

News Corp UK and Ireland Limited - Invitation to comment on a request to release Undertakings accepted by the Secretary of State in July 2019, which replaced and varied the Conditions relating to The Times and The Sunday Times approved by the then Secretary of State for Trade and Industry in January 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 release in full the Undertakings accepted by the then Secretary of State in July 2019 (‘the Undertakings’) which replaced and varied the Conditions approved 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 UK.
3. In particular, the Secretary of State is seeking views on whether there has been a material change of circumstances since the obligations in the Undertakings were imposed and, if so, whether the change means that the Undertakings are no longer appropriate or necessary for the purpose they were intended to achieve (and so should be released). The Secretary of State will consider the case in a quasi-judicial capacity and if he intends to release or vary the Undertakings, he will also conduct a further statutory consultation on the specifics 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 to 62 of the Fair Trading Act 1973 (“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 and free expression of opinion).
5. The then Secretary of State for Trade gave his consent to the transfer under section 58 of the Fair Trading Act 1973 without requiring a report from the Monopolies and Mergers Commission in view of financial concerns at the two newspapers. 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 Articles of Association be amended to give six independent national directors of TNHL certain roles with respect to safeguarding the editorial independence of The Times and The Sunday Times. This included a requirement that a majority of the independent national directors must approve the appointment or dismissal of the editors of both publications and for the

independent national directors 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, and were each responsible for giving instructions to journalists as well as the appointment, deployment and dismissal of journalists.
8. The Fair Trading Act 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. However, transitional arrangements provided for the continued effect of Conditions attached to consents given under the FTA 1973 newspaper merger regime. The Secretary of State was also given discretion under those transitional arrangements to accept new Undertakings in place of the previous Conditions, or to release previous Conditions.
9. On 10 January 2019, News UK submitted an application to the Secretary of State, asking that the Secretary of State accept proposed Undertakings in place of the 1981 Conditions. The substantive difference between the proposed Undertakings and the Conditions was that, under the Undertakings, the newspapers would be permitted to share resources, including journalists, between the two titles.
10. The Secretary of State consulted on the request, and the Undertakings were accepted on 23 July 2019. The Secretary of State concluded that there had been a material change of circumstances since 1981 and the change of circumstances justified the variation in the Conditions as the effect of the proposed changes would not materially impact on the public interest considerations. The Secretary of State also noted that the existing governance arrangements lacked clarity and certainty over roles and responsibilities and that these arrangements needed to be updated and adjusted to better reflect corporate best practice. The Undertakings accepted (at **Annex A**) allowed for the sharing of resources between the two titles and included strengthened arrangements relating to the independent national directors. The Secretary of State was satisfied that the Undertakings provide sufficient protections for the long-term future and editorial independence of The Times and The Sunday Times, and reflect current good governance practice.
11. Following preliminary discussions on process issues with officials in December 2020 and January 2021, on 1 February 2021, News UK submitted a formal request to the Secretary of State that the Undertakings be released in their entirety. A copy of the application appears at **Annex B**. News UK also provided comments from the editors of the two newspapers, and the independent national directors, confirming their support for the application. This correspondence is included at **Annex C**.

Substance of News UK’s request

12. News UK’s application includes an assessment by News UK of the changes that have occurred in the newspaper industry since the 1981 Conditions were entered into, and even since the acceptance of the 2019 Undertakings, noting the challenges it faces as a

result of the decline in circulation and readership of print newspapers as a result of the move to online. News UK has noted that, since the acceptance of the Undertakings, there has been significant consolidation in the newspaper industry, and that the COVID-19 pandemic has further exacerbated structural and financial challenges facing the industry.

