

News Corp UK and Ireland Limited - Invitation to comment on a request to accept undertakings in place of conditions relating to its acquisition of The Times and The Sunday Times newspapers in 1981

1. The Secretary of State for Digital, Culture, Media and Sport (“Secretary of State”) invites comments and the submission of relevant evidence on the attached application received from News Corp UK and Ireland Limited (“News UK”).

2. In the application, News UK requests that the Secretary of State accept proposed undertakings in place of conditions agreed in 1981 by the then Secretary of State for Trade relating to his consent to the transfer of The Times and The Sunday Times to News UK¹. The new proposed undertakings submitted by News UK seek to vary the sections of the 1981 conditions which require that ultimate control over the resources, including journalists, available to each newspaper is kept separate.

3. In particular, the Secretary of State is seeking views on whether the proposed changes are warranted given the changes in the newspaper market since 1981. The Secretary of State will consider the case in a quasi-judicial capacity and if he intends to accept the proposed undertakings, he will also conduct a further consultation on the specific terms of the proposal.

Background

4. In January 1981, News International Limited (now News UK) acquired The Times and The Sunday Times titles from the Thomson Organisation Limited. Under the applicable regime for newspaper mergers at the time, and specifically sections 57-62 of the Fair Trading Act 1973 (the “FTA 1973”), this acquisition required prior approval of the Secretary of State. The FTA regime - as it applied to newspaper merger cases - was aimed at protecting the particular public interests related to newspapers (accurate presentation of news, free expression of opinion and media plurality).²

5. The then Secretary of State for Trade gave his consent to the transfer under section 58 of the FTA 1973 without requiring a report from the Monopolies and Mergers Commission (MMC) in view of financial concerns at the two newspapers.³ The consent, granted on 27 January 1981, was subject to certain conditions (the “1981 conditions”) aimed at protecting the relevant public interests arising from the acquisition.

6. The 1981 conditions related to the continued publication of the Times and The Sunday Times as two separate newspaper titles under the direction of separate editors. To that end, the conditions also required that The Times Newspapers Holdings Ltd (“TNHL”) Articles of Association be amended to give six independent national directors (“INDs”) of TNHL certain roles with respect to safeguarding the editorial independence of The Times and The Sunday

¹ Then called News International Limited.

² These are the public interests that were generally considered in cases examined by the Monopolies and Merger Commission under the FTA newspaper merger regime and formed the basis of the public interest considerations now specified for newspapers in the Enterprise Act 2002 (section 58(2A) and (2B)).

³ Section 58(2) FTA 1973 required the Monopolies and Mergers Commission to report to the Secretary of State before consent to a newspaper transfer could be given. This was subject to an exception in section 58(3)(a) in cases where the newspaper was not economic as a going concern and as a separate newspaper, and where, if the newspaper was to continue as a separate newspaper, the case was one of urgency.

Times. This included a requirement that a majority of the INDs must approve the appointment or dismissal of the editors of both publications and for the INDs to determine any disputes between the proprietor and editors.

7. The 1981 conditions also required the Times Newspaper Limited (“TNL”) Articles of Association be altered to make clear that the editors of each paper had control over political comment and opinion, were each responsible for giving instructions to journalists as well as the appointment, deployment and dismissal of journalists. The conditions have not been amended or varied since their approval in 1981.

8. The FTA 1973 newspaper merger regime was repealed in 2003 and brought within the provisions of the Enterprise Act 2002 (“2002 Act”), which allows the Secretary of State to intervene in certain media merger cases that raise public interest concerns.⁴ However, transitional arrangements provide for the continued effect of conditions attached to consents given under the FTA 1973 newspaper merger regime.⁵ The Secretary of State is also given discretion under those transitional arrangements to accept new undertakings in place of the previous conditions.⁶ The Secretary of State is required to consult on any undertakings that he proposes to accept in place of previous conditions.⁷ Where such undertakings are accepted, they are treated as equivalent to undertakings given to the Secretary of State under the 2002 Act, and are then subject to the usual monitoring and enforcement provisions of that Act.⁸

