

RESULT OF DTI'S CONSULTATION ON DRAFT GUIDANCE "ENTERPRISE ACT 2002: PUBLIC INTEREST INTERVENTION IN MEDIA MERGERS"

INTRODUCTION

The Enterprise Act 2002 reformed merger law, taking Ministers out of the vast majority of merger cases and leaving them to be dealt with by independent competition authorities on the basis of a competition test. But the Act allows Ministers to intervene in merger cases which raise specified public interest considerations. National security was the only public interest consideration specified on the face of the Act. The Communications Act 2003 amended the Enterprise Act 2002 by adding new public interest considerations for mergers involving newspaper enterprises and broadcasting enterprises. These new considerations were brought into force on 29 December 2003, at the same time as the newspaper merger provisions of the Fair Trading Act were repealed, leaving newspaper mergers to be considered only against a competition test like other mergers, unless the Secretary of State intervenes using one or more of the specified public interest considerations. The public interest considerations for other media mergers were introduced at the same time as the government introduced widespread changes to media regulation through the Communications Act.

BACKGROUND

Consultation activities

Draft Guidance was developed and published for consultation in a document issued on 15 December 2003. The draft guidance drew heavily on the DTI / DCMS memorandum "Newspaper Mergers: the new regime", which set out the Government's views on the operation of the newspaper merger provisions that were in the Communications Bill before Parliament at the time (the broadcasting and cross-media public interest considerations did not form part of the Bill at that stage). The consultation sought views on the draft Guidance.

Copies of the consultation document were sent to organisations that had participated in previous informal consultations, and to other significant contacts. Copies were also supplied in response to orders from individual enquirers. More than 150 paper and electronic copies were dispatched altogether. The consultation document was available on the DTI website; the consultation document page received more than 3,500 visits during the December - February period.

Officials also met stakeholders in one-off meetings to canvass their views in depth.

Responses to consultation

The deadline for responses was 12 March 2004. A total of 23 responses were recorded. These broke down as follows.

Category	Number of responses
Individual employers	12
Solicitors and legal organisations	4
Employer organisations	2
Individuals responding in a personal capacity, academic researchers and public sector organisations	3
Unions or union groups	2
Total of all responses recorded	23

The responses were largely positive that guidance had been produced and its contents, and included many helpful suggestions on how to make the guidance more complete and user-friendly. The Government would like to thank respondents for supplying high-quality feedback. As well as input on policy issues, a large number of useful technical drafting suggestions were received. The Government has considered all these representations very carefully in deciding the way forward.

The responses, except those made in confidence, are available in the DTI Library and can be accessed on request by contacting the Information and Library Services in the DTI on 020 7215 6226. The majority of responses were submitted online. A list of those respondents who were willing to have their names and responses disclosed can be found at Annex A.

Understanding this document

This report starts by considering over-arching themes raised in many of the consultation responses (Government policy on the actual application of the regime, provision of confidential guidance) and then summarises the main points raised, by the paragraph number to which they principally referred. It gives an account of the views expressed in relation to each part of the document. The total number of respondents on each issue is given before the main points are summarised. The Government's conclusions are set out in bold print at the end of each section. This document restricts itself to a consideration of the main substantive points. Drafting suggestions are not considered here but will be considered in the revision of the guidance. At the end of the document a number of points are noted which were raised during the consultation but are outside the scope of the consultation exercise. Discussion of these points is limited, given their nature.

In the light of comments received, a number of changes will be made to the guidance. In particular, a number of respondents called for greater detail on issues including the timetables for the procedures, and what can happen with cases considered by the European Commission under the EC Merger Regulation. These points will be taken on board where possible,

although inevitably at the cost of the draft Guidance becoming somewhat longer. The final guidance will be published later in the spring.

SUMMARY OF RESPONSES, DTI'S REACTIONS AND PROPOSED WAY FORWARD

Over-arching themes

General policy on use of the public interest considerations

Most respondents commented that the real test of the new regime would be in how the government applied it. Ten respondents commented that the government should operate the regime in whole or in part with a "light touch", so that the regime was deregulatory compared to that which it replaced. On the other hand, six respondents were in favour of more regular recourse to use of the regime, to ensure what was variously described as a "rigorous and comprehensive" approach or "robust responses" to possible mergers.

The government's position on use of the new public interest considerations was set out in Parliament. The new regime put in place is deregulatory and the intent is to operate it in a way which secures the benefits of deregulation for industry, whilst future-proofing the provisions and protecting the public interest in recognition of the specific role that the media play in our society.

