

RESTRICTED - POLICY

To:

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PATRICIA HEWITT)separate
TESSA JOWELL)submissions

From:

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CCP8a
V/634
215 6772

27 September 2002

BP06/3/1/37

[Redacted]

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Andrew Ramsay

[Redacted]

Bill Bush

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REFORM OF NEWSPAPER MERGER REGIME: MEETING WITH SENIOR NEWSPAPER EXECUTIVES

Issues

1. Early sight, as requested, of draft briefing for your meeting with newspaper executives on the Communication Bill's newspaper merger reforms – it is proposed you meet them together, probably in November.
2. An opportunity, whilst we are still finalising the draft clauses with Parliamentary Counsel, to consider whether you wish to change the proposals in the light of representations made.

Recommendations

3. Draft briefing is attached. We will cut the Q&A down for your meeting, but thought you might like to see now full responses to the various points newspaper interests have made. The joint letter from the senior executives you are meeting, which is also attached, focuses on the role of OFCOM and alleged burden of the new regime on local newspapers.
4. I do not recommend you make any changes to the proposals. However, if you wish to make concessions to the newspaper interests, I suggest you focus on the options of:
 - a) removing OFCOM's role in advising the Secretary of State on Competition Commission reports on newspaper mergers whilst retaining its role in advising on whether to make a reference to the Commission on plurality grounds; and

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- b) removing the requirement on the Commission to consult local opinion which we have suggested might be met by Citizens' Juries.

Timing

5. For consideration during Party Conference Week. If you are minded to make concessions, it would be very helpful to know as soon as possible.

Argument

6. I do not consider the industry's arguments to be well founded and I see no reason for you to change your proposals. It is worth noting that the PLS Committee rejected the industry's submissions (whilst expressing the desirability, which we endorse, for a deregulatory outcome especially as regards local newspapers). Indeed, at the Press Conference on publication of its report the members described the evidence presented by the newspaper industry as some of the most unattractive that they had received, commenting that the owners seemed arrogant and out of touch with how they fitted into the big picture. You will also wish to consider how concessions to newspaper interests will play on the backbenches of both Houses.

7. Nevertheless, the newspapers are clearly an important and influential constituency and it is appropriate to consider whether you wish to make any changes to the proposals. Certainly it would be better to do so now rather than later.

OFCOM

8. Opposition to a role for OFCOM has generated the most heat. Apart from the concern that the new role we envisage for OFCOM in newspaper mergers is inappropriate given its background in electronic media and broadcasting regulation, much of the opposition that has been raised seems to stem from a concern that it is a Trojan horse for a wider involvement of OFCOM in the regulation of newspaper content. This is not of course intended. It is difficult to still this fear other than by assurances of good faith (and by pointing out it would require Parliamentary consent to powers we have not sought).

9. But, on the limited advisory role we have proposed for OFCOM, the PLS Committee was firmly on the Government's side, saying:

"We have considered the concerns raised by newspapers about OFCOM's proposed role in the newspaper merger regime. We consider that OFCOM will be able to develop sufficient expertise in media markets and plurality issues to make it well-placed to perform the advisory role envisaged for it. This will be particularly the case if, as we recommended earlier, OFCOM's periodic review of media ownership can be the basis for a reference for market investigation on plurality grounds. **We support the Government's proposal to give OFCOM a defined advisory role in respect of plurality considerations in the newspaper merger regime**" (paragraph 280).

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10. Despite this endorsement, the role of OFCOM is probably the industry's biggest beef and the one that unites proprietors of both national and local titles. We have therefore considered whether there is some *via media* to be found.

11. It is worth recognising that OFCOM has two different roles under the proposals. First, to assess representations received on cases where Ministers have invoked the newspaper public interest issue and to advise on whether a reference to the Competition Commission should be made. Secondly, where a reference is made, to advise on the plurality aspects (but not any competition analysis) of the report and recommendations. Whilst the latter may have merit as a quality control, so to speak, a Competition Commission report should speak for itself and this second role is probably less justifiable than the first. This is especially so as any views of OFCOM can be put to the Commission during the course of its investigation and would be summarised in its report. It is probably also the element of the role we planned for OFCOM which causes the industry most concern. Keeping the initial advisory role would still maintain some consistency with the current proposals and the views of the PLS Committee and still enable OFCOM to be able to advise authoritatively on the future of this part of media ownership regulation. But whether this strikes the right balance, and whether the PLS Committee or backbenchers would be satisfied with this reduced OFCOM role, is a matter for your judgement.

Local newspapers under the regime

12. The argument that the new regime as a whole is not de-regulatory compared to the current arrangements, both for local and national papers, is not one to be taken seriously. As regards local newspapers there is an argument, which the Newspaper Society makes, that the new newspaper merger regime will catch some transfers which are not caught under the current special newspaper merger regime because the acquirers are not current newspaper proprietors or if so do not meet the current thresholds. This is true and is settled policy. We do, for example, want to be able to catch a Desmond-type acquisition and you have been clear that plurality concerns can be relevant to local as well as national newspapers. This can be so irrespective of whether the acquirer is currently a newspaper proprietor (the proposed new regime would also free from any merger regulation certain mergers which are subject to heavy regulation under the current regime, but that point is not usually acknowledged).

