



Communications Act 2003

2003 CHAPTER 21

PART 5

COMPETITION IN COMMUNICATIONS MARKETS

CHAPTER 2

MEDIA MERGERS

Introductory

373 Repeal of existing newspaper merger regime

Sections 57 to 62 of the Fair Trading Act 1973 (c. 41) (newspaper merger references) shall cease to have effect.

374 Repeal of exclusion for newspaper mergers from general merger controls

Section 69 of the Enterprise Act 2002 (c. 40) (exclusion of newspaper mergers from references under Part 3 of that Act) shall cease to have effect.

Adaptation for media mergers of main merger regime

375 Media public interest considerations

(1) After subsection (2) of section 58 of the Enterprise Act 2002 (considerations specified as public interest considerations for the purpose of the main merger regime) there shall be inserted—

“(2A) The need for—

- (a) accurate presentation of news; and
- (b) free expression of opinion;

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in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C) The following are specified in this section—

- (a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, 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 United Kingdom 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 section 319 of the Communications Act 2003.”

(2) After that section there shall be inserted, in Chapter 2 of Part 3—

“58A Construction of consideration specified in section 58(2C)

- (1) For the purposes of section 58 and this section an enterprise is a media enterprise if it consists in or involves broadcasting.
- (2) In the case of a merger situation in which at least one of the enterprises ceasing to be distinct consists in or involves broadcasting, the references in section 58(2C)(a) or this section to media enterprises include references to newspaper enterprises.
- (3) In this Part “newspaper enterprise” means an enterprise consisting in or involving the supply of newspapers.
- (4) Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards.
- (5) For the purposes of section 58, where two or more media enterprises—
 - (a) would fall to be treated as under common ownership or common control for the purposes of section 26, or
 - (b) are otherwise in the same ownership or under the same control,
 they shall be treated (subject to subsection (4)) as all under the control of only one person.
- (6) A reference in section 58 or this section to an audience shall be construed in relation to a media enterprise in whichever of the following ways the decision-making authority considers appropriate—
 - (a) as a reference to any one of the audiences served by that enterprise, taking them separately;
 - (b) as a reference to all the audiences served by that enterprise, taking them together;

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- (c) as a reference to a number of those audiences taken together in such group as the decision-making authority considers appropriate; or
 - (d) as a reference to a part of anything that could be taken to be an audience under any of paragraphs (a) to (c) above.
- (7) The criteria for deciding who can be treated for the purposes of this section as comprised in an audience, or as comprised in an audience served by a particular service—
 - (a) shall be such as the decision-making authority considers appropriate in the circumstances of the case; and
 - (b) may allow for persons to be treated as members of an audience if they are only potentially members of it.
- (8) In this section “audience” includes readership.
- (9) The power under subsection (3) of section 58 to modify that section includes power to modify this section.”
- (3) In section 127(1) of that Act (associated persons to be treated as one person), for the word “and” at the end of paragraph (a) there shall be substituted—
 - “(aa) for the purposes of section 58(2C); and”.

376 Adaptation of role of OFT in initial investigations and reports

- (1) In section 44(3)(b) of the Enterprise Act 2002 (c. 40) (initial report by OFT in public interest cases must include summary of representations about public interest considerations) after the word “concerned” there shall be inserted “(other than a media public interest consideration)”.
- (2) After section 44(5) of that Act there shall be inserted—
 - “(5A) The report may, in particular, contain a summary of any representations about the case which have been received by the OFT and which relate to any media public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State’s decision as to whether to make a reference under section 45.”
- (3) After section 44(7) of that Act there shall be inserted—
 - (8) In this Part “media public interest consideration” means any consideration which, at the time of the giving of the intervention notice concerned—
 - (a) is specified in section 58(2A) to (2C); or
 - (b) in the opinion of the Secretary of State, is concerned with broadcasting or newspapers and ought to be specified in section 58.
 - (9) In this Part “broadcasting” means the provision of services the provision of which—
 - (a) 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
 - (b) would be required to be so licensed if provided by a person subject to licensing under the Part in question.

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(10) In this Part “newspaper” means a daily, Sunday or local (other than daily or Sunday) newspaper circulating wholly or mainly in the United Kingdom or in a part of the United Kingdom.

(11) The Secretary of State may by order amend subsections (9) and (10).”