The Informal Advice and Confidential Guidance Procedures

A significant number of respondents raised the issue of whether the Secretary of State should have any role in the offering of informal advice and / or confidential guidance to parties contemplating mergers which may raise media public interest considerations. A number of respondents noted that the original draft guidance, published as a memorandum setting out the Government's views on the operation of the newspaper merger provisions in the Communications Bill, did envisage a role for the Secretary of State in offering confidential guidance on intervention, whilst the guidance being consulted on did not. Concerns were raised that the level of information and comfort available to parties contemplating a merger would be reduced under the new regime compared to the old regime where, for newspapers, the Secretary of State offered confidential guidance on the likelihood of referral of a transaction to the Competition Commission (CC).

We recognise the concerns expressed by many parties in the consultation. The reason for withdrawing from the informal advice and confidential guidance procedures was in part that, because the government did not believe it needed to consider intervention in the vast majority of cases, the confidential guidance process would be unnecessary, especially given the presence of Ofcom to offer views on whether they would recommend referral if there was an intervention.

However, in light of the concerns expressed, DTI officials will offer informal advice, or the Secretary of State will offer confidential guidance, through the OFT informal advice / confidential guidance processes in certain cases (see paragraphs 3.11-3.18 of the OFT booklet “Mergers – Procedural Guidance” for further details of the OFT processes). Guidance will be co-ordinated between the relevant bodies, and the OFT will act as the primary contact point for parties. Advice or guidance will only be offered in broadcasting and cross-media mergers where media ownership rules have been removed, as the final guidance will make clear that she will only consider intervention in these cases (save in exceptional circumstances). It will be open to the parties to put a case to officials as to why their merger might be such an exceptional circumstance, in which case officials will offer views on the parties’ reasoning. Advice or guidance will also be available for newspaper mergers where a party to the merger thinks that a public interest issue arises.

In these cases advice or guidance will be offered on the likelihood of the Secretary of State issuing an intervention notice. As these processes are by necessity based on very limited information, no purpose would be served by DTI trying to determine whether, if intervention were considered likely, it would be likely to disagree with Ofcom’s public interest analysis in relation to reference. Confidential Guidance or Informal Advice will be available from DTI, through the OFT, for specific cases for which Intervention Notices, Special Intervention Notices and European Intervention Notices can be issued. The final guidance will reflect this.

Issues raised, by paragraph number in the Guidance

**Chapter 2: Background to the media public interest considerations; and
Chapter 3: Establishing jurisdiction**

Paragraphs 2.6 and 3.5 – what is a “wide range of high quality broadcasting”?

One respondent suggested we should define “a wide range of high quality broadcasting” and warned that it should not be taken for granted that broadcasters would have a commitment to it.

We believe that this should be considered at the time of a proposal in light of the prevailing conditions at that time. To try and define this now in the abstract would risk creating a regime that was either overly interventionist or did not catch cases which, considered on their own merits, warranted intervention.

Paragraph 3.6 – de minimis

Three respondents noted with concern that text had not been included in the consultation version of the guidance about it being important that regulatory burdens are not imposed on the very smallest transactions,

where any impact on competition or plurality would be de minimis, and called for the text to be included in the final guidance.

The absence of this text from the consultation version of the guidance was simply a matter of editing; it was felt that if the Secretary of State concluded that a case was de minimis, she would by definition take no action, so there was no need to state this. However, in light of the importance attached to this text by respondents, it will be included in the final guidance.

Paragraph 3.8 – what is “a substantial part of the UK”?

Three respondents raised the question of how a substantial part of the UK is defined, and asked for greater guidance than was included in the guidance.

The only case law of relevance is quoted in the guidance already. However, this matter is one of jurisdiction and is therefore one on which the OFT is determinative. Paragraph 2.25 of their publication “Mergers – Substantive Assessment Guidance” offers more information.

Paragraph 3.10 – determining share of supply for local radio mergers

One respondent noted that it may be hard to determine share of supply in local radio mergers where there are no uniform overlaps between station broadcast areas.

The question of establishing share of supply is a jurisdictional matter on which the OFT is determinative. Paragraph 2.24 of their publication “Mergers – Substantive Assessment Guidance” offers more information.

Paragraphs 3.12 and 3.13 – the definition of a newspaper

Four respondents raised the matter of how newspapers are defined, and whether they should be defined as newspapers if they (i) are devoted to one interest (such as football) or (ii) contain a high proportion of indecent or near pornographic images. Clarity was also sought on the level of news content needed to be considered a newspaper.

For purposes of this guidance we have decided there is no need to go beyond noting that it is our view that there is a need for a real attempt at news content, and do not need to specify the subject matter. In terms of the proportion of news content compared to advertising, it is worth noting that, as mentioned in paragraph 2.5 of the draft guidance, the Secretary of State expects there to be considerable continuity between the Fair Trading Act regime and the new regime. As noted above, Confidential Guidance or Informal Advice will be available on whether proposed mergers raise issues warranting intervention; this will, of course, need to take account of whether the proposed merger involves newspapers.

