



Local Media Assessment Guidance

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Local Media Assessment Guidance

Background

1. In January 2009 the Government published the Digital Britain Interim Report¹. It noted the views of local media groups who felt there were strong pressures on them to consolidate in order to make the transition to digital business models². It also noted arguments that the current media merger regime did not take into account the potential for competition across boundaries between newspapers and other media. In response to this, the Digital Britain Interim Report invited the OFT to undertake an exploratory review across the local and regional media sector and to make appropriate recommendations.
2. The OFT's subsequent Review of the Local and Regional Media Merger Regime report³ was published alongside the Government's Digital Britain Final Report⁴ in June 2009. It concluded that the existing merger regime is "flexible and evidence-based", and thus able to take into account the various considerations raised⁵.
3. Similarly, the Government's final Digital Britain Report, published in June 2009, concluded that:

*"...the existing framework provides an adequate mechanism for considering the importance of having a source of independent news and reporting at a local and regional level across the UK."*⁶
4. Nonetheless, in recognition of the benefit available from Ofcom's knowledge of the media sector, the OFT proposed to amend its merger guidance. This meant that in local media merger cases raising *prima facie* competition concerns, the OFT would ask Ofcom to provide them with a Local Media Assessment (LMA) covering relevant factors arising from Ofcom's understanding of media markets.
5. The OFT's revised Jurisdictional and Procedural Merger Guidance⁷, published in June 2009, confirmed that:

*"In media mergers involving newspaper publishing and/or commercial radio or television broadcasting, where the case raises prima facie competition concerns, the OFT will ask Ofcom to provide it with a local media assessment in order further to inform the OFT's decisions on the reference test and on the application of any available exceptions to the duty to refer"*⁸.
6. The OFT's Jurisdictional and Procedural Merger Guidance explains that:

¹ Digital Britain Interim Report, http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf

² Digital Britain Interim Report, section 3.3, p. 47

³ OFT: Review of the Local and Regional Media Merger Regime, http://www.of.gov.uk/shared_of/mergers_ea02/oft1091.pdf

⁴ Digital Britain Final Report, <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>

⁵ OFT: Review of the Local and Regional Media Merger Regime, paragraph 4.71

⁶ Digital Britain Final Report, chapter 5, paragraph 71

⁷ OFT: Mergers - Jurisdictional and Procedural Guidance, http://www.of.gov.uk/shared_of/mergers_ea02/oft527.pdf

⁸ OFT: Mergers - Jurisdictional and Procedural Guidance, paragraph 6.15

“...Drawing on Ofcom’s understanding of media markets, the [local media] assessment would be likely to include Ofcom’s views on:

- *the relevant counterfactual to the merger (including the risk of the asset or business in question failing),*
- *the scope of relevant product and geographic markets,*
- *the competitive effects of the merger, and*
- *exceptions to the duty to refer, and in particular Ofcom’s views on whether the markets are of insufficient importance (de minimis) to warrant reference and whether there are ‘relevant customer benefits’ – such as higher quality (which, in the context of newspapers, could for example reflect the range and quality of news reporting) or greater choice of products – which might be weighed against an identified substantial lessening of competition.”⁹*

7. This LMA Guidance sets out the approach that Ofcom intends to take in carrying out an LMA. In particular it covers:
 - the objectives of an LMA;
 - the circumstances in which Ofcom will carry out an LMA;
 - how the timing of the Ofcom LMA will fit into the OFT’s merger process and timescales;
 - the issues that are likely to be covered by an LMA; and
 - arrangements for information sharing.
8. A separate Memorandum of Understanding (MOU) published alongside this LMA Guidance sets out the working arrangements and describes the relationship between Ofcom and the OFT in relation to LMAs.

The objectives of an LMA

9. Media industries have undergone profound changes over recent years and there is no indication that the pace of change is slowing down. While different media sectors are inevitably subject to their own individual pressures, the traditional distinctions between them are beginning to blur. Furthermore, it is important to recognise that media services are generally two-sided, providing services to consumers, and also to advertisers.
10. This has potential implications for whether mergers between local media companies are to be regarded as pro- or anti-competitive. The current merger regime, as the OFT report concluded, is sufficiently flexible to take account of these factors in assessing the impact of a merger on competition¹⁰. The LMA will provide a means for Ofcom, using its sectoral knowledge, to provide views on these issues to assist the OFT in evaluating mergers.

