

# DCMS CONSULTATION ON MEDIA OWNERSHIP RULES

## SUBMISSION BY ASSOCIATED NEWSPAPERS LIMITED

25<sup>th</sup> JANUARY 2002

### 1. Introduction

1.1 Associated Newspapers Limited (“Associated”) is part of the DMGT Plc group. It is a leading UK newspaper publisher, whose titles include the *Daily Mail*, *The Mail on Sunday*, the *Evening Standard* and *Metro*. It also has significant Internet interests including ukplus.co.uk, thisislondon.co.uk, and femail.co.uk.

Associated is responding to the section of the Government’s Consultation on Media Ownership Rules which deals with ownership of the press (section 6.4). Associated welcomes the Government’s indication in the White Paper *A New Future for Communications* that it is considering a “lighter touch” for newspaper mergers, and believes that the newspaper industry has now reached the stage where an overhaul of the current regime is both appropriate and necessary. Associated has considered the proposals set out in the Consultation on Media Ownership Rules (“the Consultation Paper”) and comments in this response on the Government’s specific proposals on newspaper ownership. Our parent company, Daily Mail and General Trust plc, is responding separately on other issues raised in the Consultation Paper.

1.2 In summary, Associated’s view is as follows:

- The current newspaper merger regime, which was introduced in 1965, is no longer appropriate in today's media world, which offers a much broader range of choices to both readers and advertisers.
- Ex post facto control is now the appropriate way to govern the acquisition of newspapers. Competition authorities should have the power to review a newspaper transaction up to four months after completion, using the same procedure as is currently applied to transactions in all other industries. Parties to a newspaper transaction could therefore decide whether to submit their proposals to the competition authorities for prior approval (or for confidential guidance), or take the risk of the transaction being called in for review.
- The review of the transaction for any public interest concerns must apply to newspaper owners (however many titles they own) and non-newspaper owners alike. If there is any sensitivity attaching to newspaper ownership (a fact which underlies both the current regime and the Government's proposals), it is critical that all purchasers are subjected to the same public interest test. The review should continue to be carried out by the Competition Commission, which has a wealth of experience in assessing both competition and freedom of expression issues in newspaper transactions. It is difficult to see what additional skills OFCOM could bring to this

process, charged as it is with oversight of the entirely different regulatory requirements of electronic media and communications.

- The political element should be removed entirely from the review process. It would not serve the public interest for an independent investigative body (currently the Competition Commission) to produce a detailed report (taking evidence from interested third parties), and for the Secretary of State for Trade and Industry to then be free to overrule its conclusions.
- Associated agrees with the Consultation Paper's proposals to remove local newspapers and newspaper assets from the remit of the regime, as well as the proposal to remove criminal sanctions for non-compliance.

1.3 Each of these points is addressed in further detail below.

## **2. The new media environment**

2.1 As the Consultation Paper explains, a special newspaper regime was considered to be necessary in 1965 following the Royal Commission report on the press (published in 1962), which judged that concentration of newspaper ownership threatened to stifle diversity of opinion in newspapers. However, since the coming into force of the Fair Trading Act of 1973, the media environment has changed significantly.

2.2 In the 1970s, commercial radio hardly existed and commercial television was still a single channel monopoly. There were no free newspapers, only very few niche advertising products and the number of magazines was relatively limited. The Internet did not exist. There is now a much broader range of choice for both readers and advertisers (i.e. for editorial and advertising content respectively) and this has been reflected in the more recent Competition Commission reports dealing with newspaper transactions.

2.3 It is a fact that newspapers now face far greater competition for both advertising and editorial content from a number of other sources which, critically, do not bear the substantial editorial responsibilities carried by newspaper publishers. This is especially true of the rapid expansion of the Internet, which poses a serious and growing threat to newspaper advertising. As a result, newspaper publishers find their bottom line advertising revenues under attack from an increasing range of new media sources, many of which have extremely low barriers to market entry. At the same time they are forced to meet the real responsibilities and costs associated with publishing high quality titles comprising diverse editorial content.