13. But these acquisitions outside the special newspaper merger regime may now be subject to the current general merger law which applies a public interest test which certainly embraces plurality concerns (it was under this, of course, that Mr Desmond's acquisition of the Express titles was considered). That many small newspaper proprietors appear to have been able to operate for many years in ignorance of the application of general merger law is a powerful argument that, while they may not be wise, the application of the new regime is not a reason for them to be more worried. But Ministers will still have a discretion to intervene, as they have now, if there should be plurality concerns.

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14. The issue of jurisdiction is complex and it may be worth setting out the current and prospective position in some detail.

15. The jurisdictional tests applied under the current special newspaper merger regime are based on paid for circulation figures. This compares with the normal merger regime which applies a test based on either the value of the assets acquired (taking this as a proxy to identify transactions of overall economic significance) or the share of supply held by the businesses involved (which is an attempt to capture cases of significance to the markets in which they operate). The share of supply threshold is that the transaction *creates or enhances* a share of supply of 25% or more.

16. Under the Enterprise Bill the jurisdictional tests will essentially be the same as under the current mainstream regime, except that the £70 million assets test will be replaced with a £45 million UK turnover test.

17. We also want to use the Enterprise Bill tests for the newspaper merger regime. We see this as essential to our being able to operate the newspaper regime as an integral part of the overall regime. We also believe that by focusing on transactions that have either a £45million UK turnover, or a 25% share of supply, the test is better designed to capture cases that have at least the potential to have a real impact on competition in their markets. For plurality purposes, where the consolidating effect of the transfer is not the key issue, the tests will be the same except that there will be no requirement that the 25% share of supply is augmented by the merger ("created or enhanced"). A circulation based test is less well designed to capture the cases that are likely to be relevant – two newspapers could have the same circulation figures and yet one could have a near monopoly and the other compete with a wide range of other titles.

18. The industry has raised objection to the inclusion of this test arguing that it will bring a much large number of transactions within the scope of merger control. They say this arises because a large number of local newspapers operate in very small markets that can only support a small number of titles, and consequently large shares of supply are not uncommon. Specifically, they are arguing for the addition of a *de minimis* provision by which transfers involving newspapers below a certain level would be automatically excluded from all aspects of the regime. They also object that because the 25% share of supply that qualifies a transfer for consideration can be "in the UK or a substantial part of the UK", the test gives the authorities too much latitude to examine small areas within the UK.

19. We do not recommend acceptance of this suggestion, for reasons of both principle and practicality.

- So far as the competition aspects of the regime are concerned, it would be creating an exceptional carve out from competition control rules that apply to all other sectors of the economy. We see no justification for making a special case for newspapers.

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- The objection to the share of supply test in its application to a "substantial part of the UK" is misconceived, as it fails to appreciate that this test already exists under the mainstream merger regime to which newspaper mergers can already be subject if they fall outside of the special regime. It is true that, given how concentrated the local press is, more cases are brought within the jurisdiction than would be for many other industries. But this is equally true for other industries which are regionally concentrated, such as buses and supermarkets, and seems wholly appropriate given the purposes of the regulatory system
- We also do not see the case for an exclusion from the plurality analysis. So far as the mainstream Enterprise Bill criteria are concerned, the scope of regulation will be no wider than under the general public interest tests in the mainstream and the special newspaper regime combined.
- So far as the extended regime is concerned, there is some broadening of the scope. This is deliberate, to encompass certain types of acquisition that previously would have escaped regulation. For example, an acquisition by a foreign newspaper owner, with a doubtful plurality record, could fall outside of both the existing regimes if he had no existing UK interests. The PLS Committee endorsed our conclusion, saying that

... The de minimis provisions of the merger regime in the Enterprise Bill - £45 million turnover or 25 per cent share of supply – will not enable the plurality test to be applied in all the ways where it may be desirable to do so. **While we have not been presented with the specific draft clauses for the newspaper merger regime, we agree that the issue of newspaper ownership is sufficiently important to warrant extended jurisdiction beyond the de minimis limits contained under competition law...** [paragraph 279]

- In ensuring that the extended jurisdiction – and for that matter the mainstream regime – do not place a disproportionate burden on small transfers we place reliance on the discretionary nature of the regime which will ensure that regulatory action is appropriately targeted. Extended jurisdiction will only be an issue where a transaction has raised sufficient concerns that Ministers have decided to intervene. By contrast the industry is drawing from their experience of the mainstream regime, where all qualifying transactions are subject to notification and clearance obligations.
- There are practical objections to the industry's proposals in that it is not clear how they would distinguish between free and paid for titles. These may not be insurmountable, but the addition of a circulation-based test would be anomalous in the structure of the regime, which seeks to rely on tests that make some approximation to the economic weight of an enterprise.

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20. Overall, we consider that adequate exclusion of de minimis cases already exists by the fact that on any basis jurisdiction only arises where a newspaper has at least a 25% share of supply, and even beyond this point regulatory investigation is discretionary. Decision making under the regime will also be constrained by public law requirements of proportionality. The changes that the industry seeks would be inconsistent with the underlying policy rationale of the new merger regime, and are also unnecessary as adequate safeguards are already in place to meet the concerns that it has expressed.