⁹ OFT: Mergers - Jurisdictional and procedural guidance, paragraph 6.15

¹⁰ OFT: Review of the Local and Regional Media Merger Regime, paragraph 4.71

11. Ofcom's LMAs will not reach binding decisions on the competition impact of a media merger. Ofcom's aim in providing an independent LMA is to assist the OFT in evaluating the relevant merger and reaching its decision on whether to make a reference to the Competition Commission (CC). The final conclusion on all aspects of the competitive analysis (including, for example, the scope of the relevant market) remains one for the OFT, as does the ultimate conclusion on whether the merger creates a realistic prospect of a substantial lessening of competition.
12. The central objective of an LMA is, therefore, that it should add value to the OFT's investigation into a local media merger, by providing additional evidence and argumentation. This added value will come from two sources:
 - Ofcom will be in a position to provide an independent view informed by its existing knowledge of the media sector concerned.
 - Ofcom will aim to assist the OFT by considering certain arguments that potentially have an important bearing on the OFT's competition assessment.

In what circumstances will Ofcom conduct an LMA?

13. The OFT's merger guidance states that the OFT will request an LMA "*where the case raises prima facie competition concerns*"¹¹. In practice this is likely to mean that an LMA will be requested as soon as the OFT believes that it is appropriate to send an Issues Letter to the parties and to consider the case at a Case Review Meeting (CRM), in line with the OFT's Jurisdictional and Procedural Merger Guidance¹². The decision to send an Issues Letter is typically communicated to the merging parties by the OFT at the 'state of play' discussion¹³.
14. Ofcom will use its discretion as to whether to commence work on an LMA in respect of a particular local media merger prior to the OFT's formal request. In any event Ofcom will only submit its LMA when it is clear that the LMA is likely to add value to the overall merger process and when the analysis carried out by Ofcom could materially aid the OFT's merger assessment. Ofcom and the OFT will liaise as appropriate in all relevant cases, even where an LMA is not ultimately required.
15. Ofcom will be mindful of the need to use its resources efficiently and of the pressures an LMA may place on stakeholders. These considerations will be an important factor in Ofcom's decision whether or not to commence an LMA.
16. Ofcom will in any event make an initial assessment at an early point as to whether an LMA is likely to provide additional material that might significantly aid the OFT's merger decision in a particular case. This will rely, not just on whether the merger potentially raises any competition concerns, but also on whether the analysis that Ofcom can provide in an LMA has the potential materially to affect the OFT's competition assessment. This will depend, not least, on the merging parties' ability to provide Ofcom with relevant information at a suitably early juncture.
17. An LMA will also not be undertaken when a merger solely involves UK-wide media. There is no generally accepted definition of "local", or indeed "regional" media, and Ofcom will consequently interpret the scope of the LMA broadly to cover any sub-UK media presence.

¹¹ OFT: Mergers - Jurisdictional and procedural guidance, paragraph 6.15

¹² OFT: Mergers - Jurisdictional and procedural guidance, paragraph 6.49

¹³ OFT: Mergers - Jurisdictional and procedural guidance, paragraph 6.8

18. Ofcom may therefore provide an LMA in cases of mergers between local newspapers, radio or television broadcasters, including cross-media mergers. It may also provide an LMA in cases where only one merging party is a local media firm while the other is a UK wide media firm, or any other firm.

