

COMMUNICATIONS ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Competition in Communications Markets

Chapter 1: Functions of OFCOM under Competition Legislation

775. Chapter 1 of Part 5 of the Act allows OFCOM to exercise concurrent powers with the Office of Fair Trading (OFT) under Part 1 of the Competition Act 1998 and Part 4 of the Enterprise Act 2002. Currently, the Director General of Telecommunications has concurrent jurisdiction with the OFT to exercise functions under these Acts in so far as they relate to “commercial activities connected with telecommunications” (see section 50 of the Telecommunications Act 1984, as amended by Part 2 of Schedule 9 to the Enterprise Act 2002). Chapter 1 of Part 5 will give OFCOM concurrent powers in relation to a wider range of activities including broadcasting and related matters.

Section 369: Matters in relation to which OFCOM have competition functions

776. This section explains the expression “communications matters” as it is used throughout this Chapter. “Communications matters” include any one or more of the following:
- the provision of electronic communications networks;
 - the provision of electronic communications services;
 - the making available of services or facilities in association with an electronic communications network or service or for facilitating the use of a network or service;
 - apparatus used for any of the above; and
 - broadcasting and related matters.
777. *Subsection (2)* gives the Secretary of State a power by order to amend this definition. No such order is, however, to be made unless a draft of it has been laid before Parliament and approved by a resolution of each House.

Section 370: OFCOM’s functions under Part 4 of the Enterprise Act 2002

778. This section gives OFCOM current jurisdiction with the OFT to apply and enforce the provisions of Part 4 of the Enterprise Act 2002 (market investigations), with certain limited exceptions, in relation to commercial activities connected with communications matters.

*Under *subsection (4)*, the expression *activities connected with communications matters* includes the supply and export of apparatus used for providing or making available electronic communications networks or services and the production or acquisition of any such apparatus for supply or export.

779. Part 4 of the Enterprise Act 2002 will replace the monopoly provisions of the Fair Trading Act 1973 with a new regime of "market investigations". These are designed to complement the Competition Act 1998 by providing a means of addressing problems in markets where competition does not appear to be working well, but where there is no apparent breach of existing competition law. An example of the sort of circumstances in which a market investigation might take place would be a situation where a few large firms supplied almost the whole of the market and, without there being any agreement between them, they all tended to follow parallel courses of conduct, while new competitors faced significant barriers to entry into the market, and there was little or no evidence of vigorous competition between the existing players (i.e. a non-collusive, uncompetitive oligopoly). The OFT is able to make a reference to the Competition Commission where it has reasonable grounds to suspect that the structure of a market in or including the UK, or the conduct of persons supplying or acquiring goods, or of their customers, prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK. Where the Competition Commission finds that such an adverse effect on competition exists, it is under a duty to take such remedial action within its powers as it considers reasonable and practicable. A number of sectoral regulators have concurrent powers with the OFT to make market investigation references in respect of markets which fall within their areas of responsibility. The Communications Act will give concurrent powers to OFCOM to exercise the OFT's functions under Part 4 of the Enterprise Act 2002 in relation to commercial activities connected with communications, except that, unlike the OFT, OFCOM will neither be obliged to keep a register of undertakings accepted and orders made under Part 4 (under section 166 of the Enterprise Act 2002) nor will they be obliged to issue guidance on the making of market references (under section 177 of that Act).
780. *Subsections (5) and (6)* are designed to prevent the simultaneous exercise by both OFCOM and the OFT of their powers under Part 4 of the Enterprise Act 2002 in relation to the same matter. These subsections place those bodies under a duty to consult with each other before exercising any of the concurrent powers under this section and prohibit them from exercising these powers in a case where the other has already done so.
781. *Subsection (7)* places OFCOM under a duty, where they have referred a matter to the Competition Commission under the provisions of Part 4 of the Enterprise Act 2002, to provide the Competition Commission with any relevant information relevant to the investigation in their possession and with any other assistance that is within their power to give.
782. *Subsection (8)* gives the Secretary of State the power to conclusively determine any question that arises as to whether OFCOM may carry out any particular function under this section. However, *subsection (9)* also makes clear that no action taken by OFCOM under Part 4 of the Enterprise Act 2002 is open to challenge on the grounds that such action should have been taken by the OFT.
783. *Subsection (10)* applies section 117 of the Enterprise Act 2002 to the carrying out by OFCOM of functions under this section. Section 117 makes it an offence for a person knowingly or recklessly to supply materially false or misleading information to the Secretary of State, the OFT, the Competition Commission or to another person who he knows will use the information for the purpose of providing information to the Secretary of State, the OFT or the Competition Commission.