On the question of images, we believe that the prime issue at stake here in newspapers is news coverage. The question of whether certain

images should be allowed in newspapers is not a matter to be resolved by the mergers regime.

Paragraph 3.14 – the definition of a local newspaper

Two respondents asked why the guidance included a paragraph setting out how the Secretary of State would decide whether a newspaper is a local newspaper, and why this is important for plurality considerations.

A local newspaper is considered here because it is included in the definition of a newspaper in the Act, and it is therefore appropriate to offer some guidance.

Chapter 4: Procedure

Paragraph 4.1 – understanding the process for intervention

Several respondents suggested that it would be helpful to set out the procedures and timelines in diagrammatic form.

The final guidance will include this.

Paragraph 4.7 – Information requirements

Four respondents commented on the information to be required in submissions, including comments on Ofcom's list of information requirements.

This paragraph will be reduced in the final guidance, signposting readers to the Ofcom and OFT guidance on what to provide to those authorities.

Paragraph 4.10 – the role of the Secretary of State

Seven respondents commented on this paragraph, raising issues about whether it was clear what the Secretary of State will do when considering whether or not to intervene and matters of jurisdiction.

The final guidance will expand upon the role of the Secretary of State in intervention. It will note:

- **That if she is considering whether or not to intervene (by issuing an Intervention Notice) the parties will be informed of this and will be asked if they wish to make a written representation;**
- **Some of the types of information she may have regard to when considering whether or not to issue an intervention notice;**
- **That she will aim to take a view on intervention based on the information then available to her within 10 working days of either the case being brought to her attention or the parties notifying the case to the OFT, whichever is later, but that she will reserve her right to intervene later (within the timescales set out in law) if new and additional information comes to light;**
- **That, as a result of this timetable, she will not usually conduct a public consultation on whether she should intervene, but will welcome and take account of any third party representations received. She may also seek views of a few interested parties if**

time permits – but she will not seek the advice of Ofcom on whether to issue an intervention notice;

- **That, if she decides on the information then available not to intervene, the parties will be informed of this. This will not be confidential, but there will not be a public announcement of this, as it would cast doubt on whether the lack of an announcement in another media merger meant she was going to intervene in it, whereas the case may simply never been brought to her attention.**

Paragraph 4.11 – Ofcom’s consultation process

Five respondents commented on this paragraph. One respondent wanted it to be clear that unions should be consulted by Ofcom. Another suggested that the text could make clear that Ofcom has a statutory responsibility under section 105(1A) to bring the merger to the attention of parties that they consider might be affected by it. A third respondent proposed that the consultation should also look at wider issues of content and employment. Another respondent sought clarification of whether the Ofcom analysis would have to go into as much depth as the CC analysis of the public interest considerations. The fifth respondent suggested that the Secretary of State should undertake to accept Ofcom’s advice on whether to refer a case to the CC on public interest grounds, unless there was a material error in their examination or new circumstances came to light.

Ofcom’s guidance on the public interest test for media mergers will give detail on their information gathering and assessment process, and there is no need to repeat this information in the DTI guidance. Their analysis will, because of the shorter timeframe and the different question to be answered, be less detailed than one which the CC might produce. We do not consider that it is appropriate to undertake to accept the advice of Ofcom in all circumstances. We consider that it is more appropriate for elected representatives to take a final judgement on reference in public interest cases, having careful regard to the views put to it by Ofcom and OFT.

Paragraph 4.11 – reasoning behind intervention

One respondent called for DTI to publish details of why an intervention has been made, beyond what is provided in the published intervention notice.

When an intervention notice is issued, this will be announced through a press notice. The Secretary of State will consider the level of detail to put in that press notice, balancing the obvious desire for transparency and the need to ensure that she does not prejudice Ofcom’s investigation.

Paragraph 4.13 – The introduction of new public interest considerations

Five respondents commented on the inclusion of this paragraph, seeking confirmation that there are no plans to introduce additional public interest

considerations relevant to media mergers, or that the Secretary of State would only exercise these powers in highly exceptional circumstances. **Text on the possibility of introducing additional public interest considerations, and the limits on what could be done, is included for completeness of the guidance. There are no current plans to introduce additional public interest considerations relevant to media mergers or any other types of mergers.**

Paragraph 4.16 – weighing up public interest and competition findings

Two respondents asked about examples of where the Secretary of State might consider that the public interest outweighed an adverse competition finding by the OFT.

This text sets out what is included in the Act, which mirrors the provisions for the public interest consideration of national security. One very extreme set of circumstances where it might arise for newspaper mergers is if the competition authorities concluded that a merger should be blocked on competition grounds even if that would result in the paper to be transferred going out of business, because the competitive conditions created by the failure of the paper would still be better than those if the transfer went ahead. If the Secretary of State considered that, notwithstanding the competition assessment, there were strong public interest grounds why the paper should remain open, she might decide to allow the transfer to proceed if this was the only alternative to closure.

