

Consultation on Ofcom guidance on the public interest test for media mergers

The deadline for responses to this consultation is **5pm on Friday 12th March 2004**.

Responses should be sent to:

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Executive summary

This document sets out Ofcom's draft guidance on the public interest test to be applied to media mergers in the event of a request for further investigation from the Secretary of State for Trade and Industry.

The draft guidance is being put forward for consultation prior to implementation. It follows the recent publication of draft guidance from the Department of Trade and Industry (DTI) on its own process for intervening in a proposed merger, including the advisory role played by Ofcom in that process.

Comments on the draft guidance are invited from interested parties. The closing date for this consultation is 5pm on Friday 12th March 2004. Any comments should be sent to:

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Or via Ofcom's website (www.ofcom.org.uk).

The DTI's consultation can be found online at www.dti.gov.uk.

All comments will be treated as non-confidential and posted on Ofcom's website unless respondents identify that part or all of the response is confidential and not be disclosed.

Summary

The Communications Act 2003 requires Ofcom to investigate matters of public interest arising from the merger of newspapers or broadcast media companies, should such an investigation be requested by the Secretary of State. Under the Communications Act, Ofcom has competition powers concurrent with the Office of Fair Trading.

Sections 375 to 389 of the Communications Act set out Ofcom's advisory obligations with regard to media mergers. Ofcom would implement the media mergers public interest test, often described as the plurality test, should the Secretary of State wish there to be further investigation of:

- A proposed merger involving newspaper enterprises
- A proposed merger involving broadcasting enterprises
- A proposed merger between broadcasting enterprises and newspaper enterprises

In the case of a newspaper merger, the public interest considerations, as defined by the Act, are:

- The need for accurate presentation of news in newspapers
- The need for free expression of opinion in the newspapers involved in the merger
- The need for, to the extent that is reasonable and practicable, a sufficient plurality of views expressed in newspapers as a whole in each market for newspapers in the UK or part of the UK

In the case of a broadcasting merger or a cross-media merger, the public interest considerations as defined by the Act, are:

- The need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience in relation to every different audience in the UK or a particular area/locality of the UK
- 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
- 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 (for example, governing matters of accuracy, impartiality, harm, offence, fairness and privacy in broadcasting).

When the Secretary of State issues an Intervention Notice, Ofcom will have a set period to carry out the public interest test and report to the Secretary of State. This process will involve gathering information from the parties involved and elsewhere in order to assess the impact of the merger according to the considerations set out above.

The whole process from notification of the merger to the announcement of the Secretary of State's decision will take no more than 40 working days.

Ofcom will also offer confidential, non-binding advice in advance of any such merger being notified.

Introduction

1. Where the Secretary of State intervenes in a media merger, Ofcom has a duty to advise the Secretary of State on whether the merger is in the public interest via the application of the public interest tests under the merger control regime set out in the Enterprise Act 2002 (the Act).¹ The Secretary of State will then decide whether to refer the merger to the Competition Commission.

2. This guidance is designed to provide general information on the procedures that will be used by Ofcom in advising the Secretary of State on the public interest test. It does not fetter the discretion of Ofcom to act in a particular way on a case by case basis. It has been drawn up in light of the guidance which is currently being consulted on by the Department of Trade and Industry (DTI) on intervention in media mergers.² It also closely mirrors the Office of Fair Trading's (OFT) guidance on merger procedure.³

3. Although this guidance covers most points likely to be of immediate concern to companies and their advisers, it is interim guidance only. The new media public interest regime comes into force on 29 December 2003. Once the DTI finalises its guidance in 2004, Ofcom will be in a position to issue final guidance on its approach to the new public interest test for media mergers. This draft guidance is not therefore a substitute for the Act and the regulations and Orders made under the Act, nor can it be cited as a definitive interpretation of the law. Anyone in doubt whether they may be affected by the legislation should consider seeking legal advice.

Further Information

4. Further information can be obtained from:

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

Tel: 020 7981 3000, Fax: 020 7981 3333
and from Ofcom's website (www.ofcom.org.uk).

¹ Public Interest Cases, Part 3, Chapter 2, Enterprise Act 2002.

² DTI *Intervention in Media Mergers*, Consultation on draft Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers under Section 106A of the Enterprise Act 2002, December 2003.