13. News UK asserts that, in a challenging time for the entire newspaper industry, The Times and Sunday Times newspapers find themselves subject to Conditions which do not apply to any of their competitors. They argue that the costs of adhering to these Conditions places the newspapers at a competitive disadvantage. They also argue that the notion of “separation of titles” is outdated given that, notwithstanding their continued commitment to the print newspaper, both titles produce content across the landscape of digital media, including digital editions, social media engagement and podcasts.
14. In terms of the public interest considerations applying to newspapers, 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 release of the Undertakings would enable them to sustain accurate coverage of the widest array of topics. In terms of free expression of opinion, News UK also submits that there is a strong commercial incentive to maintain the editors’ freedom to operate without interference from the proprietor, as the economic success of the titles is linked to their reputation for independent journalism. Nonetheless, News UK proposes that, if the Undertakings are released, the employment contracts of the two editors will be amended to include provisions similar to those in the Undertakings. The editors have written to DCMS expressing support for the application, and submitting that they have no concerns that the release of the Undertakings will have an adverse impact on the free expression of editorial opinion. These letters are attached to this document. Finally, News UK suggests that the release of the Undertakings should have no adverse impact on media plurality, and that their release would help secure the future of the two newspapers, thereby maintaining rather than reducing media plurality.
15. News UK has also stated that it has consulted with the independent national directors in making the application. The independent national directors have indicated - in writing to DCMS - that they are of the view that the Undertakings are no longer relevant. A copy of their correspondence is attached to this document.

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

16. Although the Secretary of State has discretion as to whether or not to release the Undertakings, 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.¹ The Secretary of State notes that the general approach taken by the CMA in dealing with applications to vary or release Undertakings is to assess the question of whether there has been a change in circumstance, and to then consider, if

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so, whether the changes are such that the Undertakings are no longer justified. The CMA Guidance notes that a change in market Conditions has 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.

17. In view of that, in the present case, the questions the Secretary of State intends to consider are:
 - whether there has been a material change of circumstances; and, if so
 - whether the change means that the Undertakings are no longer appropriate or necessary for the purpose they were intended to achieve (and so should be released).
18. In considering the first question, the Secretary of State will consider whether there has been a material change of circumstances since the Undertakings were made in July 2019 and, to the extent it is relevant to an obligation imposed under the 1981 Conditions (and accepted as an undertaking in 2019), whether there has been a material change of circumstances since the Conditions were approved in 1981.
19. The Secretary of State accepted the Undertakings in July 2019. The Secretary of State accepted that it was appropriate to accept the offer of new Undertakings instead of the 1981 Conditions and that the change of circumstances since 1981 justified the variations to the Conditions.
20. The Secretary of State notes that the consideration given in 2019 was focused on the request from News UK to allow for the sharing of resources between the two titles and the strengthening of the governance arrangements for the independent national directors in the light of market changes and modern corporate best practice.
21. In considering the second question, the Secretary of State will take into account the public interest considerations applying to newspapers: the need for accurate presentation of news, the need for free expression of opinion and the need for a sufficient plurality of views in newspapers
22. The Secretary of State notes that the 1981 Conditions included various binding Conditions which were intended to maintain The Times and The Sunday Times as two distinct and separate publications with separate journalistic teams and with requirements to protect editorial independence. In accepting the Undertakings in 2019, the Secretary of State concluded that the variation in the Conditions (which allowed for the sharing of resources, including journalists, between the two titles) would not materially impact the public interest considerations.

Questions for interested parties

23. The Secretary of State would welcome comments and the submission of relevant evidence on the overall question of whether there has been a material change in circumstances; and, if so, whether the change means that the Undertakings are no longer appropriate or necessary for the purpose they were intended to achieve (and so should be released), 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, particularly in relation to the UK newspaper market, 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 2019 Undertakings are released as proposed by News UK; and
 - (iii) whether or not any effects adverse to the public interest considerations (namely, accurate presentation of news, free expression of opinion and media plurality) may be expected to result from the release of the Undertakings.
25. Before coming to any view on whether or not he is minded to release the Undertakings, the Secretary of State will fully consider the request made by News UK and the comments and the submission of relevant evidence made in response to this Invitation to Comment.
26. The Secretary of State will also take into account any advice provided by Ofcom and the Competition and Markets Authority (CMA), in reaching his initial decision.
27. Respondents are asked to note that in considering the application from News UK, the Secretary of State will only take into account information relevant to the specific newspaper public interest considerations in coming to his quasi-judicial decision on whether to release the Undertakings.

Consultation responses

28. Views are sought by 5pm on **15 July**. Responses should be sent to media-mergers@dcms.gov.uk

Disclosure, Confidentiality and Data Protection

29. We propose to publish non-confidential versions of the responses received on GOV.UK 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. All responses will also be shared with the CMA and Ofcom.
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.

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