2.4 As regards freedom of expression issues, the Competition Commission has recognised that to a large extent newspapers have to be self-regulating if they are to survive commercially:

*“We accepted the commercial argument that, to attract and retain readers, editors must be free to make decisions on the content of their newspapers and on the line*

*they take on local issues. So, if a publisher were to dictate or standardize the editorial content of its titles, or to impose a uniform style or approach, it would risk losing readers, and thus, returns from advertising and, for paid-for titles, circulation.”<sup>1</sup>*

- 2.5 This statement, made in relation to local newspapers, is equally applicable to regional and national titles: reader loyalty has to be won and retained on a daily or weekly basis and is not something which can be “onward sold” with a title. If a title does not satisfy its readers, then they will take their patronage elsewhere. For example, News International’s *Sun* lost a significant number of readers in the Liverpool area following the content of its coverage of the Hillsborough disaster. That readership has never been fully recovered.
- 2.6 Diversity of content and opinion continue to be promoted by opportunities for new market entry. Despite the high costs of national newspaper production, (and latterly the increased levels of competition from other media), where significant gaps in the market have been identified, and where demand has been deemed sufficient, new national titles – such as the *Independent* - have been launched. Such new market entry is market-led and market-tested. It is not – as with broadcasting – enabled by regulation and governed by licence.
- 2.7 In this mature, market-led environment, special ownership rules for newspapers are now an unnecessary additional instrument for ensuring freedom of expression and diversity of choice in print. Readers select their newspapers precisely because of their features and their editorial stance. These choices, not the whims and agendas of owners, determine what will succeed and what will not. In the case of Associated it is instructive that its titles endorse contrary opinions:–
- *The Daily Mail* and *The Evening Standard* made opposite political endorsements to their readers at the General Elections of 1997 and 2001.
  - *Ireland on Sunday* (acquired by Associated last year) and *The Daily Mail* have taken opposing positions on the Saville Inquiry;
  - *Metro*, Associated’s most recently created title, has built a considerable readership by offering straight news without editorial comment.
- 2.8 The use of special ownership restrictions to deliver diversity of output can also be entirely counter-productive to the overall health of the newspaper industry. The exclusion of experienced existing newspaper companies from taking over ailing titles whose owners have offered them for sale may lead to their acquisition by companies from outside the industry. These may lack the skills and experience to sustain a title’s viability, as well as the professionalism and editorial drive to maintain and improve the quality of the content. The outcome is a diminution of real choice for the reading public and extensive job losses among journalists and production staff. Once that has

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<sup>1</sup> News Communications & Media plc and Newsquest (Investments) Limited/Johnston Press plc/Trinity Mirror plc, Cm 4680, paragraph 1.4.

happened, the title loses its creative and economic critical mass. If it limps on, the rules may still prevent existing owners from using their expertise and potential economies of scale to buy and revive it. If it dies, there may well (as noted above) be a potential gap in the market for a new title: such a route would however take considerably more time, risk, and expense, and would be far less certain of success than simply allowing an experienced owner to take over the ailing title in the first place. Newspaper circulation can be lost in months, but take years to rebuild, if ever.

- 2.9 Against this background, Associated takes the view that newspapers do not require special regulation for freedom of expression reasons, and that the regime now operates against both the public interest and the interests of the industry as a whole. As in other media sectors, there is a real danger that overly restrictive regulations for newspaper owning companies will inhibit their potential growth in the wider UK media market, and by extension their ability to deploy resources generated domestically for international expansion. The objective of 'lighter touch' regulation should at least ensure that UK regulations for newspaper owning companies are not more onerous than those of the major countries in which their international competitors are based.
- 2.10 As explained above, the need to serve the interests of readers (an absolute imperative if titles are to continue to attract advertising revenue), and the clear incentive to remedy under-provision in any area, makes the market effectively self-regulating in terms of diversity. However, Associated understands that the Government is reluctant to move from the current regime to a state of no regulation in a sector which, for historical reasons amongst others, it believes is sensitive. It has, therefore, considered the Government's proposals with this in mind.

### **3. Ex post facto control**

- 3.1 Associated's view is that all acquisitions of newspapers should be subject to an ex post facto control on an equal basis. This would place all companies on a level playing field in terms of determining the risk of proceeding with a transaction, namely the risk that the transaction might be called in for review within four months of completion.
- 3.2 The current regime, which requires newspaper proprietors to seek prior consent, disadvantages the newspaper industry. For example, in an auction sale of a newspaper, any committed newspaper publisher seeking to expand its business is likely to value the title and assets more highly than a financial buyer, venture capitalist, or other non-trade purchaser, because acquisition of the title will enable that publisher to benefit from operational synergies. However, the statutory obligation on newspaper publishers to obtain the prior consent of the Secretary of State for Trade and Industry disadvantages trade purchasers in auction sales because vendors seeking a quick exit are prepared to accept lower offers from non-trade buyers who are not subject to the requirement of prior consent.