News UK’s request to vary conditions relating to the sharing of services and resources, including journalists

9. On 25 October 2018, News UK sought advice from DCMS on the procedure to be followed should it wish to request a variation to the 1981 conditions. DCMS advised that any request would have to proceed by way of a request to accept proposed new undertakings in place of the 1981 conditions⁹, and as far as possible in line with Competition and Markets Authority (CMA) guidance for considering the variation of competition undertakings (“CMA Guidance”), which requires a consideration of whether there is a change in circumstance warranting the variation.¹⁰ DCMS also advised that the Secretary of State would also expect to see the views of the INDs should a request be made, given the oversight role they play in respect of the two papers.

⁴ Sections 57-62 of the FTA 1973 were repealed by section 373 of the Communications Act 2003 (“2003 Act”), and section 375 of that Act inserted specific newspaper public interest considerations in section 58(2A) and (2B) of the 2002 Act.

⁵ The transitional arrangements that apply to newspaper mergers that took place under the FTA regime are set out in paragraphs 59-62 of Schedule 18 to the 2003 Act. Under those transitional arrangements, consents given to newspaper mergers, and any conditions attached thereto, made prior to the repeal of the newspaper merger provisions of FTA 1973 (i.e. before 29 December 2003) continue to have effect (paragraph 59).

⁶ Under paragraph 62 of Schedule 18 to the 2003 Act.

⁷ In accordance with Schedule 10 of the 2002 Act, as applied by paragraph 62(7) of Schedule 18 to the 2003 Act.

⁸ See paragraph 62(7) of Schedule 18 to the 2003 Act.

⁹ Under paragraph 62 of Schedule 18 to the 2003 Act.

¹⁰ See Competition and Market Authority, CMA 11: Remedies: Guidance on the CMA’s approach to the variation and termination of merger monopoly and market undertakings and orders, January 2014 (revised August 2015).

Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/453150/CMA11_Remedies_Guidance_revised_August_2015.pdf

10. Following a preliminary discussion on process issues with DCMS Media Team officials in December 2018, News UK submitted a formal application on 10 January 2019 requesting that the Secretary of State accept proposed undertakings in place of the 1981 conditions.

11. The proposed undertakings seek to vary the sections of the 1981 conditions which require that ultimate control over the resources, including journalists, available to each newspaper is kept separately with the editor of each newspaper. The main variation proposed by News UK, set out explicitly in paragraph 5 of the proposed undertakings, is that:

“The Newspapers may share services and resources, including journalists, to such extent as the Editors agree.”

12. News UK have submitted that the changes would permit a greater sharing of resources and services, including journalists, between The Times and The Sunday Times.

13. News UK has also taken the opportunity to make non-substantive changes updating the text. News UK are also requesting permission for corresponding changes to be made to TNL Articles of Association accordingly.¹¹

14. News UK’s application is published with this this Invitation to Comment. **Annex 1** of their application includes the proposed undertakings, shown as a mark-up to the text of the 1981 Conditions to illustrate the variation being requested. **Annex 2** sets out the 1981 conditions in full. The views of the Independent National Directors of TNHL are set out separately in a letter to the Secretary of State. This letter has also been published with this Invitation to Comment.

Substance of News UK’s request

15. News UK’s application¹² includes an assessment by News UK of the change that has occurred in the newspaper industry since the 1981 conditions were entered into, and the challenges they face as a result of the decline in circulation and readership of print newspapers as a result of the move to online.

16. News UK say the obvious way to achieve further costs savings in response to these market changes (and in addition to other measures they have already taken) without affecting the quality of journalism is to remove unnecessary duplication in costs in running entirely separate Monday to Saturday and Sunday newspapers, in particular, by sharing journalists between the two papers. They say most other UK national groups have substantially integrated their Monday to Saturday and Sunday publications and that separate publication is virtually obsolete. While they reserve their position on the correct interpretation of the 1981 conditions, News UK say that taking such steps puts them at risk of contravening the 1981 conditions that require each title’s editor control the appointment, disposition and dismissal of journalists on his or her newspaper. As such, News UK submits that the 1981 conditions constrain their ability to respond effectively to the changes in the UK newspaper market.

