



## Hold the front page

### Increasing public interest scrutiny of newspaper mergers

by **Aniko Adam and Amelia McWhirter**

The media industry in the UK has experienced challenging structural changes since the implementation of the public interest intervention regime under the Enterprise Act 2002 (the EA02). Consumers have increasingly shifted away from traditional media such as TV, radio and newspapers to online channels. While the consumption of news media has undergone significant change, the rules and guidance relating to the assessment of media mergers on public interest grounds have not followed. The guidance<sup>1</sup> issued in 2004 by the DTI on the operation and interpretation of public interest merger provisions relating to newspaper and other media mergers under the EA02 (the DTI Guidance) is still the “current” advice for Ofcom (and merger parties) assessing transactions.

The recent flurry of newspaper transactions subject to public interest scrutiny raises questions as to the adequacy of the regime in force. In the last three years alone, there have been more public interest interventions in media transactions in the UK than over the previous 14 years after the current regime came into force in 2003. Indeed, since 2017, the relevant Secretary of State has intervened four times in quick succession: in the acquisition of Sky by 21st Century Fox in 2017 (*Fox/Sky*), Reach’s (formerly Trinity Mirror) acquisition of the *Daily Star* and *Daily Express* newspapers from Northern & Shell Media Group in 2018 (*Reach/Express*), the minority interest acquisitions in Lebedev Holdings and Independent Digital News and Media (which publish the *Evening Standard* and *The Independent*) in 2019 (*IMC/Lebedev*), and Daily Mail and General Trust’s acquisition of the *i*’s parent company, JPIMedia Publications in 2020 (*DMGT/i*).

This article reviews the regime for assessing media transactions on public interest grounds and considers whether the existing regime is still fit for purpose.

#### **Setting the scene: structural changes facing the media sector**

Before exploring the regulatory regime, it is essential to consider the state of the industry which it seeks to regulate. There is no doubt that the media sector is experiencing extensive structural change following the growth of

online channels and changing consumer behaviour, as also explicitly acknowledged by the regulators.<sup>2</sup> The trend towards online outlets is evident when comparing how the general population has accessed news between 2006 and 2016. Ofcom’s analysis in *BSkyB/ITV* indicates that in 2006 approximately 20 per cent of the population resorted to the internet, with just under 80 per cent using newspapers.<sup>3</sup> By contrast, according to its *Reach/Express* report, in 2016, 48 per cent of the population used the internet as a source for news, and only 29 per cent used printed newspapers.<sup>4</sup> This trend has continued. In line with shifting consumer behaviour, the average net circulation of national newspapers in the UK has more than halved between 2010 and 2019.<sup>5</sup>

Broadcast media are also not immune from these changes, as can be seen from Ofcom’s assessment in the context of *DMGT/i*. From 2016 to 2019, BBC, Sky and ITV experienced a decrease in their share of news consumption, while Facebook and Google shares increased. Although many publishers and other traditional media also have a digital presence, the Competition and Markets Authority (CMA) recently concluded in the context of its market study into online platforms and digital advertising that a substantial proportion of online traffic to publishers’ websites comes from Google and Facebook.<sup>6</sup> These trends indicate that traditional media are becoming less prevalent as sources of news.

The CMA’s market study also found that content providers such as online newspapers have experienced a fall in their digital advertising revenues, which is likely to reduce their incentives and ability to invest in news and other content. Indeed, in 2019, Google and Facebook generated roughly 80 per cent of all search and display advertising expenditure in the UK.<sup>7</sup> Against this background, John Whittingdale, the Minister of State for Media and Data, warned of “profound consequences to democracy” if losing advertising revenues to Google and Facebook puts the financial viability of newspapers and broadcasters at risk.

Ofcom considers that the continued existence of a variety of media outlets is essential for preserving news plurality and democratic debate in the UK.<sup>8</sup> Despite this, the Secretary of State recently explicitly noted that “the

commercial impact of an investigation is not something that can be taken into account under the media merger regime” and did not accept the merger parties’ argument that such a review would cause unreasonable delay to providing the necessary investment to the target. Ultimately, while there is some sympathy for the difficulties faced by media providers, this does not shield them from scrutiny.

