

A1. Response coversheet Basic details

Invitation to comment title: **The Public Interest Intervention Notice**

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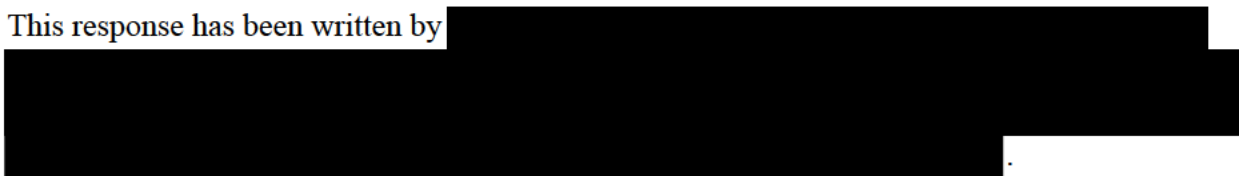
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The Public Interest Intervention Notice: a Response by CPBF North

The Campaign for Press & Broadcasting Freedom (North) publishes *MediaNorth* (www.medianorth.org.uk) and supports media policies that promote diverse and democratically accountable media. CPBF (North) also highlights threats to regional media, and campaigns for strong regional voices in broadcasting. We can be contacted at cpbfnorth@outlook.com

This response has been written by



1. It is extremely difficult to comment on the Public Interest Intervention Notice (PIIN) for two main reasons. Firstly, the manner in which the PIIN is framed in relation to accurate presentation of news exposes all too clearly a number of serious problems that have been inherent in the measure from the start. Second, the manner in which it frames the need for freedom of expression in newspapers focusses only on the freedom of editors to operate without proprietorial interference and simply ignores many other key requirements for freedom of expression in the press.
1. Merger law was reformed by the Enterprise Act 2002, which came into force on 20 June 2003. This took Ministers out of the decision-making process for the vast majority of merger cases and left them to be dealt with by the competition authorities – at that point the Office of Fair Trading and the Competition Commission – on the basis of a competition test. However, the Act allowed Ministers to intervene in merger cases which raised public interest

considerations specified in the Act. The only consideration specified at that time was national security.

2. Under the chairmanship of Lord Puttnam, the Joint Committee on the Draft Communications Bill (to which the then national Campaign for Press and Broadcasting Freedom gave both written and oral evidence) introduced a Public Interest Test into the Bill, which would be applied on a case-by-case basis where there was a possible threat of concentration in press or broadcasting markets. This was accepted by the government, albeit reluctantly as it went against the grain of the Bill's 'deregulatory' thrust, and Section 375 of the Communications Act 2003 was inserted into Section 58 of the Enterprise Act. This specified certain considerations that had to be taken into consideration in the case of media mergers. Two of these – accurate presentation of news and free expression of opinion – are the subject of the present PIIN, but there is also a third, Section 58 (2B). However, for reasons which are unclear to us, this is not included in the PIIN, although it is highly germane to the matter in hand, as we argue below.
1. Section 58 (2B) stresses 'the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom'. From the phrasing, it is clear that this does not refer simply to the need for plurality in the local and regional press: 'Newspapers in each market for newspapers in the United Kingdom', taken in context, clearly includes the market segments of the national press (broadly speaking, downmarket, midmarket and upmarket, although these are highly problematic terms).
2. The 2004 [DTI Guide](#) to the Enterprise Act notes at paragraph 5.11. that the concept of a 'sufficient plurality of views' is intended to encompass the need for a diversity of viewpoints exhibited in the relevant sector of the press:

In particular, it allows consideration of the structural impact of a transaction on the overall range of views and distribution of voice within the relevant market. The test of a sufficient plurality of views is intended to enable regard to be had not only to the need for a sufficient number of views to be expressed, but also to the need for variety in those views and for there to be a variety of outlets and publications in which they can be expressed. (2004: 25)

Paragraph 5.12 explains that the qualifying reference to ‘reasonableness and practicality’ when it comes to plurality reflects the Secretary of State’s view that ‘although plurality of views in each and every market is the ideal goal of the regime, it may not be reasonable to require this in relation to a particular part of the market because of associated costs’ (ibid.).

3.3. Given the circumstances of the proposed merger, we find it difficult to understand why these plurality considerations have been excluded.

4.1. In 2008, the House of Lords Communications Committee was critical of the Public Interest Test on a number of grounds in its report [*The Ownership of the News*](#). In particular the Committee complained that ‘neither the public interest considerations for newspaper mergers nor those for broadcasting and cross-media mergers include any requirement to establish that a merger will not adversely affect professional news gathering and investigative journalism’ (2008a: 70). It thus recommended that the considerations in respect of both newspaper mergers and broadcasting and cross-media mergers should be ‘amended to refer specifically to a need to establish whether a merger will impact adversely on news gathering’ (ibid.). The government [responded](#) that although it recognised ‘the significant role high quality journalism plays in ensuring effective public debate of issues and current affairs’, it thought that the current public interest consideration ‘provides a sufficient basis for dealing with this issue to the extent that it may give rise to public interest concerns’ (2008: 2).