¹¹ Paragraph 9 of the 1981 Conditions requires the written consent of the Secretary of State before alterations can be made to the Articles of Association of THNL and TNL which affect the operation of the requirements set out in the conditions.

¹² See paragraph 1.4 and section 5.

17. News UK has stated in its submission to the Secretary of State that it is not seeking the variation or release of any other conditions approved in 1981; this includes any variation to the provisions which are intended to ensure that both titles are operated as separate newspapers, any relaxation of the elements of the 1981 conditions designed to safeguard the editorial independence of the titles from their proprietor, or to the role of the INDs in protecting this.

18. In terms of the public interest consideration applying to newspapers¹³, News UK submit they have continued commercial incentives to maintain the very high standards of accuracy at the two papers, and indeed rather than having an adverse effect on the accurate presentation of news, they argue that the savings to be brought about by the proposed undertakings would enable them to sustain accurate coverage of the widest array of topics. In terms of free expression of opinion, News UK submit that the proposed undertakings would not have any effect on the editors' freedom to operate without interference from the proprietor, given in particular the fact that role of the INDs in this regard will continue to apply. Finally, News UK submits that the proposed undertakings could have no adverse impact on media plurality, and that the changes to be brought about would help secure the future of the two newspapers, thereby maintaining rather than reducing media plurality.

19. News UK has also stated that it has consulted with the INDs in developing the proposals set out in the application to vary the 1981 conditions. The INDs have indicated - in writing to the Secretary of State - that they are supportive of the proposals made by News UK, noting that decisions affecting journalistic cost and quality will be left in the hand of the editors and that the changes are therefore consistent with the philosophy of the original undertakings. A copy of their letter is attached with News UK's application.

The Secretary of State's approach to the consideration of News UK's application

20. Although the Secretary of State has discretion as to whether or not to accept the proposed undertakings in place of the 1981 conditions, the legislation does not specify the matters he must take into account in reaching such a view. In determining how to assess the request, the Secretary of State has taken account of the approach taken in relation to competition variations as set out in the CMA Guidance.¹⁴ The Secretary of State notes that the general approach taken by the CMA in dealing with applications to vary undertakings is to assess the question of whether there has been a change in circumstance, and to then consider, if so, what, if any changes to undertakings may be justified.¹⁵ The CMA Guidance notes that a change in market conditions have led to variations of undertakings in the past. It is also general practice for the CMA to invite public comment on any request for variation it receives.¹⁶

21. In relation to News UK's request, the Secretary of State notes that the 1981 conditions have not been reviewed since they were accepted by the then Secretary of State for Trade in January 1981. The Secretary of State also notes that there have been significant changes to

¹³ See paragraphs 1.6 and Section 8 of the application.

¹⁴ See paragraphs 2.4 to 2.7 and 3.31-3.32 of the CMA Guidance.

¹⁵ This is also consistent with the approach taken by the then Department for Business Innovation and Skills in relation to the release of FTA 1973 newspaper merger regime conditions, see for example the consultation on a request to release conditions imposed on Northcliffe, owner of the Nottingham Evening Post in August 2009 and the decision on that request in January 2010. Available at: <https://webarchive.nationalarchives.gov.uk/20100202151309/http://www.berr.gov.uk/whatwedo/businesslaw/competition/mergers/public-interest/newspaper/index.html>.

¹⁶ See paragraph 3.6 of the CMA guidance.

the media landscape since 1981 including the emergence of the internet and the migration of news and revenues away from traditional print media distribution. Indeed, the impact of these trends on the long-term viability of national and local newspapers resulted in the Government asking Dame Frances Cairncross to carry out an independent review of press sustainability in March 2018 which is due to report shortly.