Paragraph 4.21 – Ofcom advice following a CC report

One respondent suggested that the Secretary of State should undertake to accept the advice of Ofcom on a CC report save in exceptional circumstances.

We do not consider that it is appropriate to undertake to accept the advice of Ofcom in the circumstances proposed by the respondent, even if it disagrees with the assessment of the CC. We consider that it is more appropriate for elected representatives to take a final judgement on the public interest, having careful regard to the views put to it by both the CC and Ofcom.

Chapter 5: Scope of the newspaper's public interest considerations

Paragraph 5.6 – relevance of non-media business behaviour to the media public interest considerations

One respondent queried how the past behaviour of an enterprise in a non-media business could be considered to be relevant to its likely behaviour regarding accurate presentation of news when controlling a newspaper.

We believe that the past attitude of an enterprise towards accurate presentation of news may, in some cases, be relevant even if it has not previously controlled a newspaper. However, behaviour in sectors more closely related to newspapers, such as magazines, is likely to be more

relevant than behaviour in sectors with less direct connection to newspapers.

Chapter 6: Policy on intervention in newspaper public interest cases

Paragraph 6.2 – policy on intervention by the Secretary of State

Three respondents made substantive comments on this paragraph. One respondent noted that, whilst a decision on intervention would be taken when only basic information is known about a given transaction, the system must be operated with a light touch. Another suggested that this lack of detailed information means that the threshold for intervention would be low, running contrary to the claim that the new regime would be deregulatory. A third organisation proposed that the Secretary of State should only intervene on editorial grounds in highly exceptional circumstances.

The new regime is deregulatory compared with its predecessor in many ways, including the removal of pre-notification requirements, mandatory CC references in certain cases, and the abolition of criminal sanctions. The new public interest considerations can only be invoked if the Secretary of State believes they are or may be relevant to a case. But as set out in the guidance, there have in the past been only a small number of occasions when newspaper transfers have given rise to the sorts of issues which may be relevant to the new considerations. Based on this analysis of past cases we expect that in normal circumstances she will not need to invoke the new public interest considerations for newspapers often. However, we do not believe it is appropriate to raise the threshold for intervention decided upon by Parliament.

Paragraph 6.5 – intervention when a newspaper owner is acquiring non-newspaper assets

One respondent raised concerns about the possibility of intervening on public interest grounds when a newspaper acquirer is acquiring non-newspaper assets, on the grounds that the acquisition may adversely affect the viability of the newspaper. The respondent argued that issues such as financial risk in a transaction are matters for shareholders, financial markets and proprietors.

We agree that details of a transaction are primarily for the parties and the markets, and the final version of the guidance will not include the example as it is not a clear-cut example. However, this section recognises that in certain circumstances such a transaction may reach the threshold for intervention on public interest grounds, and the Secretary of State would have the right to intervene if she considered it appropriate. The paragraph notes that it is likely that only rarely will such transactions reach the qualifying threshold.

Paragraph 6.7 – correlation between high levels of concentration and potential for ownership concerns to arise.

Five respondents commented on the assertion in this paragraph that there is a recognisable correlation between high levels of concentration and the potential for newspaper ownership concerns to arise in newspaper-to-newspaper mergers. Four respondents disagreed, proposing that plurality of views does not necessitate plurality of ownership, and that local newspapers must be edited to reflect the interests of local readers if they are to survive and prosper. On the other hand one respondent agreed with the assertion, noting that more titles do not equate to more choice, and market forces alone will tend to create less choice and less diversity. **We note the mixed comments from respondents. It continues to be our view that plurality concerns are more likely to arise in a concentrated newspaper market than in one with a large number of players owning competing titles.**

Paragraph 6.7 – threshold for intervention

Three respondents raised concerns that the following text, which appeared in the draft memorandum to Parliament on the government's view on operation of the regime, had been omitted from the draft guidance, and whether this meant that the threshold had changed:

“Whilst no firm indication can be given regarding the level of consolidation that might in and of itself lead to intervention by the Secretary of State to protect newspaper public interest considerations, such intervention is likely to be at a threshold above the level at which a potential competition issue would commonly be identified”.

When the memorandum was drafted the policy on intervention was based on a consideration of the local newspaper cases which could be used as precedents. Our view is that this statement still holds true for local newspapers. However, there is no precedent for possible mergers of national newspapers on which to assert that this statement would also hold true in that market. Relevant factors may include whether all national newspapers are considered, for competition purposes, to form one market. If so, it is likely that plurality concerns may not arise solely at thresholds above those at which competition concerns would commonly be identified.

