

News Corp UK and Ireland Limited - Notice of Consultation on the Secretary of State's minded decision 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.

Views are sought by 16 December on the minded decision by the Secretary of State for Digital, Culture, Media and Sport to grant the request by News UK to release Undertakings relating to The Times and The Sunday Times.

Background

Agreement of 1981 Conditions and 2019 Undertakings

1. 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).
2. 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.
3. 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.
4. The 1981 Conditions also required the Times Newspapers 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.

5. 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.
6. 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.
7. 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.

News UK Application to release Undertakings

8. On 1 February 2021 News UK submitted an application requesting the Secretary of State to release in full the Undertakings accepted in 2019.
9. 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.
10. 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.

11. 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.
12. 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

13. Although the Secretary of State has discretion as to whether or not to release the Undertakings, the legislation does not specify the matters she 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 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.
14. 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

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

- 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).
15. 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.
 16. 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
 17. On 24 June 2021 DCMS issued a public 'invitation to comment', which includes a redacted copy of the application, and the written views received from the Editors and INDs. This ran until 15 July and received 4 responses. On 30 July, DCMS requested Ofcom and the CMA to advise by 24 September on the public interest considerations and market circumstances, respectively.
 18. After receiving advice from Ofcom and the CMA, the Secretary of State must come to a 'minded-to' decision on whether to accept the Application. If minded not to release or to vary the undertakings, DCMS will notify News UK. If minded to vary the undertakings, DCMS will conduct further discussions with News UK, the CMA and Ofcom on potential variations. DCMS will then run a statutory consultation on the proposed variations to the undertakings in accordance with Schedule 10 to the Enterprise Act 2002. If minded to release the undertakings, DCMS will run a statutory consultation on the proposed release in accordance with Schedule 10 to that Act, before the Secretary of State makes a final decision.

Minded decision by the Secretary of State

Consideration of CMA and Ofcom reports

19. In considering whether there has been a material change in circumstances, the Secretary of State considered whether there has been such a change since the Undertakings were made in July 2019 and since 1981 where this is relevant.
20. The Secretary of State sought advice from the CMA on this question. The CMA report (Annex A) includes analysis of the newspaper market and the broader media sector since 1981, when the transaction was approved on a conditional basis and since 2019, when the Undertakings were agreed. The CMA identified the following changes of circumstance in relation to the UK newspaper market, in the context of the DCMS request:
 - a. the decline in circulation for national print newspapers, reflecting in part the growth of online news;

- b. the position of news publishers in the online news and information sector (which limits their ability to replace print revenues with online revenues);
 - c. the merging of some national newspapers' operations for online news, daily and Sunday titles (where News UK is not able to make the same changes due to the Undertakings); and
 - d. the Covid-19 pandemic has accelerated the rate of decline of print media and advertising revenue.
21. The CMA's report concludes that releasing the Undertakings would have a significantly positive impact on News UK's financial position and ability to adapt to changing market conditions. In particular, the indirect costs of the separation obligation restrict the cost savings that TNL can achieve through sharing resources, as is commonly done by other national newspaper publishers. However, the CMA concluded that costs related to independence obligations (i.e. the requirement to have independent national directors) make up only a small proportion of the overall costs of operating both The Times and The Sunday Times.
22. In considering whether the Undertakings remain appropriate or necessary for the purpose they were intended to achieve this question, the Secretary of State must take into account the public interest considerations applying to newspapers as set out in law, including the need for accurate presentation of news; free expression of opinion; and for a sufficient plurality of views in newspapers. The Secretary of State sought advice from Ofcom (Annex B) on this question.
23. Ofcom do not consider that the release of the Undertakings will have a material impact on plurality. Ofcom's analysis shows that the UK newspaper market is currently reasonably plural, and consumers increasingly get their news from a range of different sources. Even in the event of a merger of the titles in question, readers would still have access to a wide range of viewpoints and any diminution of editorial voice due to further integration between the titles was unlikely because Ofcom considers that both titles position themselves on the centre right of UK politics. Lastly, there was a strong commercial rationale to release the Undertakings to the extent they require the titles to be published as separate newspapers. Their release could support the long-term viability of the business, which could have a positive effect on plurality in the long term.
24. Ofcom consider that the release of the Undertakings would create the opportunity for greater proprietorial influence over the titles, which could affect free expression and accuracy of news, but conclude, on balance, that this was unlikely to operate against the public interest. The scope for influence was constrained by the plurality of the wider market and there were commercial incentives which mitigate any impact on accuracy of news. Furthermore, News UK have proposed new processes to replace the independent national directors with the aim of protecting accuracy and editorial independence. Ofcom acknowledged these proposals as a good signal of intent but noted that they did not provide any firm guarantee that freedom of expression would be maintained in the long term.

Minded decision on whether to release the Undertakings

25. On the basis of the information and advice presented by the CMA, the Secretary of State concludes that there has been a material change of circumstances since both 2019 and, where relevant, 1981.
26. The CMA report supports the argument that the Undertakings have a material impact on the financial performance of TNL, in the context of market changes it has identified. In particular, the obligation to maintain separation between the The Times and Sunday Times newspapers restricts TNL's ability to adopt a fully-unified structure across the two titles, as is commonly used by other national newspaper publishers.
27. The Secretary of State agrees with the conclusions of Ofcom's report that the impact on media plurality of releasing the Undertakings is likely to be limited and that, on balance, releasing the Undertakings was unlikely to operate against the public interest needs for free expression of opinion and accuracy of news.
28. Therefore, in light of the Application received from News UK, responses to the Department's Invitation to Comment and the reports provided by Ofcom and the CMA, the Secretary of State is minded to grant the Application by News UK and release the Undertakings related to The Times and Sunday Times newspapers.

Consultation

29. The Secretary of State would welcome comments and the submission of relevant evidence on her minded decision.
30. To inform the Secretary of State's view on 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), in providing views on this, 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.
31. 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 her quasi-judicial decision on whether to release the Undertakings.

Consultation responses

32. Views are sought by **16 December**. Responses should be sent to

media-mergers@dcms.gov.uk

Disclosure, Confidentiality and Data Protection

33. 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 Consultation.
34. 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.

DCMS Press, Radio and Media Freedom Team,

Department for Digital, Culture, Media and Sport, 100 Parliament Street,

London,

SW1 2BQ

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