- 3.3 As the Consultation Paper itself notes, since 1980 the Secretary of State for Trade and Industry has refused to consent to only 3 merger cases out of a total of 172, imposing conditions on another 5. This extremely low level of intervention is the clearest demonstration (over more than twenty years) of the fact that newspaper mergers do not merit prior review. Consequently, the newspaper industry is placed at a significant disadvantage, both in terms of unnecessary regulation and in terms of costs, compared with other forms of media. This is most notable in television, where economies of scale have been accepted as a sound argument for a process of rapid consolidation of ownership.
- 3.4 Confidential guidance should be available in the same way as for general mergers, so that parties could approach the Director General of Fair Trading for an assessment in confidence of whether it was likely that a transaction would be referred to the Competition Commission (and whether, if a referral was likely, undertakings might be accepted in lieu of a reference).

#### **4. The review process**

- 4.1 Under the current regime purchasers not owning UK newspapers (or not meeting the statutory circulation threshold) do not require prior consent for newspaper transactions. Associated believes that the regime should apply to purchasers which are not already UK newspaper proprietors on the same basis as existing UK newspaper proprietors.
- 4.2 It is only logical that if there is to be a specific freedom of expression public interest test applicable to newspaper transactions, this same test should be applied on a non-discriminatory basis to both newspaper and non-newspaper proprietors alike. If a risk to freedom of expression exists, it exists equally in relation to both categories of potential acquirer. Whether an acquirer already owns newspapers (and the number he owns) is not relevant to whether or not a transaction should be subject to review on this basis.
- 4.3 By way of example, in 1990 the Competition Commission's predecessor, the Monopolies and Mergers Commission, investigated Mr David Sullivan's proposal to acquire a controlling interest in The Bristol Evening Post plc<sup>2</sup> newspapers through his company Roldvale and Conegate. It concluded that Roldvale and Conegate could be expected to influence editorial policy and the character and content of the Bristol newspapers, and that this could harm both the accurate presentation of news and the free expression of opinion in those titles. If Roldvale and Conegate had not held a 50% interest in Sport Newspapers Limited, publisher of the *Sunday Sport* and *The Sport*, then Mr Sullivan's proposals would not have been caught by the newspaper merger provisions of the FTA and the company would therefore have been able to acquire a controlling interest in The Bristol Evening Post plc without obtaining prior consent. Given the real concerns expressed by the Competition Commission in its

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<sup>2</sup> Cm 1083, May 1990

report, the case shows the present regulatory system to be flawed in the respects identified at 4.1 and 4.2 above. The proposals at issue were caught by the legislation purely fortuitously and, had Roldvale and Conegate not published newspapers (or had they sold fewer of them), no protection would have been available to remedy the Competition Commission's concerns.

4.4 Associated's proposal is that the specific newspaper provisions of the merger legislation should be repealed and an exceptional public interest gateway created under the reformed general merger regime. This means that the Secretary of State for Trade and Industry, on the advice of the Director General of Fair Trading, could refer to the Competition Commission any newspaper merger case which:

- (i) gives rise to freedom of expression concerns; or
- (ii) satisfies the share of supply test; or
- (iii) satisfies the assets test.

4.5 The Competition Commission would, therefore, investigate the competition and freedom of expression issues in the same way as it does now with newspaper transactions.

4.6 This is a combination of the Government's two options in the Consultation Paper. Associated feels that the dual regulatory process suggested in the first option (by the Competition Commission and OFCOM) risks gaps and/or unnecessarily complicated overlaps in the review process. Freedom of expression/accurate presentation of news issues and competition issues are not always mutually exclusive and a complete assessment can sometimes involve a balancing exercise. The Competition Commission has considerable experience in assessing both issues: it has carried out 26 newspaper merger inquiries in the last 20 years and has appointed a panel of newspaper experts to assist with such inquiries. It should, therefore, continue with this role and is well equipped to do so.

