Anticipated acquisition by of seven local weekly newspaper titles by Kent Messenger Limited from Northcliffe Media Limited

ME/5121/11

The OFT's decision on reference under section 33(1) given on 18 October 2011. Full text of decision published 31 October 2011.

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

THE PARTIES

1. **Kent Messenger Limited** (**KML**) has local media interests serving Kent and Medway. These include local newspapers and commercial radio stations, specialist printed and online magazines and other publications, and the country-wide website KentOnline. KML's turnover for the 2011 financial year was £[ ] million.

2. **The Target** (**the Target**) comprises a portfolio of seven local weekly newspaper titles in Kent and associated digital sites. It is part of **Northcliffe Media Limited (Northcliffe)**,[1] a company controlled by the Daily Mail & General Trust. The total turnover of the Target in the 2009/10 financial year was £6.9 million.

TRANSACTION

3. KML proposes to acquire the Target. The transaction is conditional on OFT clearance. The titles included in this transaction are: Times (Faversham, Whitstable, Herne Bay and Canterbury) Series; Dover Express Series; News (Medway); Folkestone Herald Series; East Kent Gazette; Thanet Times and the Isle of Thanet Gazette.

[1] On 1 October 2011, Northcliffe Media Limited incorporated all the individual local media companies under the control of the Daily Mail & General Trust. Among those was Northcliffe Local Media (South East) Limited, the subsidiary in which the Target's businesses were included until that date.

JURISDICTION

4. As a result of the transaction, KML and the Target will cease to be distinct enterprises in accordance with Section 23(1) of the Enterprise Act 2002 (the Act). The transaction qualifies as a relevant merger situation under Section 23(3) of the Act on the basis that the parties together account for more than 25 per cent of the supply of local weekly newspaper titles in six local government areas of East Kent and Medway, by circulation. In particular, they together account for 100 per cent of JICREG-registered[2] local weekly newspapers in those areas. The share of supply test in section 23 of the Act is therefore met. The Office of Fair Trading therefore believes that it is or may be the case that as a result of this transaction a relevant merger situation will be created.

BACKGROUND

5. In 2009, the OFT carried out a review of the local and regional media merger regime[3] as part of the Government's Digital Britain review. One outcome of the OFT review and the *Digital Britain* report was a commitment that the OFT would request a *Local Media Assessment* (LMA) from the Office of Communications (Ofcom) for those mergers involving local newspaper assets raising *prima facie* competition concerns.[4] In such circumstances Ofcom will provide a LMA, drawing on its experience and knowledge of media markets, to inform the OFT's decision-making process. The working arrangements in relation to the production of the LMA are governed by the *Memorandum of Understanding (MOU)* entered into by the OFT and Ofcom in December 2010.[5]

6. This merger is the first case in which the OFT has asked Ofcom to produce a LMA.[6] Ofcom's assessment of this transaction has contributed to the OFT's decision and where relevant is referred to in this text. It presents

[2] The Joint Industry Committee for Regional Media Research (JICREG) is 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.
[3] See *Review of the local and regional media merger regime*, OFT, June 2009, available at www.oft.gov.uk/shared_oft/mergers_ea02/oft1091.pdf
[4] OFT's *Mergers Jurisdictional and procedural guidance*, June 2009, paragraph 6.15.
[5] See at www.oft.gov.uk/shared_oft/mergers_ea02/OfcomMOU
[6] See *Proposed acquisition by Kent Messenger Group of seven newspaper titles from Northcliffe Media: Local Media Assessment*, Ofcom, 2 September 2011 (LMA). A non-confidential version of the LMA is published together with this decision pursuant to the MOU, paragraph 29.

Ofcom's general views on the competitive constraints on the merged entity and the consumer benefits which may arise from the transaction. The objective of the LMA is not to assess the extent to which competition may be lessened by the proposed merger.

COUNTERFACTUAL

Background

7. The OFT considers the prospects for competition with the merger against the competitive situation without the merger. More specifically, the OFT considers the effect of the merger compared with the most competitive counterfactual providing always that the OFT believes that situation to be a realistic prospect. In practice, the OFT generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the OFT will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that the prospect of prevailing conditions continuing is not realistic (for example because the OFT believes that one of the merging firms would inevitably have exited the market) or where there is a counterfactual that is more competitive than prevailing conditions.[7]

8. The test for reference to the Competition Commission (CC) has important implications for the OFT's assessment of the counterfactual. As stated in the OFT's Merger Assessment Guidelines, the OFT must form a reasonable belief, objectively justified by relevant facts, as to whether it is or may be the case that the merger has resulted, or may be expected to result, in a substantial lessening of competition. In practice, this means that, if the OFT believes that the relevant likelihood is greater than fanciful, but below 50 per cent, it has a wide margin of appreciation in deciding whether or not to refer to the CC. In such cases, it has a duty to refer when it believes there to be a realistic prospect that the merger will result in a substantial lessening of competition (the 'realistic prospect' test). The realistic prospect test under the Act is intentionally a lower and more cautious threshold for a finding of a substantial lessening of competition than that which may be applied by the CC following a detailed investigation. The realistic prospect test applies equally to the counterfactual and the OFT is therefore required

[7] *Merger Assessment Guidelines*, *Joint publication of the Competition Commission and the OFT, September 2010*, (*Merger Assessment Guidelines)*, section 4.3.

to take a cautious approach to submissions made by the merging parties that the loss of competition would have occurred independent of the merger.

9. The parties submitted that the OFT should not take the pre-merger situation as being the appropriate counterfactual in this case. KML did not explicitly argue the 'exiting firm' scenario (neither for financial nor strategic reasons) but [ ].

10. The OFT recognises that local newspapers face a number of structural and cyclical challenges. In particular, the OFT notes the decline in total advertising allocated to local and regional newspapers since around 2004, driven partly by a decline in the popularity of local newspapers and by the rapid expansion of the internet and other means of advertising.[8]

11. The LMA confirms that many of these sector-wide challenges have persisted. Ofcom suggests that if advertising revenues, circulation figures and profits continue to fall at their current rates, then absent the merger, the parties may be forced to close or merge titles in the future, or perhaps even cease operating altogether.[9]

12. The OFT appreciates that as a result of the challenges facing the industry some local newspaper titles may be forced to close or merge in the future. However, for the OFT to accept an 'exiting firm' (or title) argument, it would need (on the basis of compelling evidence) to believe that it was inevitable that the firm or title would exit the market.[10]

Application to this case

13. The OFT considers the possibility of an 'exiting title' scenario as put forward by the parties.[11] The relevant criteria are:

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[8] See *Review of the local and regional media merger regime*, paragraphs 2.8 to 2.19.
[9] LMA, paragraph 5.47.
[10] As stated in the *Merger Assessment Guidelines*, section 4.3.
[11] The framework under which an 'exiting title', rather than 'exiting firm' defence, is detailed in the *Merger Assessment Guidelines* paragraph 4.3.15, stating that the OFT will examine the evidence as to why the parent company would have closed a subsidiary or division (title, in this case) noting that such cases require particularly careful analysis.

- whether the firm would have exited, absent the merger, and if so
- would there have there been an alternative purchaser for the firm or its assets, and
- what would have happened to the sales of the firm in the event of its exit?

Would the firm (title) have exited absent the merger?

14. [ ].

15. As to the parties' overall financial position, the OFT notes that KML has made a loss of over £ [ ] in 2010 and a combined loss of £ [ ] over the last three years; and that the Target has made a combined loss of around [ ].[12] Over that same period, the parties have undertaken a range of measures to address these losses, including significant cost cutting and the diversification of their business into online services. Both have also restructured their print portfolio, with the closure or merger of a number of titles, including some in areas affected by this merger. These financial challenges are echoed by some customers, the actions of competitors, and, more generally, by the LMA.