The final guidance will have the relevant text re-introduced, but making it clear that it refers to local newspapers, and that it may not be the case for mergers involving two or more national newspapers.

Paragraph 6.10 – intervention in acquisitions by persons with no existing newspaper interests

Two respondents commented on this paragraph. One queried whether the text “however, in the absence of a significant volume of ... complaints.... the Secretary of State is unlikely to intervene in relation to acquisitions of local newspapers by persons with no existing newspaper interests” implied that intervention was more likely in regional or national title acquisitions than in local title acquisitions. Another respondent set

out a number of areas where it believed that the Secretary of State should make it clear she would be highly unlikely to intervene.

The text in paragraph 6.10 reflects that only in exceptional circumstances has it been necessary to intervene in local newspaper acquisitions by persons with no existing newspaper interests. The text did not set out to address the question of likelihood of intervention when a national newspaper was being acquired, and the text reflects this. The same issues are likely to be relevant to intervention in the acquisition of a national newspaper by persons with no existing newspaper assets (with the added possibility that the acquirer of a national newspaper is probably more likely to have newspaper assets in other countries than the acquirer of a local newspaper). However, it is not possible at this stage to use past experience to gauge the likelihood that intervention in such transactions will be necessary.

Chapter 7: Scope of the broadcasting and cross-media public interest considerations

Paragraph 7.2 – assessment of plurality in the cross-media context

Five respondents commented on this paragraph, one on the importance of making an assessment of sufficiency of plurality, and one on the need for guidance on the approach to this. One respondent sought clarity on what type of “shares held by an Enterprise” might be aggregated. Comments were also made about looking at relevant information as to how either the broadcasting or newspaper enterprise have run their affairs. One respondent agreed that it was important to consider this. On the other hand an enterprise suggested that what happens in newspapers is of no relevance to the takeover of a broadcasting enterprise because of the difference in regulatory regimes – in particular that newspapers are not under a duty to be impartial, whereas a proprietor knows that, if he obtains a broadcasting licence he will be under a duty to be impartial.

It is not possible to define in advance what would constitute a sufficiency of plurality. It will depend on a number of factors such as the nature of the medium, the number of other providers of the service, the existing levels of plurality, and the degree of cross-media ownership. In considering newspaper and broadcasting mergers, it may be relevant to consider how the newspaper enterprise had conducted its affairs; for example, consistent and serious adverse findings by the Press Complaints Commission regarding the accuracy of a newspaper’s coverage could be a relevant consideration.

The shares held by an enterprise to be aggregated in making a plurality assessment will depend on the individual case, and what the best method is for determining the reduction of plurality, if any, caused in a particular merger situation.

Paragraph 7.7 – Scope for intervention on cross-media plurality grounds

One respondent argued that intervention on plurality grounds should only cover news and current affairs providers (and even then, not satellite or

cable operators), as the plurality consideration relates to ensuring there are sufficient different voices and sources of opinion.

The plurality public interest consideration in cross-media mergers will normally apply only in areas where media ownership rules have been completely removed by the Communications Act (see paragraph 8.2) so, in practice, will be limited primarily to news and current affairs providers. However, there may be circumstances where a merger may enable one enterprise to influence opinions and control the agenda to an undue extent in a non-news or current affairs area. We believe that it would not be appropriate to rule out the possibility of addressing this sort of situation should it arise.

Paragraphs 7.7 - 7.16 – application of the plurality consideration to radio mergers

Five respondents commented that national and or local radio mergers should not be subject to the plurality test. For local radio mergers they argued that the Communications Act put in place regulation covering local radio mergers which should be sufficient to ensure plurality. For national radio they argued, amongst other things, that their political influence is limited, because they offer limited news coverage, and because their remit and the impartiality of their news coverage are defined by statute. **The government made clear during Parliamentary discussion of the media public interest considerations that the primary focus would be on areas where regulation had been removed. As some media ownership rules remain in place for local radio, the policy is that Ministers will not intervene in local radio mergers save in exceptional circumstances, as was set out in chapter 8 of the draft guidance (and see below for comments on that chapter).**

As regards national radio mergers, our view remains that it is appropriate to consider intervention in mergers involving national radio licences where media ownership rules have been removed. However, in reaching a view on whether to intervene Ministers will have regard to the remit of the stations and the extent to which plurality concerns might actually arise in any particular case.

