

Completed acquisition by Dunfermline Press Limited of the Berkshire regional newspapers business from Trinity Mirror plc

ME/3315/07

The OFT's decision on reference under section 22(1) given on 4 February 2008. Full text of decision published 18 February 2008.

Please note that square brackets indicate figures or text which have been deleted or replaced at the request of the parties for reasons of commercial confidentiality.

PARTIES

1. **Dunfermline Press Limited** (DPL) publishes 23 local and regional newspapers in the United Kingdom (UK) including three titles in Berkshire, England.¹
2. The **Berkshire regional newspaper** (BRN) business of **Trinity Mirror plc** (Trinity Mirror) comprises a portfolio of free and paid-for local and regional titles² that circulate in the Berkshire area. Its 2006 UK turnover was [].

TRANSACTION

3. DPL completed the asset acquisition of BRN on 29 July 2007. The OFT examined this merger on its own-initiative. It accepted initial undertakings on 28 November 2007. The extended statutory deadline expires on 4 February 2008.

JURISDICTION

4. As a result of this transaction, DPL and BRN have ceased to be distinct. Pre-merger the merging parties overlapped in the publication of weekly local

¹ *Slough and Langley Observer* series, *Midweek Observer* and *The Villager*.

² *Reading Chronicle* series, *Bracknell News* series, *Slough/Windsor/Maidenhead Express* series, *Chronicle Extra* series, *Midweek News* series and *Newbury & Thatcham Chronicle* with other series of publications under the titles *Great Days Out*, *Classified Directory*, *Best of Berkshire*, *Weddings* and *Exclusively Yours*.

newspapers and the provision of advertising space in local newspapers in Berkshire.

5. Post-merger, DPL supplies more than 25 per cent of all local weekly newspapers in the areas in which BRN's titles were circulated. These areas include Slough, Windsor, Reading, Wokingham, Maidenhead, Bracknell and Ascot. The combined population of these areas accounts approximately to 1 per cent of the UK's population, representing a substantial part of the UK.³
6. Therefore, the OFT believes that the share of supply test pursuant to Section 23(3) of the Enterprise Act 2002 (the Act) is met and a relevant merger situation under Section 23(2) of the Act has been created. DPL has not contested jurisdiction.

COUNTERFACTUAL

7. DPL submitted that the OFT should not take the pre-merger situation as being the correct counterfactual in this case. While DPL did not argue the failing firm defence, it maintained that the pre-merger loss-making situation with respect to the acquired BRN *Express* series, in respect of which the overlap with one of DPL's existing titles arose, was unsustainable. It argued that, absent the merger, the *Express* series would have ceased or would have continued in a considerably less significant form. DPL estimates that the *Express* series has made a loss of around [] over the past three years (from a turnover of around [] per year), and had lost around [] per cent of its advertising revenues over the three years from 2004 to 2006 (inclusive).
8. This merger resulted from Trinity Mirror's publicly stated strategy of divesting some of its local and regional titles. However, Trinity Mirror has recently announced that the divestment of other local titles portfolios has been halted. Trinity Mirror told the OFT that, while it recognised that BRN was the worst performing of its southern region publishing businesses, it did have an alternative strategy to sale that it believed would have benefited the business and allowed the business to continue to operate. None of the evidence provided to the OFT indicated that, absent the merger, Trinity Mirror would have withdrawn, in whole or in part, the *Express* series.
9. The OFT's general approach is that it relies on pre-merger conditions as the appropriate proxy for the counterfactual. The OFT will not lightly depart from

³ See Mergers and Monopoly Commission, Stagecoach Holdings plc / Chesterfield Transport (1989) Limited: A report on the merger situation, 18 January 1996.

judging the impact of such a sale as against pre-merger conditions, and will do so only when it has sufficient compelling evidence that the status quo ante is not the correct counterfactual.⁴ While accepting that the *Express* series was loss making and that it is likely that some action would have been taken, whoever the owner, to stem those losses, the OFT has not seen sufficient compelling evidence on what the outcome would have been absent the merger in this case. Thus, the counterfactual applied to this case is that of the pre-merger competitive situation.

MARKET DEFINITION

Product scope

10. The parties overlap in the supply of weekly local newspapers and advertising space in local newspapers. As shown in Table 1 below, the main overlap comes from BRN's *Express* series (weekly free) and DPL's *Observer* (weekly paid for) and *Midweek Observer* (weekly free).

⁴ See for example at the OFT decision of 11 December 2007 on the anticipated acquisition by Tesco Stores Limited of five former Kwik Save stores (Handforth, Coventry, Liverpool, Barrow-in-Furness and Nelson); paragraphs 6-21.

Table 1: Overlapping titles

BRN title	Overlaps with ...	In ...
<i>Slough, Windsor & Maidenhead Express</i>	<i>Slough, Eton & Langley Observer</i>	Slough Windsor Maidenhead Eton Iver Datchet Colnbrook
	<i>Midweek Observer</i>	Slough Windsor Maidenhead Eton Iver Datchet Colnbrook Bourne End
<i>Bracknell News</i>	<i>Slough, Eton & Langley Observer</i>	Ascot
<i>Bracknell Midweek News</i>	<i>Slough, Eton & Langley Observer</i>	Ascot
<i>Reading Chronicle</i>	No overlap	
<i>Reading Chronicle Extra</i>	No overlap	
<i>Newbury & Thatcham Chronicle</i>	No overlap	

11. To assist in the assessment of the correct product market, and the effects of the merger on both advertisers and readers, DPL commissioned two surveys carried out by Synovate, a market research company, involving 337 advertisers and around 300 readers (the Synovate surveys) in the Slough, Windsor and Maidenhead area. DPL decided to carry out this research in order to provide insights into the working of the market. The OFT, which was supportive of the idea of a survey, was invited by DPL to comment on the proposed questions to be asked in the survey, although not all of its suggestions were taken on board. In particular, the OFT had suggested to expand the scope of the survey beyond the issue of market definition to include questions on the competition effects of the merger. DPL, however, chose to focus the Synovate surveys primarily on market definition questions and did not include any questions on the direct competitive constraint removed by the merger. These surveys were carried out in addition to the OFT's own targeted enquiries of advertisers (the OFT questionnaire).

Regional and national newspapers

12. In its recent decisions,⁵ the OFT has analysed mergers on the basis that local newspapers formed a product market distinct from regional and national newspapers. The evidence before the OFT in this case was mixed, but was insufficient to warrant departing from the OFT's previous approach. It has therefore taken a cautious approach and excluded regional and national newspapers from the relevant market definition.
13. Almost all advertisers who responded to the OFT questionnaire said that they only advertise in local media. Only a small minority said that they currently use, or would consider using, the regional or national press.
14. The Synovate survey of advertisers showed that around 30 per cent (net)⁶ of respondents agreed that regional or national newspapers are an 'effective substitute' for local newspapers; 42 per cent (net) disagreed.⁷ However, given the ambiguity inherent in the term 'effective substitute', this part of the survey could not be definitive in respect of market definition. This is because it did not provide any insight into the magnitude of the price rise in local newspapers that would be required for the respondent to switch to regional or national newspapers, as would be required for a SSNIP analysis.⁸ The survey evidence suggests that regional and national newspapers confer some constraint on local newspapers, though the strength of that constraint is unclear.

Weekly local newspapers versus other frequencies

15. No advertising customer told the OFT that publications of different frequencies are directly substitutable for any particular advertising campaign. Some advertising customers (mainly advertising agencies) may use a range of frequencies, although not necessarily for the same client. On the basis of the

⁵ See for example, OFT decision of 15 June 2006 on the anticipated acquisition by DC Thompson & Co Limited of Aberdeen Journals Limited; OFT decision of 17 May 2006 on the completed acquisition by Johnston Press plc of Scotsman Publications Limited.