### Public interest intervention regime for media mergers

There has been a significant amount of attention given to public interest interventions on national security grounds, particularly given the recent and upcoming changes to that regime, but there has been comparatively little consideration devoted to the media merger regime.<sup>9</sup>

The public interest intervention regime gives the relevant UK Secretary of State the power to intervene in certain transactions which fall under the jurisdiction of the European Commission or the CMA. The Secretary of State intervenes by issuing a European Intervention Notice in the case of the former, and a public interest intervention notice (PIIN) in the case of a UK transaction. In addition, a special public interest intervention regime exists for certain media transactions which do not give rise to an increment to the share of supply and therefore do not meet the UK jurisdictional merger control thresholds.

Upon issuing the relevant notice, the Secretary of State requires the CMA to advise on jurisdiction, collate representations on the public interest consideration(s), and, in the case of a PIIN, carry out a competition assessment of the merger. Ofcom is also required to advise the Secretary of State on the public interest consideration(s). The Secretary of State then decides whether to refer the transaction to an in-depth Phase 2 review.

The media merger regime covers newspapers and broadcasting, and allows for intervention where specified considerations arise. In relation to broadcasting, the public interest grounds concern plurality of persons with control of the media enterprises that are involved in broadcasting, the need for the availability throughout the UK of a wide range of broadcasting, and the need for a genuine commitment to broadcasting standards (under section 58(2C) EA02). With regards to transactions involving newspapers, the relevant considerations for intervention are: (i) plurality of views; (ii) free expression of opinion; and (iii) accurate presentation of news (under sections 58(2A)-(2B) EA02) – these are the focus of this article.

The plurality consideration (which is relevant to both broadcasting and newspapers) has played a significant role in many interventions; however, the grounds of accurate presentation of news and free expression of opinion in newspapers have only recently been invoked. The first case involving a merger of two national newspapers under the current regime took place in 2018 (with Reach’s acquisition of the *Daily Star* and *Daily Express*, labelled the “biggest shake-up of British newspapers in more than a decade”)<sup>10</sup>,

some 15 years after the introduction of the EA02. It was then promptly followed by *IMC/Lebedev* and *DMGT/i*.

### Plurality of views

The concept of sufficient plurality of views (under section 58(2B) EA02, and the equivalent media plurality consideration for broadcasting under section 58(2C) EA02) refers to the need for a diversity of viewpoints. Under this consideration, Ofcom assesses the impact of a merger on the overall range of views and distribution of voices within the relevant market. In respect of newspaper mergers, the DTI Guidance states that “the test of a sufficient plurality of views is intended to enable regard to be had not only to the need for a sufficient number of views to be expressed, but also to the need for variety in those views and for there to be a variety of outlets and publications in which they can be expressed”.<sup>11</sup>

Ofcom reviews internal plurality of views within an organisation and external plurality of views in the media sector more generally. External plurality includes a review of the number, range and reach of news outlets. The internal plurality consideration appears to encompass an assessment of the existing differing editorial stances within the acquirer, the commercial incentive to maintain such differing positioning in respect of the target post-merger, and the editorial freedom available to the existing outlets of the acquirer.

For example, in respect of internal plurality in *DMGT/i*, Ofcom noted that “the *i* has a non-partisan stance which its readers value and which reaches a different demographic to that of current DMGT titles” and therefore DMGT had a strong incentive to maintain the *i*’s distinct voice and editorial positioning post-transaction.<sup>12</sup> Secondly, Ofcom acknowledged that DMGT’s editors attested to their freedom to exercise their editorial judgement without interference by the owner of the titles.