Citizens' Juries

21. The other concession which you might consider is over Citizens' Juries, or to be more exact the duty that in newspaper cases the Competition Commission is to make effective tests of local opinion which we have suggested might be met by Citizens' Juries (although it seems doubtful). I say this because it is not exactly integral to the proposals and indeed Parly Counsel is bemused as to the need for it, pointing out that other types of mergers may have local (competition) implications and that the Enterprise Bill would already empower (but not oblige) the Commissions to consult the local community if appropriate (and if appropriate it would be a matter of good administrative practice and to some extent law, to consult in such a case). The proposal was, of course, always intended as what Bill Bush described as a fig leaf for the backbenchers. The industry has predictably opposed it, although it is not in the front rank of their concerns. Again, you will wish to weigh any advantage it has as a concession to the industry against any perceived advantage with the backbenchers. It was not commented upon by the PLS Committee.

Other efforts to meet industry concerns

22. We gave a presentation on the proposed reforms to the local newspaper industry on Wednesday which I think assuaged some concerns although I could not say the industry is now content. Attendance was disappointing, due to the tube strike. We will need to continue to make the case.

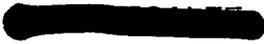
23. Beyond that we have been giving thought to how certain non-statutory, but important, procedures under the proposed regime might be made to operate. Our approach has been to try to be business friendly. We have been looking in particular at

- setting up arrangements for a one-stop confidential guidance whereby, notwithstanding that there are a number of regulators with different responsibilities, business can obtain advice on whether a deal would be likely to be referred to the Competition Commission from one body (we hope the OFT) and to one timetable;
- guidance from us on the circumstances in which Ministers would be likely, and would not be likely, to identify a case as potentially raising the plurality public interest consideration so that the normal competition merger procedures do not apply;

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- more general guidance on how we, OFCOM and the Competition Commission will interpret the public interest in accurate presentation of news, the free expression of opinion and the plurality of the press.

23. We will put up advice on these when we have concluded discussions with OFT, the Competition Commission and the putative OFCOM. I would hope that if you approve the approaches on these issues they could form the basis of a speech to the industry – they would also of course provide material for lines to take in debate in Parliament.



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BRIEF FOR MEETING WITH NEWSPAPER INDUSTRY REPRESENTATIVES
IN RESPONSE TO THEIR LETTER OF 6 SEPTEMBER

Contents

1. Steering Brief
2. Responses to the specific points raised in the letter of 6th September.
3. Briefing on additional points that we know are particular issues for the industry
4. General Q&A's for wider discussion on the proposals and giving more detailed responses on some of the key issues
5. A brief summary of the existing and proposed new newspaper regimes.

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1. STEERING BRIEF

Objectives of meeting

To hear industry concerns in relation to the proposed role for OFCOM in the new newspaper merger regime, and to advocate further the advantages of the proposed reforms.

Key points to make

1. Concerns about OFCOM are overstated

- OFCOM's role in the regime is advisory
- The proposals relate to merger control and are not about content regulation
- There are no plans to extend content regulation to the newspaper sector
- Nor does the merger regime have the scope to encompass the type of creeping control that the industry fear
- The PLS Committee supported our proposals for a role for OFCOM

2. There will not be a disproportionate impact on small newspapers

- Small newspapers if not subject to the special merger regime still have to consider the potential application of standard merger regime when engaging in acquisitions. We do not accept that there will be any increase in the regulatory burden.
- The new regime is deregulatory, for both local and national press
- It aligns the procedures for newspapers with the reformed merger control provisions being introduced generally by the Enterprise Bill
- There will be no extension to scope of competition analysis
- Any intervention on plurality grounds will be discretionary and therefore targeted
- Proportionality will be an inherent part of decision making under the new regime

3. The new regime is deregulatory and offers clear advantages for the industry

- It will be better targeted, by removing mandatory prior notifications and making the addition of a plurality investigation discretionary. Uncontentious transactions will not be delayed or subjected to the costs of a Competition Commission reference
- Newspaper transfers will have the same flexibility as is already extended to all other mergers in deciding whether to notify before or after completion of a transaction.
- Criminal sanctions will be removed
- It will be fairer, as the same processes will apply to all newspaper transactions, whether or not they are between existing newspaper owners.

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Background

A range of representatives from the newspaper industry wrote to Patricia Hewitt on the 6th September, 2002 highlighting concerns with certain aspects of the proposals for reform of the special newspaper merger regime. In particular, they wish to discuss

- The role of OFCOM
- The effect of the proposals on smaller local transactions

The PLS Committee Report

The key points from the report, as regards newspapers, are that the Committee:

- Agreed that the issue of newspaper ownership is sufficiently important to warrant extended jurisdiction beyond the de minimis limits contained under normal merger control rules.
- But wished the Government in so doing to have full regard to the need for a substantial deregulatory outcome for the newspaper industry, especially as regards local newspapers.
- Supported the Government's proposal to give OFCOM a defined advisory role in respect of plurality consideration in the newspaper merger regime.
- The Committee also proposed an extension to the newspaper plurality test to cover plurality in the media generally. [*We are not proposing to adopt this approach.*]

Note also that at the launch of the report the Committee made specific reference to the evidence presented to it by the newspaper industry as some of the most unattractive that it received, commenting that its owners seemed arrogant and "out of touch" as to how they fitted into the bigger picture.