Section 371: OFCOM's functions under the Competition Act 1998

784. This section is analogous to the existing provisions of the Competition Act 1998 giving concurrent jurisdiction to other sectoral regulators such as the Director General of Telecommunications. This section gives OFCOM concurrent jurisdiction with the OFT to apply and enforce Part 1 of the Competition Act 1998, with the exception of section 38 (1) to (6) and section 51. This means that OFCOM will be able to exercise

almost all of the functions of the OFT under Part 1 of the 1998 Act in so far as they relate to activities connected with communications matters. *Subsection (8)* gives OFCOM concurrent jurisdiction with the OFT with respect to certain transitional provisions of the 1998 Act.

*Section 38 of the Competition Act 1998 requires the OFT to prepare and publish guidance as to the appropriate amount of any penalty under Part 1 of the Act. Section 51 allows the OFT to make rules (currently in the form of the Competition Act 1998 (Director's Rules) Order 2000, [SI 2000 No. 293](#)) setting out the procedures to be followed by the OFT, the sectoral regulators and third parties under Part 1 of the Act.

*Under *subsection (4)*, the expression *activities connected with communications matters* includes the supply and export of apparatus used for providing or making available electronic communications networks or services and the production or acquisition of any such apparatus for supply or export.

785. The 1998 Act is based on Articles 81 and 82 of the EC Treaty. It contains two prohibitions: first, of agreements which prevent, restrict or distort competition and which may affect trade within the United Kingdom ('the Chapter I prohibition'); secondly, of conduct which amounts to an abuse of a dominant position in a market which may affect trade within the United Kingdom ('the Chapter II prohibition'). The 1998 Act is generally applied and enforced by the OFT. However, in a number of regulated industries such as telecommunications, gas, electricity, water and sewerage and railway services, functions under the Act are carried out by the sectoral regulator concurrently with the OFT. Examples of the functions in respect of which OFCOM will have concurrent jurisdiction include:

- to investigate possible infringements of the Chapter I or Chapter II prohibitions, either on their own initiative or in response to complaints;
- to impose financial penalties and/or to give directions to bring an infringement of either of the prohibitions to an end; and
- to issue general advice and information on how the Act applies to the communications sector.

786. OFCOM and the OFT will consult with each other before a decision is made as to who will deal with a case in respect of which there is concurrent jurisdiction. Formal arrangements for consultation are set out in regulations made under the Competition Act 1998. In general, anti-competitive agreements or abusive conduct that relate to activities connected with communications matters will be dealt with by OFCOM (unless the OFT is better placed to do so). Where it is unclear which regulator has jurisdiction, the matter will be referred to, and determined by, the Secretary of State. However, no objection may be made against anything done by OFCOM on the grounds that it should have been done by the OFT.

*Further provision for the co-ordination of the performance by the OFT and sectoral regulators of concurrent functions is contained in the Competition Act 1998 (Concurrency) Regulations 2000 ([SI 2000 No. 260](#)). The OFT and each regulator are also represented on the Concurrency Working Party which was formed in 1997 to ensure full co-ordination between regulators and the OFT and to ensure consistency of approach to casework.

787. Section 44 of the Competition Act 1998 makes it an offence, directly or indirectly, to provide false or misleading information to the OFT. As *subsection (3)* of this section provides that references to the OFT in Chapter 1 of the Competition Act 1998 are generally to be read as including OFCOM, section 44 of the Competition Act 1998 will also apply in relation to information provided to OFCOM in connection with their exercise of concurrent jurisdiction under that Act.

Section 372: Application of the Competition Act 1998 to news provision

788. This section amends section 194A of the Broadcasting Act 1990. Under that section, the Secretary of State may declare that any provisions in agreements between regional Channel 3 licence holders for the appointment of the Channel 3 news provider are either not anti-competitive or, if anti-competitive, are proportionate to the objectives being achieved. The effect of such a declaration is that the Chapter I prohibition in the Competition Act 1998 (referred to above) does not apply to those provisions and the OFT cannot use its powers under Chapter 3 of Part 1 of that Act to investigate the agreement. The Secretary of State is obliged to consult the OFT before making such declarations and to notify the OFT after making such declarations.
789. This section amends the references in section 194A of the Broadcasting Act 1990 to the OFT to refer to both the OFT and to OFCOM. This reflects the concurrent jurisdiction of the OFT and OFCOM under Part 1 of the Competition Act 1998 in relation to communications matters.
790. Paragraphs 56 and 57 of Schedule 18 (transitional provisions) provide that from the date on which sections 370 and 371 come into force, anything done by the Director General of Telecommunications under the Enterprise Act 2002 or the Competition Act 1998 which OFCOM would, under those provisions, have the power to do in the future, will be taken to have been done by OFCOM. Anything else will, from the date of entry into force, be taken to have been done by the OFT.