Timing of an LMA

19. The OFT's *Jurisdictional and procedural merger guidance* distinguishes between its procedures depending on whether notification is made by way of informal submission or statutory merger notice. The OFT's administrative timescales generally allow it 40 working days to reach a decision from the date that it receives a satisfactory submission¹⁴. The statutory merger procedure provides that an anticipated merger in the public domain must be considered by the OFT within 20 working days, with a maximum extension of 10 working days at the OFT's discretion¹⁵.
20. Where the merger is notified under the administrative timetable, the OFT aims to hold a "state of play" discussion with the parties between working days 15 and 20, depending on the type of case¹⁶, at which the OFT will aim to inform the parties whether an Issues Letter will be sent and a CRM is required. The Issues Letter is generally sent soon after the "state of play" discussion.
21. Where the merger is notified under the statutory timetable, the "state of play" discussion will take place between days 10 and 15 of the process. The Issues Letter is generally sent soon after the "state of play" discussion. Given the shorter timescales, the OFT's guidance states that the statutory merger notice procedure is *"most suitable for transactions that do not raise material anticompetitive concerns but where the certainty of regulatory clearance is required within a fixed time period"*¹⁷.
22. In either event, Ofcom would aim to produce its LMA in time for it to be considered by the OFT in advance of the Issues Letter being sent to the parties. Ofcom would ordinarily not begin working on an LMA before the merger is formally notified. The timing for Ofcom to produce an LMA is therefore potentially very short. Furthermore, it will not be clear whether the OFT is of the view that an Issues Letter (and therefore an LMA) is needed until well into its timescale. The OFT will inform Ofcom of any potentially relevant merger at the earliest opportunity and Ofcom will need to take a view on whether to commence preparing an LMA for a particular merger at the earliest possible juncture. Ofcom will inform the merging parties at the point it will commence working on an LMA.
23. An LMA is likely to be required approximately half way through the OFT's merger process. The potential benefits of Ofcom's LMA to the merger process depend on Ofcom's ability to provide additional analysis. This is more likely to be the case if Ofcom is allowed sufficient time. Ofcom therefore encourages parties to engage in discussion ahead of formal notification of the merger. The more this is possible, the more it is likely that an LMA will add value to the overall process. This also implies that for mergers notified by way of a statutory merger notice and in cases where the merging parties choose not to engage in pre-notification discussions with Ofcom, it is less likely that Ofcom would be able to provide an LMA.

¹⁴ OFT: Mergers - Jurisdictional and procedural guidance, paragraph 4.65

¹⁵ OFT: Mergers - Jurisdictional and procedural guidance, paragraph 4.52

¹⁶ OFT: Mergers - Jurisdictional and procedural guidance, paragraph 6.8

¹⁷ OFT: Mergers - Jurisdictional and procedural guidance, paragraph 4.54

What will an LMA cover?

24. Given the objectives of the LMA set out above, Ofcom will focus on the areas that it believes will add value to the OFT's decision making. This is likely to centre on three broad issues:
- the overall sectoral context;
 - the competitive constraints acting on the market (or markets);
 - the potential for a merger to produce relevant customer benefits, such as an increase in "quality".
25. In line with the objective that an LMA should add value to the OFT's decision-making process, Ofcom is unlikely to need to cover all these issues to a similar extent for all mergers. Rather, it will focus on those areas that have a greater bearing on the OFT's assessment.
26. Similarly, LMAs may vary substantially in terms of the level of attention paid to each set of issues. Ofcom will make an assessment of which issues to focus on, and to what extent, on a case by case basis. In addition, there may be issues, aside from those covered by the broad areas set out above, that Ofcom may decide should be included in a particular LMA.
27. The scope of an LMA will in part be determined by what is feasible in the timescales and given the available Information, as set out above. It may be limited by time constraints, especially in cases where the merging parties do not engage in pre-notification with Ofcom before submitting the merger notification and/or where they elect to use a statutory merger notice.

Sectoral context

28. Ofcom will set out a view of the overall context to the merger drawing on its existing knowledge of the relevant sector. It will outline the central trends affecting the sector and relate these to the merger being considered.
29. A central argument behind some local media mergers (in particular local newspapers) has been the need to consolidate to ensure long term financial viability and growth. An LMA will provide Ofcom's view on the sectoral context and will also seek to relate this to the stated rationale for the merger.
30. In particular, the OFT's assessment of the merger is based against a counterfactual situation of what would happen if the merger did not take place. Generally, as set out in the Merger Assessment Guidelines¹⁸, the OFT will take the pre-merger situation as the best approximation of the counterfactual to a merger. In dynamic sectors, however, as recognised by the OFT, the OFT's competitive assessment may need to take into account the sectoral context.

