

Local Media Assessments

Memorandum of Understanding between the Office of Communications (Ofcom) and the Office of Fair Trading (OFT)

Purpose and background

Purpose

1. This Memorandum of Understanding (MOU) sets out the working arrangements and describes the relationship between Ofcom and the Office of Fair Trading (OFT) in relation to Local Media Assessments (LMAs). It should be read alongside the Local Media Assessments Guidance (LMA Guidance)¹.
2. LMAs, as set out in the LMA Guidance, are a new element in the OFT's existing merger procedures. They are a more formalised way for Ofcom to assist the OFT in its assessment of mergers involving local media companies.

Background

3. LMAs have their origins in the Government's Digital Britain Interim Report². The report referred to local media groups' views that the transition to digital business models required consolidation but that the current media merger regime did not take account of potential cross-media competition³. Prompted by this report, the Office of Fair Trading (OFT) conducted a Review of the Local and Regional Media Merger Regime⁴ (the Review).
4. In the Review, the OFT concluded that the existing merger regime was "*flexible and evidence-based*", and thus able to take into account the various considerations raised. Nonetheless, in recognition of the benefit available from Ofcom's knowledge of the media sector, the OFT proposed that in local media merger cases raising *prima facie* competition concerns, the OFT would ask Ofcom to provide it with an LMA⁵.
5. The OFT confirmed this in the revised Jurisdictional and Procedural Merger Guidance published in June 2009⁶. Following this, Ofcom has worked closely with the OFT to define the potential scope, the content and the process of conducting LMAs, and to consult on the LMA Guidance.

¹ Ofcom: Local Media Assessments Guidance <http://stakeholders.ofcom.org.uk/market-data-research/research-publications/local-media-assessments/>

² Digital Britain Interim Report, http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf

³ Digital Britain Interim Report, section 3.3, p. 47

⁴ OFT: Review of the Local and Regional Media Merger Regime, http://www.of.gov.uk/shared_of/mergers_ea02/oft1091.pdf

⁵ OFT: Review of the Local and Regional Media Merger Regime, paragraphs 1.4 to 1.11

⁶ OFT: Mergers - Jurisdictional and Procedural Guidance, http://www.of.gov.uk/shared_of/mergers_ea02/oft527.pdf, paragraph 6.15

6. Following a consultation period over the summer 2010, Ofcom has now published its LMA Guidance setting out the scope, the content and the process of conducting LMAs.

Principles governing an LMA

7. The final conclusion on all aspects of the competitive analysis of the relevant local media merger case⁷ remains one for the OFT, as does the ultimate decision on whether the merger creates a realistic prospect of a substantial lessening of competition (and if so, whether to apply any available exception to the duty to refer or to accept undertakings offered by the parties in lieu of reference).
8. The views Ofcom presents in its LMA will be its own, independent of the OFT. Ofcom's analysis in relation to the merger case will draw on its expertise across the media sector and the OFT will take Ofcom's assessment into account in its final decision on whether to refer the merger case to the Competition Commission. Ofcom's analysis presented in an LMA is not binding on the OFT.
9. The OFT recognises that the current merger assessment procedures allow limited time for Ofcom to prepare an LMA⁸. The OFT will support Ofcom by having an open dialogue with Ofcom at every stage of the merger assessment process (including pre-notification) and by sharing relevant information as appropriate.

The LMA process

Regular sharing of general intelligence

10. The OFT and Ofcom acknowledge that regular information and intelligence sharing between the OFT and Ofcom is crucial for the delivery of LMAs to the highest standards.
11. The OFT and Ofcom will engage regularly to exchange views about possible future local media mergers and about general developments in the local media sector.

Cooperation during the pre-notification period

12. The OFT and Ofcom will alert one another if they become aware of any potentially relevant local media mergers taking place or potentially occurring in the future.
13. If the merging parties in a case involving local media decide to engage with the OFT in pre-notification discussions, the OFT will, if the parties consent, inform Ofcom of the anticipated date of a formal merger notification.

⁷ The LMA Guidance defines what constitutes a relevant local media merger case

⁸ The OFT's Merger Guidance foresees two possible merger assessment procedures – the administrative procedure and the statutory procedure. Both procedures are explained in the OFT's Jurisdictional and procedural guidance, paragraph 4.49 – 4.70

14. If the OFT becomes aware of a relevant merger that has not been notified to it, and decides to send an enquiry letter to the merging parties, the OFT will alert Ofcom with as much notice as possible.
15. The OFT and Ofcom will encourage the merging parties to engage with both agencies at the earliest opportunity in all cases involving local media, irrespective of whether the OFT expects there to be *prima facie* competition concerns. Early discussions with the merging parties may help Ofcom to form a view whether to undertake preparatory work in advance of the formal merger notification and, moreover, increase the potential benefit that may be gained from an LMA.
16. During any pre-notification period, any information in relation to the relevant merger case will be shared between the OFT and Ofcom subject to the merging parties' consent.