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2. RESPONSE TO SPECIFIC POINTS RAISED IN LETTER OF 6 SEPTEMBER

Newspapers are not currently regulated by any of the bodies that will form OFCOM...

- Newspaper mergers will not be regulated by OFCOM. Decision making will rest with either the competition authorities or the Secretary of State. OFCOM's role will be advisory.
- The reforms will transfer to OFCOM some of the functions currently performed by officials at DTI. Appropriate expertise therefore already exists within the public sector as regards the activities that OFCOM will be called on to perform.
- There is no extension to the scope of the substantive investigation in this area.

OFCOM has no knowledge or experience of the newspaper industry....

- We recognise that initially OFCOM's experience will be limited, although there is considerable DTI know how and expertise in the area that can be shared with OFCOM as part of the transitional arrangements for the introduction of the new regime.
- Over time OFCOM's experience in the new regime will enable it to build up a body of expertise. Indeed, part of the purpose of giving it a role in the casework is to ensure that it can comment in an informed manner on the regime when it exercises its triennial review functions.

OFCOM is not a suitable body for regulating the newspaper industry....

The argument here is that it is inappropriate for a "state regulator" to have any role as regards newspapers, on freedom of expression grounds.

- OFCOM will be an independent sectoral regulator and it is not inappropriate for it to have a role in the process. A state regulator, in the shape of the Secretary of State and the DTI, has had a role in relation to newspaper mergers since 1965.
- It would in any event be able to participate in the Commission's investigations as an interested third party, in the same way that other sectoral regulators would be invited to comment on mergers in their sectors.
- There is rather a tendency to overstate OFCOM's role in the overall process. Its function will be advisory only and, unlike OFT advice on competition, its advice will not be binding on Ministers.
- The PLS Committee supported the inclusion of this kind of a role for OFCOM.

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There is concern at the proposed role of OFCOM in scrutinising the findings of a Competition Commission report with regard to plurality

The essence of the concern is that OFCOM will in some way be able to “trump” the CC or have privileged access to the Secretary of State as decision maker. We believe this to be unfounded.

- OFCOM’s role will be purely advisory. In practice we would encourage it to comment in the same manner as the DGFT currently comments on CC reports i.e. to direct its comments to the issues raised by the CC, and in particular the feasibility of the remedies proposed, rather than taking on a wider remit.
- Both the Competition Commission report and OFCOM’s report will be published.

There is a lack of clarity and transparency as to:

1. How OFCOM will perform its advisory role

- We have made clear that OFCOM’s role will be restricted to plurality issues and not competition, and therefore will only be relevant in cases where the newspaper public interest consideration is invoked.
- In terms of how OFCOM will perform its role, this will be for it to develop in detail, but we see the existing practice of the DGFT, as regards competition issues, as a useful indicator. Specifically:
 - At Phase I, we envisage that OFCOM will perform the function of collating and summarising third party views, and forwarding these to the Secretary of State together with its own opinion.
 - At Phase II, following a CC report, we envisage that OFCOM will in practice normally restrict its comments to an analysis of the remedies proposed by the CC (although it will not be formally restricted to this).
- The legislation will require that OFCOM reports are published. This will ensure that a body of information will develop in the public domain as to how it conducts its enquiries.

2. the nature and status of the “plurality consideration”

Note: This is referring generally to the newspaper public interest consideration that the Communications Bill will introduce, which encompasses the accurate presentation of news, free expression of opinion, and plurality in the UK press

- The newspaper public interest consideration will only be relevant to cases where the Secretary of State exercises her discretion to intervene. All other cases will be assessed solely by reference to competition considerations.

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- The newspaper public interest consideration is, substantively, directed at the same types of public interest issues that have arisen in the past in relation to transfers of newspapers. We have very much drawn from the existing body of precedent in formulating the new newspaper public interest consideration.
- The newspaper public interest consideration will cover the concepts of free expression of opinion and accurate presentation of news that are already specially pulled out in the newspaper merger regime – and can also be applied under the general regime. Plus there will be a third limb of plurality of views. This is designed to pick up some of the issues that the Competition Commission has previously considered – or might want to consider – in relation to plurality, but which might not fall strictly within the concepts of accurate presentation of news and free expression of opinion.
- This isn't about regulation of content but rather how the relevant authorities might want to examine changes to the structure of the market. This is something they can, and do, look at under the present regime as part of the general public interest test, and the concept of plurality is intended to carry this forward.

Concern at a creeping development of a role for OFCOM in newspaper matters....

- We have no intention to extend regulation of newspapers beyond the announced policies on newspaper mergers and cross media ownership.
- Nor do we believe that the newspaper merger regime would be an appropriate vehicle for the kind of extension into content regulation that the industry is concerned about. Merger control is concerned with structural changes in the market and although remedies directed at behaviour are possible, these do not operate at the kind of level that would allow for detailed content regulation.
- The rules would only apply in the event of an acquisition raising competition or plurality issues on its facts, and remedies would have to be directed to the issues raised by the particular transaction. OFCOM will have no general powers of intervention in relation to newspaper markets.

