Enterprise Act (broadly speaking, the turnover of the body being acquired exceeds £70m or the merger would result in marketshare of 25% or more). Consequently, the smallest local newspapers were removed from regulation altogether.
- Where a merger does not meet the jurisdictional criteria it is still possible for the Secretary of State to intervene, under the special public interest regime, which applied regardless of the identity or existing business interests of the persons acquiring the newspaper if the newspaper to be acquired had a 25% share of a market in a substantial part of the United Kingdom. In other words, it was not just

limited to situations where the shareholding was the result of merging two or more existing businesses.

- The Secretary of State retains the power to refer those cases that involved the public interest in plurality for wider investigation by the Competition Commission.
- The plurality public interest considerations are set out in section 58 (2A) and (2B) Enterprise Act 2002 and cover:
 - 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.
- Where there has been a reference to the CC, the CC will make recommendations as to any remedies it deems appropriate to meet competition or plurality concerns. The final decision on any action to take with respect to plurality issue rests with the Secretary of State. However, the Secretary of State may seek the advice of Ofcom on the CC's recommendations on the plurality aspects of the transfer. He can disregard the competition authorities' proposed solutions to competition problems, but only where the plurality issues justify this course of action: the Secretary of State will decide overall on the basis of a public interest test that will take account of both plurality and competition.

Developments since 2003: Local Media Assessment

2009 The interim *Digital Britain* report included an invitation to the OFT to conduct a review of the local and regional media merger regime. The conclusions of this review were published in the final Digital Britain report. The OFT broadly considered that the existing merger framework was sufficiently robust and flexible, but recommended that a number of small changes would be advantageous. This included amending OFT guidance to ensure that, where a local media merger raises prima facie competition issues, the OFT will ask Ofcom to provide a Local Media Assessment (LMA) covering relevant factors arising from their understanding of media markets.

The OFT's revised Jurisdictional and Procedural Merger Guidance confirmed this.

Dec 2010 Following consultation Ofcom published its final LMA Guidance. The Guidance sets out:

- the objectives of an LMA;
- the circumstances in which Ofcom will carry out an LMA;
- how the timing of the Ofcom LMA will fit into the OFT's merger process and timescales;
- the issues that are likely to be covered by an LMA; and

- arrangements for information sharing.

The LMA intended to add value to an OFT investigation into a local media merger, so Ofcom will only submit its LMA once it is clear it will materially aid OFT's assessment.

2011

Ofcom has to date conducted one Local Media Assessment, concerning the proposed acquisition by Kent Messenger Group (KMG) of seven newspaper titles owned by Northcliffe Media. Ofcom provided its LMA to the OFT on 2 September 2011. Ofcom considered that a merger could provide the opportunity to rationalise costs, maintain quality and investment, and provide a sounder commercial base from which to address long-term structural change, for example by expanding the availability of online and other digital local services. It also said these potential benefits needed to be weighed against any potential customer harm resulting from reduced competition identified in the OFT's overall assessment.

The OFT referred the proposed merger to the Competition Commission on 18 October 2011, but the CC cancelled its inquiry after KMG announced it was abandoning the proposed acquisition as a result of the referral. According to KMG "The costs and time required for a full Competition Commission review would be completely unreasonable for a business of our size and for a deal of this scale."