

# HACKED OFF

THE CAMPAIGN FOR A FREE + ACCOUNTABLE PRESS

## **Consultation on proposed amendments to the conditions attached to the 1981 News UK acquisition of The Times & Sunday Times newspapers: Hacked Off response**

### **Summary**

Hacked Off welcome the spirit of the newly proposed amendments to the undertakings and the companies' Articles of Association. Potentially, the amendments proposed would be beneficial to the editorial independence and integrity of The Times and The Sunday Times newspapers.

However, some of them risk introducing new threats to the independence of the newspapers, while others are vulnerable to being redrawn over time or ignored. Our submission recommends amendments which would address those threats and close any exposed loopholes.

Hacked Off also retains the view that, in the interests of resisting the threat of redundancies at the newspapers and reductions in quality<sup>1</sup>, the initially proposed variation to the conditions should be rejected.

### **Second series of proposed amendments to the 1981 conditions attached to News UK's acquisition of The Times and The Sunday Times**

#### **1. The definition of "Independent National Director"**

The proposed definition for an Independent National Director would provide welcome clarity. It should not, however, be set out in the Articles of Association of TNHL.

Future applications to vary the undertakings will require at least some form of consultation, as required in subparagraph 9(5), Schedule 7 of the Enterprise Act 2002. If the amended undertakings are agreed to, however, paragraph 3(b)(i) of the proposed new undertakings would make the new definition amendable by direct approval of the Secretary of State (without need for any consultative process).

This would allow substantial amendments to be made to the IND definition which bypass any requirement to consider representations on the matter, as required for the variation of undertakings under the 2002 Act.

The protections in place to protect editorial independence at the newspapers are reliant on the robustness of the INDs' independence. Any future Government would be able to effectively dissolve the protections offered by the system of Independent

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<sup>1</sup> As described in an anonymous response to the consultation on those proposed undertakings from a Times/Sunday Times employee: *"amalgamating the titles will result in significant employee redundancies at all levels of both organisations"*.

National Directors by directly amending the definition, without the need to go through any consultative process (by, for example, loosening the restrictions on appointments from the Murdoch family). History tells us that governments will always lean towards accommodating powerful media enterprises, unless robust independent mechanisms of scrutiny are built in.

**Recommendation:**

For the system of INDs to function securely in the long-term, the definition must be set out in full in the undertakings themselves; thereby requiring an element of scrutiny for any amendment sought in the future.

## **2. Compliance reporting**

Hacked Off welcome new paragraph 6 of the undertakings, which requires the Articles of Association of TNHL to provide for a process of monitoring compliance with the undertakings. As with the IND definition, however, the lack of clarity in the undertakings themselves exposes the new requirements to the risk that they will be watered-down in the future.

The undertaking would require reports to be shared with the Secretary of State and CMA but leaves the matters of the frequency and content of those reports to the TNHL Articles of Association. There is a risk that the requirements on frequency and content of the reports will be reduced over time, by amendment to the Articles of Association.

Although new paragraph 8 might be engaged in amendments sought for this effect, and would prevent TNHL from making amendments to their Articles of Association unilaterally, as with the proposed new definition above, a future Secretary of State could nevertheless sign off on reductions of regular compliance reports (or indeed their termination) without having to go through any consultative process.

Given that the amendment to the undertakings requires these reports to be produced anyway, it would be appropriate to set out in the same paragraph some detail of what they must cover and their frequency.

Given that new paragraph 6 already provides an exemption from disclosing privileged information (and rightly so), the undertakings should also require that, in the interests of transparency, these reports are made publicly available – not kept confidential as the TNHL Articles of Association currently states. Any commercially sensitive information may be redacted.

**Recommendation:**

New paragraph 6 should be amended to set out the content and frequency of compliance reports, and that these reports should be made publicly available with redactions for commercially sensitive information.

## **3. New paragraph 7**

New paragraph 7 appears to be wholly unnecessary, and risks paving the way for a future Secretary of State to bypass scrutiny in considering future applications to amend the undertakings.

A requirement for considering representations before agreeing to vary undertakings is set out in Schedule 7 of the Enterprise Act 2002, subparagraph 9(5).

Subparagraphs 9(2)b and 9(2)c of Schedule 7 of the 2002 Act provide means for the Secretary of State to vary or release these undertakings. It is unclear what new paragraph 7 of the undertakings adds, other than to dispense with subparagraph 9(5) which requires that the Secretary of State considers representations.

**Recommendation:**

New paragraph 7 should be removed.

**Proposed amendments to the Times Newspapers Holding Limited Articles of Association**

**4. New subparagraph 86(a)**

Hacked Off welcome the requirement to provide means for TNL employees to raise concerns about compliance with the undertakings, but there is a risk this will cause more harm than good.

There is a recent history of institutional cover-up at News UK over criminality, which is well-known, and which, at the time, implicated senior legal figures at the company. Indeed, part 2 of the Leveson Inquiry was designed partly to investigate corporate governance failures at the company and make recommendations for reform. As this was later cancelled, no reasonable person could have confidence that practices have improved at the company.

Any suspected failure to comply with the undertakings should be considered by the Secretary of State and their Department. News UK and its General Counsel can of course engage with that process as it progresses.

**Recommendation:**

Remove subparagraph 86(a) and replace it with a requirement to notify staff of means to raise concerns about owner-interference at the newspapers, or other breaches of the undertakings, to the Department for DCMS on an anonymous basis.

**5. New subparagraph 86(d)**

It would compromise the integrity of the compliance reports produced by the Independent National Directors for them to have to pass through the General Counsel of News UK.

New subparagraph 85(e) provides for the INDs to have access to independent legal advice. The INDs should rely on such advice to review the content of their reports.

**Recommendation:**

Replace the provision requiring General Counsel of News UK to review compliance reports with a provision which requires the INDs to seek independent legal advice on any privileged information in the reports.

## **6. New paragraph 86(e)**

As set out above, it is not appropriate to leave News UK in the position of investigating their own compliance with the undertakings. This is a matter for the Secretary of State and relevant regulatory body; the CMA.

### **Recommendation:**

New paragraph 86(e) should be replaced with a requirement for the INDs to immediately raise concerns about breaches of the undertakings with the Department for DCMS, the Secretary of State, or their officials.

## **Initial application to vary the undertakings**

7. Hacked Off note that the Secretary of State's announcement that he was minded to accept News UK's initial application to vary the 1981 undertakings was made in spite of objections from every one of those who responded to the relevant consultation. This included the largest body representing working journalists in the UK, and a Times/Sunday Times employee.
8. Hacked Off and other campaigners for a free and thriving news media industry raised three major concerns;
  - a. That the proposed variation would create new risks for declining quality at Times & Sunday Times titles
  - b. That there would be an increased risk of redundancies at the titles in future
  - c. That downgrading the 1981 "Conditions" to "Undertakings" reduced the enforceability of all the Conditions.
9. It remains our view that the Secretary of State should engage meaningfully with the responses of consultees and reverse his minded-to decision to accept that initial application.

## **Departmental engagement with News UK**

10. The proposals discussed above follow the Secretary of State's announcement on April 11<sup>th</sup> 2019 that he would request his Department to engage with News UK over further possible amendments to the 1981 Conditions.
11. The details of what further amendments to the conditions were sought by the Department have not been published, however. Nor have the details of any rejected proposals for amendments made by News UK.
12. To ensure the process of considering further amendments to the conditions/undertakings is subject to the appropriate scrutiny, the Government should publish the details of what discussions his Department has had with News UK representatives concerning reforms to the conditions/undertakings.