Clear presumption in some quarters that OFCOM should have a role in newspaper matters (e.g. circulation of Towers Perrin report to industry as "key stakeholders").

- There are no plans for OFCOM to have a role in relation to newspapers beyond its functions in relation to the newspaper merger regime, and its function in reviewing the operation of the media ownership rules as a whole on at least a triennial basis.

Specific clauses on newspaper mergers have not been published.

- We have published the detailed Memorandum that was provided to the PLS Committee on 3rd July, which sets out in a full and frank manner the Government's proposals in relation to newspaper mergers. We believe that this can form a basis for consultation on the proposals that will be of equal if

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not more value than a consultation based on draft legislation. The draft clauses in reality will be a series of provisions making amendments to the Enterprise Bill.

- We had intended to publish draft clauses on the new newspaper merger regime alongside the cross media rules. However, as the provisions will operate as an integral part of the Enterprise Bill, and will take the form of a series of amendments to the Enterprise Bill, we agree with the advice we received that the provisions should be drafted by the Enterprise Bill Counsel. We regret that pressures on Parliamentary Counsel's time, amongst other things, meant that it has not yet been possible to publish draft clauses.
- The passage of the Enterprise Bill means that there is a heavy legislative burden in the competition field and that resources in this area are strained. Counsel is currently working on draft clauses. If we have them in time then we still intend to publish them for informal consultation.

[N.B. This is the current position – to be updated before meeting in November.]

The new regime will be stricter than the old for local newspapers....

Note: This is a known concern of the Newspaper Society. We doubt that it will be an issue for the representatives of the national press. The root of the confusion seems to be a lack of understanding as to the impact of the removal of mandatory notification requirements, and as to the scope of the existing merger control provisions outside of the mainstream merger regime.

- The new regime will undoubtedly be deregulatory, for both the local and the national press.
 - Transactions will not be subject to mandatory notifications, prior consent, criminal sanctions, or mandatory references.
 - Non-competition intervention and any special treatment of newspapers will be restricted to cases where there is a prima facie plurality issue
- There will be no increase in the number of cases subjected to competition analysis.
- As regards plurality, the extended jurisdiction provisions are, in part, designed to catch cases that would have fallen under the special regime anyway, but would not satisfy the Enterprise Bill tests.
- There will be some extension to the scope to intervene on plurality grounds only. This is necessary and appropriate to deal with, for example, an overseas acquirer that does not qualify under the E Bill and would not qualify under the existing special regime, but who might have a difficult plurality record overseas that would justify investigation.

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- However, these extended provisions will have no effect unless and until Ministers exercise their discretion to intervene. There will be no reason to intervene absent plurality concerns. Proportionality will be taken into account in making the decision on intervention.

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3. OTHER KNOWN CONCERNS OF THE NEWSPAPER INDUSTRY

1. The regime is too complicated

- Object of reforms is to produce a streamlined regime.
- It will be simpler for parties to operate because starting point is the same in all cases (OFT)
- This means that responsibility will rest with regulators and not industry to get cases on the right track
- Although the formal role of OFCOM is new, there is nothing new in Ministers taking account of the views of competition authorities and sectoral regulators.
- Confident that the authorities can co-operate
- There will only be one decision at the end of the day

2. The proposals for newspapers are more onerous than for other media

- Other media have much stricter controls on ownership through licensing regimes that are neither necessary nor appropriate for newspapers.
- There is no regulation of newspapers unless and until there is an acquisition, and only then if the newspaper has a 25% share of supply or a £45 million turnover
- Even then, action will be discretionary and therefore will be targeted at those transactions that appear to raise issues meriting further investigation.

3. The share of supply test applies too narrowly/is inappropriate for newspaper markets

- There is nothing new in the application of a share of supply test to small markets. It has existed in the mainstream mergers regime (which can apply to newspaper acquisitions that do not qualify for the special regime) since 1965.
- Proportionality is an inherent principle of UK and EC law
- There are also specific provisions in the Enterprise Bill to ensure that there will not be disproportionate regulatory intervention – e.g. OFT has a discretion not to refer small markets, Ministers have discretion not to intervene

4. Why not include a circulation-based de minimis provision for the extended jurisdiction?

- Jurisdiction tests based on paid for circulation, which are used in the current special newspaper merger regime, have proved inflexible. Circulation cannot measure the relative strength of a title in the market in which it operates.
- They are also inappropriate for a regime that applies equally to free titles.
- Share of supply is a more effective means of catching those acquisitions that will potentially raise either competition or plurality concerns. And it enables

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the regime to be integrated into the general merger regime.

- As regards the extended jurisdiction provisions (where there is less need to align directly to the competition regime), these in any event have no effect unless and until there is an intervention. Proportionality will be taken into account in making the intervention decision. We therefore do not see the need for additional provision.

