

Trinity Mirror plc

17th September 2010

Jakub Dubaniewicz
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

By email (LMAGuidance@ofcom.org.uk)

Dear Mr Dubaniewicz

TRINITY MIRROR RESPONSE TO DRAFT LMA GUIDANCE

We refer to Ofcom's consultation paper on its draft Local Media Assessment Guidance ("Guidance"), published on 23 July 2010. We understand that the Guidance will set out how Ofcom will go about carrying out a Local Media Assessment ("LMA") when requested to do so by the OFT.

We welcome the opportunity to respond to this important consultation.

We set out below our comments below. Please do not hesitate to contact us if you would like to pick up on any of these issues in more detail.

Enclosed with this letter is the Ofcom cover sheet concerning confidentiality.

1. **OVERVIEW: SCOPE OF ROLE**
- 1.1 Our overall impression is that the envisaged role for Ofcom is relatively minimal, even more than the very limited exercise described in the preceding Digital Britain and OFT papers. Although all of the elements of an LMA mentioned in those documents are included in this draft, we have two concerns:
 - (a) the window of time during which Ofcom is expected to carry out the LMA appears to be reduced to a period likely to be measured in days rather than weeks; and
 - (b) Ofcom's involvement appears to be expected to take place at a stage in the OFT's decision-making process where the OFT will already have been engaged on the merger for weeks or (in the case of almost any merger likely to raise substantive issues) months.
- 1.2 We trust this does not reflect a lack of interest on the part of Ofcom in taking this role.
- 1.3 Our comments set out below largely deal with ways in which we believe the LMA could be made into a more useful part of the consideration of a newspaper merger, without extending the overall length of the merger investigation by the OFT.
- 1.4 Comments are set out below in the order of the relevant sections of the draft Guidance. Questions are highlighted in bold.

2. THE OBJECTIVES OF AN LMA AND ROLE OF OFCOM

- 2.1 Paragraphs 2.16 to 2.19 of the consultation document deal with the overall role which an LMA will play in the OFT's decision-making process. It is clear that the ultimate decision rests with the OFT, but it is not clear exactly how Ofcom's LMA will slot into that decision making process.
- 2.2 **What will Ofcom's starting point be?** It appears from these paragraphs (and from paragraph 2.37 later on) that the OFT will give Ofcom a starting point of its working view on what are the relevant product and geographic markets and any possible competition issues. This seems appropriate and necessary, given the limited amount of time that Ofcom will have to perform its LMA. However, it would be desirable for this to be explicit and ideally also for the Guidance to make it clear that Ofcom need only take this as a starting point in making its assessment and that Ofcom will critically analyse the OFT's initial thinking.
- 2.3 **What will the LMA work product be?** Paragraph 2.18 suggests that "Ofcom's LMAs will not reach conclusions on the competition impact of a media merger". This seems undesirable and reflects the very limited role that the draft envisages for Ofcom.
- 2.4 Although Ofcom is not the final decision-maker, we believe Ofcom should produce a conclusion based upon its own thinking, which the OFT can then build into its own conclusions. If the LMA does nothing more than express more factors to be weighed in either direction, then it is not performing an assessment but merely giving commentary of the sort which it might already provide today. Without some kind of conclusion on the part of Ofcom, we question whether it would be "adding value" in any true sense as claimed.
- 2.5 It may be that this is a question of drafting, which could be corrected by stating Ofcom will not reach "final" or "binding" conclusions, since the "final conclusion" remains one for the OFT.
- 2.6 **What documentation can parties expect? From a process perspective, what form will the work product take? Will Ofcom produce a formal conclusion document? Will it be shared with the parties to the merger at the time that it is shared with the OFT? Will a non-confidential version be made publically available at the time that it is shared with the OFT? Will it be made available at a later stage?**

3. IN WHAT CIRCUMSTANCES WILL OFCOM PROVIDE AN LMA?

- 3.1 Paragraphs 2.20 to 2.23 discuss when an LMA will be provided. They make clear the policy that an LMA will not be provided when it is clear that there is no competition issue, ie when it does not appear appropriate for the OFT to send an issues letter to the parties. This seems sensible and desirable.
- 3.2 This section also deals with when a media competition issue may be "local". Paragraph 2.22 proposes to take a broad interpretation and to provide an LMA for issues arising from any sub-UK media presence. This seems the correct approach.

Timing of an LMA and Ofcom starting work

- 3.3 Paragraphs 2.24 to 2.27 set out where an LMA will fit into the normal OFT merger timetable. In brief, the draft notes that Ofcom will not have long to produce its LMA

and will need to use its discretion to decide whether to start work prior to the OFT formally calling for an LMA.