16. KML submitted that the OFT need not require evidence to a compelling standard that 'specific titles will close absent the merger'. It argued that '[the OFT's] test of closures being 'foreseeable' enabling it to predict with 'some confidence' does not require such a high test'. It added that 'the LMA strongly supports the position that some of the (unspecified) titles are likely to close absent the merger.'[13] The Target further submitted examples of other local newspapers that Northcliffe had shut or merged in the last year and told the OFT that [ ].

17. In assessing the submissions made by the parties in relation to the exiting firm scenario, the OFT has had due regard to the test for reference and its approach to the counterfactual set out in its Merger Assessment Guidelines and previous practice (see paragraph 8 above). In this case, neither KML nor Northcliffe provided substantiating evidence that compellingly pointed to any of the overlapping titles exiting absent the merger. Neither party

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[12] [ ].

[13] [ ]

pointed to any title that was more or less likely to exit, indicating that titles are interlinked such that the feasibility of all titles (including the profitable ones) was uncertain.[14] The OFT notes that the LMA (and the parties) considers that there is a certain foreseeability that titles may exit in the future but the OFT also notes that businesses, including local newspapers, generally can continue providing goods and services by undertaking restructuring or moving into different more profitable areas without necessarily exiting the market. Without specific evidence supported by financial and/or strategic plans that exit is imminent, the OFT is unable to merely consider that the wider structural challenges facing the market, in and of themselves, indicate with a sufficient degree of certainty that any of the specific titles will exit the market.

18. As a result, in the absence of compelling evidence to the contrary, the OFT is obliged to take a cautious approach and consider that the pre-merger conditions of competition are the appropriate counterfactual against which to assess the merger.

19. Given the OFT's finding with regard to the first criterion, it has not been necessary to conclude on the second or third criteria.

MARKET DEFINITION

20. KML and the Target (the parties) overlap in the supply of local weekly newspapers and associated websites in Kent, as well as separate stand-alone websites. KML is also active in local commercial radio and publishes several local magazines.

21. The OFT considers that market definition provides a framework for its analysis of the competitive effects of the merger[15] but emphasises that the boundaries of the market do not determine the outcome of its analysis of the competitive effects of the merger in any mechanistic way. Irrespective of the precise product scope the OFT considers it appropriate to consider the extent of the competitive constraints on the parties' titles from both within and outside of any candidate market boundaries.[16]

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[14] The OFT was also unable to determine, however, on the basis of evidence available to it, the extent to which titles may interact (on the supply-side through allocated costs or on the demand-side through packaged advertising or strategic value) with each other.

[15] *Merger Assessment Guidelines*, paragraph 5.2.1.

[16] *Merger Assessment Guidelines*, paragraph 5.2.2.

PRODUCT SCOPE

22. Local newspaper publishers have two distinct sources of revenue, the cover price and advertising sales, and the competitive constraints faced by local newspapers may differ for each type of customer.[17] There are, however, important links between these two customer groups, and any newspaper is dependent on both, intermediating between them as a 'two-sided platform'. For example, an increase in the cover price charged to readers will most likely reduce circulation. The reduced demand from readers will have a knock-on effect, reducing demand from advertisers (or reducing what they pay for advertising).[18] The result in this example is to amplify the effect on revenue of a price rise on one side of the 'platform'; that is, to amplify the effect of an increase in the cover price.[19]

23. This two-sided view of local newspapers is echoed by Ofcom's LMA, which points to alternatives to local newspapers for both readers and advertisers that may potentially constrain KML post-merger. That said, Ofcom notes that its submissions are general observations rather than any definitive view of the competitive constraints on local newspapers, generally or in this case. Furthermore, Ofcom points out that the use of alternative media by both readers and advertisers may be partly complementary.[20] The OFT also notes that much of the evidence in the LMA, by its nature, relates to the wider marketplace in which the parties operate, taking account of industry trends nationally or the South East rather than the local areas in Kent specifically affected by this merger.

24. In past cases, the OFT has generally considered that free and paid-for local

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[17] In fact, different categories of advertising customer (motors, property, recruitment etc) are not demand-side substitutes, and may therefore in principle constitute narrower markets. However, for the purpose of assessing this merger, we consider it appropriate to aggregate these markets and analyse them as one since this will not affect the overall assessment of the merger in this case (see further paragraph 5.2.17 of the *Merger Assessment Guidelines*).

[18] This is known as an indirect network effect, where the value of the product to one group of customers (for example, advertisers) is affected by the number of customers served of the other group (for example, readers). See *Merger Assessment Guidelines,* paragraphs 5.2.20 and 5.7.16.

[19] The overall effect of this interdependence between both sides of the platform may be to reduce the profitability of any price rise by a hypothetical monopolist. This raises a risk that the strict application of the hypothetical monopolist test to define the narrowest plausible market could result in a candidate market that is drawn too narrowly, unless this two-sided nature is recognised. However, in this case, irrespective of the precise product scope, the OFT considers the full extent of the competitive constraints on the parties' titles as part of the competitive assessment.

[20] *Ibid*. paragraph 4.30 to 4.31.

weekly newspaper titles constrain each other.[21] The OFT's market investigation generally supported this position in this case.

25. KML argued that the market should be drawn significantly wider than this, however, given that post-merger it would still be subject to constraints from a range of different choices for both readers and advertisers. KML submits that its local weekly newspapers – both paid-for and free – are and will be constrained by:

- other local print and online publications
- specialist websites or publications
- local television channels, and
- local commercial radio stations.

26. KML has submitted evidence purporting to show the competitive constraints exerted on the parties' local newspapers from each of these.

27. Given the highly differentiated nature of the alternatives put forward by KML, the constraint that each exerts on another and on KML post-merger will likely vary considerably, irrespective of the exact product scope. Any competition concerns that arise from the merger will therefore be independent of whether the merger is framed as one resulting in a high concentration of suppliers within a narrowly defined relevant market or as one involving the loss of close, direct competition between two suppliers in a more broadly defined relevant market with differentiated publishers.

28. As such, the OFT has considered below the extent of competitive constraints placed on the merging parties by these other forms of media, in the context of market definition. The OFT emphasises, however, that this serves only to frame the subsequent analysis. Assessment of the competitive effects of the merger is not exclusively determined by the precise market definition.

Regional and national newspapers

29. In its recent decisions, the OFT has analysed mergers on the basis that local weekly newspapers formed a product market distinct from regional

[21] See, for example, OFT's decision of 15 June 2006 on the *Anticipated acquisition by DC Thompson & Co Limited of Aberdeen Journals Limited*.

and national newspapers.[22]

30. In this regard, Archant's county-wide titles Kent on Saturday and Kent on Sunday (KoS), which have two local editions, North & Mid-Kent and East Kent, [ ]. This evidence suggests that KoS may represent some constraint on the merging parties' local weekly newspapers.

31. However, the strength of that constraint is unclear. In particular, around 75 per cent of the parties' advertising customers are very local advertising in just one or two local titles, while [ ] estimated that [ ].

32. Further, most advertisers who responded to the OFT's market investigation said that they generally only advertise in local media. When the OFT pointed out to some advertisers that they procured advertising space in Archant's KoS, they responded that they did not consider KoS to be a substitute to the merging parties local weekly newspapers because KoS:

- does not target as localised an audience, and
- has smaller reader coverage as KoS does not provide door-to-door distribution (and the extent of its coverage is unclear as it has no independently audited distribution figures).

33. On this basis, the OFT considers the evidence available of the constraints from regional newspapers on local newspapers to be mixed.