³ OFT *Mergers Procedural Guidance, Enterprise Act 2002*; and OFT *Guidance Note on the Handling of Media Mergers by the OFT* following the coming into force of the Communications Act on 29 December 2003.

The Legal Framework

5. The framework for the assessment of mergers in the UK is set out in the Enterprise Act 2002 (the Act). Most qualifying mergers will be assessed by the independent competition authorities against a competition test. However, the Act permits intervention by the Secretary of State in certain cases on specified public interest grounds⁴.

6. The OFT will examine Newspaper, broadcasting and cross media mergers in the same way as other mergers under the Act. Under the public interest regime, the Secretary of State may choose to intervene in a media merger by issuing an Intervention Notice (IN) if it is believed that a case raises media public interest issues.

- If an IN is **not issued**, the OFT will make its decision on competition grounds as if it were any other merger case.
- If an IN is **issued**, Ofcom has a duty to advise the Secretary of State on the media public interest aspects of the case, while the OFT reports on any competition issues.
- There is no statutory role for Ofcom unless an IN is issued, although the OFT will, as now, routinely consult regulators about any mergers in which they are likely to have industry specific knowledge.

7. Ofcom's findings will help to inform the Secretary of State's decision as to whether or not to refer certain media mergers to the Competition Commission.

8. This media public interest regime applies to all mergers where the media public interest considerations may be relevant i.e. mergers involving:

- a newspaper enterprise, or
- a newspaper enterprise and a broadcasting enterprise, or
- a broadcasting enterprise

Jurisdiction

9. The Secretary of State may intervene on media public interest grounds in two kinds of merger situations. .

a) In a "relevant merger situation", the Secretary of State may intervene where:

- two or more enterprises cease to be distinct as a result of the merger⁵; and where either
 - The value of the turnover in the UK of the enterprise being taken over exceeds £70 million (the turnover test); and / or
 - The merger would result in the creation or enhancement of at least a 25 per cent 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).

⁴ Section 58, Enterprise Act 2003.

⁵ Section 26, Enterprise Act 2002.

- b) In a “special merger situation” the Secretary of State may intervene:
- where two or more enterprises cease to be distinct and
 - one of the merging parties has an existing 25 per cent or more share of the supply of newspapers or broadcasting in the UK or in a substantial part of the UK.⁶

10. If there is intervention in a “relevant merger situation” a public interest assessment will be carried out in addition to the standard competition assessment by the OFT. In a “special merger situation” case, any assessment will be limited to the public interest.

11. The Secretary of State may also intervene on specified media public interest grounds in cases falling under the European Merger Regulation by serving a European intervention notice.⁷ The Secretary of State can make a reference to the Competition Commission if it is believed that, on the basis of the public interest consideration alone, the merger operates or may be expected to operate against the public interest. Ofcom will be obliged to prepare a report on the media public interest issues if there is intervention on these grounds.

Media public interest tests

12. When the Secretary of State believes a merger raises media public interest considerations, she intervenes by issuing an intervention notice specifying these considerations.

13. Ofcom must then provide a report to the Secretary of State with advice and recommendations on the specified media public interest considerations within a deadline specified by the Secretary of State. . Ofcom’s report to the Secretary of State must also contain a summary of any representations about the case which have been received by Ofcom in response to Ofcom’s consultation. A non-confidential version of Ofcom’s report will be published by the Secretary of State.

14. In addition, the OFT will be obliged to provide a report on the jurisdictional issues and, for “relevant merger situations”, competition issues. The Secretary of State will be bound by the OFT’s findings on these issues..

- 15.** The media public interest considerations are divided into:
- a newspaper test for mergers involving newspaper enterprises
 - a broadcasting and cross media test for mergers involving broadcasting enterprises or mergers between broadcasting enterprises and newspaper enterprises.

⁶ Section 59(3C),(3D), Enterprise Act 2002.

⁷ A European Intervention notice is served pursuant to Section 67 of the Enterprise Act. The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 then sets out the procedures for reference etc obliging OFT to report etc. This Order has been amended by the Enterprise Act 2002 and Media Mergers (Consequential Amendments) Order 2003 which provides a role for OFCOM in such European merger cases and mirrors the role in domestic cases where media public interests are invoked..