### Free expression of opinion

Ofcom tested for the first time the ground of free expression of opinion in newspapers under section 58(2A)(b) EA02 (alongside the plurality consideration under section 58(2B) EA02) in the context of *Reach/Express*. In accordance with the DTI Guidance, Ofcom assessed free expression of opinion as “an editor’s ability to determine the stance of a newspaper without interference by the proprietor” which equates to a consideration of editorial independence.<sup>13</sup>

In applying this ground, Ofcom considered “the measures that Reach plc ha[d] put in place to promote and maintain editorial independence [...] whether there may be commercial or political incentives for shareholders and Board members to attempt to influence editorial decision making and whether they are able to act on such incentives”.<sup>14</sup> Ofcom concluded that the transaction did not give rise to concerns relating to free expression of opinion for reasons including a public commitment by Reach to ensuring free expression of opinion in its newspapers and the lack of incentive and ability by the board and

shareholders of Reach to influence the titles' editorial positions. In particular, Ofcom viewed the appointment of new editors to the *Daily Express* and the *Daily Star* by the editor-in-chief without involvement from the board or shareholders of Reach as demonstrating no restriction on free expression of opinion. Ofcom was subsequently also required to consider the free expression of opinion ground in *IMC/Lebedev*, where it reviewed, amongst other things, the measures that the parties had in place to promote and maintain editorial independence.<sup>15</sup>

### Accurate presentation of news

Ofcom considered the ground of accurate presentation of news (under section 58(2A)(a) EA02) for the first time in *IMC/Lebedev*, which concerned the *Evening Standard* and The Independent (alongside the free expression of opinion consideration under section 58(2A)(b) EA02). Once again, Ofcom resorted to the DTI Guidance which indicates that evidence of past behaviour by the relevant enterprises and the persons with control of them is relevant to the assessment of the impact of the merger.<sup>16</sup> Such evidence need not come from the newspaper industry, but could be in respect of any media business.

Both the DTI Guidance and Ofcom cite the 1990 case of David Sullivan and the *Bristol Evening Post*. In that case, the Monopolies and Mergers Commission concluded that David Sullivan's connection with the *Daily Star* as well as his 50 per cent shareholding in Sports Newspapers Ltd (where stories published were "often 'fantasy' and made no attempt at the accurate presentation of news") could indicate that "he would seek to influence the editorial policy and character and content of the newspapers in a manner that would harm both the accurate presentation of news and the free expression of opinion".<sup>17</sup> In applying this to *IMC/Lebedev*, Ofcom considered whether there were any incentives for the acquirers to influence the accuracy of the publications and any evidence of their likely behaviour, including the conduct of the publications since completion of the merger, and ultimately concluded that no reference was warranted.<sup>18</sup>

### Is the existing regime still fit for purpose?

As noted above, the media industry has experienced a significant shift in the consumption of news since the implementation of the current regime nearly two decades ago, but the rules and guidance have not been updated to account for this. Questions therefore arise as to whether the regime still adequately reflects the structure of the media industry. Ofcom has itself noted that the public interest grounds were established in a significantly different era for newspapers and the wider media industry, and expressed its concerns that they "may no longer reflect the reality of news consumption".<sup>19</sup>

For example, in *IMC/Lebedev*, the question arose as to whether the public interest regime could apply to online newspapers. The merger parties argued that *The*

*Independent* (which is digital only) is not a "newspaper" within the meaning of the EA02, and that the newspaper public interest consideration cannot therefore apply to it. Although the Secretary of State agreed that newspapers are generally understood to refer to hard copy papers, he did not consider that this prevented the relevant jurisdictional tests from being met.<sup>20</sup>

Much of Ofcom's criticism has been directed at the DTI Guidance which was published in 2004 and is intended to assist Ofcom in its interpretation of the legislation in carrying out its advisory function. For example, when interpreting section 58(2A)(b) in *Reach/Express* for the first time, Ofcom noted that "significant change has occurred in the newspaper industry since the guidance was written in 2004". Moreover, in applying the DTI Guidance when referring to an interpretation of editorial independence, Ofcom noted that "some time has passed since that guidance was put in place".<sup>21</sup> Therefore, the relevance of the precedents in the DTI Guidance to the current state of the UK media sector can be questioned, particularly in respect of cases dating back to 1981 (such as *George Outram & Company Ltd/The Observer*).