Other print and non- print media

34. The OFT has also found in past cases that other print and non-print media are capable of imposing some competitive constraint on local weekly newspapers for advertising content but the strength of these constraints in any local area will likely vary and will need to be assessed on a case by case basis.[23]

35. In this case, KML submitted that there exists a wide range of other print media which offer effective alternatives to advertisers wishing to target

[22] See, for example, the OFT's decision of 15 June 2006 on the *Anticipated acquisition by DC Thompson & Co Limited of Aberdeen Journals Limited*; and the OFT's decision of 17 May 2006 *on the Completed acquisition by Johnston Press plc of Scotsman Publications Limited.*

[23] See, for example, the OFT's decision of 4 February 2008 on the *Completed acquisition by Dunfermline Press Limited of several titles from Berkshire Regional News* (DLP/BRN), paragraph 58; and *Review of the local and regional media merger regime: Final report*, OFT1091, June 2009.

readers in local areas of East Kent and Medway. KML referred to some magazines distributed locally (such as *The Verve* or *Inside Kent*), specialist publications (such as *Autotrader*), advertising-only publications (such as *Friday Ad)*, classified directories (such as the *Yellow Pages* or *Thomson Local*), local authorities' publications, and direct mail and leaflets.

36. In support, KML provided the OFT with samples of these publications, which contained, to varying degrees, some cross-over of similar advertisements to those in the parties' local weekly newspapers. KML also supplied examples of switching from and to KML from those publications, and submitted minutes of internal commercial meetings in which different publications and radio stations were mentioned. In KML's view this evidence corroborates that there are many alternatives which will constrain KML post merger.

37. The parties also submitted that they competed with specialist online websites (such as Rightmove, eBay, Auto-trader.co.uk, Google and Facebook) with search facilities that are able to target very localised areas and local online newspapers. The published financial results of some of the websites showed their growing advertising revenues in contrast to the declining advertising revenues in local newspapers, the parties said. KML also supplied several reports prepared by independent consultants on advertising markets, all of which showed that whilst advertising revenue in local newspapers had declined, it had increased in online advertising.[24]

38. Consistent with this, the LMA was of the view that if other media sources were purely complementary, then any 'new media' consumption would be in addition to current usage and the current consumption of local newspapers would be unaffected, which 'does not appear to be the case.'[25]

39. However, responses from third parties on these points did not fully support the parties' submissions. Most respondents to the OFT's information request said that they used alternative advertising channels but nonetheless submitted that advertising in local newspapers is important to them.

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[24] These included: the *Enders Analysis: UK Classified Annual Report, September 2010 (Parts 1 and 2); UKOM:'The online media landscape', May 2011*.
[25] LMA, paragraph 4.29.

40. Moreover, the examples of switching provided by the parties—though directionally helpful—were not sufficient in number or detail for the OFT to be able to conclude that these other publications should be included in the relevant product market. In this regard, though the evidence submitted by KML and received from third parties supports the existence of some constraints on the parties from alternative media, much of it relates to the competitive constraint from specific identified publications, which will also likely vary by title and publication and can be considered as part of the competitive assessment directly.

GEOGRAPHIC SCOPE

41. In past cases the OFT and the CC have generally assessed the competitive effects of a merger between two local newspaper publishers at a local level. Consistent with this, in this case KML considered the narrowest candidate geographic market to be a collection of local areas where the parties' distribution/circulation footprints overlap.[26]

Local

42. Recent OFT and CC cases have considered the narrowest candidate geographic market to be defined by JICREG[27] circulation or distribution areas where the parties overlap 'significantly' (that is, one where the parties had at least 50 per cent of the circulation with an increment of at least 10 per cent). Several previous cases have found the relevant geographic market to be wider than this candidate market however. In light of this, KML applied these filters to identify 'significant overlaps' in 'local government areas', which are wider than JICREG 'locations' but which—in KML's view—more accurately represent the catchment areas for the Target's titles. Further, a number of competitors highlighted by KML do not subscribe to JICREG, notably KoS. The distribution[28] of KoS is available by local government area.

43. KML submits its titles, on this basis, overlap with the Target's titles in six local government areas of East Kent (Canterbury, Dover, Shepway,

[26] See, for example, *DPL/BRN*, paragraphs 50 and 51.
[27] See footnote 2 above.
[28] The OFT follows industry convention whereby paid-for titles are measured by their 'circulation' and free titles by their 'distribution'.

Ashford, Swale, and Thanet) and in Medway. Each of these overlaps is 'significant' based on the filters applied in past cases.[29]

44. The OFT considers that, where titles' geographic footprints overlap significantly, advertisers are more likely to consider them close substitutes because they target the same readers.

45. The OFT does not consider, however, that local government areas are necessarily the narrowest candidate geographic markets in this merger, particularly given the extent of localised advertising in the parties' titles. Nevertheless, the OFT believes that the application of the filter described above to local government areas is an appropriate starting point to identify the parties' overlaps and focus the competitive assessment on those areas where the parties appear to compete most strongly. The OFT considers it appropriate to assess the direct competitive constraints on each title, and implicitly the closeness of competition between the parties, irrespective of the precise geographic scope of the relevant market.[30]

Regional

46. The parties do not publish or overlap in the publication of any clearly 'regional' (that is, county-wide Kent) newspaper titles (although a number of their titles extend beyond merely local areas). Nevertheless, the parties' overlapping local newspaper titles are all based in East Kent and Medway and a number of advertisers indicated to the OFT that they targeted a county-wide audience or, at the least, one covering a number of local areas. Consistent with this, some respondents to the OFT's market investigation noted they advertise in a number of the parties' titles across various areas. Some respondents also indicated that their next best alternative to some titles was 'located' in an adjacent local government area (Thanet and Canterbury, for example) though most did not. On this basis, the OFT considers it appropriate to assess any regional issues arising from the merger.

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[29] An analysis based on JICREG 'locations' would, by its nature, show the merger to represent a merger to monopoly in each area. See also footnote 2 above.

[30] Although note this is likely to represent an analysis principally in those overlapping JICREG areas put forward by the parties.

Conclusion on frame of reference

47. The OFT does not consider the evidence as outlined above – in relation to the constraints from print and non-print media – sufficiently compelling to justify widening the relevant market beyond the narrow candidate market of local weekly (paid-for and free) newspapers. As a result, on a cautious basis, the OFT considers the relevant market to be the supply of local weekly newspapers and advertising space in local weekly (paid-for and free) newspapers. However, the OFT recognises that there will inevitably be some degree of competition from outside the boundaries of this relevant market and considers it appropriate to assess the direct competitive constraints on the parties' titles as part of the competitive assessment, including from different forms of media generically and from specifically identified alternatives.

COMPETITIVE ASSESSMENT

48. KML submitted that it competes with a variety of alternative media. Some of these are local, some regional and others national. In KML's view, advertisers allocate their available spend to those media that they believe will best help them achieve their goals affordably and advertisers will switch their business if faced with price rises or a decline in effectiveness.

UNILATERAL EFFECTS

49. Unilateral effects concerns arise in differentiated markets such as local newspapers, where the merger combines close substitutes for a substantial proportion of advertisers and/or readers, and countervailing constraints are insufficient to prevent this.

50. The OFT has examined the possibility that the merged entity could unilaterally impose price increases or deteriorate its competitive offering beyond the level possible absent the merger, to both readers and advertisers, across different advertising categories and customer groups. The OFT's approach is generally to focus on the advertisers' side of the market,[31] noting where relevant if any effects from the readers' side of the

[31] See, for example, *Review of the local and regional media merger regime: Final report*, OFT1091, June 2009). Advertising is a key input to the competitive process in other markets, and so if advertising rates increase, then the increase in costs will tend to be passed on by the advertisers to their customers. As such, harm to advertisers will typically also generate harm to end-consumers in those other markets.

market may countervail or exacerbate effects there. Nevertheless, the OFT considers it appropriate in this case to consider any additional effects on readers, particularly given the parties publish both free and paid-for newspapers.

51. KML submits that its principal overlaps with the Target are as follows:[32]

[32]Types include: Free (F), Paid-for (P) and Hybrid (H) papers. Hybrid charging is a mix of free and paid-for, with some copies of the title being distributed free to readers' homes and others, in different areas, being paid-for by readers.