⁶ The survey results reported in this decision are 'net' results, that is the total who agree (adding together those who agree strongly or slightly), or the total who disagree (adding together those who disagree strongly or slightly).

⁷ Generally in the Synovate surveys the proportion of those who agreed and the proportion of those who disagreed will not sum to 100 because some neither agreed or disagreed and some did not know.

⁸ Market definition considers small but significant non-transitory price rises (SSNIP), usually around 5-10 per cent (see Market Definition: understanding competition law, OFT403, December 2004).

evidence available, the OFT has concluded, consistent with previous OFT and CC cases, that the appropriate product market should be limited to weekly local newspapers and should disregard local newspapers of other frequency.⁹

16. The OFT's previous cases¹⁰ have analysed the merger on the basis that, within print media, the relevant frame of reference includes weekly publications that are both JICREG and non-JICREG registered titles. The OFT received no evidence to warrant departing from this. In the latter category of non-JICREG newspapers, the OFT has identified only one weekly newspaper in the overlapping area: *The South Bucks and Berks News*. Thus, the OFT will also take into account this publication in assessing the competitive constraints on the merged entity post-merger in the competitive assessment below.

Other print and non- print media (excluding Internet)

17. DPL submitted that there exists a wide range of other print media which offer viable alternatives to advertisers wishing to target readers in and around Slough and Windsor. DPL referred to some glossy magazines distributed locally (such as *Windsor This Month* or *Totally Society*), specialist advertising-only publications (such as *Ad Trader* or *Auto Trader*), local radio (Time FM), classified directories (such as the *Yellow Pages* or *Thomson Local*), and direct mail and leaflets.
18. DPL argued that advertisers refer to other media when seeking to negotiate lower advertising prices with local newspapers. Responses from third parties to the OFT on this point were mixed and the OFT has not seen any conclusive evidence to support DPL's statement.
19. The Synovate survey of advertisers showed that only around 20 per cent (net) agreed that advertising-only publications¹¹ were an effective substitute for local newspapers. Over 50 per cent disagreed.
20. In light of these results, the OFT believes that specialist advertising-only publications should in general be excluded from the relevant market definition. However, the OFT notes that there may be particular types of advertisements for which this general analysis may be less appropriate. About 40 per cent of

⁹ See for example footnote 5 above.

¹⁰ See for example OFT decision of 29 April 2004 on the completed acquisition by Archant Limited of the London regional division of Independent News & Media plc; paragraph 7.

¹¹ Including specialist advertising-only publications.

advertisers in the motor section identified some specialist advertising-only publications as a substitute for local newspapers. The Synovate survey did not separately categorise advertising in property although the OFT considers that advertising-only property publications might also provide a more significant constraint on property advertising in local newspapers. The OFT notes, however, that DPL publishes a separate property supplement, *Property News*, with the Slough, Windsor, Ascot and South Bucks association of estate agents which would have to be taken account of if the market were widened. This could be one explanation as to why the Synovate survey did not include any specific questions on advertising in property. These potential exceptions to the general proposition that advertising-only publications should be excluded from the relevant market are taken into account in the competitive assessment below.

21. Some third parties identified classified directories as a possible alternative to local newspapers, in particular with respect to advertising local businesses. In its market investigation of classified directories, the CC considered that 'local newspapers have historically been the closest alternative to advertising in classified directories, but such advertising tends to fulfil different functions from directory advertising, is much more expensive and there has been limited past switching between classified directories and newspapers'.¹²
22. The Synovate survey of advertisers showed that 27 per cent of respondents agreed, but around 50 per cent disagreed, with the proposition that classified directories were an 'effective substitute' to local newspaper advertising.
23. Similarly, when asked about local radio, 29 per cent of advertisers agreed that local radio was an effective alternate media, while 36 per cent disagreed.
24. The Synovate survey also asked about direct mail and leaflets. Forty per cent of respondents said that direct mail or leaflets did offer an 'effective substitute' for advertising in local newspapers, while about a third (34 per cent) disagreed. When respondents who had indicated that they would change their advertising behaviour in some way following a 10 per cent price rise in local newspapers were asked where they would reallocate all or part of their advertising spend, around 20 per cent (or around 14 per cent of total

¹² Competition Commission: Classified Directory Advertising Services, Market investigation, 21 December 2006, paragraph 5.76.

respondents)¹³ said that they would switch to direct mail and leaflets. This may be significant enough for the OFT to include advertising via direct mail and leaflets in the same product market as advertising in local newspapers.

25. Most third parties who responded to the OFT questionnaire replied that they would not switch to other media if the price of local newspapers were to rise by a small but significant amount (around 10 per cent). Those who said that they would switch named direct mail and specialist advertising publications as likely destinations for their advertising spend (although some said that they would switch away without saying to which medium).
26. The Synovate survey for advertisers provided similar results. It shows that at least 80 per cent of advertisers would continue advertising in local newspapers even if prices were to rise by 10 per cent (although they may reduce the frequency of advertising or the size of their advertisement, see Table 2 below).
27. Based on findings in previous recent cases, the results of the Synovate surveys and third party responses to the OFT questionnaire, the evidence before the OFT indicates that, in this case, other media (local glossy magazines, specialist advertising-only publications, local radio and classified directories) should not be included in the same product market as local newspaper advertising.
28. It is less clear whether or not leaflets and direct mail should be included in the same relevant market. However, it is not necessary to conclude on this issue as the critical issue is the level of the constraint these types of publications confer on local newspapers advertising. This question is addressed in the competitive assessment below.

Internet

29. DPL submitted that the most significant constraint on local newspaper advertising came from advertising on the Internet.
30. The Synovate survey of advertisers distinguished between paid for Internet advertising and other Internet advertising (such as a company developing its

¹³ '14 per cent of total respondents' because 61 per cent said that they would change their advertising behaviour and a further 7 per cent said that they did not know. Around 20 per cent of this 68 per cent is 14 per cent of the total.

own website). This distinction may be important, since advertisers value the gateway to an audience (potential customers) that some media provide. Advertisers advertise in local newspapers because they wish to gain access to that newspaper's readership (potential customers of their own). DPL acknowledged that 'competition for advertisers is driven, to a large extent, by a medium's success in attracting audience.'

31. The ability of a given medium, including paid for internet advertising, to provide access to an advertiser to an existing audience is a different product characteristic to a firm developing its own website, for which there is no existing group of potential customers reach. Therefore, when considering whether advertising on the internet provides a competitive constraint on local newspapers, the OFT has placed greater weight on paid for internet advertising than on other forms of Internet advertising / promotions.
32. Half of the respondents to the Synovate survey of advertisers agreed that paid for Internet advertising provides an 'effective substitute' to advertising in local newspapers (20 per cent disagreed). There was relatively little dispersion when results were segmented by advertisers' characteristics. Those respondents advertising in the 'recruitment' and 'motors' categories of local newspapers were the most likely to agree (55 per cent) that paid for advertising on the Internet was an 'effective substitute.' When the results were weighted by advertising spend, approximately a third (34 per cent) of respondents agreed and another third (33 per cent) disagreed that paid for advertising on the Internet was an 'effective substitute.'¹⁴
33. DPL also submitted some email correspondence from local newspaper advertisers stating that they were reallocating an increasing proportion of their advertising budget to advertising on the Internet. This anecdotal evidence did not reveal, however, the reasons (e.g. a price change) that might have made advertisers reallocate their budgets.
34. Third parties (competitors) contacted directly by the OFT generally agreed with DPL that advertising on the Internet provided a constraint on local newspaper pricing. Almost all other publishers who responded to the OFT questionnaire said that the Internet provided a strong constraint on their advertising offer and on how local newspapers compete. Only one publisher told the OFT that the Internet has not affected it as much as it was expecting. It said that some Internet sites such as eBay offer a good alternative to some

¹⁴ The remaining third neither agreed nor disagreed, or did not know.

advertisers who would otherwise use the classified ads in a local newspaper, while other Internet sites have also proved a strong alternative to those wishing to sell other goods (for example, cars). However, this publisher stated that it had not seen any substantial switching away from those advertisers using the 'local retailers', 'jobs' and 'property' sections of the newspaper.