5. What will be the basis for any intervention/how do we know how many cases will be intervened on?

- Intervention will be discretionary. It follows from this that it will not be routine in every case
- It will be directed at cases that appear to raise plurality issues and we expect that over time an identifiable pattern of cases will emerge
- Will build from our experience under the existing legislation in making intervention decisions

6. Why have local newspapers not been taken out of the regime as promised in earlier consultations?

- The very smallest newspapers will be taken out of the regime, because they will not have a turnover of £45 million or reach the 25% share of supply threshold in a substantial part of the UK.
- The jurisdictional tests are the same as those that identify a deal as being of sufficient significance to bring it within the Enterprise Bill merger regime. The only exception is that where there is an existing 25% share of supply of newspapers or advertising in newspapers there is no need for any increase in the share of supply for a plurality test alone to apply, as consolidation is not relevant to plurality assessments.
- The treatment of local newspapers needs to be seen in the context of the reforms to the regime as a whole. In particular, the prior written consent of the Secretary of State, on pain of criminal sanctions, is no longer necessary. Regulatory intervention in future will focus on those transactions that raise issues.
- Specified public interest issues can arise in respect of local newspapers. It is right for the authorities to be able to investigate further where plurality concerns have been identified.

7. Will there be guidance?

- We are fully aware of the value of guidance, both in published form and on a confidential basis as regards specific transactions
- We are also aware that any change of law leads to additional guidance requirements in the transitional period
- OFT has established procedures as regards guidance on competition issues

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- We are currently discussing with OFCOM, OFT and CC what we can do as regards the plurality aspects of the new regime, and the best way in which to do it.

8. Lord Puttnam's proposed plurality test

[NB – Response not yet published]

- [The Government's view is that the only way to guarantee sufficient levels of plurality on a cross-media basis is to set clear, specific limits on ownership through a number of key rules.
- Since these rules - which will apply to all mergers - are directed at the same objectives as a general plurality consideration, we do not see the need to provide additionally for a general plurality test in the Enterprise Bill merger control regime.]

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4. GENERAL Q&A's

Why is the new regime still so heavily regulatory?

The new newspaper regime will be better targeted, delivering effective regulation whilst lifting unnecessary regulatory burdens.

The existing regime places a disproportionate burden on parties to newspaper transactions by requiring the prior consent of the Secretary of State for all transactions. Of the 175 cases considered under the regime since 1980, only four have been refused and five cleared subject to conditions.

- The regime will be better targeted: the newspaper plurality provisions will only be invoked in relation to those transfers which are thought to raise wider public interest concerns. Uncontentious transfers will not be unnecessarily delayed or subjected to the costs of a Competition Commission reference.
- The regulatory burden will be wholly removed in relation to the very smallest transfers i.e. those where the company acquired has a turnover of less than £45 million or where neither the original entities nor the combined entity has a 25% share of supply in a substantial part of the United Kingdom.
- Criminal sanctions will be removed. These are an anomaly and are unjustified. Removal will promote consistency with the mainstream merger regime, and will facilitate confident decision making by businesses.
- The regime will be fairer: the same processes will apply to all newspaper transactions. The existing regime distinguishes between existing and new newspaper proprietors, without regard to whether there are any substantive differences in the issues raised by their acquisitions.
- The new regime is consistent with the Enterprise Bill regime for mainstream mergers; where transactions only raise competition issues, these will remain with the specialist competition authorities to deal with.

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What is the purpose of the role for OFCOM? It has no expertise in relation to newspaper mergers/it won't add anything to the CC's analysis. OFCOM will have an unduly privileged position.

Competition assessments will rest with the competition authorities, whether a transaction is dealt with under the normal merger rules or the newspaper rules. OFCOM will not be prevented from contributing to this assessment, as any other third party, but it will have no privileged access either to the competition authorities or to the SoS. Indeed, the SoS will be obliged to accept the recommendations of the competition authorities on competition issues.

On plurality we do consider that OFCOM will have additional specialist sectoral input to make into the process. As the independent media and communications regulator, OFCOM is the body best placed to advise the Secretary of State on the plurality aspects of newspaper mergers. At present officials in the DTI advise the Secretary of State on the competition and plurality aspects of these transfers, both before and after a reference. As the independent media regulator, we feel that OFCOM will make a useful contribution to such analysis in the future.

Furthermore, OFCOM will have some background in newspapers since the Radio Authority enforces the cross media rules in relation to local newspapers and local radio. And a better understanding of the whole span of the media, assisted by greater involvement in newspaper cases, can only help it in considering cross media issues in general and the operation of media ownership rules as a whole.

However, OFCOM will be in an advisory role only. Any representations made by OFCOM will be taken into account alongside the consideration of the CC's report but the final decision will rest with Ministers.

There will be a lack of transparency as regards OFCOM's role.

The need for transparency is fully appreciated and we intend that OFCOM's advice will be published.

Aren't the proposals for newspaper mergers inconsistent with the Government's promise of a streamlined and less burdensome regime?

Not at all. The new regime will be

- **Streamlined**, because it will operate as an integral part of the mainstream merger regime. Parties to transactions will no longer be responsible for choosing the correct procedural regime. Although the role of OFCOM is new, an interrelation between the OFT, Competition Commission and the Secretary of State forms part of the existing merger regime and there is considerable experience in ensuring a smooth liaison between these bodies. One of the key roles of the SoS in the new regime will be to co-ordinate the input of the different regulators to ensure a joined-up application of the regime.