16. The newspaper test assesses whether any of the following are relevant to a consideration of the merger:⁸

- the need for accurate presentation of news in newspapers
- the need for free expression of opinion in the newspapers involved in the merger
- the need for, to the extent that is reasonable and practicable, a sufficient plurality of views expressed in newspapers as a whole in each market for newspapers in the UK or part of the UK

17. The broadcasting and cross media test assesses whether any of the following are relevant to a consideration of the merger:

- the need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience in relation to every different audience in the UK or a particular area/locality of the UK
- 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
- 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 (e.g. due impartiality of news, taste and decency).

18. In response to an intervention notice, Ofcom applies these tests to relevant mergers and reports the results to the Secretary of State along with a recommendation on whether the merger should be referred to the Competition Commission for further consideration.

19. The Secretary of State then makes a judgement on whether to refer the case to the Competition Commission in the light of the reports received from Ofcom and the OFT (where relevant).. Where the Secretary of State decides that media public interest considerations are relevant, references can be made either because:

- the merger results in a substantial lessening of competition and, taking account of this together with any public interest issues, the merger will operate or be expected to operate against the public interest; or,
- while there is no substantial lessening of competition arising from the merger, the public interest issues are such that the merger may be expected to operate against the public interest.

20. The Secretary of State will also consider whether undertakings in lieu of a reference are justified.

21. If a reference is made on public interest grounds (with or without competition grounds) the Secretary of State will also make the final decision on the merger following the Competition Commission's report.

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

⁸ Section 58(2A), (2B), Enterprise Act 2002.

Notifying Mergers to Ofcom

Keeping Ofcom in the picture

23. There is no statutory requirement to notify mergers to either the OFT or to Ofcom. However, telling Ofcom about an anticipated merger in advance may allow potential media public interest concerns to be identified in good time.

24. Relevant media enterprises considering a merger are encouraged to contact Ofcom early in the merger process to discuss the application of the Act to the merger situation. Contact details for Ofcom's public interest test team (the Team) are provided above and on Ofcom's website (www.ofcom.org.uk). Ofcom will provide advice or guidance to parties on the likelihood (if an intervention notice is issued) of Ofcom recommending to the Secretary of State, on media public interest grounds, that a merger be referred, that undertakings be negotiated in lieu of reference or that the merger be cleared. Ofcom cannot advise on the likelihood of the Secretary of State issuing an Intervention Notice.

25. Parties to a merger can ask the OFT and Ofcom to consider a merger in a number of ways.

- informal advice.
- confidential guidance.
- pre-notification discussions.
- statutory voluntary pre-notification
- informal submission/common notification form

The first three of these are confidential processes that occur before the transaction has been made public; the last two are public processes. Each of these is described below.

Informal advice

26. In order to assist the planning and consideration by companies and their advisers of possible mergers, Ofcom is prepared to give advice on an informal basis on the likely media public interest considerations arising out of a prospective media merger situation which has not yet been made public.

27. The OFT and Ofcom propose to offer media enterprises contemplating a merger a 'one stop shop' service whereby they will receive competition advice from the OFT as well as Ofcom's advice on the media public interest issues raised by the merger together.

28. Any advice on public interest issues would merely be the Team's view of the prospective merger situation, and would not take account of the views of third parties and is not binding on Ofcom (or the OFT or the Secretary of State). It is not possible to give a final decision on whether reference on public interest grounds would be recommended until the merger has been made public and the Secretary of State has issued an Intervention Notice, and other interested parties have had the opportunity to express their views. Like the OFT, the Team will not consider hypothetical transactions and will only give a 'one shot' consideration of a prospective merger situation. Any advice given will be based on the information before the Team which may change.

29. Parties requesting informal advice should send brief information to the OFT, with a copy sent to Ofcom, two to three days before the meeting about the

prospective transaction, the current state of affairs in relation to relevant media public interest considerations and the potential effects of the merger. While this information should be brief, the quality and accuracy of the Team's advice will reflect the quality of the information provided.

30. There is no administrative timetable for providing informal advice. However, both the OFT and Ofcom will generally try to deal with requests within time frames requested by the parties. It is worth noting that this may not always be possible.

31. Companies seeking informal advice should firstly contact OFT and then Ofcom. Contact details are provided above and on Ofcom's and OFT's website (www.ofcom.org.uk, www.oft.gov.uk).