4.2. The Committee was also concerned that the considerations relating to newspaper mergers are considerably less rigorous than those for broadcasting and cross-media mergers in that, in the case of the latter, plurality of ownership may be considered, whereas for newspapers there are no such considerations. It pointed out that, for the purposes of the Public Interest Test, the need is merely for a ‘plurality of views’ in the case of newspapers, and that, as we have already noted above, even this consideration is subject to a caveat concerning reasonableness and practicality. Their report also expressed concern that ‘the considerations for newspaper mergers are hard to measure objectively and are in need of review’ and in particular raised the question of how accurate presentation of news can be measured and considered before a merger has gone ahead (2008a: 71). The Committee thus recommended that:

The considerations set out in the Public Interest Test for newspaper mergers should be reviewed by Ofcom. This exercise should consider the rigour of the criteria and how they can be assessed. Conducting such a review will give Ofcom the opportunity to start building an expertise in advance of actually having to look at a newspaper merger. (Ibid.)

The government [responded](#) that it was

satisfied that the current wording of the newspaper public interest considerations adequately describes the public interest concerns that may potentially arise in media mergers and are appropriate. The considerations appear to provide an adequate basis for an examination of the relevant concerns, suitable reports to be provided and final decisions taken about whether or not such a merger might be detrimental to the public interest. We are therefore content with the current text.

We are satisfied that Ofcom is capable of undertaking an adequate initial investigation into

newspaper mergers and providing a report that would help the Secretary of State reach a properly informed decision on whether or not to make a reference to the Competition Commission. (2008: 2)

4.3. We now come on to the role of Ministers in initiating the Public Interest Test. This gave the Committee cause for concern in that:

Governments of all persuasions spend time building good relationships with powerful media proprietors. This is not necessarily wrong but it does raise a possible conflict of interest if the same people who want, and need, to stay on the right side of a media company, have the final say on that company's business interests. (2008a: 73)

In this they were echoing concerns raised by various of those who gave [evidence](#) to the Committee. For example, the CPBF pointed out that 'the decision about what can be considered "reasonable and practical" rests almost exclusively with the secretary of state, leading to an opacity and potential conflict of interest that is not healthy in a democracy' (2008b:137). Similarly the Voice of the Listener and Viewer noted that 'the Test is applied only after a decision to do so by the Secretary of State, creating the possibility of such a decision appearing to represent a conflict of interest (where, for example, a media organisation has either a perceived good or bad relationship with the Government)' (ibid.: 289). A similar concern was subsequently raised by Rachel Crauford-Smith in the highly authoritative *Media Law: Text, Cases and Materials* (2014) in which she argued that 'in enhancing ministerial discretion as to whether or not to refer a merger for investigation the new procedure increased, rather than reduced, the scope for political considerations to come into play' (283) and concluded that:

It is debatable whether the power to decide whether to initiate (and ultimately determine) a media plurality investigation should be vested in a government minister, given

governments' interest in maintaining positive press coverage and fear of antagonising powerful media companies (ibid.: 288).

In light of such considerations, the report concluded that:

Ofcom should be given the power to initiate the Public Interest Test. This would sit more comfortably with Ofcom's duty to promote the interests of the citizen. We do not believe that the power to trigger a Public Interest Test should be taken away from Ministers. Along with Ofcom, Ministers should retain the power in the event that they consider there is a risk to the public interest that Ofcom has not fully recognised. Therefore, the power to issue an Intervention Notice should be held by both Ofcom and the Secretary of State.

(2008a: 74)

To which the government [responded](#) that it considered that

the power to intervene in a media merger on public interest grounds should remain solely with the Secretary of State. It is right that judgements about the public interest should fall to be made by Ministers. The Committee appears to accept that the Secretary of State should remain the final decision maker in public interest cases. There seem strong reasons to avoid a situation where the person responsible for issuing the intervention notice is not the same person who would be responsible for taking final decisions. This could introduce unwelcome uncertainty over for the relative responsibilities of different authorities, particularly in the context of a possible legal challenge to decisions. (2008: 3)

Regarding the questions of conflicts of interest between the Secretary of State and media enterprises, the government argued that:

The decision as to whether a public interest intervention may be appropriate in any particular case necessarily requires a judgement to be made. There is no bright line test as to when such intervention should or should not be made. Accordingly, the Act affords the

Secretary of State a degree of latitude to reach conclusions based on his assessment of the available evidence. But clearly, if a media merger arises that appears to engage the media public interest considerations, the Secretary of State has a duty to give proper consideration to the case for making an intervention and would be open to legal challenge if his decision appeared to be unreasonable. (Ibid.)