¹⁸ Office of Fair Trading / Competition Commission: Merger Assessment Guidelines 2010 (OFT1254), paragraph 4.3.5, http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/pdf/100916_merger_assessment_guidelines.pdf

Competitive constraints

31. A major issue affecting the assessment of any merger is how widely to define the market. In local media mergers, this is relevant both in the product sense (whether the merging firms experience wider competitive pressures from other products or services that would limit their ability to raise prices after a merger) and in the geographical sense (what is the geographic area over which the market spreads).
32. In respect of product markets, an LMA will examine the extent to which competitive pressure is exerted by other forms of media (e.g. radio on newspapers etc). A key feature in the development of media markets has been the potential for greater substitutability between different media, due in particular to the growth of the internet and its use as a means of advertising.
33. An LMA will, consequently, seek to provide views on whether there are broader competitive constraints from other products that potentially limit the merged entity's ability to raise prices. In doing this, Ofcom will seek to provide views on product substitutability between different forms of media and between different platforms. These will be based on an assessment of generic trends applied to the particular merger under consideration.
34. In a similar way, Ofcom may also provide views on the nature of geographic competition in respect to the particular merger. The issue of geographic market definition will inevitably be specific to the merger in question, depending on which parts of the country the merging companies operate in. Ofcom will seek to provide views on whether competitive pressures from areas outside the geographic market definition initially posited by the OFT can be expected to affect post-merger competition.

Relevant customer benefits - Quality

35. Under the Enterprise Act 2002 section 22(2)(b), 33(2)(c) and 30, where the OFT believes that there are "*relevant customer benefits*" that outweigh the potential substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition, the OFT may exercise its discretion not to refer a merger to the CC. The Enterprise Act 2002 section 30(1) indicates that amongst such customer benefits is the potential for greater innovation and higher quality.
36. An LMA will consider whether potential improvements in quality exist and whether any such benefits might be weighed against the potential customer harm arising from an identified substantial lessening of competition.
37. When a merger takes place, in addition to the benefits accruing to the merging parties, there may be a number of wider benefits that result from the transaction. These benefits can be considered in two broad ways:
 - a "public interest" perspective; and
 - private consumer benefits.
38. The "public interest" perspective is where "quality" is the level of contribution that the media makes to the life of consumers as democratic citizens. This viewpoint captures the positive externalities and wider social value of media. It would also include issues such as plurality of views and the coverage of democratic proceedings (e.g. local council meetings). A related view of the "quality" of media makes this synonymous

with the quantity and depth of “worthwhile” journalism, whether or not this is what consumers would themselves choose if left to their own devices. In economic terms, quality in this sense is a “merit good”. “Quality” can also be seen in terms of the depth of “worthwhile” journalism, i.e. the quality of writing, the level of analysis of issues, etc.

39. On the other hand, “quality” can also be seen from a private consumer demand perspective – “quality” is what consumers consider it to be; specifically how an individual personally values the content of the media. That is, “quality” can be measured by whether the media satisfies consumer demand for particular types of content.
40. The public interest and merit good arguments are in essence “public values” whereas the private consumer benefits viewpoint focuses purely on the “private value” to an individual. Because the LMA is intended to inform the OFT’s assessment under the Enterprise Act 2002, the LMA will focus on the private value of media. This means that Ofcom will focus on the specific elements of the particular media involved that consumers themselves directly value, i.e. what they themselves enjoy and value.
41. While private consumer benefits might potentially fall within the definition of relevant customer benefits under section 30 of the Act, public values, on the other hand, would be more relevant if the Secretary of State has issued a public interest intervention notice under section 42 of the Enterprise Act (see section below.)

Other issues

42. In addition to the issues described above, an LMA may also cover further issues that Ofcom sees as potentially relevant to the OFT’s assessment. These may include the impact of media specific regulations on competition, and the overall importance of the merger. In particular an LMA may include views on whether the value of the affected markets is sufficiently low that they might be seen as being of insufficient importance (“*de minimis*”) to warrant a reference to the CC.

Remedies

43. Because an LMA will cover specific aspects as set out above, it is not a full assessment of the impact of the merger. As such, Ofcom will not generally focus on potential remedies to the merger within LMA.
44. Nonetheless, the issues raised by an LMA may affect the OFT’s view of what undertakings in lieu it might be willing to consider. Ofcom will therefore provide views as and when it is valuable to do so.