32. Informal advice is provided to companies on the basis of the conditions and understandings specified by the OFT in their procedural guidance. In summary, these considerations are as follows:

- any company seeking informal advice must not reveal the fact that advice has been requested or given (or the contents of the advice given) to any other party even after the merger proposal becomes public. The advice given is confidential and is only for the Board members (and not individual shareholders) of the requesting parties and their advisers.
- Any advice given is based on the assumed accuracy of the information given
- The advice given is solely that of the Team and does not bind Ofcom.

Confidential guidance

33. As for informal advice, Ofcom will offer a confidential guidance service for merging companies which mirrors that offered by the OFT. The request for confidential guidance should be sent to the OFT, and a copy sent to Ofcom at the same time. Confidential guidance will involve a more detailed assessment of the issues and will therefore take a longer time than informal advice. Before an anticipated merger becomes public knowledge, the parties can seek confidential guidance from Ofcom on whether Ofcom is likely to recommend referral on media public interest grounds should the Secretary of State at the public stage issue an Intervention Notice.

34. Ofcom's decision will be based on the information that has been made available to it in the request for confidential guidance. Confidential guidance might also give some indication of whether undertakings in lieu of reference might be acceptable but if the parties want to follow this path, they should prepare their request for confidential guidance in much the same way they would prepare a submission were the merger already public. Submissions originally prepared for the OFT's confidential guidance on competition issues often form the basis of subsequent public submissions. Ofcom's confidential guidance service will operate in a similar manner.

35. The Team will assess any request for confidential guidance in the same way as it does for public cases, and will give guidance following that evaluation. However, since the transaction remains confidential and the views of third parties cannot be canvassed, it is not possible for Ofcom to give a binding guarantee that referral would not be recommended if an Intervention Notice were to be issued. At the public stage, Ofcom is free to take a different view in the light of any additional information received from interested parties' responses when Ofcom

invites comments on the transaction following the issue of an Intervention Notice.

36. Ofcom's decision will fall into one of four categories:

- No issues – The merger appears unlikely to raise any media public interest considerations that would warrant reference to the Competition Commission at the public stage.
- Not possible to say – It is not possible to say whether or not the merger would raise media public interest considerations that would warrant reference at the public stage.
- Issues but undertakings are possible – the merger appears to raise media public interest considerations that would warrant reference at the public stage but such concerns might be remedied by undertakings.
- Issues and undertakings are not appropriate – the merger appears to raise media public interest considerations that would warrant reference at the public stage, and undertakings do not appear to be appropriate.

37. The parties will be informed of Ofcom's guidance at the same time as they receive the OFT's confidential guidance on the competition aspects of the transaction.

38. If the merging parties consider that guidance in these terms might not be as informative as they would wish, they can request a meeting at which both Ofcom and the OFT are prepared to offer a more detailed explanation of the confidential guidance given.

39. Since limited information is available while the matter remains confidential, it is sometimes impossible to reach a conclusion on the likelihood of a reference where confidential guidance is requested. If it is not possible to form a view, Ofcom will advise the parties accordingly.

40. Ofcom will usually respond to the parties with guidance within six weeks (i.e. 30 working days) of receiving the request for confidential guidance, if no further information is needed.

41. No fee is payable by the parties for confidential guidance.

Parties that have received confidential guidance on an anticipated transaction should notify the OFT and Ofcom if the anticipated transaction becomes public knowledge.

Pre-notification discussions

42. To assist parties planning to make a public submission either as a merger notice or an informal submission, the Team is prepared to hold pre-notification discussions to explore the type of information that Ofcom would be looking for in a particular case should the Secretary of State issue an Intervention Notice. Where competition issues are raised by the transaction, these pre-notification discussions should be held with the OFT as well.

43. It is helpful if the parties supply OFT and Ofcom with a draft of the submission to consider two to three days before the meeting.

44. Parties seeking to hold pre-notification discussion should contact the Team leader.

Notification of mergers in the public domain

45. There are two possible ways in which merging parties may notify a media merger to the OFT and Ofcom:

- a statutory voluntary pre-notification
- an informal written submission

These processes are for mergers which are in the public domain.

46. Certain features are common to all of these public processes:

- The submission should be sent to the OFT and Ofcom at the same time.
- the submission must be clear and complete setting out the terms of the transaction and any public interest issues that have been foreseen.
- on receipt of this submission, Ofcom will nominate a case manager (CM) who will take responsibility for dealing with the case and be the point of contact for the merging parties in subsequent exchanges with Ofcom. The CM will draw on the expertise from others within Ofcom.
- Normally, the CM will seek a meeting with the parties if any significant public interest issues arise.