Chapter 2: Media mergers

791. The Enterprise Act 2002 (EA 2002) repealed the majority of the merger provisions of the Fair Trading Act 1973 (FTA 1973) and created a new merger control regime. However, the special newspaper merger regime contained in sections 57 to 62 FTA 1973 remained intact. Under the special newspaper regime, a transfer of a newspaper or newspaper assets to a newspaper proprietor requires the prior written consent of the Secretary of State where the newspapers of the proprietor to whom the transfer is made (including the titles being acquired) have an average paid for circulation of 500,000 copies or more per day. Subject to certain statutory exceptions, the Secretary of State cannot give this consent until the Competition Commission have reported on the matter. If consent is not obtained when required, the transaction will be unlawful and void.
792. Consideration of reform of this aspect of the merger control system was deferred so that it could be considered as part of the overall reform of media ownership rules in this Act. Chapter 2 of Part 5 of this Act makes provision for the repeal of the existing newspaper merger regime provisions and the integration of newspaper mergers into the overall structure of the EA 2002 merger regime. Newspaper mergers will no longer be subject to mandatory pre-notification requirements and the criminal sanctions, which underpin the current regime, will not be continued.
793. The EA 2002 provides for decisions on the majority of non-newspaper mergers to be taken by the independent competition authorities (the OFT and the Competition Commission) against a new competition-based test of whether they result in a substantial lessening of competition. This replaces the broader public interest test used in the FTA 1973. However, the EA 2002 also provides a mechanism whereby the Secretary of State can intervene and decide on particular mergers that raise specified public interest considerations, by the serving of an intervention notice. National security is the only public interest consideration currently specified in section 58 EA 2002, although there is a mechanism in the EA 2002 that enables the Secretary of State to add a new public interest consideration or remove or amend an existing public interest consideration. The Secretary of State can serve an intervention notice in relation to any transaction that qualifies for consideration by the competition authorities because it is a “relevant merger situation” (see section 23 EA 2002). She can also serve a “special intervention notice” in relation to mergers involving government defence contractors where the standard qualifying thresholds (i.e. 25% share of supply or UK turnover of

company being acquired exceeds £70 million) are not satisfied (i.e. where there is a “special merger situation” - see section 59 EA 2002), allowing these to be examined by reference to the specified public interest consideration(s), but not on competition grounds.

794. **Chapter 2** of Part 5 of the Act integrates treatment of newspaper mergers with the merger regime of the EA 2002. However, as newspaper mergers can potentially raise public interest concerns beyond the substantial lessening of competition test, provision is also made for public interest considerations relating to newspapers (the need for accurate presentation of news and free expression of opinion in newspapers, and the need for, to the extent that is reasonable and practicable, a sufficient plurality of views in newspapers) to be specified in section 58 EA 2002 so that the Secretary of State can specify these in an intervention notice or special intervention notice under the EA 2002. Similarly, as media mergers can potentially raise public interest concerns beyond the substantial lessening of competition test, provision is also made for public interest considerations relating to media mergers and cross-media mergers (the need for plurality of persons with control of media enterprises, the need for the availability of a wide range of broadcasting and the need for persons carrying on such enterprises to have a genuine commitment to the broadcasting standards objectives) to be specified in section 58 EA 2002, allowing the Secretary of State to intervene on these grounds. Together, these are referred to as the “media public interest considerations”. Provision is also made for OFCOM to have an additional advisory role where the Secretary of State intervenes in a case on media public interest grounds.

Section 373: Repeal of existing newspaper merger regime

795. This section repeals sections 57 to 62 FTA 1973, which give effect to the existing special newspaper merger regime.

Section 374: Repeal of exclusion for newspaper mergers from general merger controls

796. This section repeals section 69 EA 2002, which prevents a case from being referred to the Competition Commission under both the special newspaper merger regime in the FTA 1973 and the general merger regime in the EA 2002. With the repeal of sections 57 to 62 FTA 1973 (see section 373) this provision is no longer necessary.