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- **Less burdensome and better targeted**, because intervention will be limited to those transactions that appear to raise plurality issues. Transactions that do not raise any plurality issues will be dealt with as part of the mainstream regime in the same way as any other transaction.
- **Flexible** – we have retained powers to intervene in cases raising plurality or competition concerns, but the removal of the requirement for prior consent will make it easier for straightforward transactions to proceed and place newspaper transactions on an equal footing with all other mergers.

Are there adequate de minimis provisions in the newspaper merger regime?

[Note: This has been argued strongly to the Committee by the Newspaper Society in particular]

Our proposals for reform of the newspaper merger regime align it with every other sector of the economy. The de minimis provisions of the general merger regime, as reformed through the Enterprise Bill, will apply equally to the newspaper sector. Therefore transactions where the turnover of the enterprise being acquired is below £45m and where the transaction neither creates nor enhances a 25% share of supply in a substantial part of the UK will fall outside merger control. This appears to me to be entirely equitable. And I see no reason why the newspaper industry should be treated any differently to every other sector of the economy.

The only exception is that where there is an existing 25% share of supply of newspapers or advertising in newspapers there will be no need for any increase in the share of supply for a plurality test alone to apply, as consolidation is not relevant to plurality assessments. However, there will be no competition test for such transactions. And, as with all other transactions there will only be a discretion to refer, whereas all but a limited category of cases are subject to mandatory references under the current regime.

Why is a plurality test being extended to cases where it wouldn't have applied before – for example, because the buyer wasn't an existing proprietor or the combined circulation was less than 500,000?

The existing special newspaper regime, with its requirements for prior consent and criminal sanctions, only applies to certain newspaper transfers which meet the prescribed thresholds. However, it is wrong to think that newspapers which fall outside the current special newspaper regime, but are nevertheless caught by merger control, escape scrutiny beyond competition. The current merger regime applies a public interest test which would allow consideration of plurality issues. For example, Ministers had advice on wider issues than competition when examining Northern & Shell's acquisition of the Express titles.

We are providing for such mergers to continue to be assessed on plurality, as well as competition grounds, alongside newspaper transfers which fall under the special regime, on a consistent basis and without the burdens of criminal sanctions and prior consent. I would have thought this should be welcomed. Indeed the newspaper industry has generally welcomed applying the regime to non-newspaper proprietors

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who fall outside the existing special regime.

The plurality test is too vague and creates uncertainty for business. Why is it not more clearly defined in the legislation?

We have defined quite clearly what we mean by plurality. That is the accurate presentation of news, free expression of opinion and plurality of views in the UK press. The Competition Commission has considerable expertise in applying such tests under the existing regime. In addition, their previous reports provide clear evidence of the sort of issues that will be considered under these headings.

Why is a plurality test needed?

Since 1979 the Competition Commission has made adverse findings in 9 of the 46 newspaper cases referred to it. Public interest issues, namely the accurate presentation of news and free expression of opinion, were relevant to five of these decisions. And they were the key reason for an adverse conclusion in two of the cases.

We consider that the existence of these cases illustrates the continued need for special provisions to protect the public interest in newspaper transfers.

Why do newspapers, alone of all media, need a 'special regime', when consolidation is being allowed elsewhere? What's wrong with normal competition law?

Plurality of views and opinion in the UK Press is a vital public interest. However, the newspaper industry is alone among the mainstream media - television, radio, satellite - in not requiring licences from the independent media authorities to operate. Through the award of licences, the authorities are able to ensure diversity and plurality in these media. By contrast, the plurality dimension of a newspaper transfer will only be investigated if it appears to raise concern. It is therefore a 'light touch' regime.

The competition aspects of newspaper mergers will be assessed by the competition authorities against the same tests as mergers in other sectors. In the case of those mergers that also raise plurality concerns, the final decision on whether to block or clear the merger, or whether to apply conditions to the merger will remain with the Secretary of State. This is because the Secretary of State will need to take account of both the competition and plurality aspects of the case when deciding whether it may be expected to operate against the public interest.

How will the new newspaper regime work alongside the new competition law?

It will form a part of the new competition regime. The competition aspects of newspaper transactions will be examined by the OFT and, where appropriate, the Competition Commission, in the same way as for any other merger. However the legislation will identify the public interest in newspaper transactions as a public interest consideration that may be examined in addition to competition. This will

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relate to the accurate presentation of news, free expression of opinion, and plurality of views in the UK press.

Where a particular newspaper transaction is identified as raising these additional public interest concerns there will be a power for Ministers to intervene and seek the advice of the OFT and OFCOM as to whether the Competition Commission should examine these aspects of the transaction. The Competition Commission will report to the Secretary of State with their conclusions as to the competition impact of the transaction and the overall public interest impact of the transaction, taking into account both the newspaper public interest consideration and competition. Where appropriate they will also be able to recommend appropriate remedies.

[Note - their recommendations as to competition remedies will not be binding on Ministers, who will, where necessary, balance the interests of competition and plurality, although a direct conflict between these two principles is in any event unlikely]

What is the competition test that will be applied to newspaper mergers?

The competition authorities will consider whether a qualifying transaction has or would result in a substantial lessening of competition in any relevant economic market. For newspapers, this will normally be either the sale of newspapers or advertising in newspapers in a particular geographic area.