47. Whether anticipated or completed, potential merger situations that the OFT is aware of are evaluated when they become public knowledge. This is so even if they have already gone through the informal advice or confidential guidance processes. Where an Intervention Notice has been issued by the Secretary of State, Ofcom will take the same approach, evaluating those mergers when they become public knowledge. The parties involved will be need to copy their submission to the OFT for Ofcom to begin its public interest assessment.

Statutory voluntary pre-notification

48. The voluntary pre-notification procedure is the formal statutory process by which parties can have their merger considered by the OFT pursuant to a strict timetable and rules regarding submissions. Ofcom will also consider the public interest aspect of the merger according to this strict timetable.

49. This procedure can only be used to formally notify an anticipated merger which has already been made public. It cannot be used for completed mergers, or for anticipated mergers which have not yet been made public.

50. Under this procedure, the prescribed merger notice must be used to set out the basic information that will be required about the transaction by OFT. Copies of the merger notice can be obtained from the OFT or as a downloadable document on the OFT's website. Ofcom is in the process of developing an additional form for those media mergers raising public interest considerations. In the meantime, parties using the voluntary pre-notification procedure should submit the additional information pertaining to the media public interest regime set out below under the heading Content of Submissions.

51. The completed merger notice form should be submitted to the OFT together with the additional information relating to the media public interest aspects of the transaction. A copy should be sent to Ofcom at the same time. Consideration of the merger proposals cannot begin until the working day after the fully completed form and the appropriate fee have been received by the OFT. An incomplete submission is likely to be rejected.

52. The fee for voluntary pre-notification is payable to the OFT in advance. It should be submitted together with the merger notice form and the written submission on the public interest considerations.

53. Voluntary pre-notification is subject to a statutory timetable that guarantees a decision on reference to the Competition Commission within six weeks (i.e. 30 working days) with some exceptions. Where an Intervention Notice is issued this statutory consideration period is extended to eight weeks or 40 working days. Subject to some exceptions, a merger will be automatically cleared where no reference has been made by the end of that period.

Informal submissions

54. There is no prescribed form for informal submissions but the appendix to this guidance gives an indication of the kind of information useful in such submissions. A submission that does not contain all of the information needed for the OFT's investigation cannot be rejected, but the OFT's administrative timetable may be suspended until the additional information is received.

55. Once this information has been provided in full, parties can expect a decision within 8 weeks (i.e. 40 working days). In the case of informal submissions, OFT's timetable cannot be started until a complete submission has been received.

56. If an Intervention Notice is issued a fee is not payable for an informal submission until the Secretary of State publishes a reference decision or publishes a decision not to make a reference. See the OFT's guidance for more on fees.

The Assessment Process

57. Ofcom's assessment process involves two main stages:

- information gathering and analysis
- decision making process

Information gathering and analysis

58. Information is gathered by Ofcom in two ways:

- information is submitted to Ofcom by the merging parties and third parties
- data is gathered by Ofcom from various sources.

59. Ofcom might also require supplementary information from the merging parties and has certain powers to require this information to be provided. In the case of a broadcasting enterprise, failure to supply information in response to a request by Ofcom may constitute a breach of the enterprise's licence.

60. Any requests for additional information will be made as soon as it is clear that it is needed. However, the deadline for supplying this information will normally be short. Any failure to meet a specified deadline may result in suspension of an administrative timetable until the information requested has been supplied.

61. At an early stage after an information request has been made, the merging parties should discuss with Ofcom the availability of the requested data, the likely timetable for its provision, and the form in which it will be made available. Ofcom can modify its request in light of this information if necessary.

62. In public merger situations Ofcom may invite comments from interested third parties by means of an invitation to comment notice published through the Regulatory News Service and on its website at www.ofcom.org.uk. To ensure that a merger is brought to the attention of consumers (i.e. readers/listeners/viewers), Ofcom may also require that notice of the merger is published or broadcast by the merging parties. Ofcom may require that consumers are notified of a merger as soon as it becomes public. Unsolicited comments will also be noted.

63. Ofcom might also target consultations or information requests more specifically and so might ask the merging parties to provide contact details for their main customers, suppliers, owners and/or competitors. Ofcom might also contact relevant government departments and sectoral regulators.