Section 375: Media public interest considerations

797. Under the EA 2002, the Secretary of State can only intervene in mergers which satisfy the jurisdictional criteria (i.e. where there is a “relevant merger situation” pursuant to section 23 EA 2002 or a “special merger situation” pursuant to section 59 EA 2002) if she believes that a public interest consideration specified in section 58 EA 2002 is relevant.
798. Currently, only national security is a specified consideration in section 58 EA 2002. This section inserts new sections 58(2A) to (2C) into the EA 2002, which provide for media public interest considerations to be specified in section 58 of that Act, thus giving the Secretary of State the power to intervene in a merger which satisfies the jurisdictional criteria where any of these media public interest considerations are relevant. It also inserts a new section 58A into the EA 2002 for the purposes of construing new section 58(2C).
799. New subsection (2A) specifies the need for accurate presentation of news and free expression of opinion in newspapers. This carries forward (albeit in a slightly different context) the specific reference to these two factors in the public interest test that is currently applied by the Competition Commission when considering newspaper transfers under the special newspaper merger regime of the FTA 1973 (see section 59(3) FTA 1973).

800. New subsection (2B) specifies the need for a sufficient plurality of views in newspapers. This is intended to enable a number of plurality issues going beyond free expression or accurate presentation of news to be taken into account, in particular the structural impact of a transaction on the overall range of views and distribution of voice within the market. 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. There is a qualitative element to the plurality assessment that requires account to be taken of the context in which titles circulate and the nature of those titles – for example, one title in a particular area may be of greater significance for plurality purposes than another.
801. The newspaper plurality consideration in subsection (2B) is qualified by the reference to reasonableness and practicability of securing a sufficient plurality of views. This reflects the fact that although plurality in each and every market (which may be different to the economic market used for competition assessment) is the ideal goal of the regime, it may not be reasonable to seek to achieve this in relation to a particular part of the market – for example, because of the associated costs. Moreover, the level of plurality that may be considered reasonable in a large urban area may be different to that which is practicable in a small rural community. In making this assessment the Competition Commission will be able to take into account all relevant circumstances. It will be able to consider, for example, the size and location of the relevant area, and the extent to which other newspapers in the same area contribute to the level of plurality.
802. New subsection (2C) has three elements: (a) the need in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience; (b) the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in the Communications Act 2003. The first limb of this subsection is concerned primarily with ensuring that ownership of media enterprises is not overly concentrated in the hands of a limited number of persons. The second and third limbs of the test look at the content of the media enterprises involved and the extent to which media owners demonstrate a genuine commitment to complying with the standards objectives – i.e. complying with the spirit and not just the letter of the objectives.
803. [Section 375](#) also inserts a new section 58A into the EA 2002. New section 58A contains provisions relating to the operation of the public interest considerations set out in new section 58(2C). Section 58A(1) states that for the purposes of section 58, a media enterprise is one that consists in or involves broadcasting. Section 58A(2) provides that a newspaper enterprise may also be a media enterprise for the purposes of section 58 if it is involved in a merger with a broadcast media enterprise. This enables cross media mergers involving newspaper enterprises to be assessed against the public interest considerations specified in subsection (2C). Section 58A(3) clarifies that a newspaper enterprise is one consisting in or involving the supply of newspapers.
804. New section 58A(4) makes clear that where a merger situation (i.e. a relevant merger situation or a special merger situation) involves two media enterprises serving the same audience, then there is deemed to be a reduction in the number of such media enterprises for the purposes of the plurality assessment in subsection (2C)(a). This means that all such mergers, including those involving an increase in levels of control of such media enterprises, may be scrutinised for the purposes of subsection (2C)(a), even though the number of enterprises may in fact be unchanged.
805. New section 58A(5) ensures that the authorities can look at the substance of who controls media enterprises when carrying out a plurality assessment.