Notification of a local media merger

17. The LMA Guidance encourages merging parties to submit to Ofcom copies of all material provided to the OFT.
18. If the merging parties have not submitted copies of all material provided to the OFT to Ofcom, the OFT may pass the relevant information to Ofcom⁹. Such an information transfer, if considered appropriate, would take place as soon as possible after the notification and could potentially include all information submitted by the merging parties, including the confidential information¹⁰.

Cooperation during the merger assessment

19. The OFT and Ofcom will provide each other with regular updates on the status of work and exchange any additional information in relation to the merger case that may be relevant for the assessment of the merger.
20. The OFT will inform Ofcom with as much notice as possible whether it intends to send the Issues Letter to the merging parties. The OFT informs the merging parties at the "state of play" discussion whether the case team is minded to send an Issues Letter¹¹. The OFT's decision to send (rather than the sending of) an Issues Letter to the merging parties will be the point that for the purposes of the LMA signals *prima facie* competition concerns and as such it will be the point at which the OFT would request an LMA from Ofcom.
21. Based on the information available, Ofcom will use its discretion to determine when to begin preparing for an LMA. Ofcom may decide to commence an LMA before the OFT's decision to send an Issues Letter. Ofcom will also use its discretion to determine which issues an LMA will cover and to what degree of detail. Ofcom will focus on the aspects that it considers will add value to the OFT's merger assessment.

⁹ The OFT may use a statutory gateway under section 241(1) Enterprise Act pursuant to which the OFT may pass specified information that it receives to Ofcom for the purpose of facilitating the exercise by the OFT of its merger control function

¹⁰ LMA Guidance, paragraph 1.54

¹¹ OFT: Mergers: Jurisdictional and Procedural Guidance, paragraph 6.8

22. Ofcom will submit an LMA in time for it to be considered and reflected to the extent appropriate by the OFT in the Issues Letter. This version of an LMA will contain the substantive information and advice to be provided by Ofcom to the OFT, but may be subject to final verification by Ofcom officials where necessary.
23. To the extent that the OFT wishes to place weight on the information contained in an LMA in any potential case for reference, it will refer to that information in the Issues Letter in order for it to be considered, and responded to, by the parties.
24. Once the LMA has been submitted and the Issues Letter has been sent to the merging parties, Ofcom colleagues involved in the production of an LMA will be available to meet the OFT merger assessment team to explain the reasoning and analysis underlying the advice provided. The OFT may ask Ofcom to provide further advice in relation to arguments raised in an LMA or in relation to additional evidence provided by the merging parties in response to the Issues Letter. In such cases, Ofcom will provide to the OFT such further information as the OFT may request and which is readily available to Ofcom in time for it to be considered at the Case Review Meeting (CRM).
25. Meetings between the parties will generally be held separately by Ofcom and the OFT, recognising the independence of the LMA process. Where appropriate, however, joint meetings may be held between the parties, the OFT and Ofcom in order to facilitate the review and ensure administrative efficiency.

Requesting information from the merging parties

26. To minimise the burden on merging parties, wherever possible, Ofcom and the OFT will liaise with one another to coordinate any information requests.
27. Ofcom may request information directly from the merging parties, in which case any information in relation to the merger obtained from the merging parties will be passed to the OFT.
28. An LMA submitted by Ofcom to the OFT may contain information that is confidential (either as regards the merging parties or other confidential information known to Ofcom). Ofcom will usually seek consent from relevant parties before passing confidential information to the OFT. If Ofcom considers that disclosure of this information is made for the purpose of facilitating the carrying out by Ofcom or the OFT of any of their functions, then consent will not be necessary.

Publication of an LMA

29. The OFT will publish an LMA at the same time that it publishes the non-confidential version of its decision on the OFT website.
30. For publication purposes, Ofcom will provide the OFT with a version of an LMA that does not contain confidential information submitted to Ofcom. The OFT will liaise with the parties (at the same time as it discusses redactions from its own decision) to obtain a finalised non-confidential version of an LMA suitable for general publication.

Revisions to this MOU

31. This MOU may be revised in the future subject to mutual agreement between the OFT and Ofcom. Any revisions to this MOU will be published on the OFT's and Ofcom's websites.

OFFICE OF FAIR TRADING

Signature:



Name: Sheldon Mills

Position: Director of Mergers

Date: 26 November 2010

OFFICE OF COMMUNICATIONS

Signature:



Name: Yih-Choung Teh

Position: Competition Policy Director

Date: 26 November 2010