64. Ofcom strictly observes confidentiality in all aspects of its operations. This applies to material supplied both by the parties to the merger themselves and by third parties.

65. The Secretary of State will of course be given all relevant confidential information to enable her to make the reference decision. Government departments and sectoral regulators might also be given information in confidence so that Ofcom can take account of their views on public interest issues. When there is a reference, Ofcom will make available all information to the Competition Commission it has in its possession as the Competition Commission may reasonably require to carry out its functions.

Decision making process for cases where an Intervention Notice is issued

66. In cases raising no public interest issues or issues that can be easily resolved, the decision to recommend clearance of the merger will be made within the Team. The Team will prepare a short report which will be circulated internally. Members of the Team who disagree with the decision or think that the case raises issues that require further discussion can request that a Team issues meeting be held. The report will then be finalised and sent to the Secretary of State.

67. In cases raising more complex or material public interest issues, a different process will be followed. Once such a case has been identified (e.g. in the Team issues meeting) an issues meeting will be convened with the merging parties and their advisers. To structure the discussion at this meeting, an issues letter will be prepared by the Team and sent to the parties ahead of the meeting. This letter will set out the core arguments and evidence in the case so that the parties have an opportunity to respond to the reasons why a reference, if it follows, has been recommended by Ofcom.

68. The merging parties may comment on an issues letter in writing or orally at an issues meeting or both. Ofcom envisages an interval of one to two working days between receipt of the issues letter and the issues meeting.

69. Following the issues meeting, a draft of the report to the Secretary of State will be finalised by the Team and begin passing through the various stages of the approval process. A draft of the report will be circulated to the Team and any changes incorporated before it goes to the Main Board and the Content Board (if broadcasting content issues are involved) for approval. The final report is then sent to the Secretary of State who will announce her decision and publish the reports of Ofcom and the OFT. The recommendation is then communicated to the parties (and announced in public cases).

Annex 1 - Content of Submissions

70. As a general guideline, the types of information that will be required by Ofcom when assessing the public interest issues arising from a merger are outlined below. This list is neither prescriptive nor exhaustive, and parties should also refer to the OFT guidance when compiling informal submissions, which sets out the background information that will be required in most cases .

71. The list is divided into the information needed from newspapers and information needed from broadcasting enterprises.

72. Ofcom will need historical information about the merging enterprises as well as information about the merged entity going forward.

Newspaper enterprises

73. The following information should be provided for all merging parties, where available and appropriate:

- **Activities.** Details of all purchaser's existing newspapers particularly where the titles compete with those to be acquired:
 - List of titles
 - Circulation figures for paid-for titles
 - Distribution figures for free-sheets
 - Details (e.g.) maps, demographics of circulation area
- **Ownership.** Breakdown of the shareholdings in the merging parties' and where possible, an assessment of any anticipated changes to the shareholding composition post-merger. It is important to indicate who ultimately controls the merging parties and who will ultimately control the merged entity.
- **Other newspaper interests,** held by those controlling the merging parties, the duration and size of interest, and details of any plans to increase or decrease such media interests post-merger.
- **Market share.** Revenues (e.g. circulation, average sales per issue) of the merging newspapers enterprises and the likely impact of the merger on these numbers. The market shares of the merging enterprises should be indicated along with the expected market share(s) of the merged entity(ies).
- **Readership** demographics and other information pertaining to the readership of the merging newspapers (e.g. relevant internal market research data) as well as an indication of the likely demographics of the readership(s) post-merger.
- **Complaints.** Including details of complaints made directly to the merging enterprises, complaints made about the merging newspapers to the PCC or other bodies, the outcome of complaints and details of any policy to apologise or publish corrections.
- **Content.** Assessment of column inches dedicated to advertising, regional/local stories, sport, human-interest stories, features, etc.

Assessment of the likely impact of the merger. A declaration of any current political allegiances of the newspaper enterprises. Summary analysis of advertising content of merging newspapers, detailing type and prominence as well as an indication of likely changes post-merger.