Target titles	Type	KML titles	Type
Times Series		Kentish Gazette Group	
Canterbury Times	F	Kentish Gazette	P
Whitstable Time	F	Whitstable Gazette	P
Herne Bay Times	F	Herne Bay Gazette	P
Faversham Times	P	Faversham News	P
		Canterbury Extra	F
Dover Express Series		East Kent Mercury	P
Dover Express	P	Dover Mercury	P
Deal & Sandwich Express	F		
News (Medway)	F	Medway Messenger (Monday)	P
		Medway Messenger (Friday)	P
		Medway Extra	F
Folkestone Herald Series		Folkestone Extra	F
Folkestone Herald	H	Ashford Extra	F
Romney Marsh Herald	H	Kentish Express[1]	
Hythe Herald	H	Folkestone	P
Ashford Herald	F	Romney Marsh & Hythe	P
		Ashford	P
		Tenterden	P
East Kent Gazette		Sheerness Times Guardian	P
Sittingbourne	H	Sittingbourne Extra	P
Sheppey	H	Kentish Gazette Group	
		Faversham News	P
		Sittingbourne Messenger	P
Thanet Times	F	Thanet Extra	
Isle of Thanet Gazette	P		

Market shares

52. On the basis of the narrow markets outlined above, local weekly newspapers (including free and paid-for titles) in the six local government areas of East Kent (Canterbury, Dover, Shepway, Ashford, Swale, and Thanet) and Medway in which the merging parties overlap, this merger would result in a monopoly.[33]

[33] As stated in the *Merger Assessment Guidelines*, 'the [UK competition] Authorities will not normally have regard to market shares and concentration thresholds calculated on anything other than the narrowest market that satisfies the hypothetical monopolist test'. See paragraph 5.2.3.

53. However, as noted above, in assessing whether a merger may give rise to an SLC, the OFT may take into account constraints outside the relevant candidate market. The OFT first considers local issues that are common to all the parties' titles and overlaps. The OFT then considers additional evidence available for each local title individually, including [ ] and the effect these may have on the loss of competition arising from the transaction. Lastly, the OFT considers regional issues.

Closeness of substitution between the parties

Competition to the parties

54. The parties submitted switching evidence, which shows specific advertisers that have been lost or won by KML to or from some competitors. Much of this is at a general level (that is, not relating to any specific title or local area) and includes numerous instances of advertisers switching advertising spending to both print and non-print media, the latter including radio and online competitors.

55. In addition, KML's internal business documents[34] demonstrate monitoring of other publications and further details of switching at a general level: business won from and lost to competitors over the last two years without referring to the specific titles such switching relates to. In particular, the documents make a significant number of references to [ ] and point to switching that has occurred between KML and [ ].

56. Other publications and media are also subject to occasional monitoring by the parties in these internal documents, including the magazines [ ] and magazines more generally; the classified directory [ ]; the [ ]; specialist websites and the development of their own websites by advertising customers; as well as more general switching to online media. [ ] [35] [ ].

57. However, the evidence available to the OFT suggests that the extent of the constraint exerted by these publications and other media – both those listed above and submitted for specific areas (as discussed below) – on the parties is uncertain for a number of reasons.

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[34] Principally the minutes of Commercial Meetings and Monthly Commercial Updates.
[35] [ ].

58. First, the OFT's market investigation indicated that third parties generally consider titles or publications with similar characteristics to be closer substitutes. The most likely substitute for an advertiser in a given local weekly newspaper title was generally considered to be another local weekly newspaper title. The competitive constraint from publications that differ materially from this, for example, on the basis of frequency of publication (monthly rather than weekly), type of publication (magazines or websites rather than newspapers), content of publication (advertising only or local government publication rather than newspapers) – were considered by respondents to represent more distant substitutes.

59. In this regard, in almost all instances the publications highlighted by the parties were not considered close substitutes by the advertisers that spoke to the OFT.

60. This view was also supported by several publishers producing advertising-only and local government publications, and magazines with similar geographic footprints to one or more of the parties' titles. In their view, the constraint they impose on the parties' titles is, at most, very limited. For example, one noted that local government publications do not attempt to attract advertisers or the advertising they did have was very limited. Other publishers stressed the different frequencies, much smaller circulation or distribution, much less extensive pagination, or far different content (for example, not focused on local news). There was one exception: [ ], a monthly magazine with a distribution of [ ] copies across [ ].

61. Second, there is very little evidence in the internal documents of actual switching taking place between KML and these publications (with the exception of [ ]). This is detailed in the assessment of specific local areas below.

62. Third, on several occasions, the parties' internal documents dismiss some of these suppliers as ineffective competitors, [ ]. KML responded that these statements reflected a static assessment of a competitor at any point in time (for example, that particular monthly commercial meeting), rather than a general dismissal of the competitor. However, the extent to which such dismissal of competitors is transitory is unclear to the OFT and has not be substantiated by the parties with supporting evidence.

63. Fourth, the monitoring of [ ] [36] [ ]. As a result, any competitive constraint that they now represent upon the parties' [ ] is unclear from this evidence. Despite this, KML submitted that [ ] will continue constraining KML's local weekly newspapers post merger and provided examples of local advertisers taking space in [ ]. However these titles rarely feature in the responses from advertisers to the OFT.

64. Fifth, KML's submissions insist that Archant promotes all its Kent publications for local advertisers and list some common advertisers that overlap with KML. These include (i) its county-wide KoS, with two local editions; and, (ii) local online newspapers. KML also points to Archant's aggressive pricing policy, suggesting that it would not be expensive to switch to Archant's county-wide newspapers. However, the OFT did not receive sufficient evidence to allow it to compare KoS and KML prices (see further paragraph 70) and the responses from some advertisers suggested that using a county-wide paper instead of local titles would result in substantial wastage and would therefore be an inefficient way to spend their budget.

65. Finally, while the OFT recognises that there are instances of switching to and from other publications, particularly [ ], print and online, radio, and of monitoring of alternatives, it was difficult to attach significant weight to this evidence: there was no specified time period over which the switching took place; there was limited information on the amount of revenue involved; some of the examples related to new or lost customers, not specifically to switching; and it was not possible for the OFT to determine from many of the examples which of the specific KML titles affected by the merger these other publications competed with. A number related to customers with a clear national or regional focus. In particular, the majority of the examples relating to [ ] were not specific to any local area or were explicitly customers seeking an audience wider than a single local area.

66. A number of the examples given also relate to switching to the [ ]. Examples moving from or to some of the other printed or online titles are notably more limited.

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[36] [ ].

Third Party Views

67. Beyond the third party comments detail above, a significant number of advertising customers – and the majority of third party submissions – stated that the parties were either the only two alternative suppliers they could use or were close competitors. For each overlap, the majority of respondents indicated that the loss of competition resulting from the merger would likely lead to increases in advertising prices and raised competition concerns.

68. Even many of those advertisers who currently use alternative media to promote their products (such as lifestyle magazines, Archant's KoS, radio, internet, billboards) or who had recently switched a significant proportion of their expenditure to such alternative media, stressed the importance of targeting local customers via local newspapers.

69. These respondents cover a range of different advertising categories. For example, some estate agents stated that whilst it is possible to use new marketing channels to promote their products/services, including specialist websites (and most of them do), they also require local advertising to maintain their local presence. These estate agents were concerned that the merger would lead to increases in the cost of advertising in local newspapers as two essential titles would come under the control of a single owner and no alternatives would remain.

70. The competition concerns raised by advertising customers related principally to the likelihood of price increases arising from the merger. A number of third parties pointed to the [ ] relative to the Target. They considered that for those advertisers spending more in a Target title, prices would rise to match those currently charged by [ ]. One customer stated that these higher prices would be imposed on them with no opportunity to negotiate. KML indicated that it is difficult to compare accurately advertising charges since negotiations take place on a bilateral basis, although the OFT notes that [ ] which tended to confirm, on the evidence available, the basis for the concerns raised.