In recent reports on newspaper transfers, the Competition Commission has defined the relevant markets for newspapers as:

- free and paid for morning, evening and Sunday titles;
- and separately free and paid-for weekly titles;

where they operate in the same or substantially overlapping geographic areas.

However, as always the competition authorities will be obliged to look at each case on its facts. They will define the relevant markets as they see fit – this will not be prescribed in the legislation.

If a qualifying newspaper merger does not raise any plurality concerns, it will be dealt with by the independent competition authorities in the same way as a merger in any other sector of the economy. In addition, where the Secretary of State has intervened on plurality grounds she will not be able to dispute the findings of the OFT or the Competition Commission on competition. [NB – in applying remedies the SoS will be able to weigh up the competition and plurality detriments in her consideration of the overall public interest.]

You're putting Ministers back into merger decisions aren't you?

Competition judgments on newspaper mergers will be made by the specialist competition authorities. The additional public interests that are relevant to newspaper mergers are fundamental to the preservation of debate that is central to democratic government. The exceptional public interest regime will be invoked only in relation to those transactions that raise public interest issues beyond pure competition

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concerns. It is appropriate that Ministers rather than the specialist competition bodies continue to take responsibility in relation to these matters.

Will the 'fit and proper' test be extended into the new regime?

Neither the general merger regime nor the special newspaper merger regime has a 'fit and proper' test of the kind contained in, for example, the regulatory system for financial services businesses and similar 'licensing' schemes. Neither do we intend to introduce such a test.

Instead, mergers involving newspapers will be assessed against the normal competition test and also the test of whether they would be likely to harm the public interest in the accurate presentation of news, the free expression of opinion and the plurality of views in the UK press. Of course, a person's character and record could be relevant to that test.

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5. BRIEF SUMMARY OF EXISTING AND PROPOSED NEW NEWSPAPER MERGER REGIME**The existing regime**

The Fair Trading Act not only contains the provisions for the current general merger regime, but also for a separate, and stricter, regime for newspaper mergers. This provides that a transfer of a newspaper or newspaper assets to an existing newspaper proprietor, that meets the circulation thresholds for the special regime, will be unlawful and void without the prior written consent of the Secretary of State.

These special provisions are the result of the 1961-2 report of the Royal Commission on the Press, which concluded that action should be taken to regulate the increasing concentration of newspaper ownership that could threaten freedom and variety of expression of opinion and perhaps even the unbiased presentation of news.

Qualifying newspaper transfers are, with limited exceptions, subject to a mandatory reference to the Competition Commission before the SoS can make a decision on consent. Where a newspaper transfer is referred to the CC it is required to investigate whether the transfer may be expected to operate against the public interest, and in particular the need for accurate presentation of news and free expression of opinion.

Newspaper transfers that do not qualify, or that are not referred under the provisions of the special newspaper regime, can also be subject to investigation under the mainstream merger regime if they satisfy the relevant jurisdictional criteria.

The special newspaper merger regime is underpinned by criminal sanctions. Anyone involved in or privy to a purported transfer without the Secretary of State's prior consent commits an offence and is liable for a fine and/or up to two years imprisonment. However, the criminal sanctions have never been used.

Of the 175 cases considered under the regime since 1980, only four have been refused and five cleared subject to conditions.

The new regime

There continues to be a role for special provisions in relation to newspaper mergers. However, the current system is too inflexible and imposes unnecessary burdens both on business and on the authorities. The Bill will replace it with a streamlined and less burdensome regime that focuses regulatory action on those newspaper transfers that appear to raise competition or plurality concerns.

The new regime will be applicable to all newspaper transfers that satisfy the jurisdictional criteria for mergers in the Enterprise Bill. However, the new regime also will apply where there is a 25% share of supply of newspapers or advertising in newspapers in a substantial part of the United Kingdom regardless of the identity or existing business interests of the enterprises involved. This will be an extension of the regime (because there is no requirement that the transfer has a consolidating effect) but will still exclude the very smallest local newspapers that are unlikely to

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raise plurality or competition concerns.

Competition issues raised by newspaper transfers can be adequately protected by the mainstream merger regime. The Secretary of State will only retain powers to intervene where a newspaper transfer raises concerns about the public interest in the accurate presentation of news, free expression of opinion, and plurality in the UK Press. In such cases the Secretary of State will be able to refer the transaction to the Competition Commission for investigation. The CC will report on whether the merger may be expected to operate against the public interest by reference to its impact on the accurate presentation of news, free expression of opinion and plurality of views in the UK press. [NB Where included in the reference the CC will also assess and take into account competition issues arising from the transfer.]

For those transactions that do appear to raise plurality concerns, OFCOM will have an advisory role both at the point of the decision to refer and the Competition Commission's conclusions.

The final decision on the overall public interest will rest with the SoS. She will take account of both plurality and competition. However, the Secretary of State will not be able to dispute the findings of the OFT or the Competition Commission on competition.

There will be no requirement for the Secretary of State's prior consent to newspaper transfers. Criminal sanctions will also be removed.

In the case of local newspapers, the Competition Commission will be expected to carry out effective tests of local opinion, for example by means of Citizens' Juries.