35. Given the complexity of Internet advertising pricing (for example, 'pay per click' versus flat rates) and the enormous variety of Internet advertising (for example, advertising on search engines versus specific sites, for example *Autotrader*, versus online directories) it was not feasible for the OFT to analyse trends in Internet advertising prices coupled with changes in demand. Instead the OFT has relied upon evidence submitted by DPL and other publishers on how the Internet has affected them, and on comments made to the OFT by advertisers.

Critical loss analysis

36. The parties provided evidence, based on the results of the Synovate surveys, to seek to demonstrate that, overall, a price increase in local newspapers in the Slough and Windsor area would not be profitable because of the existence of other competitive constraints. Such 'critical loss analysis' uses estimates of variable costs saved in response to an arbitrary loss of business to calculate how much business would have to be lost to render a 10 per cent price increase unprofitable—this is the 'critical loss.' If estimates of the actual loss of business in response to a 10 per cent price increase exceed this critical loss, then the market may be wider than hypothesized.
37. The financial information (management accounts) that DPL supplied for the *Observer* and the *Express* showed that a price increase of 10 per cent would be unprofitable if more than [] per cent of *Observer* customers or more than around [] per cent of *Express* customers would switch away from those titles. DPL's own critical loss analysis was substantially similar, indicating that a 10 per cent price increase would be unprofitable if [] per cent of *Observer* customers or [] per cent of *Express* customers switched away.¹⁵
38. According to the Synovate survey of advertisers, 84 per cent of advertisers agreed that they have 'effective substitutes' for their local newspaper

¹⁵ The reason for the slight difference in results was that DPL's estimates of cost savings were more granular than those used by the OFT, being based on interviews with managers at the relevant local newspapers.

advertising. Around 70 per cent identified two or more 'effective substitutes.' In addition, 72 per cent of advertisers agreed that non-print media (the Internet and radio) offered an 'effective substitute' to local newspaper advertising.

39. These numbers are clearly higher than the critical loss of customers that would be required to switch away from local newspapers in order to make a 10 per cent price rise unprofitable. However, the above figures from the Synovate survey were not the result of a question asking what respondents would do in the event of a 10 per cent price rise.
40. In this regard, when asked 'what would you do if prices rose by 10 per cent', only 13 per cent of advertisers said that they would switch away from local newspapers advertising altogether (see Table 2 and surrounding discussion, below) – a figure which may be below (or at least very similar to) the likely critical loss. Some 80 per cent of advertisers responded that they would continue to advertise in local newspapers, although the frequency and/or size of the advertisement may change for 48 per cent of advertisers. There is no evidence from the survey results as to how significant this reduction in frequency and/or size of advertisement would be for those 48 per cent of respondents (Table 2 below). DPL submitted, however, that under certain conservative assumptions about the significance of this reduction in frequency and/or size of advertisement, the actual loss would exceed the critical loss.
41. The OFT notes, however, that the gross margins for the *Express* and *Observer* that were implied by DPL's critical loss analysis indicated price elasticities of demand facing those newspapers that are consistent with an actual loss of around the same level as found in the Synovate survey. We took this to indicate that the reduction in frequency and/or size of advertisement for that 48 per cent of respondents might not be particularly significant.
42. The results do not vary considerably when segmented by which newspaper(s) the respondents use or by which category of advertisements the respondents use.¹⁶ It is clear from the responses to this question that, although the Synovate survey of advertisers suggests that half of respondents see paid for internet advertising as an effective substitute for local newspaper advertising, it is not clear that actual switching would mean that after the merger DPL would find a price rise of 10 per cent unprofitable, nor what the results would

¹⁶ Apart from those who use Official Notices. 54 per cent of these respondents would continue advertising at present levels.

show had the relevant price rise been 5 per cent – a post-merger price rise that would still raise concerns.

Table 2: Responses to what advertisers would do if prices were to rise by 10 per cent

Stated response	All respondents (%)
Continue advertising at the same level as present	32
Continue advertising but reduce advertising space	24
Continue advertising but reduce frequency	24
Stop advertising in these local newspapers	13
Don't know	7

Source: DPL based on the Synovate survey of advertisers.

43. These results make it difficult to broaden the product market definition from local newspaper advertising only without knowing how much advertising space or frequency would be reduced for those 48 per cent of respondents that would continue advertising but with reduced advertising space or frequency. Notwithstanding this, even if the actual loss were to exceed the critical loss, it appeared that the actual loss would not significantly exceed the critical loss. If so, this implies that – although the product market may be wider than local newspapers – it is not significantly wider, and the competitive constraint implied by whatever other media are in the market is not great. Accordingly, this is not a case where a conservative approach to market definition would result in egregious errors of omission, whereby a very large constraint from other relatively close substitutes to the parties' products would be ignored. Consequently, after the merger, DPL may still find it profitable to increase advertising rates if the price increase more than offsets the loss of business from those reducing their advertising spend in local newspapers.

44. In terms of the media to which advertisers would switch their advertising spend (or at least a proportion of it), the survey found that Internet advertising and direct mail / leaflets were by far the most likely destinations (Table 3).¹⁷ This result, coupled with the results discussed above on whether advertisers viewed advertising on these other media as an effective substitute, indicate that the Internet and direct mail/leaflets are the most likely candidates for being in the same product market as local newspaper advertising, or at least constituting a competitive constraint on it which

¹⁷ Respondents to this question included all original respondents except those who had previously answered that they would continue advertising at present levels in response to a 10 per cent price rise. From the original 337 respondents, this left 229.

should be given proportionate weight in the competitive assessment of unilateral effects.

45. As for advertising in other media, no one destination – apart from the Internet and direct mail / leaflets – appears on the basis of the evidence available to be providing a significant competitive constraint on local newspaper advertising.

Table 3: Responses to where advertisers would reallocate advertising spend after a switch away from local newspapers following a 10 per cent price rise

Destination of switched spend	All (229) respondents (%)
Any Internet	34
Leaflets / direct mail	21
Local newspapers in another area	7
Local radio	6
National newspapers	5
Other local publications	3
Regional radio	3
Regional newspapers	2
Advertising only publications	2
Classified directories	2
Television	2
National radio	1
Other advertising	17
Don't know	16

Source: DPL based on its survey of advertisers.

46. DPL did not submit its view on what constitutes the relevant product market; instead, it submitted that other media (for example, industry-specific publications and some Internet sites) would continue to constrain the parties' ability to raise advertising prices post merger. Consistent with its critical loss analysis, DPL also emphasised that what is important, in the round, is that a significant proportion of customers will switch away which will discipline DPL from raising prices, not where they will switch to. The OFT agrees with this principle. It is entirely appropriate not to discount other media entirely as competitive constraints in the competitive assessment, and that constraints from a variety of demand-side substitutes are cumulative in character. Based on all of the evidence available to it, the OFT believes that paid for advertising on the Internet and – albeit to a lesser extent - direct mail / leaflets are likely, cumulatively, to provide some degree of constraint on advertising terms and conditions for weekly local newspapers.