71. A significant proportion of customers that responded to the OFT raised concerns across all material overlaps between the parties. Customers highlighted the competitive constraint exerted by each of the titles to be acquired on specific titles of KML:

a) In some cases, the Target was considered to be a close competitor (and exert a significant competitive constraint) to more than one KML title (for example, *News (Medway)* on *Medway Extra*, as well as on *Medway Messenger*)

b) In other cases more than one of the Target's titles was considered to be a close competitor (exerting a significant competitive constraint) to a single KML title (for example, the *Thanet Times* and the Isle of *Thanet Gazette* on the *Thanet Extra*)

c) In other cases, more than one of the Target's titles was considered to be a close competitor (and exert a significant competitive constraint) to more than one KML title (for example, the *Times Series* on the *Kentish Gazette Group*, and the *Folkestone Herald Series* on various editions of the *Kentish Express*, as well as the *Folkestone* and *Ashford Extra)*.

72. The OFT considers that where either or both of the parties have a number of titles, all of which are relatively close competitors to each other, unilateral effects may be more likely to arise post-merger as the cumulative competitive constraint from each publisher on the other, rather than just from each title on another title, is a more accurate reflection of the competition that will be lost as a result of the merger. Similarly, even where titles are perhaps not each other's closest competitors but another of the parties' titles represents the next best alternative (and then possibly the next best alternative again and so on), unilateral effects concerns are likely to be exacerbated.[37]

73. A number of third party concerns were raised on specific editions of certain parent titles.[38] The OFT considers such concerns to be especially significant, as KML and the Target not only have a series of titles which materially overlap but have numerous localised editions that target the same audiences. The OFT considers the effect of such localised matching to likely heighten the closeness of competition between the parties with respect to these titles

[37]This is especially true in relation to a number of the parties' titles with some advertisers noting that, for example, in addition to the closeness of competition between the parties three Thanet-based titles, the next best alternative to some customers were the parties' Swale-based titles. Swale is adjacent to Thanet. This is discussed in the local areas assessment below.

[38]For example, the *Faversham News* (KML) was considered to be a close competitor to the *Faversham Times* (the Target). Similarly, the *Ashford Herald* (the Target) was considered to be a close competitor to the *Ashford Extra* (KML). KML parties point to an overlap in Swale between the *Times Series* and the *Kentish Gazette Group*, yet each of these titles has localised editions in: Canterbury, Whitstable, Herne Bay, and Faversham.

(and may even be caused by the two parties competing with each other for advertisers in these areas). These concerns are addressed in the 'Specific local areas' section below.

74. While the OFT's third party inquiries focused on advertisers a sizeable number of readers also raised significant concerns about the effects of the merger in relation to a number of the titles.

Conclusion on closeness of substitution

75. The OFT considers that the evidence points to the parties being especially close competitors and representing a strong competitive constraint to each other across all material overlaps highlighted by the parties. While there is some evidence of additional constraints on the parties, these appear to be far weaker than the constraint exerted by the parties on each other. The OFT does not believe that it has sufficient evidence to corroborate that KML will be sufficiently constrained by the alternative advertising suppliers presented above in the round across East Kent and Medway.

76. As a result, the OFT considers that there is sufficiently strong competition between the parties' titles that the merger is likely to give rise to unilateral effects. This closeness of substitution, on the evidence available, applies equally to readers and advertisers. This is confirmed by the OFT's market investigation in which advertisers raised concerns and pointed to the potential for price increases. The OFT has no reasons to believe that these advertisers, active across different local areas and advertising categories, do not give a representative view of competition between the parties and between them and other media.

[ ]

77. The OFT also notes KML's post-merger plans [ ]. In light of the competitive constraint between the parties the OFT believe that it may be the case that the [ ] titles could benefit from readers and advertisers of the [ ] titles pre-merger diverting to KML post-merger [ ]. As a result, it is not fanciful to consider that the KML's post-merger plans [ ] could be considered to represent an immediate unilateral effect— [ ] —arising from the merger.

78. In this regard, the OFT would generally be especially concerned when the likely effect of the merger is to [ ], rather than just remove the direct

competitive constraint it represents. If two competing titles were not combined, but simply [ ], competition concerns would relate to a price rise on one or both of the titles: marginal consumers that would have switched between the two pre-merger following a given price rise (say five per cent), and been lost, will be captured by the combined firm post-merger. However, [ ]. As a result, [ ] generally exacerbates the OFT's competition concerns.

79. KML has submitted a number of arguments as to why the [ ] will have no material impact on readers or advertisers in specific areas as defined by the parties. In particular, KML argues that there will still remain in all local areas the choice of a free and a paid-for newspaper. However, the OFT notes that while customer choice may remain, [ ]. Nevertheless, the OFT has carefully considered the arguments put forward by KML in relation to each of the relevant titles below.

Specific local areas

Thanet

80. In Thanet, third parties identified the Target's paid-for *Isle of Thanet Gazette* and *Thanet Times* and KML's *Thanet Extra* as close competitors, the latter two of which are both free with almost identical distributions of around 41,000. [ ].

81. KML pointed to six competing local print publications in this area: the weekly KoS (East edition); the monthly advertising-only magazines *Margate Handbook* and *Ad-Venture*; the free annual advertising-only publication *Community Ad*; *Rag News*, a student magazine; the quarterly free local leisure magazine *Isle Magazine*; and *Your Thanet*, a weekly free online-only local newspaper, published by Archant.

82. However, KML was unable to provide any examples of the competitive constraint exerted on its merging titles from these publications, either through switching to or from these publications or through monitoring of them in internal documents, with the exception of [ ], for which [ ] switching examples were given.[39] Further, all of the titles, with the exception of [ ] represent materially different offers to that of the parties, with a frequency ranging from monthly to annual and providing very little, if any, property,

[39] To set this in context, KML identified [ ] examples of switching in this area: [ ] to [ ] and [ ] to [ ], [ ] and the [ ].

motors, and jobs advertising.

83. Consistent with this, [ ].

84. In addition, KML also put weight on the recent launch of a new title: *Your Local (Thanet),* a 16-page quarterly advertising-only magazine which includes some advertisers formerly using KML.[40] In particular, of *Your Local (Thanet)*'s 117 advertisers, KML identified [ ] current KML customers who were trialing *Your Local (Thanet)* and [ ] former KML customers.

85. KML told the OFT that between the 2009/10 and 2010/11 financial years, it had lost [ ] advertising customers in Thanet; [ ] per quarter. Treating all [ ] of these current and former KML customers as switchers, implies [ ] per cent of the [ ] customers apparently lost by KML in the quarter before *Your Local (Thanet)*'s launch diverted to it. This suggests that it may represent some constraint. However, it has not been possible on the evidence before the OFT to determine the level of constraint that it represents in financial terms, nor whether this constraint will persist beyond the first few editions of the magazine given that advertisers told the OFT that they apply a sophisticated approach to testing the effectiveness of new publications.[41]

86. Advertisers from the Thanet area were concerned that the removal of competition between the merging parties would lead to price rises. Readers of Thanet titles contacted the OFT raising their concerns about the loss of choice if the merger went ahead.

87. In addition, as noted above (see paragraph 46) the situation may be exacerbated as some advertisers also identified the merging parties' titles in adjacent Swale (the Target's *Times Series*; KML's *Kentish Gazette Group* and *Canterbury Extra*) as the next best alternatives to the parties' titles in Thanet.[42]

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[40] This launch is addressed in the Barriers to entry and expansion section below. See paragraphs 128 and *ff.*

[41] Many advertisers indicated they often trial other publications and monitor the effectiveness of the advertising, with some indicating they are able to monitor and evaluate the effect of the advert on number of sales, profits and margins.

[42] Although the OFT note it is unclear if such substitution would apply only to a limited number of advertisers based around on the borders of the two local government areas or more generally.

88. The OFT, on the basis of this evidence, considers there to be a realistic prospect of a substantial lessening of competition in this area.