4.7 The Competition Commission's review of freedom of expression issues in previous reports has routinely involved consideration of the financial impact of the proposed transaction. It recognises that a threat to the accurate presentation of news and free expression of opinion could also arise from financial pressures, which might lead to the closure of titles, or to cost cutting so severe as to reduce the ability to engage in full and accurate news reporting.<sup>3</sup>

4.8 Associated does not believe that OFCOM should be appointed as a "concurrent" regulator for newspaper transactions. First, the example set out above shows that a review of a newspaper transaction involves balancing different factors. The proposal

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<sup>3</sup> see for example the Competition Commission's report on the Trinity/Mirror Group plc and Regional Independent Media Holdings Limited/Mirror Group proposals, published in July 1999 (at paragraph 2.29) and the report on Regional Independent Media Limited and Gannett UK/Johnston Press/Guardian Media Group, published in November 2000 (at paragraph 2.50).

to subject companies to dual regulation and two separate investigative processes (which no doubt would involve the giving of oral and written evidence) would necessarily create an artificial distinction between these factors. Second, OFCOM's principal role pursuant to the Government's proposals set out in the White Paper will be to police impartiality and other content issues in broadcasting, with its staff drawn largely from existing licensing and regulatory authorities in broadcasting, and from OFTEL.

- 4.9 Printed publications are unlicensed and there are no regulations requiring newspapers to ensure "due impartiality". It is therefore difficult to see in what respect OFCOM, with its different responsibilities and skills in regulating the content of broadcast media, would be a more appropriate body to regulate newspaper transactions than the Competition Commission with its comprehensive corpus of case experience in this area.
- 4.10 The Competition Commission should, if it considers it relevant and helpful in the context of a specific newspaper transaction, be able to request written and/or oral evidence from OFCOM on freedom of expression issues. It would be equally open for OFCOM, as for any other third party, to volunteer its own views on any particular transaction. OFCOM's views would be summarised in the traditional chapter of the Competition Commission report recording the views of third parties, and the Competition Commission would consider its evidence when reaching its conclusions on freedom of expression/accurate presentation of news and media and competition issues.
- 4.11 In circumstances where a newspaper group which owned a broadcast interest was acquiring another newspaper, in the absence of some form of "share of voice" or "Media Impressions" test covering aggregate limits on the media market, the Competition Commission would still be the body charged with adjudicating such a merger. If the Government were to introduce some test relating to limits on the share of the cross-media market as a whole, that test should then supersede the Competition Commission's jurisdiction.
- 4.12 Associated does not believe that in the absence of a comprehensive cross-media "share of voice" or similar test, there is any merit in setting out in advance a plurality test determining a "sufficient" number of newspaper owners. As in the past, this should be dealt with by the Competition Commission on a case-by-case basis. What is acceptable now might change by the time of the Competition Commission's next newspaper reports without there having been an opportunity to revisit the plurality test in the interim. In the context of newspaper mergers, each regulatory assessment ought to depend on the facts and the market context at that point in time.
- 4.13 The changing approach taken by the Competition Commission, in its reports on newspaper transactions over the years, demonstrates the inappropriateness of adopting a pre-determined stance in relation to a flexible public interest concept. The Competition Commission has demonstrated itself well able to take account of changing market circumstances impacting on both freedom of expression and competition issues.

## **5. Involvement of politicians**

- 5.1 Associated is also of the view that it is problematic for the Secretary of State for Trade and Industry to be the ultimate decision maker (as envisaged in the Consultation Paper's second option), because he/she has not always acted on the advice of the regulators, as required, in the past, and can therefore compromise conclusions reached by independent competition authorities after a thorough and transparent review of the issues. This is, in Associated's view, especially problematic in media sectors where there is a greater potential for a perception of conflicts of interest. If the Secretary of State for Trade and Industry has specific concerns about a transaction, he/she would be free to express them by way of evidence to the Competition Commission in the same way as OFCOM (see paragraph 4.10 above).
- 5.2 If (contrary to Associated's views above) it is decided that the Secretary of State for Trade and Industry should continue to be the ultimate decision maker, he/she should be required to put evidence regarding any concerns before the Competition Commission in writing or orally, so that it can assess and comment on this evidence in its report.

## **6. Other proposals in the Consultation Paper**

- 6.1 Associated agrees that local newspapers (those titles with limited circulation or distribution) should be removed from the remit of the legislation.
- 6.2 Associated also believes that newspaper assets no longer need to be covered by the legislation: it is often difficult to identify such assets with precision and such acquisitions in themselves are unlikely to raise public interest concerns.
- 6.3 Criminal sanctions have never been imposed under the newspaper regime and Associated considers that they are no longer appropriate.
- 6.4 With regard to cross-media ownership, Associated continues to believe that if the Government decides to maintain the principle of cross-media limits, the share of voice approach – as outlined in our previous submission – is potentially the optimum solution and as such merits further research.