- **Policies.** Existing policies relating to reporting techniques and journalism standards and details of any plans to change the merged enterprises policies on reporting, post-merger. Arrangements envisaged for ensuring the accurate presentation of news pre and post-merger. Arrangements for ensuring editorial freedom both pre and post-merger. Information from the merging parties about the current level of contact between the owner and the editor/other senior management staff as well as an assessment of any plans to alter the level of contact and any plans to significantly alter the composition of staff post-merger.
- **Future Plans.** What will happen if the transfer is allowed to proceed
 - Whether it is intended that the newspaper(s) to be acquired should continue as separate newspapers
 - Whether the transfer will lead to a concentration of ownership in a local area or region.
 - What arrangements are envisaged for ensuring accurate presentation of news
 - Details of whether the existing editor and reporting staff likely to be maintained
 - What is the likely level of involvement of proprietors in editorial decisions, with evidence of track record from acquiring enterprise
- **Samples of the newspaper.** A copy of the newspaper should be provided for each day of the most recent week in the case of daily newspapers and for each week of the most recent month in the case of weekly newspapers.
- **Other relevant information.** For example other proposed changes to newspaper policies post-merger, including advertising content targets, changes to staff remuneration system, and proposed changes to frequency and size of publication. Also plans to merge or share information-gathering methods post-merger between the merged newspapers.

74. The acquiring owner should provide the following information where appropriate and available:

- Personal statement outlining any general plans for the newspapers post-merger, the type of market usually targeted by the acquiring owner, personal opinions of all newspapers, and details of personal editorial contributions to newspapers,
- Employment history of the acquiring owner including newspaper and media-related employment, outlining length of service, position and if applicable, any reason for leaving the role.

Broadcasting enterprises

75. The following information should be provided for the merging parties, where available and appropriate:

- **Operations.** Details of all purchaser's existing media and other businesses and the markets in which they operate, both in the UK and overseas:
 - List of broadcasting services

- Details of other businesses controlled by the acquiring company (if newspapers, details to be supplied as for the newspaper test)
- **Ownership.** Breakdown of the shareholdings in the merging enterprises and where possible, an assessment of any anticipated changes to the shareholding composition post-merger. It is important to indicate who has ultimate control of the merging enterprises and who will control the merged entity.
- **Other media** interests held by those controlling the merging parties, the duration and size of interest, both in the UK and overseas, and details of any plans to increase or decrease such media interests post-merger.
- **Market shares.** Revenue of the merging enterprises should be provided by source (e.g. advertising, subscription) along with audience reach, share and demographics and the likely impact of the merger on these numbers. The market shares of the merging parties should be indicated along with the expected market share of the merged entity.
- **Content.** Data from each broadcasting operation controlled by each of the acquiring and the acquired enterprises as follows:
 - **For Television:** Data for the most recent calendar year and actual and planned for the current calendar year on:
 - Range of output measured by volume and cost by genre (standard Ofcom definitions) for the broadcasting enterprise being taken over (and if relevant the acquirer's broadcasting enterprises).
 - Data should be split into peak (18.00 – 22.30) and non-peak, with data for each of these day-parts further split into
 - In-house originations
 - Independent commissions
 - Acquired programming
 - Repeats
 - If relevant, information should also be provided on regional output by region (i.e produced specifically for transmission in each region), split into:
 - news,
 - current affairs
 - otheragain split between peak and non-peak transmission.
 - Data should also be provided on performance against each of the broadcaster's license commitments.
 - **For Radio:** For both the acquired broadcaster and, if relevant, the acquiring broadcaster, data for the most recent calendar year and actual and planned for the current calendar year on:
 - the location of each station,
 - TSA coverage area and population,
 - format,
 - hours of locally produced programming,
 - hours of automated programming,
 - hours of syndicated programming (i.e. shared with other stations),