377 Additional investigation and report by OFCOM

After section 44 of the Enterprise Act 2002 (investigation and report by OFT in public interest cases) there shall be inserted—

“44A Additional investigation and report by OFCOM: media mergers

(1) Subsection (2) applies where—

- (a) the Secretary of State has given an intervention notice in relation to a relevant merger situation; and
- (b) the intervention notice mentions any media public interest consideration.

(2) OFCOM shall, within such period as the Secretary of State may require, give a report to the Secretary of State on the effect of the consideration or considerations concerned on the case.

(3) The report shall contain—

- (a) advice and recommendations on any media public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State’s decision as to whether to make a reference under section 45; and
- (b) a summary of any representations about the case which have been received by OFCOM and which relate to any such consideration.

(4) OFCOM shall carry out such investigations as they consider appropriate for the purposes of producing a report under this section.”

Extension of special public interest regime

378 Extension of special public interest regime for certain media mergers

(1) In section 59 of the Enterprise Act 2002 (c. 40) (intervention by Secretary of State in special public interest cases), for subsections (3) and (4) (definition of “special merger situation”) there shall be substituted—

“(3) For the purposes of this Part a special merger situation has been created if—

- (a) the condition mentioned in subsection (3A) is satisfied; and
- (b) immediately before the enterprises concerned ceased to be distinct—
 - (i) the conditions mentioned in subsection (3B) were satisfied;
 - (ii) the condition mentioned in subsection (3C) was satisfied; or
 - (iii) the condition mentioned in subsection (3D) was satisfied.

(3A) The condition mentioned in this subsection is that—

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- (a) no relevant merger situation has been created because of section 23(1)(b) and (2)(b); but
 - (b) a relevant merger situation would have been created if those enactments were disregarded.
 - (3B) The conditions mentioned in this subsection are that—
 - (a) at least one of the enterprises concerned was carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom; and
 - (b) a person carrying on one or more of the enterprises concerned was a relevant government contractor.
 - (3C) The condition mentioned in this subsection is that, in relation to the supply of newspapers of any description, at least one-quarter of all the newspapers of that description which were supplied in the United Kingdom, or in a substantial part of the United Kingdom, were supplied by the person or persons by whom one of the enterprises concerned was carried on.
 - (3D) The condition mentioned in this subsection is that, in relation to the provision of broadcasting of any description, at least one-quarter of all broadcasting of that description provided in the United Kingdom, or in a substantial part of the United Kingdom, was provided by the person or persons by whom one of the enterprises concerned was carried on.”
- (2) After subsection (6) of that section there shall be inserted—
- “(6A) The Secretary of State may by order amend the conditions mentioned in subsection (3)(b)(ii) and (iii).”
- (3) After that section there shall be inserted—

“59A Construction of conditions in section 59(3C) and (3D)

- (1) For the purpose of deciding whether the proportion of one-quarter mentioned in section 59(3C) or (3D) is fulfilled with respect to—
 - (a) newspapers of any description, or
 - (b) broadcasting of any description,the decision-making authority shall apply such criterion (whether value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or such combination of criteria, as the decision-making authority considers appropriate.
- (2) References in section 59(3C) to the supply of newspapers shall, in relation to newspapers of any description which are the subject of different forms of supply, be construed in whichever of the following ways the decision-making authority considers appropriate—
 - (a) as references to any of those forms of supply taken separately;
 - (b) as references to all those forms of supply taken together; or
 - (c) as references to any of those forms of supply taken in groups.
- (3) For the purposes of subsection (2) the decision-making authority may treat newspapers as being the subject of different forms of supply whenever—

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- (a) the transactions concerned differ as to their nature, their parties, their terms or their surrounding circumstances; and
 - (b) the difference is one which, in the opinion of the decision-making authority, ought for the purposes of that subsection to be treated as a material difference.
- (4) References in section 59(3D) to the provision of broadcasting shall, in relation to broadcasting of any description which is the subject of different forms of provision, be construed in whichever of the following ways the decision-making authority considers appropriate—
- (a) as references to any of those forms of provision taken separately;
 - (b) as references to all those forms of provision taken together; or
 - (c) as references to any of those forms of provision taken in groups.
- (5) For the purposes of subsection (4) the decision-making authority may treat broadcasting as being the subject of different forms of provision whenever—
- (a) the transactions concerned differ as to their nature, their parties, their terms or their surrounding circumstances; and
 - (b) the difference is one which, in the opinion of the decision-making authority, ought for the purposes of that subsection to be treated as a material difference.
- (6) The criteria for deciding when newspapers or broadcasting can be treated, for the purposes of section 59, as newspapers or broadcasting of a separate description shall be such as in any particular case the decision-making authority considers appropriate in the circumstances of that case.
- (7) In section 59 and this section “provision” and cognate expressions have the same meaning in relation to broadcasting as in Part 3 of the Communications Act 2003; but this subsection is subject to subsections (4) and (5) of this section.”