Consequently, Ofcom has been mindful of the changes in the commercial environment for newspapers since the DTI Guidance was published and has indicated that it is treating the DTI Guidance "carefully" as a result. The Secretary of State has also acknowledged this, referring to the DTI Guidance as "relevant, but purely guidance" and noting that it "cannot be indicative of the approach to be taken in all cases".

### Lessons learnt and indications for the future

Despite the recent rise in the number of public interest interventions in media mergers, only *Fox/Sky* was referred to an in-depth Phase 2 review. The other recent cases (all of which involved an overlap in newspapers) were cleared at Phase 1. This suggests that Ofcom's advice to the Secretary of State has been generally supportive of media mergers that provide for the continued existence of a range of news media outlets.

The traditional news industry is facing substantial challenges following a growing trend towards the online realm. On more than one occasion the CMA has acknowledged merging parties' submissions that structural changes in the industry threaten the long-term economic viability of print publishers.<sup>22</sup> It is therefore perhaps unsurprising that merger parties cite the decline in circulation of printed newspapers as one of the main reasons behind their acquisitions. Given that the trend is not likely to change, further mergers and acquisitions may be expected in the media sector.

Ofcom appears to be adapting to these changing times (for example, by including online intermediaries (such as Facebook) when assessing media plurality). Additionally, despite the fact that the DTI Guidance was published at a time when the industry was significantly different to its structural composition today, Ofcom has applied key concepts from the DTI Guidance whilst also considering the wider challenges faced by the media sector. These

recent cases may provide some insight into the potential application of the public interest regime for media mergers in the future. However, given the ongoing changes to other public interest regimes and the potential broader regulatory reforms in the digital space, this may also be an opportune moment to update the guidance relating to media mergers.

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#### Endnotes

1. <https://webarchive.nationalarchives.gov.uk/20100512170615/http://www.bis.gov.uk/files/file14331.pdf>.
2. See, eg, Ofcom report in *Fox/Sky*, para 4.27; Ofcom report in *IMC/Lebedev*, para 4.2; and CMA report on the relevant merger situation and substantial lessening of competition in relation to *DMGT/i*, para 4.3.
3. Competition Commission final report on acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc, Appendix I (plurality), 14 December 2007, figure 4.
4. Ofcom report in *Reach/Express*, figure 3.2.
5. Ofcom's report in *DMGT/i*, figure 4.2.
6. CMA final report online platforms and digital adv, para 5.362-5.363.
7. *Ibid*, para 2.63 and 6.39.
8. See, eg, Ofcom report in *DMGT/i*, para 4.3; and Ofcom report in *IMC/Lebedev*, para 4.2.
9. For the avoidance of doubt, current reforms to the national security regime do not impact media mergers.
10. Garrahan, M. "Trinity Mirror's acquisition of Express sent to Ofcom", *The Financial Times*, 23 April 2018.
11. DTI Guidance, para 5.11.
12. Ofcom report in *DMGT/i*, page 2 and paras 6.14 to 6.19 and 6.24 to 6.26.
13. Ofcom report in *Reach/Express*, para 1.12.
14. Ofcom report in *Reach/Express*, paras 2.20 and 5.2-5.4.
15. Ofcom report in *IMC/Lebedev*, paras 2.20 and 2.21.
16. DTI Guidance, para 5.5.
17. Ofcom report in *IMC/Lebedev*, para 2.15; and DTI Guidance, para 5.6.
18. Ofcom report in *IMC/Lebedev*, para 2.16.
19. Ofcom report in *Reach/Express*, paras 1.5 and 1.12, footnote 9.
20. DCMS letter to Lebedev Holdings Ltd and Independent Digital News and Media Ltd – issuing of the Public Interest Intervention Notice by the Secretary of State, 27 June 2019, para (b)(iii).
21. Ofcom report in *Reach/Express*, paras 1.12 and 2.18.
22. See, eg, *Reach plc/Northern & Shell Media Group Ltd*, 31 May 2018, para 31; and *IMC/Lebedev*, 28 June 2019, para 4.2.

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