22. In view of that, in the present case, the central question the Secretary of State intends to consider is whether changes in circumstances in the UK newspaper market since the 1981 conditions were entered into are such that the changes to be brought about by the proposed undertakings from News UK are warranted. In doing so, the Secretary of State will take account of the relevant public interest considerations applying to newspapers (accurate presentation of news, free expression of opinion and media plurality) as set out in the 2002 Act¹⁷ and the current guidance on public interest intervention in media mergers¹⁸.

Questions for interested parties

23. The Secretary of State would welcome comments and the submission of relevant evidence on the overall question of whether changes in circumstances in the UK newspaper market since the 1981 conditions were entered into are such that the changes to be brought about by the proposed undertakings are warranted, taking account of relevant public interest considerations applying to newspapers (accurate presentation of news, free expression of opinion and media plurality).

24. In providing views on this question, respondents may want to consider commenting and providing relevant evidence on the following points:

- (i) the extent and nature of the changes in circumstances in the UK newspaper market since the conditions were entered into in 1981, in the context of News UK's request;
- (ii) whether or not News UK is - as they suggest - either unable or constrained in its ability to respond to such market changes unless the 1981 conditions are amended as proposed by News UK; and
- (iii) whether or not the changes proposed by News UK will have an adverse effect on the relevant public interests: namely accurate presentation of news, free expression of opinion and media plurality.

25. Although at this stage the Secretary of State is consulting only on this question and these points, respondents are also welcome to provide initial comments on the precise terms of News UK's proposed undertaking. It should be noted however that the Secretary of State will,

¹⁷ As set out in footnote 1, these are the public interests that were generally considered in cases examined by the Monopolies and Merger Commission under the FTA newspaper merger regime and formed the basis of the public interest considerations now specified for newspapers in the Enterprise Act 2002 (section 58(2A) and (2B)).

¹⁸ Department for Trade and Industry, Enterprise Act 2002: Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004. Available at: <http://webarchive.nationalarchives.gov.uk/20100512144753/http://www.bis.gov.uk/files/file14331.pdf>

as required by legislation¹⁹, need to consult for a minimum of 15 days on the precise terms of the undertakings should he propose to accept them after having considered the responses to this Invitation to Comment.

26. Before coming to any view on whether or not he intends to accept the proposed undertakings, the Secretary of State is inviting comments and the submission of relevant evidence on the proposed undertakings proposed by News UK and will consider relevant representations made to him in response to this Invitation to Comment.

27. Respondents are asked to note that in considering the application from News UK, the Secretary of State is only able to take into account information relevant to the specific newspaper public interest considerations in coming to his quasi-judicial decision on whether to accept the proposed undertakings in place of the 1981 conditions.

Consultation responses

28. Views are sought by 5pm on **Monday 11 February 2019**. Responses should be sent to media-mergers@culture.gov.uk

Disclosure, Confidentiality and Data Protection

29. We propose to publish non-confidential versions of the responses received on the DCMS website and may also refer to them in any response to the Invitation to Comment, or in further publications related to the Secretary of State's decision. We would be grateful if you would indicate in your response whether you would be content for your response to be published and submit a non-confidential version for publication highlighting any redactions you wish to make. It would also be helpful if you would indicate whether you are content for your name and/or the name of your organisation to be published either alongside your response, or if not, as having responded to the Invitation to Comment.

30. All responses and personal data will be processed in compliance with the Data Protection Act 2018 and the General Data Protection Regulation. More information on disclosure, confidentiality and data protection is set out in the Privacy Notice associated with this Invitation to Comment (this available via the following link) <https://www.gov.uk/government/consultations/news-corp-uk-and-ireland-limited-invitation-to-ccomment-on-a-request-to-accept-undertakings-in-place-of-conditions-relating-to-its-acquisition-of-th>

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¹⁹ In accordance with paragraph 62(7) of Schedule 18 to the Communications Act 2003, any undertakings the Secretary of State proposes to accept would be subject to the consultation requirements set out in Schedule 10 to the Enterprise Act 2002.