Paragraph 7.19 – Assessment of impact of a merger on range of broadcasting

One respondent suggested that the guidance should make clear that an assessment of the effect of a merger on the range of broadcasting should focus on the future plans of the acquirer, rather than past performance. **We agree that the primary focus of the test should be on the future plans of an acquirer, though it will need to have regard to the likelihood of those plans being carried out. The final guidance will be revised to reflect this.**

Paragraph 7.20 – compliance with requirements on other broadcasting enterprises

Four respondents commented on points raised in this paragraph. One agreed that the Secretary of State should take into account a media owner's past compliance with requirements on his other broadcasting enterprises when looking at the range of broadcasting consideration, but believed that this assessment should not be limited to assessments by regulators who "fail to uphold the vast majority of complaints", and that more attention should be paid to the complaints made by the public. Another respondent felt that close scrutiny should be given to compliance with programme origination obligations. And two respondents called for the removal of the example in the paragraph mentioning local radio, as they considered that this implied that intervention could be expected in local radio mergers.

An assessment of compliance with requirements on broadcasting enterprises will be an area Ofcom may have regard to in providing advice to the Secretary of State if she has intervened in a case. Similarly, the Secretary of State may take account of past compliance in deciding whether to issue an intervention notice and, if having done so, whether to refer a merger to the CC. In all these circumstances the views of regulators and third party commentators will be taken into account. Similarly, any views expressed on a media owner's past compliance with programme origination obligations, whether provided by regulators or other interest parties, will be taken into account.

The example quoted in paragraph 7.20 relating to local radio does not imply that intervention is expected in local radio mergers. The example relates to the issue of assessing range of broadcasting by having regard to compliance with requirements on other broadcasting enterprises owned by the acquirer, such as radio format or localness obligations. The example does not imply anything about local radio mergers.

Paragraph 7.21 – Other factors to take into account

One respondent suggested that an aspiration to serve the public with recognisably excellent programmes and a respect for the audience were factors that should be taken into consideration in considering the issue of range of broadcasting

Paragraph 7.21 sets out that all other material factors will be taken into account, and then lists some factors that may be relevant in certain cases. It does not seek to be exhaustive.

Paragraphs 7.17-7.21 – application of the range of broadcasting consideration to radio mergers

Four respondents argued that the range of broadcasting consideration should not be applied to national and / or local radio mergers. On national radio one respondent argued that national radio licences have predetermined formats, so intervention is not necessary. Several arguments were put forward regarding local radio:

- Local radio is already regulated, through Ofcom's programme formats system;

- Common ownership in local radio encourages different formats to maximise a media owner's audience reach; and
- Just as the CC have argued that local newspapers are owner neutral – that is to say they must reflect the views and concerns of readers in their area – the same applies to local radio.

The government made clear during Parliamentary discussion of the media public interest considerations that the primary focus would be on areas where ownership rules had been removed. As some media ownership rules remain in place for local radio, the policy is that Ministers will not intervene in local radio mergers save in exceptional circumstances, as was set out in chapter 8 of the draft guidance (and see below for comments on that section).

As regards national radio mergers, our view remains that it is appropriate to consider intervention in mergers involving national radio licences where media ownership rules have been removed. However, in reaching a view on whether to intervene Ministers will have regard to the remits of the stations and the extent to which concerns about a range of broadcasting might actually arise in any particular case.

Paragraph 7.25 – compliance with UK broadcasting standards

One respondent argued that an assessment of compliance with UK broadcasting standards should focus on evidence of serious and repeated infringements, rather than assuming that one infringement, whether it be major or relatively minor, should raise compliance concerns.

The assessment of commitment to broadcast standards must be a qualitative, rather than a quantitative assessment, and the final guidance will make this clearer.

Paragraph 7.25 – compliance with broadcasting standards overseas

Three respondents commented on the possible use, in assessing commitment of broadcasting standards, to the consideration of compliance with broadcasting standards in other jurisdictions. One respondent agreed that this should form part of the assessment. On the other hand, one respondent thought that the assessment should be restricted to the UK, and another thought that if it was not restricted to the UK, great care should be taken in considering the comparability of UK standards with those in other jurisdictions.

We accept that broadcasting standards vary around the world. However, where an enterprise owns a company which operates in another jurisdiction, the extent of compliance with the broadcasting standards in that jurisdiction (however stringent they may be) may add usefully to the overall assessment of the extent to which an enterprise is truly committed to broadcasting standards where they operate. But again, the assessment is qualitative rather than quantitative.

Paragraphs 7.22-7.26 – relevance of the commitment to broadcasting standards objectives to radio mergers

Four respondents commented on the relevance of this consideration to national and / or local radio mergers. One considered that a national radio merger would not give rise to concerns on this front; one noted that for local radio mergers Ofcom enforce programme standards anyway; one proposed that adherence to codes and a complaint-free record should be ample evidence that no concerns arise; and one accepted that a proposed new owner must be committed to upholding the standards set out in Ofcom's codes.

The government made clear during Parliamentary discussion of the media public interest considerations that the primary focus would be on areas where ownership rules had been removed. As some media ownership rules remain in place for local radio, the policy is that Ministers will not intervene in local radio mergers save in exceptional circumstances, as was set out in chapter 8 of the draft guidance (and see below for comments on that section). The Secretary of State may consider whether it is necessary to intervene if a prospective new entrant to local radio ownership has not shown genuine commitment to broadcasting standards in other media or countries.