4.4. That the concerns about the Public Interest Test raised by the House of Lords Select Committee on Communications and others were dismissed by the government of the day and have not been revisited by any of its successors goes a long way to explaining why, in our view at least, the issuing of the PIIN in the current case raises a number of significant difficulties.

5.1. Firstly, let us return to Crauford-Smith's point about whether it is advisable that 'a media plurality investigation should be vested in a government minister, given governments' interest in maintaining positive press coverage'. That the *Daily Telegraph* has, throughout its existence, strongly supported the Conservatives both in government and opposition is an incontrovertible fact. However, under the ownership of the Barclay family the paper (along with its Sunday stablemate) has increasingly thrown its weight behind the hard right factions of the party as the government has tacked ever further in their direction. As Robert Shrimley pointed out in the *Financial Times*, 29 November: 'Once a bastion of serious if somewhat crusty journalism, the title now too often descends into shrill populist paranoia and heated anti-immigrant rhetoric', a judgement which is amply borne out by Jane Martinson's highly detailed study of the titles under the Barclays' ownership, *You May Never See Us Again* (2023).

5.2. For a government in a situation as fraught as the present one, press support is more than usually vital, and thus it is perfectly reasonable to harbour the suspicion that the Secretary of

State's concern about the future ownership of the *Telegraph* titles and *The Spectator* may be at least partly motivated by fears for the future of three particularly valuable press allies. It could also be the case that, given the current conflict in the Middle East, in which both the government, the *Telegraph* titles and *The Spectator* strongly support Israel, the Secretary of State may have concerns about how publications owned by RedBird IMI, a company bankrolled by Sheikh Mansour, brother of the president of United Arab Emirates and himself its deputy prime minister, might cover future conflicts in the area.

5.3. These concerns are, admittedly, largely hypothetical, but Ofcom has stated that:

The impact of a relevant merger situation on accurate presentation of the news is likely to be assessed by reference to evidence of past behaviour by the enterprises in question, or by the persons with control of such enterprises, in relation to that of other enterprises, including but not limited to newspapers.

In this respect it's significant that various far from disinterested right-wing commentators have brought up the past journalistic record of RedBird IMI chief executive Jeff Zucker, the former boss of CNN and NBC News. For example, in *The Times*, 22 November, Juliet Samuel branded him as 'the man credited with turning CNN into a hard-left creature of the culture wars' and Charles Moore in the *Telegraph*, 24 November, characterised him as 'a media executive under whose watch CNN became an aggressively Left-wing news network', a frankly perverse judgment that was endorsed by Camilla Tominey in the same paper on 1 December.

5.4. On the other hand, however, some of RedBird's investments appear to tally quite closely with the *Telegraph's* right-wing views and interests. For example, it invests in at least three oil and gas companies, and its website boasts of its role in a string of successful campaigns, all for Republican candidates in the US. These include Glenn Jacobs, the mayor of Knox County,

Tennessee, better known as the masked WWE wrestler Kane. It should also be noted what whilst at NBC, Zucker greenlighted the Trump vehicle *The Apprentice*. Furthermore, Zucker was quoted in the *Financial Times*, 24 November, as stating that the *Telegraph* is ‘a great, iconic brand that stands for quality journalism’ that could compete in the US as an alternative to the more liberal *New York Times* and *Washington Post*, adding that: ‘We’ve thought for a long time that the real gap in the US marketplace was a very strong centre-right media brand’. He also promised to create an editorial advisory board that would uphold the independence of the *Telegraph* and the *Spectator* and emphasised that he had no plans to change the management or editorial team at either title.

5.5. In light of such considerations we would conclude that it is extremely difficult, if not impossible, to judge how the proposed change of ownership would affect the accuracy of the presentation of news in the titles concerned. As the Lords Communications Committee asked in 2008, as noted above: how can the accurate presentation of news be measured and considered before a merger has actually gone ahead?

6.1. In the matter of free expression of opinion, Ofcom states that this concerns

the extent to which the transaction would affect the freedom of editors to operate without interference from the proprietor. We will consider the free expression of opinion ground in light of the market context and any measures which the parties may have put in place to preserve editorial freedom.

It has to be said that the history of such measures in the UK, and particularly in the case of the Murdoch press, shows them to be largely worthless. Furthermore, judging free expression of opinion in terms of editorial freedom from proprietorial interference is extremely naïve. No-one who knows how newspapers work seriously believes that proprietors are constantly telling their editors what opinions to express. Instead they appoint editors and managers who

know perfectly well what lines their proprietors expect them to take on the main subjects of the day, and in all likelihood agree with them. This is a process of allocative as opposed to operational control and operates by means of anticipatory compliance. Nonetheless we should point here to a reason why freedom from proprietorial interference in the present case is particularly important.