- the output of local news (hours per week and the number of journalists employed).
 - Data should also be provided on performance against each of the broadcaster's license commitments
 - **Plans** - Details of the planned output of the merged enterprise, including the acquirer's plans to ensure continued commitment to the existing range and quality of output, including:
 - Broadcasting a wide range of subjects
 - Meeting the needs/interests of as many different audiences as possible
 - High general standards
 - Originality and innovation
 - High production values
 - Ambitious programme making
 - Acceptable standards of taste and decency
- In particular, for mergers involving the Channel 3 licence holder or the Channel 5 licence holder:
- Details should be provided of any changes planned to the broadcasting service by reference to
 - the type and content of the services to be included in the service
 - the allocation of time to each strand (and where appropriate sub-strand) of programmes
 - the target audiences which the service is aiming to serve
 - the amount of original productions/commissions to be included in the service
 - the amount of first-run programmes to be included in the service
 - (as appropriate) the amounts of regional and sub-regional programmes broken down into news, current affairs and other types of programmes
 - the proportion and range of programmes made in the UK that are made outside the M25 and the proportion of expenditure on programmes made in the UK which is referable to a range of production centres outside the M25
 - the scheduling of programmes with particular reference to the amounts of original productions, news, current affairs and regional programmes in peak time (6pm to 10.30pm)
 - Also, details should be provided of how the Channel 3 licensee or 5 licensee will in the future achieve the public service remit for the channel in Section 265 of the Communications Act 2003 and in the particular the requirement to provide a range of high quality programming and (in the case of Channel 3) high quality regional programmes. If any changes are planned to the organisation and staffing of the company, or to the sources of supply for programmes to be included in the service, which might have a bearing on the ability of the licensee to achieve the above, give details.
 - Details should be provided of the how the Channel 3 licensee or Channel 5 licensee will contribute to the fulfilment of the purposes of public service broadcasting set out in Section 264 of

the Communications Act 2003. Supporting information should be provided related to any changes planned as indicated above.

- In the case of Channel 3, details should be provided of any changes which are planned which would have the effect of reducing:
 - The amount, quality and range of programmes to be offered to the network
 - The proportion of regional (or sub-regional) programmes to be made in the region (or sub-region)
 - The use in connection with the service of the services of persons employed (whether by the licensee or any other person) within the region (or sub-region)
 - The extent to which managerial and editorial decisions relation to programmes are to be taken by persons employed within the region (or sub-region).
- **Complaints/Compliance.** Including details of complaints made directly against the acquiring owner, either in the UK or overseas, complaints made against broadcasting enterprises to Ofcom or its predecessors, the outcome of complaints and details of any policy to apologise or publish corrections. More generally, the recent compliance history of the broadcasting enterprises may be taken into account.
- **Broadcasting obligations.**
 - Merging parties past performance against the licence obligations specific to each service. Past investment in meeting broadcasting obligations and planned future investment.
 - Performance against published obligations to provide broadcasting services (e.g. enshrined in the statement of programme policy for TV broadcasters or in the format requirements for radio broadcasters). The past performance of the media enterprise against these obligations.
 - Merging parties' history of compliance with the various quotas applicable to broadcasters where relevant (e.g. origination, independent, European, regional) and the plans of the merged entity to comply with these quotas going forward.
- **For radio stations,** samples of the station's news output. The main news bulletin for each day (or the 8am bulletin if no special news programme is produced) broadcast over the most recent week should be recorded on to cassette or CD.
- **Other relevant information.**

76. The following information should be provided for the acquiring owner, where available and appropriate:

- Personal statement outlining any general plans for the broadcasting enterprise post-merger.
- Employment history of the acquiring owner including all media-related employment, outlining length of service, position and if applicable, any reason for leaving the role.

Annex 2 - Ofcom's consultation process

How Ofcom approaches each formal consultation

There are seven principles which we will follow for each written consultation.

Before the consultation

1. Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

In this case, there was an urgency to have interim guidance in place as soon as possible as the Communications Act is now law.

During the consultation

2. We will be clear about who we are consulting, why, on what questions and for how long.

In this case, we are consulting the broadcasting and newspaper industries, consumer groups and any other interested parties.

3. We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A two page summary of the key points is shown at the front of this document.

4. We will normally allow 10 weeks for responses.

In this case the closing date for responses is 5pm on Friday 12th March 2004.

5. There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

The contact point in Ofcom is **Philip Rutnam**, Partner, Competition and Strategic Resources. His contact details are 020 7981 3585, and philip.rutnam@ofcom.org.uk

6. If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

Other than under point 1 above, the remaining principles have been followed.

After the consultation

7. We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website.

We would prefer people and organisations to give us views which they would be happy to see in public. But if those who have responded to a consultation tell us that some or all of their views must stay confidential, we will respect this.

We will also:

- list these seven principles in every consultation document that we publish;
- run a consultation helpdesk – to help organisations such as small businesses and consumer and community groups make their views heard in response to our consultations; for more details contact Philip Rutnam on 020 7981 3585; and
- keep a table on our website at www.ofcom.org.uk listing all current consultations, those recently closed and (as far as possible) those we are planning in the near future. The table will include a brief summary of each document.