806. New section 58A(5)(a) provides that, for the purposes of section 58, where a number of media enterprises would fall to be treated as under common ownership or common control for the purposes of section 26 of the EA 2002, they are treated as being controlled by one person. This is because, in assessing the effect of a merger on the sufficiency of plurality of persons with control of media enterprises, the decision-making authorities need to assess the total number of persons with control of media enterprises and what effect the merger will have on the plurality of media as a whole. Apart from the merging media enterprises, in order to get an accurate picture of who has control of the remaining media enterprises, it is important to be able to look not just at the owners of those entities, but at the persons with ultimate control of those entities.
807. New section 58A(5)(b) provides that where a number of media enterprises are otherwise under the same ownership or control, they are treated as being controlled by one person. This is intended to cover any situation where the other media players may have never been “brought” under common ownership or control at any point in the section 26 EA 2002 sense.
808. New section 58A(6) gives the decision-making authorities discretion to determine what is meant by the “audience” of a media enterprise for the purposes of subsection (2C) and section 58A in whichever of the ways specified in subsection (6) they considers appropriate. This enables the decision-making authority to treat different audiences as separate or to group them, or any of them, together. This is modelled on the discretion given to the decision-making authorities in assessing whether the share of supply threshold under the standard merger regime is satisfied. Subsection (7) builds on this by making clear that the criteria for deciding the composition of an audience shall be such as the decision-making authority considers appropriate and may include potential members of that audience.
809. New section 58A(8) clarifies that audience includes readership. This will be relevant in the context of cross media mergers involving a newspaper enterprise.
810. New section 58A(9) extends the power in section 58(3) to modify the public interest considerations specified in section 58 so that modifications can also be made to the provisions of section 58A which construe section 58(2C). Any order made pursuant to section 58(3) to add, remove or amend a public interest consideration in that section is subject to the affirmative resolution procedure (see section 124 EA 2002).
811. [Section 375\(3\)](#) amends section 127(1) of the EA 2002 so that, when determining whether enterprises are under common control for the purposes of new section 58(2C), associated persons are treated as one person. This provision enables interests held by family members, business partners etc to be aggregated.

Section 376: Adaptation of role of OFT in initial investigations and reports

812. Under the public interest regime of the EA 2002, where the Secretary of State has intervened in a merger, the OFT is obliged to prepare a report for the Secretary of State under section 44 EA 2002. This section amends section 44 EA 2002 to adapt the role of the OFT in relation to mergers where a media public interest consideration has been specified in an intervention notice.
813. *Subsection (1)* makes amendments to section 44(3)(b) EA 2002 to provide that the OFT’s duty to provide the Secretary of State with a summary of relevant representations received in relation to public interest considerations mentioned in the intervention notice does not extend to representations received in relation to media public interest considerations. This is to avoid duplication, as OFCOM will have this duty where a media public interest consideration has been specified in the intervention notice (see section 377).
814. *Subsection (2)* adds a new section 44(5A) EA 2002 that ensures that the OFT nonetheless has the power to include such a summary of representations. Such a power

might be used, for example, if the OFT received representations after OFCOM had delivered its report, in order to ensure that representations were drawn to the Secretary of State's attention. It also clarifies that the OFT is not required to artificially separate out plurality and competition issues where this is unhelpful to the overall purpose of advising the Secretary of State.

815. *Subsection (3)* inserts new sections 44(8) to (10) into the EA 2002. Sections 44(8), (9) and (10) contain the definitions of “media public interest consideration”, “broadcasting” and “newspaper”. The definition of “media public interest consideration” encompasses the considerations in new section 58(2A) to (2C) EA 2002 that are inserted by section 375 of this Act or any other public interest consideration concerning broadcasting or newspapers that the Secretary of State thinks should be specified in section 58 EA 2002. This latter aspect could encompass, for example, any changes to the existing media public interest considerations that the Secretary of State thinks ought to be made. The definition of “broadcasting” covers the provision of services, the provision of which is required to be licensed under Part 1 or 3 of the Broadcasting Act 1990 or Part 1 or 2 of the Broadcasting Act 1996, or which would be required to be so licensed if provided by a person subject to licensing under the Part in question. The latter part of the definition is intended to capture services provided by the BBC or the Welsh Authority, or by broadcasters established abroad and broadcasting into the UK under EC licences. Although neither the BBC nor the Welsh Authority could be involved in a merger situation, this broad definition allows the Secretary of State to take account of the existence of their services when carrying out an assessment of the sufficiency of plurality of controllers of media enterprises for the purposes of new section 58(2C)(a). The definition of “newspaper” is the same as that currently used for the purposes of the special newspaper regime in the FTA 1973. This covers daily and Sunday newspapers (whether national or local) and local periodical newspapers.
816. New section 44(11) EA 2002 sets out a power for the Secretary of State to amend the definition of “newspaper” or of “broadcasting” by statutory instrument. This power is designed to deal with future developments in the nature of the newspaper or broadcasting markets that might mean that the scope of the media public interest consideration should be redefined (for example, in relation to newspapers, if it became more common for newspaper titles to circulate across national boundaries such that important UK titles did not necessarily circulate “wholly or mainly” in the UK). An order under new section 44(11) can only be made after a draft has been laid before, and approved by a resolution of, each House of Parliament (see paragraph 24 of Schedule 16, which amends section 124 EA 2002).