47. At the same time, market definition should not be elevated to the decisive question in merger control, especially when the merging parties' products are differentiated and the theory of harm is unilateral effects (see below). As OFT Guidance states, market definition is not an end in itself, it is a framework for analysing the direct competitive pressures facing the merged firm. In this case, inclusion of other media does not resolve the OFT's unilateral effects concerns that the merger eliminates close competition between the two predominant sources of local advertising in the area – in other words, by treating such media sources as immediate competitive constraints in the market, the merging parties' titles are likely to remain the first and second choices for a substantial proportion of customers' demand, with other media a more distant third or further choice.
48. Notwithstanding that market definition is an imperfect tool in a differentiated-products, unilateral-effects case, and taking this issue in isolation, the OFT observes that critical loss analysis is one of the best ways to test the hypothesis of the profitability of a SSNIP and the boundaries of a market. In this case, the critical loss analysis and other evidence make it a relatively marginal and finely balanced judgment as to whether a local newspaper monopolist in the relevant area could raise price by 10 per cent or not.
49. Given that the conclusion on competitive effects does not change even with inclusion of other media in the market, it is prudent not to reach a binary conclusion on a finely balanced question of product market definition. It is clear that the product market is not narrower than weekly local newspapers; in considering substitutes to such papers, the competitive assessment takes into account the likely constraint of the parties' titles on one another – lost by the merger – in a context in which both parties' titles also compete with other media sources such as internet and direct mail/leaflet options.

Geographic market

50. Third party comments from the OFT questionnaire indicated that the relevant geographic market is local, not regional or national.¹⁸
51. Recent OFT cases have adopted the candidate geographic market definition used by the Competition Commission (CC) in Archant / INM,¹⁹ that is, JICREG

¹⁸ See discussion at the section on 'local newspaper versus regional and national newspapers' above.

(Joint Industry Committee for Regional Press Research²⁰) circulation or distribution areas where the parties overlap 'significantly' (significant overlap was taken to be where the parties had at least 50 per cent of the circulation in any one area with an increment of at least 10 per cent, known as the 'footprint').²¹ Analysis in previous cases has included examining JICREG areas individually as well as in aggregate, although in Archant / INM – a case focused on newspapers in London²² – the CC concluded on the basis of demand side switching that the relevant geographic market was wider than the overlapping JICREG areas.

52. The relevant geographic market may not be exactly the same geographic area in which the parties' newspaper titles are circulated if advertisers' next best alternative has a slightly different geographic 'footprint'. For example, many third parties told the OFT that the *Maidenhead Advertiser* is a close substitute to the parties' titles. It is distributed in some of the same JICREG areas as those in which the parties overlap including the larger population centres of Maidenhead, Slough and Windsor. However, if it is distributed in areas in which the parties do not overlap, it may be argued that the relevant geographic market is wider than just those JICREG areas in which the merging parties overlap.
53. Conversely, it may be the case that the relevant geographic market is narrower than the area in which the parties overlap. For example, in the Ascot JICREG area the parties overlap with a combined share of supply of 97 per cent. However, the overlap occurs between BRN's *Bracknell* series of newspapers and DPL's *Observer*. This is the only area in which any DPL title overlaps with the *Bracknell* series but Ascot accounts for only two per cent of the *Observer's* total circulation and the *Observer's* share is less than 10 per cent (representing only 210-220 copies circulated). As such including Ascot in the analysis will not affect the analysis as to whether the merger creates a realistic prospect of a substantial lessening of competition (because of the

¹⁹ Competition Commission: A report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited, 22 September 2004 (Archant/INM).

²⁰ An industry body that collates data on its paying members' publications. Only local newspapers with audited circulation or distribution may be members of JICREG. JICREG areas are formed of groups of local contiguous postcodes in which newspapers circulate, deemed useful for advertising purposes.

²¹ In Archant / INM the CC distinguished between the footprint of a paid for title (circulation) and a free title (distribution). In the decision we use the term 'circulation' to refer to both types of newspaper.

²² The CC emphasised that London may be a special case and that 'we make no presumption that our results and conclusions would apply to local newspaper advertising elsewhere.' Appendix D, paragraph 3.

relatively minor presence of the *Observer* in Ascot). Therefore, the Ascot JICREG area has been omitted from our analysis.

54. All other overlaps involve BRN's *Express* series and DPL's *Observer* series and *Midweek Observer* series (apart from in Bourne End which only involves an overlap between the *Express* and the *Midweek Observer*).
55. In addition, from the Synovate survey of advertisers only 31 per cent of respondents agreed that advertising in local newspapers in other areas is an effective substitute for advertising in local newspapers in Slough, Windsor and Maidenhead. Some 35 per cent disagreed.
56. However, of those advertisers who would change their advertising behaviour as a result of a 10 per cent price rise, only seven per cent said that they would switch to advertising in local newspapers in another area. In terms of switching costs, the main one was said to be the opportunity cost of not advertising in an advertiser's best catchment area. Although having around 30 per cent of an advertiser's customers threatening to switch may constrain prices, the survey results are not conclusive (especially given the linked question that only seven per cent would choose to advertise in other areas).
57. Therefore, the OFT has adopted a cautious approach and examined this merger on the geographic basis of all overlapping JICREG areas apart from Ascot but with particular emphasis on the Slough/Windsor area.²³

Conclusion on market definition

58. On a cautious basis, the OFT considers that the appropriate relevant market definition in this case is at least as wide as weekly local newspapers, and the provision of advertising space in weekly local newspapers, in all overlapping JICREG areas apart from Ascot but with particular emphasis on the Slough / Windsor area. Internet, direct mail and leafleting are given proportionate (that is, relatively low) weight as constraints in the competitive assessment below.

UNILATERAL EFFECTS

59. Unilateral effects concerns arise in differentiated markets such as media, where the merger combines first and second choices for a substantial

²³ These are Slough, Windsor, Maidenhead, Eton, Bourne End, Datchet Colnbrook and Iver. These areas are contiguous.

proportion of customers, and countervailing constraints are not sufficient. In particular, other choices of customers would need to offset the fact that the merged firm is likely to recoup sales lost when it raises the price of a customer's first choice, when it owns that customers' next-best choice. While customers may indeed switch to third and other more distant choices if the price increase across local newspapers is high enough, there may be latitude for the merged firm profitably to raise price or reduce value for money by a small but significant amount (for example, by five per cent).

Share of supply data

60. Although the best measures of unilateral effects arise from calculation of diversion ratios (see further below), in the absence of such data share of supply data can give an initial indication of the relative intensity of competition between the parties relative to other rivals. Indeed, one of the traditional benefits of market definition in a unilateral effects case is to allow the calculation of market concentration data as a proxy to commence the competitive effects analysis. In this case, even assuming internet, direct mail and leafleting are in the candidate market, it has not been possible to amalgamate revenue data from local advertising spend on paid-for internet, direct mail and leafleting with the JICREG data relating to local newspapers. However, the OFT believes – based on the critical loss analysis – that both the share of supply and increment data of the parties would still remain high, even if diluted to account for these other media constraints.
61. Within local newspaper data derived from JICREG, previous cases undertaken by the OFT and CC have used a number of filters to focus the analysis on likely competition concerns. These filters, sometimes referred to as the 'rules of thumb'²⁴, comprise the following: that the parties hold over 50 per cent share of supply, the increment is above 10 per cent, household penetration is above 10 per cent and the areas account for over 30 per cent of each title's overall circulation.
62. By applying the rules of thumb to individual JICREG areas in this case, only two JICREG areas warrant further investigation: Slough and Windsor.
63. The shares of supply for these two areas (whether considered separately or together) are very high (Tables 4 and 5 below). Based on these shares, the

²⁴ See for example at Competition Commission: A report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited, 22 September 2004.

merger could be seen as a merger to monopoly within the market for local newspapers advertising in Slough and Windsor.