379 Adaptation of role of OFT in special public interest regime

- (1) Section 61 of the Enterprise Act 2002 (c. 40) (initial investigation and report by OFT in special public interest cases) shall be amended as follows.
- (2) In subsection (3)(b) (report must include summary of representations about considerations specified in section 58) after the word “concerned” there shall be inserted “(other than a consideration which, at the time of the giving of the notice, was specified in section 58(2A) to (2C))”.
- (3) In subsection (4) for the words “59(4)(b)” there shall be substituted “59(3B)(b)”.
- (4) After subsection (4) there shall be inserted—
 - “(4A) The report may, in particular, contain a summary of any representations about the case which have been received by the OFT and which relate to any consideration which—
 - (a) is mentioned in the special intervention notice concerned and, at the time of the giving of that notice, was specified in section 58(2A) to (2C); and
 - (b) is or may be relevant to the Secretary of State’s decision as to whether to make a reference under section 62.”

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

After section 61 of the Enterprise Act 2002 (initial investigation and report by OFT in special public interest cases) there shall be inserted—

“61A Additional investigation and report by OFCOM: certain media mergers

- (1) Subsection (2) applies where—
 - (a) the Secretary of State has given a special intervention notice in relation to a special merger situation; and
 - (b) the special intervention notice mentions any consideration which, at the time of the giving of the notice, was specified in section 58(2A) to (2C).
- (2) OFCOM shall, within such period as the Secretary of State may require, give a report to the Secretary of State on the effect of the consideration or considerations concerned on the case.
- (3) The report shall contain—
 - (a) advice and recommendations on any consideration which—
 - (i) is mentioned in the special intervention notice concerned and, at the time of the giving of that notice, was specified in section 58(2A) to (2C); and
 - (ii) is or may be relevant to the Secretary of State’s decision as to whether to make a reference under section 62; and
 - (b) a summary of any representations about the case which have been received by OFCOM and which relate to any such consideration.
- (4) OFCOM shall carry out such investigations as they consider appropriate for the purposes of producing a report under this section.”

New general functions in relation to media mergers

381 Public consultation in relation to media mergers

After section 104 of the Enterprise Act 2002 (c. 40) there shall be inserted—

“104A Public consultation in relation to media mergers

- (1) Subsection (2) applies where the Commission—
 - (a) is preparing—
 - (i) a report under section 50 on a reference which specifies a media public interest consideration; or
 - (ii) a report under section 65 on a reference which specifies a consideration specified in section 58(2A) to (2C); and
 - (b) is not under a duty to disregard the consideration concerned.
- (2) The Commission shall have regard (among other things) to the need to consult the public so far as they might be affected by the creation of the relevant merger situation or special merger situation concerned and so far as such consultation is practicable.

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- (3) Any consultation of the kind mentioned in subsection (2) may be undertaken by the Commission by consulting such representative sample of the public or section of the public concerned as the Commission considers appropriate.”

382 General information duties in relation to media mergers

- (1) Section 105 of the Enterprise Act 2002 (general information duties of OFT and Competition Commission) shall be amended as follows.

- (2) After subsection (1) there shall be inserted—

“(1A) Where OFCOM decide to investigate a matter so as to make a report under section 44A or 61A, they shall, so far as practicable, take such action as they consider appropriate to bring information about the investigation to the attention of those who they consider might be affected by the creation of the relevant merger situation concerned or (as the case may be) the special merger situation concerned.”

- (3) In subsection (2) (exclusion for merger notices) for the words “Subsection (1) does” there shall be substituted “Subsections (1) and (1A) do”.