As regards national radio mergers, our view remains that it is appropriate to consider intervention in mergers involving national radio licences where media ownership rules have been removed.

Chapter 8: Policy on intervention in broadcasting and cross-media public interest cases

Paragraph 8.2 – areas in which Secretary of State may consider intervention

Six respondents commented on the areas in which the Secretary of State would normally consider intervention, in addition to those who had commented on why local and national radio mergers should not be subject to the broadcasting and cross-media public interest considerations. A general theme was that the text did not offer any more guidance than was given in Parliament, whereas Ministers had said that the guidance would provide more detail on the general application of the public interest tests.

Specific comments included:

- The drafting of the “chapeau” of paragraph 8.2 did not offer enough clarity or certainty;
- Why specify 20% as a lower limit for consideration of mergers involving national newspapers and either the Channel 5 licence holder or a national radio service, and how the share should be assessed;
- The bullet point relating to changes in control of the Channel 3 licence holder does not accurately reflect the changes made to regulation;

The wording in the final guidance will be amended to set out more clearly that she will only consider intervention in the areas set out, save in exceptional circumstances.

The text relating to the change of control of the Channel 3 licence holder will be amended to reflect the fact that, under the previous legislation, the principal constraints on ITV mergers were (a) if they involved TV licences the audiences for which together exceeded 15% of total TV audiences or (b) the rule preventing joint ownership of two regional licences for the same area (e.g. the two London licences). Consequently, Ministers will consider intervening only in cases where ITV mergers result in a TV audience of more than 15%, or where two ITV licences for the same area come under common control, unless there are exceptional circumstances justifying intervention in other cases. Such acquisitions are less likely to raise concerns where the acquirer is already an existing ITV licence holder in view of ITV's proven track record as a public service broadcaster. The guidance will also make it clear that the Secretary of State may consider intervening in a merger between C5 and C3 if it would exceed the 15% TV audience limit. Intervention may also be considered where mergers involve the national ITV licence holder and C5, as the rule preventing this has been repealed. However, the 20% criteria in two of the bullet points reflects where regulation has been relaxed and the government continues to believe that this is the appropriate starting point for considering intervention.

Paragraph 8.4 – intervention in mergers where there are no media ownership restrictions

Four respondents commented on this area. Three respondents considered that there could be public interest issues arising from mergers involving satellite or cable operators, one of whom suggested that intervention on plurality grounds should be made in every case. On the other hand one respondent suggested the guidance in this paragraph was not sufficiently clear and that it should be more explicit that intervention would not be made in these cases.

The text in this paragraph will be amended to make clearer the government's position that, where prior to the Communications Act 2003 there were no media ownership restrictions, intervention will only be made in exceptional circumstances.

Paragraphs 8.6 and 8.7 – European Economic Area

Three respondents commented on the difference in policy for media owners from within the EEA and those outside it. One agreed that interventions should be made against owners outside the EEA (and on plurality grounds against those within the EEA), but two queried why the two types of owner should be treated differently.

Prior to the Communications Act 2003, there was an absolute prohibition on non-EEA persons holding certain broadcasting licences, so distinctions

along the lines of EEA and non-EEA ownership are not new. The Communications Act removed this absolute prohibition and, in line with Government policy of considering intervention where ownership restrictions have been completely removed, Ministers may decide to intervene where they believe that a merger involving a foreign owner raises media public interest concerns.

Paragraph 8.8 – Exceptional circumstances

Five respondents commented that this paragraph did not offer enough guidance as to when exceptional circumstances might arise; some asked for it to be clear that no exceptional circumstances would arise for local radio mergers, or that there should be no exceptional circumstances at all.

The final guidance will offer more detail on the question of what might constitute exceptional circumstances. It will include the two instances that Ministers suggested in Parliament might constitute exceptional circumstances, and the example noted in chapter 7 about the commitment to broadcasting standards of new entrants to media such as local radio. It will also make clear that no other examples of exceptional circumstances are currently envisaged. It will note that an adverse finding against a merger under a previous regulatory regime might not in itself constitute exceptional circumstances meriting intervention.

Chapter 9: Enforcement

Paragraph 9.4 – power to veto appointments or dismissals

Four respondents made specific reference to the non-exhaustive list of remedies in this paragraph, and the ability of the Secretary of State to require, as a remedy to a public interest detriment, the seeking of her prior consent before taking certain actions, including the appointment or dismissal of an editor, journalist or directors. Comments included that this was a far-reaching power which should be used sparingly if at all, that it was not appropriate to use this power, that it was difficult to envisage its legitimate use, and that it would represent political interference in a free press and editorial control.