Table 4: Shares of supply of local weekly newspapers, Slough and Windsor (%)

	<i>Slough</i>	<i>Windsor</i>	<i>Slough and Windsor</i>
DPL	50.6	52.0	50.9
BRN	45.0	42.9	44.5
Combined	95.6	94.9	95.4
Baylis	3.7	5.1	4.0
Trinity Mirror	0.7	-	0.6

Source: The parties based on JICREG data.

64. Even, when all of the overlapping areas (omitting Ascot)²⁵ are taken in aggregate (and once the rules of thumb are applied), the shares of supply are still high (albeit lower than for Slough and Windsor alone) at around 75 per cent (Table 5 below) and are aligned to the OFT's conclusion on the geographic market in this case. Apart from the parties, the only significant publishers operating in the area are Guardian Media Group²⁶ and Baylis, publisher of the *Maidenhead Advertiser* and the *Maidenhead Midweek Advertiser*.²⁷

Table 5 Shares of supply in overlap areas – taken in aggregate-(%)

<i>Publisher</i>	<i>Share</i>
BRN	39.7
DPL	35.6
Combined	75.4
Baylis	17.7
Newsquest	3.1
South Bucks & Berks News	2.7
Trinity Mirror	0.9
Higgs & Co	0.2
Guardian Media Group	0.1

Source: The parties based on JICREG data and their own estimate for the *South Bucks and Berks News*.

²⁵ See paragraph 53 above.

²⁶ Some of its titles in the area are: *Aldershot News*, *Bracknell & Wokingham Standard*, *Reading Evening Post*, *Reading Post* and *Wokingham Times*.

²⁷ Trinity Mirror will maintain a minor presence in the area since it has retained the titles *Staines Leader*, *Surrey Herald News*, *Buckinghamshire Advertiser* and *Examiner*.

Unilateral effects – readers

65. The parties do not receive a significant proportion of their revenues from paid for cover price revenue. In the year to March 2007, approximately [] per cent of the *Observer's* revenues came from newspaper sales.²⁸ The *Express* is mostly free – a small number (around [] copies out of a total circulation of around 73,000) are sold in newsagents. As a result, only a small proportion of the *Express'* income comes directly from readers.
66. DPL submitted²⁹ that its post-merger plans for the *Express* and the *Observer* series are [].
67. On the face of it, it appears that readers of the *Express* and *Observer* will be worse off as a result of the merger. []. Further, the OFT did not know how many copies of the *Express* and *Observer* were actually read pre-merger as opposed to circulated (i.e. posted through letterboxes). [].
68. DPL have told the OFT that such changes must be weighed up against the counterfactual which it considers to be that the format of the *Express* would have been changed in some way or it would have been closed down. As stated above³⁰, the OFT's threshold to depart from its default counterfactual approach (that is status quo ante) is high and the evidence before the OFT in this case is insufficient in this respect.
69. DPL also provided the OFT with an early version of its revenue and profit projections for 2008 and supporting documentation. [].
70. The internal documentation went on to say []. These documents might be seen to cast doubt over the strength of the constraint imposed by other media. In response, DPL submitted that the document was prepared at a very early stage in the auction process [].
71. The Synovate survey of readers (300 were interviewed) does not provide evidence in this respect (for example, their reaction to a price rise of the cover price of the *Express* or *Observer* series) since readers were asked about their attitude to advertising and the various sources of information that they

²⁸ [].

²⁹ 9 November 2007 submission, paragraph 4.48.

³⁰ See paragraphs 7 to 9 above.

perceived were open to them when they wished to seek out relevant advertising.

Unilateral effects –advertisers

72. One possible effect on advertisers arises indirectly from []. Nevertheless, in Slough and Windsor advertisers may not have the same choice of titles in which to advertise as was available pre merger - titles which, according to the OFT questionnaire of advertisers, are each other's closest competitor. In these circumstances, it is plausible to consider that prices (advertising rates) may rise (whether directly or indirectly) and/or service standards fall as a result of the merger.
73. As noted above, third party comments made directly to the OFT indicate that the parties are each other's closest competitor in the overlap areas. Baylis' *Maidenhead Advertiser* was also commonly cited as a close competitor in some areas (notably Maidenhead).
74. DPL does not believe that it will be able to increase advertising rates in any one newspaper. It considers other media – especially the Internet and to a lesser extent direct mail / leaflets – provide a sufficient competitive constraint on local newspaper publishers so as to prevent them from raising prices. It also submits (in line with other publisher submissions to the OFT on this case) that barriers to entry and expansion are low. These two critical issues are dealt with in turn below.

Constraint from other media- Internet

75. The Synovate survey of advertisers showed that three-fifths of respondents (61 per cent) would reduce their advertising in local newspapers in response to a 10 per cent price rise (either by stopping their advertising in local newspaper altogether, or by reducing the frequency of their advertising or by reducing the size of their advertisement). Synovate's survey of readers offered some support to the advertisers' incentives to switch (if prices were to rise) inasmuch as most readers would consider searching the Internet for a range of products and services (the two exceptions being local services and local businesses).
76. A key mean of assessing the closeness of competition between different media is to calculate the diversion ratios between them, in other words the

proportion of switchers who would switch to one medium rather than another.

77. As previously noted,³¹ the Synovate surveys did not provide any information, and in particular diversion data, on the closeness of competition between DPL's *Observer* and BRN's *Express* titles. Based just on the market share data for the parties (see Table 4), one could expect that the diversion ratio from DPL to BRN would be around 65 per cent. Even if one were to take into account the Internet as a competitive constraint on the basis of the figures from the advertisers' survey (that around half of the customers would switch to the Internet), the diversion ratio from DPL to BRN would still be around 35 per cent.³² It is therefore unclear that the constraint from the Internet eliminates a realistic prospect of a substantial lessening of competition arising as a result of the merger. Adding in the Internet and direct mail/leaflets (with a 40 per cent switching rate ascribed to them) would reduce the diversion ratio from DPL to BRN to around 25 per cent.
78. DPL itself submitted that if it did not acquire the *Express*, the *Express* would have needed to take action to turn around its financial fortunes. One option that it would have had, absent the merger, is to raise advertising rates but, DPL submitted, 'if any attempt were made to increase revenues from advertising by raising prices, advertisers would be likely to be diverted away from the *Express* to the *Observer* and the *Midweek Observer*, which have continued as profitable titles in this area, or any of the multitude of other publications or media which are available in the area.' In saying this, DPL could be said to have been essentially acknowledging the closeness of competition between its *Observer* series and BRN's *Express* series.
79. Moreover, the *Observer*, *Midweek Observer* and *Express* series might be particularly close rivals for certain sets of customers. For example, it appears from the results of the OFT questionnaire that advertisers are more likely to be concerned about the merger if they are not already advertising on the Internet. Synovate's survey of advertisers shows that within some customer groups the Internet is not viewed as an 'effective substitute' as widely as within other customer groups. For example, within 'official notices', and to a lesser degree, 'display' ad customers.³³ 'Official notices' customers were

³¹ See paragraph 11 above.

³² As previously noted, it is not clear from the survey what magnitude of price increase would be required in order to prompt advertisers to switch to the Internet.