Section 377: Additional investigation and report by OFCOM

817. This section inserts a new section 44A in the EA 2002, which sets out OFCOM's reporting and related investigatory duties where an intervention notice has been served specifying any media public interest consideration.
818. New section 44A(2) provides that OFCOM are obliged to report to the Secretary of State within a deadline specified by the Secretary of State. There is nothing to prevent the Secretary of State from altering the deadline if the circumstances so require. New section 44A(3) ensures that the Secretary of State will receive information in the report on at least two areas:
- OFCOM's advice and recommendations on any media public interest consideration mentioned in the intervention notice; and
 - OFCOM's summary of the relevant representations that it has received in relation to any such media public interest consideration.

Section 378: Extension of special public interest regime for certain media mergers

819. This section amends section 59 EA 2002, which currently makes provision for the Secretary of State to intervene and serve a “special intervention notice” in relation to an exceptional category of mergers involving government defence contractors. These may be referred for investigation, on specified public interest grounds only, even though they do not meet the normal qualifying thresholds (i.e. 25% share of supply or UK turnover of the company being acquired exceeds £70 million, as set out in section 23 EA 2002).
820. *Subsection (1)* replaces sections 59(3) and (4) EA 2002 with new sections 59(3) to (3D). These incorporate the existing criteria set out in section 59 EA 2002 for establishing a “special merger situation” in cases involving government defence contractors, together with new provisions providing that a special merger situation also arises where:
- all of the criteria for a relevant merger situation within section 23 EA 2002 have been met except for the share of supply or turnover thresholds in sections 23(1)(b) and (2)(b) EA 2002 – that is, where two or more enterprises have ceased to be distinct within the relevant time limits (see sections 24-27 EA 2002); and
 - at least 25% of the supply of newspapers of any description in the UK, or in a substantial part of the UK, was supplied by persons carrying on one of the enterprises concerned in the merger (unlike the general jurisdiction test in section 23(2)-(4) EA 2002, there is no requirement that the share of supply is created or enhanced by the merger); or
 - at least 25% of the provision of broadcasting of any description, provided in the UK or a substantial part of the UK was provided by the person who carried on one of the enterprises involved in the merger. (As in the case of extended jurisdiction for newspapers, there is no requirement that this 25% share is created or enhanced).
821. Intervention in relation to cases that fall within the special public interest regime is limited to the public interest grounds specified in section 58 EA 2002. They cannot be scrutinised on competition grounds.
822. *Subsection (2)* inserts new subsection (6A) in section 59 EA 2002. Subsection (6A) gives the Secretary of State a power to amend the share of supply conditions relating to the broadcasting and newspaper extended jurisdiction. In particular, this will ensure that in the event that the Secretary of State exercises her powers in section 123 EA 2002 in order to amend the share of supply test in section 23 EA 2002, the changes can be carried across to section 59 EA 2002, such that the share of supply test remains consistent throughout Part 3 EA 2002.
823. *Subsection (3)* inserts new section 59A into the EA 2002. This replicates for the new newspaper and broadcasting share of supply provisions in the special public interest regime the provisions on the calculation of share of supply already included for the standard regime in section 23 EA 2002. New section 59A(1) makes it clear that, for the purposes of applying the newspaper share of supply test in new section 59(3C) or the broadcasting share of supply test in section 59(3D) the authorities can apply such criteria (such as value, cost, quantity etc.) as they consider appropriate to determine whether the 25% threshold is satisfied. New section 59A(2) allows the authorities to consider whether goods or services taken on their own, or with others or in groups, make up this proportion. Sections 59A(3), 59A(4) and 59A(5) give the competition authorities the discretion to decide when goods or services are the subject of different forms of supply.

Section 379: Adaptation of role of OFT in special public interest regime

824. Under the special public interest regime of the EA 2002, where the Secretary of State has intervened in a merger under this regime, the OFT is obliged to prepare a report for the Secretary of State under section 61 of that Act. This section amends section 61 EA 2002 to adapt the role of the OFT in relation to mergers under the special public

interest regime where a media public interest consideration has been specified in a special intervention notice.

825. *Subsection (2)* makes amendments to section 61(3)(b) EA 2002 to provide that the OFT's duty to provide the Secretary of State with a summary of relevant representations received in relation to public interest considerations mentioned in the special intervention notice does not extend to representations about media public interest considerations. This is to avoid duplication, as OFCOM will have this duty (see section 380) where a media public interest consideration, which is specified in section 58 at the time, has been mentioned in the special intervention notice. The amendments made by this section refer only to considerations specified in sections 58(2A), (2B) and (2C) at the time of the notice, because the special public interest regime has no equivalent to the provisions in the standard public interest regime by which the Secretary of State can intervene on the basis of a new public interest consideration which has not been specified in section 58 (see section 42(3) EA 2002).
826. *Subsection (4)* adds a new section 61(4A) EA 2002 to ensure that the OFT nonetheless has the power to include such a summary of representations. Such a power might be used, for example, if the OFT received representations after OFCOM had delivered its report, in order to ensure that representations were drawn to the Secretary of State's attention.