3.4 Given that this Guidance will provide a framework for Ofcom in which to exercise its LMA function, we believe that this section should provide more direction to Ofcom's discretion and the Guidance should state that, in case of doubt, Ofcom should begin work before it formally knows that an LMA will be required. We consider that it would be worth Ofcom deciding at an early stage where on a spectrum between the following two situations a case was likely to lie.

- At one end of the spectrum would be a case where any media competition issues were marginal and where the timetable for an OFT decision was particularly tight. The tight timing might be for commercial reasons or because a transaction had already completed. In such a case the key points are going to be quick decision-making and ensuring that there is not a waste of Ofcom's (and parties') resources on a case in which the OFT might not even ask for an LMA. In such a situation, the current draft seems adequate and it is likely that Ofcom would exercise its discretion not to undertake significant amounts of work prior to being told by the OFT to do so.
- At the other end of the spectrum would be a transaction involving very clear substantive local media competition issues and with a (relatively) generous timescale for the OFT to consider the transaction. An example would be an anticipated acquisition and particularly one where the parties are engaging with the OFT in pre-notification discussions; such discussions are now commonplace and may, without difficulty, run into months rather than weeks. In this situation, it seems inappropriate for Ofcom refrain from starting work until formally asked by the OFT for an LMA. It would be far more sensible for Ofcom to begin substantive work and also to interact with the parties (and the OFT) at an early stage, particularly in the case of a merger subject to pre-notification discussions. Substantially all of the thinking of the OFT may be developed during those pre-notification discussions and leaving the LMA until the main body of the formal OFT investigation may risk the LMA producing ill-informed and contradictory opinions at a late stage, or opinions that are too heavily reliant on the OFT's work product.

3.5 This last example raises the more general point of how the parties and the OFT will interact with Ofcom. The draft Guidance suggests that parties should provide to Ofcom the same information which it provides to the OFT and should engage with Ofcom at the same time that they engage with the OFT. This seems very sensible. However, it might be more productive still for such engagement to be carried out on a completely joint basis, with Ofcom personnel attending meetings with the OFT which deal with potentially-relevant points and inclusion of Ofcom in correspondence in both directions between the OFT and parties.

4. **WHAT WILL/SHOULD AN LMA COVER?**

Sectoral context and general research/position papers

4.1 Paragraph 2.32 notes that a central argument in some local media mergers (in particular local newspaper mergers) has been a need to consolidate to ensure long-term financial viability and growth. It says that an LMA will provide Ofcom's view on

the sectoral context and will also seek to relate this to the stated rationale for the merger. This is a welcome statement.

- 4.2 However, we urge Ofcom to undertake general sectoral research: to give thought to the core issues which might occur in any newspaper merger before it is asked to look at a specific merger. This will give it the time to consider the issues properly and to consult properly. Parties consulted in that more neutral setting might also be more likely to provide full and accurate answers than parties consulted on a particular merger, where almost everybody will have an “agenda”. Since this is a sector in which long-term consolidation is likely, there seems little risk that Ofcom's work would be wasted or merely hypothetical; if Ofcom were to consider multiple newspaper mergers over time, this work could be repeatedly applied at no further cost.
- 4.3 There may be other areas in which general research ahead of a specific merger by Ofcom would be sensible. For example, in paragraph 2.36 Ofcom notes that it will seek to provide views on substitutability between print forms of media and between different platforms, based on an assessment of generic trends applied to the particular merger under consideration. In these circumstances, a prior study of these generic trends would be important if the LMA is to add anything of value and meaning.
- 4.4 A key concern is that, unless this research is carried out in advance by Ofcom, then the necessary expertise will never develop. The very limited amount of time that Ofcom has to carry out an LMA will inevitably mean that it has limited opportunity to develop its thinking and in relation to difficult issues during a specific merger investigation. A material risk is that, without this in-depth understanding, far from providing the benefit of additional expertise through the LMA, an LMA may reflect an inadequate understanding of the markets involved.
- 4.5 This is a point of particular concern in the newspaper sector, where Ofcom does not have the opportunity through its role as a sectoral regulator to develop expertise of the sort that it has in, for example, the radio industry. Ofcom already undertakes regular market research and publishes updates for non-print sectors. It would be highly desirable for Ofcom to start a programme of (eg) annual data gathering for the newspaper sector to create a database showing trends in the industry.
- 4.6 If Ofcom were to conduct research, it would be helpful for its results to be published in the form of guidance or a position paper. This could allow parties some insight into Ofcom's thinking without their transactions having to serve as a guinea pig. Absent some such published guidance, parties may be inappropriately deterred from pursuing mergers which Ofcom might ultimately have decided were pro-competitive.