³³ 'Official notices' only had a small sample size.

found to be the least likely to change their advertising behaviour in response to a 10 per cent price rise, although they do account for a small share of advertising revenue (around [] per cent).

80. However, because the customers who, from the survey results, appear to be more price inelastic (and therefore are most likely to suffer some detriment under price discrimination) account for a small share of the parties' overall advertising revenue, the OFT has not found it necessary to examine the possibility of possible price discrimination in this case (despite the CC examining this possibility in Archant / INM³⁴).

81. In summary, given the closeness of competition between the parties, the OFT cannot conclude that the constraint imposed by Internet and direct mail/leaflets on local newspapers advertising is sufficient to prevent the anticompetitive unilateral effects resulting from the merger.

Barriers to entry and expansion

82. New entry and the threat of entry can also represent important competitive constraints on the behaviour of a merged entity. The entry must, however, be timely, likely and sufficient to restore the loss of competition arising from the merger.³⁵

83. DPL submitted (as did many other publishers who replied to the OFT) that barriers to entry and expansion in local newspapers are low. DPL told the OFT that it would be very easy for one of the existing publishers in Berkshire to move into the Slough, Windsor and/or Maidenhead areas if advertising prices were to rise. The OFT notes that there are several publishers (both large national chains and local newspapers publishers) with the resources and expertise in the area (for example, Baylis – publisher of the *Maidenhead Advertiser* – and the Guardian Media Group). In terms of the constraint offered from Internet advertising, DPL also emphasised the ease with which online competitors could increase their presence in the affected local areas.

84. Given DPL's assertion that barriers to entry and expansion were low, the OFT would expect to see examples of entry and expansion occurring previously, and in particular in the local areas relevant to this case. The OFT has been provided with evidence of two examples of footprint expansion that have taken place in

³⁴ Competition Commission: A report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited, 22 September 2004 Paragraphs 4.26-4.30.

³⁵ See Mergers – substantive assessment guidance (OFT516), paragraphs 4.17-4.26.

the market in the last five years (the *Express* entering into Maidenhead and the *Maidenhead Midweek* being launched in the same area in 2004). Information submitted to the OFT indicates that the *Express* was able to enter into the Maidenhead area within six to nine months, gain a 40 per cent share of circulation and around a 20 per cent of advertising. However, the OFT does not have any information as to whether this example of entry was profitable and sustainable (the *Express* has been losing money overall []). The OFT has some reservations about the context in which the entry of the *Maidenhead Midweek* took place. It has been put to the OFT that possible retaliation might have triggered the rapid reaction from the incumbent player, though the OFT has not been able to verify this information.

85. The OFT has been unable to identify any other significant recent entry into the overlapping areas. Some third parties have provided some examples of new entries in other geographic areas of the UK, although the OFT notes that most of these are not local newspapers. Overall, if barriers to entry and expansion were low, the OFT would have expected to see a number of examples of such entry or expansion within local markets in the UK, and in particular in the local areas relevant to this case, over recent years. However, no such evidence has been provided and the OFT is not independently aware of a substantial history of entry in local newspapers in various geographic markets across the UK.³⁶ The OFT is not satisfied that the examples of entry cited above alone can provide sufficient support for the view that new entry in the area affected by this merger would be sufficiently likely as to provide an effective competitive constraint.
86. Moreover, the OFT also notes that if new entry or expansion were to be easily achievable, then DPL could have entered or expanded its activities into Bracknell and Reading from the operations it already has with respect to the *Observer* title. However, it has chosen to expand by acquisition of an existing title with a local presence. This proposition is supported by third party responses that incumbency might represent a significant barrier to entry. The OFT has not been provided with any internal documentation showing the constraints or threats conferred by low barriers to entry. Further, despite contacting third parties on this point, the OFT has been unable to identify any

³⁶ This is in contrast to recent OFT cases, for example, in the UK airline sector generally, which has exhibited a lively history of entry and expansion. See *Anticipated acquisition by Flybe Group Limited of the BA Connect business of British Airways plc* (26 June 2007) and *Anticipated acquisition by easyJet Airline Company Limited of GB Airways Limited* (18 January 2008).

third parties with actual intentions and/or plans to enter into these local markets.

87. Based on the above, the OFT is not satisfied that low barriers to entry would be sufficient to prevent any anticompetitive unilateral effects that may arise from this merger.

Conclusion

88. In summary, the merger will reduce the number of credible competitors in the supply of weekly local newspapers and local advertising in Slough and Windsor. The parties' are each others closest competitor and the remaining competition does not appear to be sufficient to constrain direct or indirect post merger price increases for advertisers and/or readers. The OFT has not received sufficient evidence that entry or expansion would be likely such that this threat will be adequate to constrain DPL post merger.

THIRD PARTY VIEWS

89. The OFT received comments from around 20 advertisers and five publishers. Almost half of advertisers raised unilateral effects concerns (that advertising prices might rise) which have been discussed in detail above.

ASSESSMENT

90. Pre-merger the merging parties overlapped in the supply of weekly local newspapers and advertising space in local newspapers in Slough, Windsor and some smaller nearby towns.
91. DPL submitted that the OFT should not take the pre-merger situation as being the correct counterfactual in this case. While DPL did not argue the failing firm defence, it maintained that the pre-merger situation with respect to BRN's *Express* series was commercially unsustainable and that this title would cease or would continue in considerably less significant form. The OFT has not been presented with sufficiently compelling evidence to depart from its starting position that the correct counterfactual is pre-merger conditions of competition. Thus, the counterfactual applied to this case is the pre-merger situation.
92. DPL argued strongly that the product market should be broadened to include at least advertising on the Internet and advertising via direct mail and leaflets. On the basis of the evidence available, the OFT considers that the Internet

and advertising via direct mail and leaflets do provide some constraint, but it was uncertain whether, on balance, either was sufficiently strong to be included in the market. In any event, market definition is not an end in itself, and so the OFT did not consider it necessary to conclude on the precise scope of the market, and in particular whether advertising on the internet and via direct mail and leaflets should be included in the relevant product market. The critical question is to assess the loss of competition arising from the merger in the context of the competitive pressures facing DPL post-merger.

93. The balance of evidence suggests that the parties have been each other's closest competitor in Slough and Windsor and that the presence of other forms of advertising locally are not sufficient to constrain the possibility of adverse effects arising from the merger by way of higher prices for both advertisers and readers. As an indication, in Slough and Windsor, the parties' combined share of supply of local newspaper circulation is 95 per cent (increment 45 per cent), and so the transaction would be close to a merger to monopoly in these areas; looking at the overlapping areas in aggregate, the parties' combined share is 75 per cent (increment 36 per cent). Customers have told us that the parties are each other's closest competitor.
94. The loss of close competition between the parties raises unilateral effects concerns: the OFT has concerns that the merged firm will still have significant latitude to increase cover prices and/or advertising rates, and reduce circulation areas (which might be expected to indirectly increase advertising rates) post-merger, even if – as the critical loss analysis tends to suggest – it may not be able to act like a monopolist facing no constraints other than its own demand curve. The OFT considers that these commercial decisions would not have been profitable absent the merger, given the loss of business diverted to the other party's newspaper title.
95. The parties have argued that local newspaper publishers (especially those in the South East) face a significant constraint from other media - notably the Internet and direct mail/leaflets.
96. In order to support this point, DPL commissioned a survey of 337 advertisers and 300 readers in the Slough, Windsor and Maidenhead area. The survey shows that over 80 per cent of advertisers consider that they have at least one other alternative to local newspaper advertising. However, only 13 per cent said that they would switch away from local newspapers altogether (in the event of a 10 per cent price increase) - most said that they would simply

reduce their spend in some way (reduced frequency or smaller size of advertisement).