The guidance includes reference to these possible remedies as they are included in law. It does not seek to reach a view on the extent to which these remedies, or any others, should be used.

Chapter 11: EC Merger Regulation

Paragraph 11.1 – European Mergers

Three respondents commented on this section to seek further information or clarification of the Secretary of State's remit and policy with respect to mergers falling for consideration under the EC Merger Regulation.

The final guidance will expand this section to offer additional information on European Intervention Notices and how cases will be considered.

COMMENTS RECEIVED WHICH ARE OUTSIDE THE SCOPE OF THIS CONSULTATION

- Two respondents commented on the rationale for having a regulatory system for newspapers (paragraph 2.1). One agreed with the 1962 Report of the Royal Commission on the Press and its ongoing relevance now, and one disagreed. However, Parliament has already agreed that a regulatory system is still appropriate.
- One respondent suggested that where possible “deconcentration” of media organisations should be sought. However, the legislation deals only with the effects of mergers under consideration.
- One respondent proposed that a member of the Newspaper Panel should be selected for all newspaper merger inquiries. The Newspaper Panel is only used if a newspaper merger is referred to the CC on public interest grounds. If there are members of the Newspaper Panel who are also on the main Panel, the CC can appoint them to a competition-only newspaper inquiry on the basis of their membership of the main Panel, but that is a matter of policy for the CC.
- One respondent suggested that a very great deal seems to rest upon the discretion of the Secretary of State and suggested that it might be appropriate to make permanent regulators the final determining bodies. However, this would require a change in law which is outside the scope of this consultation.
- One respondent suggested media mergers should be considered against additional criteria to those set out in the guidance, in particular the possible impact on employment and employment rights. However, this would require the introduction of new public interest considerations; they are beyond the scope of the considerations currently in the Enterprise Act, and is therefore outside the scope of this consultation.
- One respondent argued that there should be a statutory timetable for intervention in a special merger situation. However, this would require a change in the law and is outside the scope of this consultation.

Annex A: List of respondents who were willing to have their names and responses disclosed

<p>Kevin Beatty Managing Director Northcliffe Newspapers Group Ltd 31 John Street London WC1N 2QB</p>	<p>Dee Ford Group Managing Director Emap Performance Radio House 900 Herries Road Sheffield S6 1RH</p>
<p>John C Beyer Director Mediawatch-UK 3 Willow House Kennington Road Ashford Kent TN24 0NR</p>	<p>Katherine Holmes Richards Butler International Law Firm Beaufort House 15 St Botolph Street London EC3A 7EE</p>
<p>Roger Bolton General Secretary BECTU 373-377 Clapham Road London SW9 9BT</p>	<p>David Newell Director The Newspaper Society</p>
<p>Tim Bowdler Chief Executive Johnston Press Plc 53 Manor Place Edinburgh EH3 7EG</p>	<p>Alex Nourry European Competition and Regulation Clifford Chance LLP 10 Upper Bank Street London E14 5JJ</p>
<p>Bruce Breckenridge Solicitor Legal & Regulatory Advisor British Sky Broadcasting Ltd</p>	<p>Daniel Owen Director of Regulatory and Public Affairs Chrysalis Radio</p>
<p>Catherine Chibnall Professional Support Lawyer Ashurst Broadwalk House 5 Appold Street London EC2A 2HA</p>	<p>Lisa Roberts General Secretary's Office National Union of Journalists Headland House 308/312 Grays Inn Road London WC1X 8DP</p>
<p>Alison Clark Director of Corporate Affairs News International Ltd 1 Virginia Street London E98 1EX</p>	<p>Martin Smith Simmons & Simmons CityPoint One Ropemaker Street London EC2Y 9SS</p>
<p>Commercial Radio Companies Association 77 Shaftesbury Avenue London W1D 5DU</p>	<p>Mike Stewart Managing Director DMG Broadcasting Ltd Building 10 Chiswick Park 566 Chiswick High Road London W4 5TS</p>

<p>Simon Cooper Group Public Affairs Director GWR Group Plc Classic FM House 7 Swallow Place Oxford Circus London W1B 2AG</p>	<p>Christy Swords Director of Regulatory Affairs ITV Plc London Television Centre Upper Ground London SE1 9LT</p>
<p>Jo Dipple Head of Public Affairs Trinity Mirror Plc</p>	<p>Caroline Thomson Director, Policy & Legal British Broadcasting Corporation Room MC4 C4 Media Centre Media Village 201 Wood Lane London W12 7TQ</p>
<p>Andrew Flanagan Chief Executive SMG Plc 200 Renfield Street Glasgow G2 3PR</p>	<p>Barry White National Organiser Campaign for Press and Broadcasting Freedom</p>

End

Department of Trade and Industry
Consumer and Competition Policy Directorate