Canterbury

89. The Target's *Times Series* and KML's *Kentish Gazette Group* and *Canterbury Extra* compete in this area. The titles in KML's *Kentish Gazette Group* have local editions that match up like for like with the *Times Series*, albeit with limited editorial and advertising changes. The OFT believes based on the information gathered from advertisers that the two are close competitors across these editions. Similarly, the *Canterbury Extra* is a comparable free title with similar distribution to the *Times Series* (both just under 50,000) and third parties considered these titles as close competitors.

90. KML pointed to 10 competing local print publications in Canterbury, which it submits represent competitive constraints to the parties' titles: the *Daily Doings*, a weekly magazine distributing 12,000 copies; *District Life*, a biannual council magazine which is distributed door-to-door; *Barham & Wymynsham*, a monthly parish magazine; *Ad-venture* and *The Imp*, both free monthly magazines; *Whitstable Residents Guide* (bi-annual) and *Canterbury Residents Guide* (annual)*,* both residents' magazines; and the annual door-to-door magazine, *Community Ad* (all of which are free). In addition, Archant publishes *Your Canterbury*, the weekly free online-only local newspaper.

91. KML did not provide any examples of the competitive constraint exerted on it by these publications, either through switching to or from them or through monitoring of them in internal documents, with the exception of [ ], for which [ ] switching examples were given. Further, all of the titles with the exception of [ ] represent materially different offers to that of the parties, with a frequency ranging from monthly to annual and providing very little, if any property, motors, and jobs advertising.

92. However, switching data submitted by KML makes [ ] reference to each of the *Yellow Pages*, *Autotrader*, *Wealden Times*, *Friday Ad* and *Inside Kent*.[43]

93. KML also put weight on the recent launch of a new 68-page monthly glossy magazine *Canterbury Index,* whose 83 customers in the September 2011 issue include [ ] formerly using KML and [ ] current KML customers who are

[43] There are also [ ] examples of switching to [ ] and [ ] to [ ].

trialing the product, according to KML.[44] The OFT notes that [ ] of the [ ] former KML customers were not recent —having last been KML customers in 2002, 2004 and 2009—and cannot reasonably be regarded as probative of a competitive constraint. KML told the OFT that between the 2009/10 and 2010/11 financial years, it had lost [ ] advertising customers in Canterbury and Faversham; [ ] per month. While this may suggest some competitive constraint, albeit limited, it was not possible for the OFT to determine—on the basis of the evidence before it—the extent of this constraint financially, not whether it would persist beyond the first few editions of the magazine given advertisers may merely be testing its effectiveness.[45]

94. Further, the OFT notes that a substantial proportion of the display advertisements – there are no motors, property or recruitment advertisements – in the two issues supplied to the OFT of *Canterbury Index* relate to businesses located across the county.

95. In support of its arguments, KML pointed to [ ].

96. The OFT was unsure what weight to attach to this example, however, for two reasons:

- the attempted [ ][46] and
- the OFT was not provided with evidence of what happened to yields as a result of the [ ] in adjacent areas such as [ ] that KML used as comparators.

97. KML's post-merger plans [ ].

98. For readers and advertisers these [ ]. This strategy, [ ]. In addition some advertisers specifically rejected the view that [ ] is a substitute to the parties' titles in Canterbury.

99. The OFT does not consider, based on the evidence currently available to it, that the entry of the *Canterbury Index* or any of the other constraints highlighted by KML, is sufficient to curtail the realistic prospect of a substantial lessening of competition in this area.

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[44] This launch is addressed in the Barriers to entry and expansion section below. See paragraphs 128 and *ff.*
[45] See footnote 41 above.
[46] [ ].

Medway

100. The Target's *News (Medway)* competes with KML's *Medway Messenger* (Monday and Friday editions) and *Medway Extra* in the Medway local government area. [ ].

101. KML pointed to over 10 competing local print publications in Medway, which it submits represent some competitive constraints to the merging parties' titles. These competing titles include magazines such as *The Net*, *Peninsula Times*, *WOW*, *Coupon Directory*, *Health Matters*, *Gravesham & Medway Life* and *Verve*; local government publications such as *Medway Matters*; and a news-sheet publication, *Rochester Chronicle*. In addition, Archant publishes its county-wide KoS (Mid and North Kent edition) and its free online weekly *Your….* titles.

102. Switching data submitted by KML shows [ ] switches to [ ], [ ] to [ ], [ ], [ ] each to [ ], [ ], a monthly magazine with a circulation of [ ] and [ ], representing only a small proportion of total advertisers. [ ] also appears in KML's internal documents. In light of the evidence discussed above on publications with very different offerings being poorer substitutes to local newspapers, this evidence suggests that this merger leads to the creation of a monopoly in the supply of advertising space in local weekly newspapers in Medway.

103. In relation to KML's post-merger plans, the Target submitted that its [ ] office is [ ] (together with [ ]). This may raise questions about its viability. However, the Target stated that before reaching a decision on this point, it would consider the [ ] (the Target explained that given the extent to which advertising is [ ]). It would also assess the impact on shared costs which such closure could have. In addition, the OFT has noted that the Target's [ ] which could, [ ], lead to a positive contribution.

104. The OFT, based on the evidence available to it, cannot conclude that the constraint from other publications and media on the merging parties' titles post-merger will be sufficient to curtail the risk of a substantial lessening of competition in this area.

Swale

105. In Swale, the Target's *East Kent Gazette* (with two local editions, Sittingbourne and Sheppey) competes with KML's *Sheerness Times Guardian* and *Sittingbourne Extra*. A Sittingbourne edition of *Kent Messenger* and a local edition of the *Kentish Gazette*, *Faversham News* are also circulated in the area. KML intends [ ].

106. KML submitted that readers will still [ ] copy of any of the [ ] currently available. Those readers of the free *Sheppey Gazette* will still be able to obtain a copy of [ ] this title. Readers of the [ ]. Further, advertisers will retain the choice of advertising in a paid-for title, free title or both and will be able to tailor this approach according to the areas they wish to target. It submits [ ].

107. In support KML pointed to eight competing local print publications in this area. These include *The Net* and *Verve,* two glossy magazines which also appears in other local areas, *Visit Sheppey*, *Inside Swale*, *News Shopper* and *Faversham RG*. In addition, Archant's publishes its county-wide KoS and its free online weekly *Your*.... titles.

108. Switching data submitted by KML shows [ ] cited the highest number of times ([ ] examples) with [ ] the second largest number of switches (with [ ] examples), both of which represent a very small proportion of total advertisers. There are also references to other publications such as [ ]. However, the general comments made on publications other than local newspapers (see paragraph 34 and *ff* above) also apply here. This leads the OFT to take a cautious approach in the absence of compelling evidence which would have shown that these publications have constrained the merging parties and would continue to do so post-merger.

Dover, Ashford and Shepway

109. KML submitted that the majority of advertising in their Dover, Ashford and Shepway titles [ ]. Thus, this assessment considers these areas together under this heading.

110. In Dover, the Target's *Dover Express Series* (including *Dover Express* and *Deal and Sandwich Express*) competes with KML's *East Kent Mercury* and *Dover Mercury*. In Ashford, KML's *Ashford Herald* and the Ashford edition of

its *Kentish Express* series compete with matching editions of the Target's *Folkestone Herald* series which includes the *Ashford Herald*. Other titles with which the parties compete in Shepway are the Target's *Folkestone Herald* series with editions also in Folkestone, Romney Marsh and Hythe and KML's *Folkestone Extra* and the *Kentish Express* series with editions also for Folkestone, Romney Marsh & Hythe, and Tenterden.

111. In these areas, KML pointed to over 10 competing local print publications. These include a local fortnightly newspaper for Romney Marsh, *The Looker*, magazines such as *Cinque Ports Life* (quarterly), *Deal Walmer Kingsdown Residents Guide* (bi-annual), S*andwich & Eastry Residents Guide* (bi-annual)*, Dover Life* (annual*), and Community Ad* (annual) which is an ad-only magazine distributed door-to-door. Other publications included *Wealden Ad*, *Wealden Times, Inside Kent and Friday Ad.* In addition, Archant publishes its county-wide KoS (East edition) and its free online weekly *Your....* titles (*Your Dover*, *Your Deal* and *Your Sandwich*).