97. The responses with respect to the Internet and direct mail/leaflets suggest that these media provide a constraint of some extent on local newspaper advertising. The survey results provided the OFT with valuable insights into the role advertising in other media plays in giving advertisers choices, but it did not analyse the strength of the constraint placed on local newspaper publishers. Given the available evidence, the OFT cannot properly conclude that the constraint imposed by Internet and direct mail/leaflets on local newspapers advertising is sufficiently close and immediate to prevent the anticompetitive unilateral effects resulting from this merger.
98. New entry and the threat of entry can also represent important competitive constraints on the behaviour of the merged entity. However, the entry must be timely, likely and sufficient in scale or character to replicate the competition lost by the merger. Based on the evidence before the OFT, entry in this case might be timely and sufficient, but was not considered, on the evidence available, to be suitably likely.
99. Consequently, the OFT believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom that is: the supply of local weekly newspapers and advertising space in weekly local newspapers in Slough and Windsor.

EXCEPTIONS TO THE DUTY TO REFER

The legislative and policy framework

Relevant provisions of the Act

100. Section 22(1)³⁷ of the Act requires the OFT to consider first whether it is under a duty to make a reference to the Competition Commission. Section 22(1) provides that 'the OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that (a) a relevant merger situation has been created; and (b) the creation of that situation has resulted, or may be expected to result, in a substantial

³⁷ This section refers to the duty in respect of completed mergers under section 22. Equivalent reasoning applies to the duty in respect of anticipated mergers under section 33.

lessening of competition within any market or markets in the United Kingdom for goods or services.' The OFT's duty under section 22(1) is subject to the application of certain discretionary exceptions, of which two are relevant here.

101. The first is the 'markets of insufficient importance' or *de minimis* discretion: section 22(2), provides that 'the OFT may decide not to make a reference under this section if it believes that (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission ...'. The Act does not specify what criteria the OFT should consider in exercising this particular discretion, but leaves the matter to the judgment and expertise of the OFT.
102. The second is the undertakings in lieu discretion: section 73(2) provides that 'the OFT may, instead of making such a reference and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.' The exercise of each of these discretionary exceptions is explained further in OFT guidance, and is discussed below.
103. The issue of whether one or more exceptions to the duty to refer could (in principle or in practice) be available is of no relevance to the question of whether the OFT is under a duty to refer under sections 22(1) of the Act. This applies as much to undertakings in lieu as any other exception. The OFT places great importance on making the assessment of its statutory duty independent of the question of available remedies because there is no legal basis to consider issues relating to undertakings as relevant to the applicability of the duty. This would amount to taking an irrelevant consideration into account, or in more colloquial terms, to 'reverse-engineering' the OFT's substantive analysis to accept a remedy without having properly considered whether the public policy justification for doing so – a realistic prospect of a substantial lessening of competition – applies in the case at hand.
104. A different issue arises once the OFT has found that it is under a duty to refer. It then considers whether to exercise its discretion in favour of a statutory exception. In relation to the *de minimis* and undertakings in lieu discretions, the Act makes clear in section 73(1) that the OFT's discretion to accept undertakings in lieu under section 73(2) applies only once the OFT has

already decided not to exercise its *de minimis* discretion under section 22(2) to avoid a reference to the Competition Commission.³⁸ The question of whether to apply the exception for markets of insufficient importance therefore precedes the question of whether (in appropriate cases) to accept undertakings in lieu. This sequence is required under the Act because the question of whether to accept undertakings in lieu of reference that have been offered by the parties arises only once the OFT has decided that it would actually, otherwise, be under a duty to refer the merger to the Competition Commission.

105. However, the sequence of questions that the OFT is required to ask itself under the Act does not limit the scope of the OFT's discretion under section 22(2)(a) to decide not to make a reference to the Competition Commission based on the markets of insufficient importance exception. The Act leaves open to the OFT the considerations it should take into account in exercising that discretion; it does not, for example, provide that the OFT should disregard the possibility of accepting undertakings in lieu of reference under section 73(2).

106. In these circumstances, it is open to the OFT, when exercising its discretion under section 22(2)(a) to have regard to all relevant considerations, including whether the consumer harm in the case in question could have been avoided by the provision of clear-cut undertakings in lieu. Where the duty to make a reference under section 22(1) of the Act is met, the OFT then considers whether it would be appropriate to exercise its discretion to apply the duty to refer pursuant to section 22(2) of the Act. For the reasons set out below, the OFT considers it proportionate to make a reference where (i) it is under a duty to refer and (ii) clear-cut undertakings in lieu are, in principle, clearly available to the parties to avoid a reference in the case under consideration.

The proportionality assessment in *de minimis* cases

107. The revised OFT Guidance on the use of the markets of insufficient importance, or *de minimis*, discretion emphasises that this discretion is fundamentally a proportionality assessment:

³⁸ Section 73(1) states: 'Subsection (2) applies if the OFT considers that it is under a duty to make a reference under section 22 or 33 (disregarding the operation of section 22(3)(b) or (as the case may be) 33(3)(b) but **taking account of** the power of the OFT under section 22(2) or (As the case may be) 33(2) to decide not to make such a reference.' (Emphasis added).

The OFT may exceptionally decide not to refer such a merger to the CC if it believes that the markets to which the duty to refer applies are not of sufficient importance to justify a reference. By precluding a CC reference, use of this provision has the same effect as an exemption that clears the merger unconditionally. Its purpose is to avoid references being made where the costs involved would be disproportionate.³⁹

108. In its consultation document,⁴⁰ the OFT also explained that 'the proportionality test is best understood as requiring a comparison of the incremental costs and benefits of each reference' (at 2.5). The benefits in this context should be measured 'in particular in terms of the harm to consumer welfare potentially avoided' (2.1). The OFT further explained that this must be recognised as an ultimately qualitative, rather than quantitative, judgment, because the analysis cannot 'realistically be thought of as the application of a mathematical formula in which precisely quantified calculations of cost and benefit are balanced out' (4.10).

109. Unlike previous cases involving the *de minimis* exception under the new Guidance,⁴¹ this case raises the issue of whether a potentially problematic merger should be exempted on *de minimis* grounds where another means to avoid the costs of a CC inquiry – a clear-cut undertaking in lieu – is in principle available.

110. The OFT believes that a reference decision in a case where it is clearly open to the party or parties to offer a clear-cut undertaking in lieu of reference would be proportionate, because the recurring benefits of avoiding consumer harm by means of undertakings in lieu in a given and all future like cases outweighs the one-off costs of a reference in that particular case. The considerations underlining this conclusion are:

- An undertaking in lieu of reference outcome avoids the risk of consumer harm implied by a realistic prospect or expectation of a substantial

³⁹ See *Revision to Mergers – substantive assessment guidance: Exception to the duty to refer: markets of insufficient importance*, OFT516b, November 2007, paragraph 7.5.

⁴⁰ See *Consultation on proposed revision to Mergers - Substantive assessment guidance: Exception to the duty to refer: markets of insufficient importance*, OFT933con, June 2007.