- (4) In subsection (3) (duty of OFT to give requested assistance to Competition Commission)—

- (a) after the word “Commission”, where it occurs for the first time, there shall be inserted “or OFCOM”; and
- (b) after the word “Commission”, where it occurs for the second, third and fourth time, there shall be inserted “or (as the case may be) OFCOM”.

- (5) After subsection (3) there shall be inserted—

“(3A) OFCOM shall give the Commission or the OFT—

- (a) such information in their possession as the Commission or (as the case may be) the OFT may reasonably require to enable the Commission or (as the case may be) the OFT to carry out its functions under this Part; and
- (b) any other assistance which the Commission or (as the case may be) the OFT may reasonably require for the purpose of assisting it in carrying out its functions under this Part and which it is within the power of OFCOM to give.”

- (6) In subsection (4) (duty of OFT to give unrequested information to Competition Commission)—

- (a) after the word “Commission”, where it occurs for the first time, there shall be inserted “or OFCOM”; and
- (b) after the word “Commission”, where it occurs for the second and third time, there shall be inserted “or (as the case may be) OFCOM”.

- (7) After subsection (4) there shall be inserted—

“(4A) OFCOM shall give the Commission or the OFT any information in their possession which has not been requested by the Commission or (as the case may be) the OFT but which, in the opinion of OFCOM, would be appropriate to give to the Commission or (as the case may be) the OFT for the purpose of assisting it in carrying out its functions under this Part.”

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- (8) In subsection (5) (duty of OFT and Competition Commission to give requested assistance to the Secretary of State) after the word “OFT”, in both places where it occurs, there shall be inserted “, OFCOM”.
- (9) In subsection (6) (duty of OFT to give unrequested information to Secretary of State)
- (a) after the word “OFT”, where it occurs for the first time, there shall be inserted “and OFCOM”;
 - (b) for the word “its” there shall be substituted “their”; and
 - (c) after the word “OFT”, where it occurs for the second time, there shall be inserted “or (as the case may be) OFCOM”.
- (10) In subsection (7) (duty to have regard to information given) for the words “or (4)” there shall be substituted “, (3A), (4) or (4A)”.
- (11) After subsection (7) there shall be inserted—
- “(7A) OFCOM shall have regard to any information given to them under subsection (3) or (4); and the OFT shall have regard to any information given to it under subsection (3A) or (4A).”

383 Advice and information in relation to media mergers

After section 106 of the Enterprise Act 2002 (c. 40) there shall be inserted—

“106A Advice and information in relation to media mergers

- (1) The Secretary of State may prepare and publish general advice and information about the considerations specified in section 58(2A) to (2C).
- (2) The Secretary of State may at any time publish revised, or new, advice or information.
- (3) Advice or information published under this section shall be prepared with a view to—
 - (a) explaining the considerations specified in section 58(2A) to (2C) to persons who are likely to be affected by them; and
 - (b) indicating how the Secretary of State expects this Part to operate in relation to such considerations.
- (4) Any advice or information published by the Secretary of State under this section shall be published in such manner as the Secretary of State considers appropriate.
- (5) In preparing any advice or information under this section, the Secretary of State shall consult the OFT, OFCOM, the Commission and such other persons as he considers appropriate.”

384 General advisory functions of OFCOM in relation to media mergers

After section 106A of the Enterprise Act 2002 there shall be inserted—

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“106B General advisory functions of OFCOM

- (1) OFCOM may, in connection with any case on which they are required to give a report by virtue of section 44A or 61A, give such advice as they consider appropriate to the Secretary of State in relation to—
 - (a) any report made in such a case by the Commission under section 50 or 65; and
 - (b) the taking by the Secretary of State of enforcement action under Schedule 7.
- (2) OFCOM may, if requested to do so by the Secretary of State, give such other advice as they consider appropriate to the Secretary of State in connection with any case on which they are required to give a report by virtue of section 44A or 61A.
- (3) OFCOM shall publish any advice given by them under this section but advice given by them in relation to a report of the Commission under section 50 or 65 or related enforcement action shall not be published before the report itself is published.”

385 Other general functions of OFCOM in relation to media mergers

After section 119 of the Enterprise Act 2002 (c. 40) there shall be inserted—

“Further provision about media mergers

119A Other general functions of OFCOM in relation to this Part

- (1) OFCOM have the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of their functions under this Part.
- (2) That function is to be carried out with a view to (among other things) ensuring that OFCOM have sufficient information to take informed decisions and to carry out their other functions effectively.
- (3) In carrying out that function OFCOM may carry out, commission or support (financially or otherwise) research.
- (4) Section 3 of the Communications Act 2003 (general duties of OFCOM) shall not apply in relation to functions of OFCOM under this Part.”