Competitive constraints

- 4.7 In paragraph 2.36 and 2.37, it is proposed that the LMA will consider whether there are wider competitive constraints from other products or other areas which might limit a merged entity's ability to raise prices. In doing so, Ofcom will begin with the market definition “initially posited by the OFT”. We believe this gives rise to a number of questions/concerns.
- (a) **Is this intended to imply that a review aimed only at identifying further competitive constraints cannot lead to a conclusion of a more narrow market than that suggested by the OFT, only a broader market/less market power?**

- (b) We are concerned that over-reliance by Ofcom on the OFT's market definition is likely to give Ofcom a preconception which it might not otherwise have and which is not appropriate. For example, if the OFT tells Ofcom that it believes that the correct geographic scope of a market is an individual area, it seems very unlikely to us that Ofcom would (given the time available) be able to carry out any "blue sky thinking" about whether local newspapers competed across a broad regional level. We fear Ofcom might instead focus only on whether in a particular location there might be particular constraints from a neighbouring area, which may not be the appropriate economic analysis.
- (c) We would also hope to be comforted that the relationship as between OFT and Ofcom would not encourage the OFT to start with the narrowest possible market, even where it may not be the one which it considers most appropriate, on the understanding that Ofcom will consider whether to broaden it.

5. RELEVANT CUSTOMER BENEFITS – QUALITY

- 5.1 This section draws a distinction between "quality" as a private benefit of the sort relevant to competition law (paragraph 2.42) and a more general public interest benefit (2.41). The draft proposes to consider only the former type of benefit in an LMA. In doing so, the draft refers to the concepts of a merit good and positive externalities.
- 5.2 Up to a point, we agree with the Ofcom view. The OFT can only consider competition issues, not wider issues of public interest, and it is appropriate that Ofcom does the same in its LMA. However, it seems that Ofcom is taking a particularly narrow definition of which benefits could be counted towards the competition assessment. The starting point for such an assessment is clearly consumer welfare. The most obvious way to measure consumer welfare is to see how consumers value products. However, this is not necessarily right for a competition law analysis.
- 5.3 If a merger will lead a superior product for consumers, eg a better free newspaper with better content which readers will prefer, this seems to be a relevant benefit, even though a consumer would not pay more for such a newspaper (and an advertiser would not pay more to place an advertisement in that newspaper).
- 5.4 We also seek clarification as regards Ofcom's use of the term "consumers" rather than "customers". Consumers tends to mean domestic end-users, ie, readers. However, we believe that the more appropriate term is "customer" which includes advertisers, otherwise Ofcom ought to add an additional category of benefits pertaining to advertisers which could be considered.

6. INFORMATION GATHERING AND SHARING

- 6.1 The bullet point list after paragraph 2.53 sets out types of information which Ofcom might want to see from merging parties. Each of these items seems reasonable and the sort of the thing which merging parties would expect in any case to provide to the OFT.
- 6.2 As with the points above on beginning its analysis at an appropriately early stage, it will also be helpful if the Guidance committed Ofcom to telling the parties at an early stage, ie before the beginning of the LMA itself, what information (if any) it thinks that it will need.

- 6.3 We note that the draft Guidance is silent on whether Ofcom will carry out any market-testing, ie asking third parties for their views. **Is Ofcom, given the very short timetable that Ofcom will have to conduct an LMA, proposing not to carry out market-testing?** In terms of the quality of the output that Ofcom can then produce, this is a clear limitation and we encourage Ofcom to consider carrying out market testing and to coordinate with the OFT to avoid any duplication of market testing. If Ofcom does not propose to do this, then the Guidance should say so. Equally, even if Ofcom will not proactively carry out market testing, the Guidance should say whether Ofcom would accept unsolicited comments from third parties.
- 6.4 Again on a process point, paragraph 2.56 notes that Ofcom may engage with parties directly in order to obtain additional information and that information provided to Ofcom will be shared with the OFT. If any of this information is to be provided in the form of telephone calls or meetings, this would again suggest that the three-way contacts between the parties, the OFT and Ofcom would be sensible.
- 6.5 This sharing of information is also relevant to how Ofcom and the OFT will treat confidential information. Paragraph 2.57 says that Ofcom will treat all commercially confidential information sensitively and in line with its statutory responsibilities. It is important for the guidelines to deal with what would happen in the event of a disagreement between the OFT and Ofcom about the confidential nature of any information. **In particular, whose view will prevail?** One argument/approach could be that it better preserves the spirit/purpose of the confidentiality provisions for the prevailing view to be whichever regulator agrees with the assertion of confidentiality. An alternative approach would be to say that in the event of any disagreement the OFT's view will prevail, given that the OFT is the chief decision-maker in the merger control review.

Please do not hesitate to contact us if you would like to discuss any of the above points.

Yours sincerely

Paul Vickers
Secretary and Group Legal Director

Trinity Mirror plc
One Canada Square
Canary Wharf
London E14 5AP

encl: cover sheet