⁴¹ The OFT does not believe that clear-cut undertakings in lieu of reference (consistent with OFT guidance on first-phase remedies) were available in principle in the NEG, Arriva and Stagecoach cases. See further OFT press notices 16/08, 180/07 and 156/07.

lessening of competition – yet at the same time avoids the full costs of reference.⁴²

- If the OFT were wholly to disregard the availability in principle of clear-cut undertakings in lieu, the UK merger regime would lose much of the incentive on parties to structure transactions that allow the economic logic of a benign or beneficial merger to proceed while at the same time guarding against the acquisition or market power that harms consumers in markets representing a subset of the transaction. It is clear from the OFT's deterrence evaluation work that a given OFT undertakings in lieu decision, like CC remedies decisions, have a significant impact on private merger activity and planning and structuring decisions beyond the individual case itself.⁴³ Accordingly, the one-off costs of a reference – in any given case where undertakings are in principle available – is outweighed by the long-run and recurring benefit of remedial and/or deterrent action at the OFT stage that, in aggregate, has resulted and would continue to result in substantial welfare savings for consumers.⁴⁴
- While recognising that first-phase remedies are clearly not voluntary in an absolute sense, in that the result would not occur but for the presence of the UK merger regime, it is nevertheless ultimately at the parties' private discretion, faced with the prospect of reference, as to whether to choose to offer undertakings in lieu in such a case, or to pursue their case afresh at the CC; the OFT cannot impose a first-phase remedy via order (as can the CC in appropriate second-phase cases) and the OFT's approach on *de minimis* does not remove the parties' discretion in undertakings in lieu issues.
- The OFT's judgment is an 'in principle' one that does not depend on the actual offer, if any, of undertakings in lieu, which is a separate question relevant only to the subsequent exercise of the OFT's discretion in Section 73(2), and that judgment must be reasonable and consistent with the clear-cut standard articulated in OFT Guidance, which emphasises that a clear-cut remedy is one that is both effective and proportionate (in other words, the OFT should disregard ineffective and/or disproportionate

⁴² Cf. Consultation document, observing that the cost/benefit calculation would be adjusted if the calculation were to include the benefits to be gained from reference decisions that in fact lead to undertakings in lieu of reference (UIL), and thus do not incur the costs of a CC investigation while still preventing the relevant harm (oft933con, 4.14)

⁴³ On the deterrent effect or precedential value of intervention by the OFT or CC affecting private mergers and acquisitions activity, the best estimates, from a survey of relevant legal practitioners, is that the ratio of proposed mergers abandoned or modified on competition grounds (before the OFT becomes of them) to those in which there was a finding of SLC (by the CC) or undertakings in lieu is approximately five to one: see *The deterrent effect of competition enforcement by the OFT: a report prepared for the OFT by Deloitte* (OFT962, November 2007), at 4.6, page 29.

⁴⁴ See below.

undertakings in making this judgment). The OFT will therefore evaluate whether undertakings in lieu are in principle available without regard to whether or not undertakings in lieu have in fact been offered in the case in question.

111. In considering the factors above, the OFT has also been mindful of the significance and utility attached to the OFT's undertakings in lieu power by stakeholders in the merger regime. In this respect, the OFT notes that the Competition Appeal Tribunal underscored the public value of undertakings in lieu – in part of its IBA Health judgment undisturbed by the Court of Appeal – by taking the view that 'the OFT should be slow to deprive itself of the possibility of obtaining undertakings under section 73' which it characterised as a 'useful power'.⁴⁵ Recent evaluation work conducted by the OFT in 2007 suggests that the recurring annual benefit of the OFT's undertakings in lieu caseload is considerable – the current three-year annual average estimate being £42 million per year in consumer detriment likely avoided.⁴⁶ Finally, from the perspective of the private sector, the DTI Peer Review of Competition Policy survey of June 2007, in asking respondents what improvements they would suggest for the UK competition regime, highlights that a suggestion 'mentioned repeatedly' was 'more discretion for the OFT not to refer mergers to the CC and accept undertakings instead. It was commented that the OFT should be more pro-active in discussing remedies and be less reluctant to accept undertakings.'⁴⁷

112. Taking the above together, the OFT therefore believes that the policy justification underpinning its desire not to diminish the benefits of the undertakings in lieu regime is a sound one, and is therefore an appropriate driver of its proportionality analysis in the class of cases outlined.

Application of *de minimis* in this case

113. As stated above, the OFT believes that there is a realistic prospect of a substantial lessening of competition arising in relation to the supply of weekly local newspapers and the supply of advertising space in local newspapers in Slough and Windsor.

⁴⁵ See *IBA Health v OFT* [2003] CAT 27, paragraph 205.

⁴⁶ See OFT, *Positive Impact 06/07: Consumer benefits from competition enforcement, merger control and scam busting* (OFT 928, July 2007), estimating consumers benefit from OFT undertakings in lieu of £19m in 04/05, £43m 05/06 and £65m 06/07 at 4.37, page 28.

⁴⁷ See *DTI Peer Review of Competition Policy* (6 June 2007, KPMG), page 70.

114. The OFT's revised Guidance on the use of the markets of insufficient importance states that '[b]efore using this discretion the OFT will exercise its judgement in considering each case on its individual facts.'⁴⁸ The revised Guidance notes that '[t]he OFT is generally likely to consider the affected market(s) to be of sufficient importance to justify a reference where their annual value in the UK, in aggregate, is more than £10 million.'⁴⁹
115. The *de minimis* exception is not ruled on out grounds of aggregate market size alone in this case: the relevant figure is below £10 million under any reasonable scenario. However, in this case, the OFT considers that clear-cut (effective and proportionate) undertakings in lieu are in principle available, because it is open to DPL to divest either BRN's *Express* series or DPL's *Observer* series to a suitable purchaser, thus removing the problematic overlap created by the merger. Indeed, this case appears to fit the classical profile of the OFT's undertakings in lieu cases: a small proportion of a larger benign or even beneficial transaction raises concerns, and those concerns can be addressed structurally by means of a divestiture package.

Undertakings in lieu

116. Where the duty to make a reference under section 22(1) of the Act is met, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, accept from such of the parties concerned undertakings as it considers appropriate for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may result from it.
117. The OFT's guidance states that in order to accept undertakings in lieu of reference '[...] the OFT must be confident that the competition concerns identified can be resolved by means of undertakings without the need for further investigation. Undertakings in lieu of reference are therefore appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation [...]'.⁵⁰
118. Prior to making its decision, the OFT explored with DPL []. DPL was not prepared to make such an offer, but did propose on a 'without prejudice basis'

⁴⁸ See paragraph 7.6 of the revised Guidance.

⁴⁹ As above.

⁵⁰ See paragraph 8.3 of OFT *Mergers Substantive Assessment Guidance*.

the divestment of the *Express* series to an up-front buyer, that is, a named purchaser to be identified.

119. This proposed undertakings removes the overlap resulted from this merger. Thus, the OFT believes it constitutes a clear-cut remedy, rendering it appropriate for the OFT to suspend its duty to refer. The OFT considers that, in the circumstances of this case, in particular given the loss-making nature of the *Express* series, a necessary requirement to suspend the duty to refer and consider undertakings is that divestiture of the *Express* should be to a suitable purchaser approved by the OFT before the OFT consults on the undertakings publicly prior to acceptance.
120. In light of these considerations, the OFT is currently of the view that the proposed undertakings in lieu – assuming they are capable of being implemented - will restore competition to pre-merger levels, and that the undertaking offered is sufficiently clear cut to remedy the concerns identified, namely the substantial lessening of competition in the supply of weekly local newspapers and the supply of advertising space in local newspapers in Slough and Windsor.
121. Therefore, the OFT has decided to exercise its discretion under section 73(2) of the Act to consider whether to accept undertakings in lieu of a reference.

DECISION

122. The OFT's duty to refer the completed acquisition by DPL of BRN to the Competition Commission pursuant to section 22 of the Act is suspended because, on the information currently available, the OFT is considering whether to accept appropriate undertakings in lieu of reference from Dunfermline Press Limited pursuant to section 73 of the Act.