6.2. The United Arab Emirates has a poor record on free speech. Detention of journalists is not uncommon and the nation ranked 145th out of 180 countries included in the press freedom index compiled by [Reporters Without Borders](#). According to a story in *The Guardian*, 24 November, until last year IMI owned the Emirati print newspaper *al-Roeya*. In September, local media reported that the paper's print edition had been shut down and dozens of employees sacked, just weeks after it had ran a story about how Emiratis were struggling with higher fuel prices following the invasion of Ukraine. And it's difficult not to wonder how a *Telegraph* owned by an Abu Dhabi-backed fund would report, let us say, a scandal involving a member of the UAE ruling family. Thus in spite of many of the criticisms of the proposed deal being coloured by the fact that they emanate from disappointed suitors, and notwithstanding the lingering suspicion that the fact that the UAE is a Muslim country also enters into the equation, we would agree that this is a matter which deserves investigation on the grounds of public interest.

6.3. However, we would also enter a very considerable caveat here. As noted at the start of this submission, the way in which the PIIN frames the need for freedom of expression in newspapers focusses only on the free expression of editorial opinion and simply ignores many other key aspects of freedom of expression in the press – something which, many would argue, is in a perilous state when it comes to many of the national titles in the UK. See, for example, Chapter 7 of Peter Osborne's *The Assault on Truth* (2021), Chapter 7 of Ian Dunt's

How Westminster Works ... and Why It Doesn't (2023) and the bulk of James O'Brien's *How They Broke Britain* (2023). Obviously this is not the place for a critique of the entirety of the UK national press, but it is worth noting in this respect that in the *Financial Times*, 29 November, Robert Shrimmsley argued that if we are going to discuss the *Telegraph* deal let's spare ourselves the humbug of pretending that existing British media moguls are as hands-off and virtuous as a Disney princess is chaste. Individuals buy newspapers for status or power and invariably use them to advance personal or professional interests. And the roll call of UK press barons is hardly one to shout about.

We would also draw attention to the sections on the national press in the recent report by the Media Reform Coalition, [Who Owns the UK Media?](#), which show extremely disturbing levels of both concentration and proprietor power.

6.4. However, as this exercise concerns the *Telegraph* titles specifically it's worth noting their own record when it comes to both accuracy and free expression of opinion. Space precludes us from giving a full range of examples demonstrating just how appalling this is, but a particularly disturbing insight may be gained from an [article](#) written by the *Daily Telegraph*'s erstwhile chief political commentator, Peter Osborne, in which he explains how he resigned from the paper because its owners were routinely suppressing stories about HSBC because it was an important advertiser and keeping quiet about Hong Kong for fear of upsetting valuable Chinese interests. (It is relevant to our point about the state of much of the British national press that this ended his career not only in the *Telegraph* but in the rest of Fleet Street – not to mention on the BBC as well). We would also draw Ofcom's attention to a recent detailed [analysis](#) by DeSmog which reviewed over 2,000 *Telegraph* opinion pieces and editorials published online over six months in 2023. Of the 171 opinion pieces that dealt with environmental issues, 85% were identified as 'anti-green': attacking climate policy,

questioning climate science and ridiculing environmental groups. Doubtless the *Telegraph* would argue that ‘comment is free’, but the picture that emerges from this analysis strongly suggests an editorial culture in which: the anti-green agenda operates powerfully from the top down; opinions are frequently expressed without due regard to the accuracy of the facts on which they purport to be based; and readers are not routinely informed of writers’ links to the main climate science denial group, the Global Warming Policy Foundation. Doubtless there was considerable freedom on the part of editorial teams to express their views, but what about the freedom of journalists to express views which dissented from the dominant editorial line, and the freedom of readers to access such views, not to mention their freedom from exposure to disinformation and corporate spin on the part of the fossil fuel industry in the guise of ‘journalism’? Such concerns are absolutely central to any serious discussion of press freedom, but are completely excluded by the PIIN’s narrow focus on the freedom of editors to operate without interference from the proprietor.

7.1. To conclude, CPBF North endorses the need for a Public Interest Test in the case of the proposed acquisition of the Telegraph Group by Redbird IMI, but is deeply concerned that the narrow and limited nature of the Test will mean that many important factors will fall outside its parameters. Accurate presentation of news and the need for free expression of opinion in newspapers are indeed requirements of a free and responsible press on the Fourth Estate model, but the full range of what is actually entailed by such requirements is largely absent from the PIIN as conceptualised in the DTI document quoted above and on which Ofcom is basing its approach.