112. Switching data submitted by KML showed [ ] times, [ ] times, [ ] times and [ ], [ ], [ ], [ ], and websites between [ ] and [ ] times each, each example representing a small proportion of total advertisers.

113. KML submitted that customers (advertisers and readers) will not be substantially worse off as a result of this merger. It argued that the Target's *Your Deal and Sandwich Express* and A*shford Herald* are relatively new publications[47] and have not established a position of relevance to the local community. It argued that they target primarily national advertisers and have not reached any significant scale resulting in very limited circulation and local content. [ ].

114. The responses from third parties in these specific areas were more mixed than in other areas but the OFT was unable to dismiss, on the evidence available, that the merger may give rise to a substantial lessening of competition also in these local areas. Customers' (advertisers) arguments against the transaction raised concerns about expected price increases. They noted that glossy magazines are not cost effective substitutes to local newspapers and that despite the availability of other means, local newspapers are important means of advertising for motor and property (due to its visual nature).

[47] According to KM, the A*shford Herald* started in 2009.

Conclusion on specific local issues

115. On the basis of the evidence before it, the OFT believes that the loss of rivalry between these two close competitors will remove a significant competitive constraint with a limited number of alternative choices, none of whom appear sufficiently close to constrain the parties post-merger in any of the local areas discussed above. The OFT therefore considers on a local basis that there is a realistic prospect of a substantial lessening of competition arising post-merger – across each of the affected areas – leading to increases in price or quality declines. In addition, the OFT also considers that KML's post-merger plans [ ]. Based on the evidence in front of it, the OFT believes that the merger [ ] might lead to a two-fold effect: an increase in price for those that now pay; and [ ]. For advertisers, [ ]. For those readers of [ ], this represents a cover price increase.

116. Advertisers across different categories (including motor, property and recruitment) were concerned of the creation of a 'virtual' or 'near' monopoly, as stated by some of those respondents which stressed the importance of using local newspapers for their campaigns even when they can complement their activity with other advertising channels.

117. Given the balance of evidence, the OFT is obliged to take a cautious approach and conclude that based on the evidence before it its competition concerns are not fanciful in each of the areas in which the parties' titles overlap.

Regional issues

118. The OFT considers that national or regional advertisers may seek to reach a target audience by purchasing space in a package of local titles across a regional area, such as Kent. In this context individual local newspaper titles could be either complements (packaged together as part of an offered bundle), substitutes (part of competing bundles of titles) or could be competitively unrelated (with advertisers enjoying 'one-stop shopping' economies of scale or scope in purchasing them together).

119. For those advertisers that require coverage across East Kent and Medway, on the basis of the conclusion on each local area in East Kent above, the parties are likely to be close competitors. The OFT's market investigation also pointed to concerns from customers that currently purchased across the

Target's and KML portfolios and are thus seeking coverage that is wider than local. Nevertheless, the OFT recognises the scope for alternatives is likely to be wider at a regional level. In particular, the regional, county-wide title KoS would likely become an increasingly attractive option as the 'wastage' from advertising in such a title diminishes the wider the advertiser's desired coverage. The parties have submitted several examples of advertisers that have switched to or from them to KoS that are not specific to any local area and some further which appear specifically to be regional or national advertisers.

120. The OFT considers the merger may likely change or create incentives for the parties at a regional level and for regional unilateral effects concerns to arise from the merger. However, the OFT is less concerned of the potential for unilateral effects concerns to arise at a regional level than it is at a local level. As a result, the OFT has not found it necessary to conclude on whether there is a realistic prospect of a substantial lessening of competition at a regional level.

Assessment of possible efficiencies resulting from the merger

121. The parties submitted that the merger is pro-competitive in that it would result in the long-term sustainability of the remaining titles, a hassle-free transfer of advertisers to those titles, a better platform for all advertisers and readers, and improved quality such as more editorial content.

122. Ofcom's LMA also notes the possibility for consumer benefits to arise, stating that the 'merger may provide a sounder commercial base from which to address long-term structural change.'[48]

123. As stated in the Merger Assessment Guidelines, '[e]fficiencies arising from the merger may enhance rivalry, with the result that the merger does not give rise to an SLC.'[49] The Act also enables efficiencies to be taken into account in the form of relevant customer benefits.[50]

124. To form a view that the claimed efficiencies will enhance rivalry so that the

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[48] *Ibid.* paragraph 1.11.

[49] *Ibid.* paragraph 5.7.2.See Section 5.7 on Efficiencies.

[50] These are addressed below. See paragraph 149. Also for a discussion on the relationship between efficiencies and relevant customer benefits, see the OFT's decision of 23 September 2010 on the *Anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited,* paragraphs 106 and *ff*.

merger does not result in an SLC, the OFT must be satisfied, on the basis of compelling evidence, that the following criteria will be met:

- the efficiencies must be timely, likely and sufficient to prevent an SLC from arising, and
- the efficiencies must be merger specific.

125. In addition, as previously stated by the OFT, '[i]n practice, efficiencies will almost never justify a merger to monopoly.'[51] Furthermore, the evidence presented by the parties on efficiencies must also be compelling. Whilst the market assessment has confirmed that other media impose some constraint on the merging parties' weekly titles, that constraint appears to be too limited leading some customers to describe the outcome of this merger as a 'virtual monopoly'.

126. Further, the OFT considers that the evidence presented to it is not sufficiently substantiated to corroborate that those benefits will arise and can only be achieved through the merger. The OFT also notes that the removal of KML's main competitor in some areas may soften the intensity with which KML would be willing to implement any possible efficiencies resulting from this merger.

127. In light of the above, the OFT does not have sufficiently compelling evidence to conclude, taking a cautious approach, that these aspects would prevent a substantial lessening of competition arising.

BARRIERS TO ENTRY AND EXPANSION

128. KML submits that the threat of new entry and expansion by both local newspapers and other media would act as a further competitive constraint on the parties' titles post-merger. In particular, the parties point to the example of Archant's KoS, which launched its Kent titles in 2002 and has since established itself as one of the leading publishers in Kent with a substantial audience of around 390,000. In addition, publishers have the ability to expand existing local publications into neighbouring areas, according to KML.

[51] See *Global Radio/GCap*, paragraph 151; and the OFT's decision of 15 February 2011 on the *Anticipated joint venture between Ordnance Survey and the Local Government Improvement and Development* (*Ordnance Survey/LGID JV*), paragraph 77.

129. 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. KML submitted (as did other publishers who replied to the OFT) that barriers to entry and expansion in local newspapers are low. It presented two recent examples of entry: *Your Local Thanet* magazine and *Canterbury Index* magazine.

130. While the OFT acknowledges the above examples of recent entry, it has not received any compelling evidence indicating that these (or any other new entrants) provide an effective competitive constraint on the parties. This proposition is supported by third party responses that do not identify any of these titles. Furthermore, the OFT has not been provided with any internal documentation showing the constraints or threats conferred by low barriers to entry. In addition, it is not clear to the OFT the extent to which entry would be likely in these local areas given the wider market conditions highlighted by the parties.

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

THIRD PARTY VIEWS

132. The OFT received comments from around 50 advertising customers, five publishers and over 50 readers who submitted responses unsolicited. Most of the advertisers and readers raised unilateral effects concerns (that advertising prices might rise) which have been discussed in detail above.

ASSESSMENT

133. Pre-merger the merging parties overlap in the supply of local weekly newspapers and advertising space in those newspapers in six local government areas of East Kent (Thanet, Swale, Canterbury, Dover, Shepway and Ashford) and Medway.