386 Monitoring role for OFT in relation to media mergers

After section 119A of the Enterprise Act 2002 there shall be inserted—

“119B Monitoring role for OFT in relation to media mergers

- (1) The OFT has the function of obtaining, compiling and keeping under review information about matters which may be relevant to the Secretary of State in deciding whether to give a special intervention notice mentioning a consideration specified in section 58(2A) to (2C).

Status: This is the original version (as it was originally enacted).

- (2) That function is to be carried out with a view to (among other things) ensuring that the Secretary of State is aware of cases where, in the opinion of the OFT, he might wish to consider giving such a notice.
- (3) That function does not extend to obtaining, compiling or keeping under review information with a view to carrying out a detailed analysis in each case of the operation in relation to that case of the consideration specified in section 58(2A) to (2C).”

Supplemental provisions of Chapter 2

387 Enforcement powers in relation to newspaper and other media mergers

In Schedule 8 to the Enterprise Act 2002 (provision that may be contained in certain enforcement orders) after paragraph 20 there shall be inserted—

“Newspaper mergers

- 20A (1) This paragraph applies in relation to any order—
- (a) which is to be made following the giving of—
 - (i) an intervention notice which mentions a newspaper public interest consideration;
 - (ii) an intervention notice which mentions any other media public interest consideration in relation to a relevant merger situation in which one of the enterprises ceasing to be distinct is a newspaper enterprise;
 - (iii) a special intervention notice which mentions a consideration specified in section 58(2A) or (2B); or
 - (iv) a special intervention notice which, in relation to a special merger situation in which one of the enterprises ceasing to be distinct is a newspaper enterprise, mentions a consideration specified in section 58(2C); and
 - (b) to which the consideration concerned is still relevant.
- (2) The order may make such provision as the person making the order considers to be appropriate in all circumstances of the case.
 - (3) Such provision may, in particular, include provision requiring a person to do, or not to do, particular things.
 - (4) Provision made by virtue of this paragraph may, in particular, include provision—
 - (a) altering the constitution of a body corporate (whether in connection with the appointment of directors, the establishment of an editorial board or otherwise);
 - (b) requiring the agreement of the relevant authority or another person before the taking of particular action (including the appointment or dismissal of an editor, journalists or directors or acting as a shadow director);
 - (c) attaching conditions to the operation of a newspaper;
 - (d) prohibiting consultation or co-operation between subsidiaries.

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- (5) In this paragraph “newspaper public interest consideration” means a media public interest consideration other than one which is such a consideration—
- (a) by virtue of section 58(2C); or
 - (b) by virtue of having been, in the opinion of the Secretary of State, concerned with broadcasting and a consideration that ought to have been specified in section 58.
- (6) This paragraph is without prejudice to the operation of the other paragraphs of this Schedule in relation to the order concerned.”

388 Alterations concerning newspaper panel of Competition Commission

In paragraph 1 of Schedule 7 to the Competition Act 1998 (c. 41) (the Competition Commission: interpretation), in the definition of “newspaper merger reference”, for the words from “newspaper”, where it occurs for the second time, to “Act” there shall be substituted “reference under section 45 of the Enterprise Act 2002 which specifies a newspaper public interest consideration (within the meaning of paragraph 20A of Schedule 8 to that Act) or a reference under section 62 of that Act which specifies a consideration specified in section 58(2A) or (2B) of that Act”.

389 Further provision in connection with media mergers

- (1) Schedule 16 (which contains further amendments in connection with media mergers) shall have effect.
- (2) Sections 276(2) and (3) and 277 of the Enterprise Act 2002 (c. 40) (power to make transitional and consequential amendments etc.) shall apply in relation to this Chapter of this Part of this Act and its related repeals as they apply in relation to that Act.
- (3) For the avoidance of doubt, the power conferred by virtue of subsection (2) by applying section 277 of the Act of 2002 includes the power to modify that Act.
- (4) Section 402 shall not apply in relation to any power to make an order which is exercisable by the Secretary of State by virtue of subsection (2).