Public Interest Test and Local Media Assessment

45. In addition to LMAs, Ofcom has an existing role in providing advice in relation to media mergers, namely to assist the Secretary of State in assessing the public interest impact of media mergers.
46. Section 42 of the Enterprise Act 2002 allows for the Secretary of State to assume responsibility for determining whether or not to refer a merger to the CC, and what action to take in relation to the merger, by issuing a public interest intervention notice (PIIN). A PIIN may be issued when certain public interest considerations may be relevant to a particular media merger. In cases where the Secretary of State decides to intervene on media public interest grounds, Ofcom will provide an initial report with

advice and recommendations to inform the Secretary of State on the public interest aspects of the case under section 44A of the Enterprise Act 2002.

47. An LMA is distinct from any assessment that Ofcom may carry out in relation to the broader public interest implications of a merger. It operates under a different framework and considers different issues.
48. Ofcom's role in advising the Secretary of State on the public interest aspects of the merger is to allow for considerations of, for example, the need for the accurate presentation of news and free expression of opinion (in newspapers) and the need for a sufficient plurality of persons with control of media enterprises. Parliament considered these to be necessary for a healthy functioning democracy and they allow for other wider social value to be taken into account if the merger is seen as raising issues in this regard. In assessing the public interest considerations, Ofcom will not consider any competition effects of the merger.
49. The role of an LMA, on the other hand, as set out above, is to assist the OFT in making its decision on the competition effects of the merger (and potentially any relevant exceptions to the duty to refer, including relevant customer benefits). As set out in the OFT's merger guidance, in cases where a PIIN has been issued, the OFT will carry out its review in the same way as it would for any other case¹⁹. The LMA is undertaken to advise the OFT on competition issues, whereas a public interest assessment is undertaken to advise the Secretary of State on public interest issues which are wider than those recognised in the OFT's review. The two exercises are therefore distinct, even though Ofcom may be required to undertake both exercises in relation to a single case.

Information gathering and sharing

50. Ofcom provides an LMA to the OFT on an advisory basis, given that the decisions in relation to the assessment of the substantial lessening of competition test fall to the OFT. Nonetheless Ofcom will need information from the merging parties to conduct an LMA. This information may include:
 - the rationale for merging;
 - the parties' future plans for the new business;
 - any information on what the likely future consumer benefits could be;
 - evidence relevant to the counterfactual;
 - any research conducted relating to consumer and supplier views of substitution;
 - information relating to pricing policies (this is to get an understanding about demand elasticities);
 - views (consumer, supplier and merging parties) of characteristics and functionality of products; and
 - details of products produced by target (e.g. if newspaper merger, number of titles, circulation, ad revenues, profitability over time, geographic coverage).

¹⁹ OFT: Mergers: Jurisdictional and Procedural Guidance, paragraph 9.7

51. As outlined in the OFT Jurisdictional and Procedural Merger Guidance²⁰, the OFT would also require similar information and Ofcom would therefore encourage the parties to provide this information to both the OFT and Ofcom.
52. Recognising the potential burden on parties, Ofcom will seek not to duplicate the information requested by the OFT. Ofcom encourages parties to provide copies of all material provided to the OFT to Ofcom at the same time to facilitate Ofcom's assessment²¹.
53. Ofcom may also engage with the parties directly in order to obtain any additional information that might be needed for an LMA. This information may relate to any of the elements being considered under an LMA. Ofcom will notify merging parties what information it thinks it will need as early as possible. Any information provided to Ofcom in relation to a specific merger will also be shared with the OFT.
54. In preparing an LMA, Ofcom may take into consideration unsolicited submissions received from third parties. Any information provided by third parties will be shared with the OFT.
55. Ofcom will treat all commercially confidential information sensitively, in line with its statutory responsibilities in this regard.

²⁰ OFT: Mergers: Jurisdictional and Procedural Guidance, chapter 5

²¹ It should be noted that there is a statutory gateway under Section 241(1) Enterprise Act 2002 pursuant to which the OFT may be able to pass information that it receives to Ofcom for the purpose of facilitating the exercise by the OFT of its merger control function.