134. The parties submitted that the OFT should not take the pre-merger situation as being the correct counterfactual in this case. They argued that the pre-merger situation with respect to the overlapping titles is financially unsustainable and one or more of the titles would cease or would continue in a considerably less significant form. However, the OFT has not received

sufficiently compelling evidence to depart from its starting position that the appropriate counterfactual is the pre-merger conditions of competition.

135. KML argued strongly that post-merger it would face sufficient competitive constraints from a range of alternative media, not be limited to printed local weekly newspapers. In KML's view, the candidate market should be broadened to include many other advertising channels.

136. The OFT does not consider the evidence – in relation to the constraints from print and non-print media – sufficiently compelling to justify widening the candidate market beyond the supply of advertising space in local weekly (paid-for and free) newspapers. However, the OFT recognises that there will inevitably be some degree of competition across market boundaries and considers it appropriate to assess the direct competitive constraints on the parties' titles as part of the competitive assessment, including from different forms of media generically and from specifically identified alternatives.

137. The OFT assessed local issues in the seven local government areas of East Kent and Medway where the parties' titles overlap. It also assessed any possible competition issues at county-wide level.

138. The balance of evidence suggests that the parties have been close competitors in the affected areas of East Kent and Medway 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.

139. The merger leads to a monopoly in those seven local government areas. In addition, the OFT believes that the loss of rivalry between these two close competitors will remove the most significant competitive constraint to each other with a limited number of alternative choices, none of whom appear sufficiently close to impose any significant constraint on KML post-merger in any of the local areas discussed above, or in the aggregate. KML's post merger plans [ ].

140. The OFT considers the merger may likely change or create incentives for the parties at a regional level. However, the OFT is less concerned of the potential for unilateral effects concerns to arise at a regional level than it is at a local level. As a result, the OFT has not found it necessary to conclude on whether there is a realistic prospect of a substantial lessening of

competition at a regional level.

141. The potential for new entry to constrain KML post merger was not substantiated with any compelling evidence to suggest it would be either timely, likely, or sufficient.

142. Consequently, the OFT believes that it is or may be the case that the merger 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 local weekly newspapers in six areas of East Kent (Thanet, Canterbury, Swale, Dover, Ashford and Shepway) and Medway.

EXCEPTIONS TO THE DUTY TO REFER

143. The OFT's duty to refer under section 33(1) of the Act is subject to the application of certain discretionary exceptions, including the markets of insufficient importance, or de minimis exception, and relevant customer benefits.

DE MINIMIS EXCEPTION

144. The OFT may decide not to refer a merger to the CC if it believes that the market(s) to which the duty to refer applies is/are not of sufficient importance to justify a reference. The OFT considers that the market(s) concerned will generally be of sufficient importance to justify a reference where its/their annual value in the UK, in aggregate, is more than £10 million. However, in deciding whether or not to apply the 'de minimis' exception, the OFT will exercise its discretion, taking into account of the facts of each individual case. The OFT will also take account of the wider implications of its decisions in this area, and will be less likely to exercise its discretion where the merger is potentially replicable across a number of similar markets in a particular sector.[52]

145. KML has submitted that although the overall market size of the areas affected by the transaction exceed £10 million, the OFT should apply its de minimis discretion to this transaction because:

[52]See *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance*, December 2010 (OFT's *Exceptions Guidance*).

- the OFT may not find an SCL in some of the areas therefore reducing the total market size affected by the SLC

- the OFT may decide to apply the de minimis discretion to each local area individually without aggregating them

- the revenues of local newspapers are shrinking and therefore the OFT should take into account the forecast figure for 2012 rather than the expected 2011 revenues, and/or

- the OFT can apply its discretion even if the total market size is above £10 million as indicated in *Global Radio/GCap*.[53]

146. 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 local weekly newspapers and advertising space in local weekly newspapers in six areas of East Kent (Thanet, Canterbury, Swale, Dover, Ashford and Shepway) and Medway.

147. The OFT's consistent practice is to aggregate all individual markets, which satisfy the OFT's duty to refer.[54] In this case, KML has stated that the overall value of the concerned markets is just over £[ ] million. In addition, the OFT believes that this decision will have replicability implications beyond this case.

148. As a result, the OFT does not believe that it would be appropriate to apply its de minimis discretion.

RELEVANT CUSTOMER BENEFITS

149. As stated above, efficiencies arising from the merger can be taken into account in the form of relevant customer benefits as an exception to the OFT's duty to refer.[55] For the OFT to consider that relevant customer

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[53] OFT's decision of 8 August 2008 on the *Completed acquisition by Global Radio UK Limited of GCap Media plc*, paragraph 232.
[54] See OFT's *Exceptions Guidance*, paragraph 2.30, third bullet point.
[55] *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance*, OFT, December 2010, Chapter 4.

benefits will offset any SLC finding, the customer benefits must be timely, likely and sufficient, having regard to the effect specifically of the merger.[56]

150. In this case, KML submits that significant customer benefits will result from the transaction, including the long-term sustainability of the remaining titles, and improved quality. Ofcom's LMA also notes the possibility for consumer benefits to arise, stating that the 'merger may provide the opportunity to rationalise costs, maintain quality and investment, and provide a sounder commercial base from which to address long-term structural change.'[57]

151. For the OFT to consider exercising its discretion, the claimed relevant customer benefits must be clear, and the evidence in support of them must be compelling.[58] These evidentiary standards apply equally to efficiencies qualifying as relevant customer benefits.[59]

152. In its LMA, Ofcom considered whether potential customer benefits might arise from the proposed merger and whether any such benefits could be weighed against the potential customer harm arising from any identified realistic prospect of a substantial lessening of competition by the OFT.[60] For this case, Ofcom has used the framework developed by an economic consulting firm, DotEcon, for the assessment of potential benefits to local media consumers.[61] This includes the following elements: size of the paper, the frequency of delivery, the extent of distribution, the price of the title, the quality of the journalism, the extent of local presence, the variety of content and the number of online services.

153. Ofcom's LMA concludes that while it seems that post-merger, KML's greater customer insight and understanding of market dynamics in the affected geographic areas would be likely to extend to the titles to be acquired, it cannot reach a firm conclusion on the other factors, based on the information available to it. It is notable that Ofcom's LMA stresses the difficulties associated with measurement of qualitative consumer benefits and to determine whether any changes in quality are a direct result of the

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[56] Note the same criteria – timely, likely, sufficient, and merger specific – applies equally to an assessment of whether relevant customer benefits are able to mitigate the effect of an SLC.
[57] *Ibid.* paragraph 1.11.
[58] See OFT's *Exceptions Guidance*, paragraph 4.9 and *Ordnance Survey/LGID JV,* paragraph 95.
[59] See paragraphs 143 and *ff*.
[60] *Ibid*. paragraph 5.1. This is in accordance with Ofcom's *Local Media Assessment Guidelines*, 1 December 2010. Paragraph 36.
[61] The report is available at www.dotecon.com/publications/DotEcon_Ofcom_LMA_report.pdf

merger.[62] It notes that 'without assurance from KML that any potential benefits would be maintained in the future, there may be questions over whether consumers (as opposed to shareholders) would realise these benefits.'[63] Ofcom factors this possible consumer harm against the possibility that advertising revenues, circulation figures and profits continue to fall at their current rates which could challenge the future of these titles and their publishers.

154. As stated above, the OFT does not have sufficiently compelling evidence to assess this merger against a threshold other than the pre-merger situation and therefore to consider that all titles would continue being published, absent the merger. In addition, with regard to the specific relevant customer benefits assessed by Ofcom, as noted in the LMA, the OFT cannot conclude, taking its appropriate cautious approach that the evidence presented to it are sufficiently compelling to corroborate that those benefits will arise and can only be achieved through the merger. Therefore, the OFT does not consider that the criteria to use its discretion apply in this case.

DECISION

155. This merger will therefore be referred to the Competition Commission under section 33(1) of the Act.

[62] See LMA, paragraph 5.7.
[63] See LMA, paragraphs 5.46 and 5.47.