Section 380: Additional investigation and report by OFCOM: special public interest cases

827. This section inserts a new section 61A in the EA 2002, which sets out OFCOM's reporting and related investigatory duties where a special intervention notice has been served mentioning any of the media public interest considerations that are specified in section 58(2A), (2B) or (2C) EA 2002. The new section refers only to considerations specified in section 58(2A), (2B) or (2C) at the time of the giving of the special intervention notice because the special public interest regime has no equivalent to the provisions in the standard public interest regime by which the Secretary of State can intervene on the basis of a new public interest consideration which has not been specified in section 58 (see section 42(3) EA 2002).
828. New section 61A(2) provides that OFCOM is obliged to report to the Secretary of State within a deadline specified by the Secretary of State. There is nothing to prevent the Secretary of State from altering the deadline if the circumstances so require. New section 61A(3) ensures that the Secretary of State will receive information in the report on at least two areas:
- OFCOM's advice and recommendations on any media public interest considerations specified in section 58(2A), (2B) or (2C) and mentioned in the special intervention notice; and
 - OFCOM's summary of the relevant representations that it has received in relation to any such media public interest consideration.

Section 381: Public consultation in relation to media mergers

829. This section introduces a new section 104A EA 2002, which applies only to references to the Competition Commission that specify a media public interest consideration. In conducting its inquiry into such cases the Competition Commission is specifically required, so far as it is practicable, to have regard to the need to consult the sections of the public that may be affected by the merger. The duty can be discharged by consulting such representative sample of the public as the Commission considers to be appropriate for this purpose. This duty applies in addition to the Commission's normal duties of investigation in relation to merger references in public interest cases (see sections 50(3) and 65(4) EA 2002).

Section 382: General information duties in relation to media mergers

830. This section amends section 105 EA 2002 to ensure that, where a media public interest consideration is invoked, OFCOM, as well as the OFT and the Competition Commission, will have general information duties vis-à-vis those that might be affected by the merger, each other and the Secretary of State.
831. *Subsection (2)* inserts a new section 105(1A) EA 2002 to ensure that where OFCOM are required to produce a report on any media public interest consideration, they will act, if practicable, to bring cases that they are investigating to the attention of those that might be affected by the transaction. The effect of the amendment to section 105(2) in *subsection (3)* is that this duty does not apply to merger notice cases, which carry their own publicity requirements (see section 99 EA 2002).
832. *Subsections (4) and (6)* amend section 105(3) and 105(4) EA 2002 to ensure that OFT has the same obligations to give relevant information to OFCOM as it already has for the Competition Commission.
833. *Subsections (5) and (7)* insert new sections 105(3A) and (4A) EA 2002 to provide that OFCOM will give relevant information to the OFT and the Competition Commission.
834. *Subsections (8) and (9)* amend sections 105(5) and (6) EA 2002 to ensure that OFCOM have the same obligations as the OFT and the Competition Commission to give information and assistance to the Secretary of State in order to enable her to carry out her functions in relation to cases that raise public interest considerations.
835. *Subsection (10)* amends section 105(7) EA 2002 to extend the duties of the Competition Commission and the Secretary of State to have regard to information given to them under sections 105(3) to (6) so as to encompass information supplied to them under those sections by OFCOM.
836. *Subsection (11)* inserts a new section 105(7A) EA 2002, which provides that OFCOM must have regard to any information given to it by the OFT under sections 105(3) or (4) EA 2002 and that the OFT must have regard to any information given to it by OFCOM under new sections 105(3A) or 105(4A).

Section 383: Advice and information in relation to media mergers

837. This section inserts a new section 106A EA 2002, which provides that the Secretary of State may publish advice and information to explain the media public interest considerations specified in sections 58(2A), (2B) and (2C) EA 2002 and to indicate how the Secretary of State expects the merger provisions of the EA 2002 to operate in relation to them. If the Secretary of State chooses to publish such advice she will be required, in preparing the advice, to consult the OFT, OFCOM, the Commission and such other persons as she considers appropriate.

Section 384: General advisory functions of OFCOM in relation to media mergers

838. This section inserts a new section 106B EA 2002 setting out the general advisory functions of OFCOM. In any case where a media public interest consideration has been invoked, OFCOM may give advice to the Secretary of State on any report by the Competition Commission on the case and the taking of enforcement action by the Secretary of State.
839. There is also a general power for OFCOM to give advice where the Secretary of State has requested this in connection with any case on which they are required to report. This could be used, for example, in the event that the Secretary of State required supplementary advice on a particular aspect of a case. Except for the specific cases mentioned in new section 106B(1), this section does not empower OFCOM to give advice unless the Secretary of State has requested it.

840. Any advice that is given will be published (subject to compliance with the provisions of Part 9 EA 2002 relating to disclosure of information, in particular section 244 EA 2002), but not before the publication of the Competition Commission's report on the case.

Section 385: Other general functions of OFCOM in relation to media mergers

841. This section inserts a new section 119A EA 2002 that gives OFCOM the function of obtaining and reviewing information relating to any of its functions in relation to the media public interest considerations. This information-gathering role, which may involve research, is with a view to OFCOM having the information it needs to make decisions and carry out its functions under Part 3 EA 2002.
842. Subsection (4) of new section 119A EA 2002 provides that the general duties of OFCOM under section 3 of this Act do not apply when OFCOM are exercising their functions under the media merger provisions of the EA 2002 (see also section 3(7) of this Act). In practice the media merger provisions will operate as part of the EA 2002, and this Act has its own provisions setting out the functions and responsibilities of the different authorities.

Section 386: Monitoring role for OFT in relation to media mergers

843. This section inserts a new section 119B EA 2002, which gives the OFT the function of obtaining and reviewing information that may be relevant to the Secretary of State's decision on whether or not to intervene on the basis of the media public interest considerations set out in section 58(2A), (2B) or (2C) EA 2002. In particular, the OFT in carrying out this function will ensure that the Secretary of State is made aware of cases where (in the OFT's opinion) she may wish to consider issuing a special intervention notice. The OFT will not be under any obligation to carry out a detailed analysis of any media public interest consideration that may be relevant.
844. This section only applies to such cases where they may fall within the special public interest consideration regime in relation to a media public interest consideration. The OFT's duties in relation to public interest cases falling within the standard regime are already fully set out in the EA 2002 (see section 5 and Chapter 2 of Part 3 EA 2002).

Section 387: Enforcement powers in relation to newspaper and other media mergers

845. This section inserts a new paragraph 20A in Schedule 8 EA 2002, which contains the list of matters that can be included in final orders for the purpose of remedying, mitigating or preventing any adverse public interest effects which have resulted, or may be expected to result, from a merger involving a newspaper enterprise. Remedies to an adverse finding on the basis of the media public interest consideration may be different in character to the remedies directed at competition detriments with which Schedule 8 is principally concerned. Accordingly, paragraph 20A allows the Secretary of State to make such provision, in relation to these cases, as she considers appropriate in all the circumstances. Sub-paragraph (4) sets out a non-exhaustive list of the type of steps that might be taken in exercise of this power. These are remedies that experience in dealing with newspaper transfers under the FTA 1973 has shown it would be useful to be able to call upon.
846. This provision applies only to orders made in cases where (i) any of the newspaper public interest considerations were specified in the intervention/special intervention notice and remain relevant at the point of a decision on remedies, or (ii) where a consideration in section 58(2C) has been specified, provided that the relevant merger situation or special merger situation in question is one where one of the enterprises ceasing to be distinct is a newspaper enterprise.
847. New sub-paragraph (5) sets out the definition of a "newspaper public interest consideration". This is defined as a media public interest consideration other than

one which is set out in section 58(2C) or which is a consideration concerned with broadcasting which the Secretary of State thought ought to have been specified in section 58.

Section 388: Alterations to newspaper panel of Competition Commission

848. This section amends the definition of “newspaper merger reference” in paragraph 1 of Schedule 7 to the Competition Act 1998. Schedule 7 to that Act makes provision about the Competition Commission and includes provisions on the appointment of newspaper panel members to the group selected to carry out an inquiry following a reference. The effect of this amendment is that the provisions on the appointment of newspaper panel members to any constituted group will only apply where a merger reference is made specifying a newspaper public interest consideration.

Section 389: Further provision in connection with media mergers

849. *Subsection (1)* of this section gives effect to Schedule 16, which contains further amendments in connection with media mergers.
850. *Subsection (2)* extends to the provisions of this Chapter of the Act and its related repeals the provisions of sections 276(2) and (3) and 277 EA 2002, which gives the Secretary of State the power to make by order supplementary, incidental or consequential provisions for the purposes of, or in consequence of, or for giving full effect to, the EA 2002. *Subsection (3)* clarifies, for the avoidance of doubt, that this includes the power to modify the EA 2002.