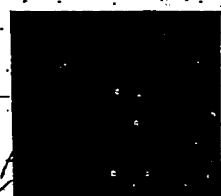


# News International plc

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For info

BD/OW/27/279/4

2. File- News International

12 July 2002

Rt Hon Tessa Jowell MP  
Secretary of State  
Department for Culture, Media & Sport  
2-4 Cockspur St  
London SW1Y 5DH

*Tessa Jowell*

Please find attached a copy of a letter sent today from News International to the Joint Committee on the Draft Communications Bill and to the DTI/DCMS Joint Communications Bill Team, in response to the Government's proposals to reform the newspaper merger regime.

*Yours sincerely*



Alison Clark  
Director of Corporate Affairs


Enc


Department for Culture, Media and Sport	
DATE RECEIVED	15 JUL 2002
Minister	<i>COS</i>
Lead	<i>[Redacted]</i> (Tick)
Action:	Advice & Draft Reply by <i>/</i>
	Advice as Appropriate by <i>29/07</i>
	For information only
Permanent Secretary	Cc: <i>A. HOWELL</i>
Director ( <i>A-R</i> )	
Director of Strat & Com	
Private Secretary ( <i>W.F.</i> )	
Diary Secretary ( )	
PCU REFERENCE:	<i>02/08976</i>

# News International plc

1 Virginia Street, London, E98 1EX,  
Telephone: 020 7782 6000 Facsimile: 020 7782 6097

12 July 2002

  
DTI/DCMS Joint Communications Bill Team  
Department of Trade & Industry  
Room 387  
151 Buckingham Palace Road  
London SW1W 9SS

  
Please find attached a memorandum prepared by News International responding to the Government's proposals to reform the newspaper merger regime as set out in the Memorandum prepared for the Joint Committee on the Draft Communications Bill, dated 3 July 2002. A copy of our response has also been sent to the Joint Committee.

News International is concerned by the proposals set out in the 3 July Memorandum. The Government stated in the Policy Document accompanying the Draft Communications Bill that its intention was to replace the current newspaper merger regime with "a streamlined and less burdensome regime that focuses regulatory action on those newspaper transfers that appear to raise competition or plurality concerns" (paragraph 9.7.1). While we welcome the proposed abolition of the pre-merger consent requirement and the criminal sanctions, it is difficult to see how the rest of the proposals set out in the 3 July Memorandum will achieve the aim of creating a more deregulatory and better targeted regime.

- The proposals will result in greater regulation of the newspaper industry than under the current regime and will mean that newspaper ownership is more regulated than any other media.
- The proposals are confusing, unnecessarily complex – involving four different regulators – and will cause more uncertainty.

- The best way to guarantee plurality and diversity is to protect competition in the media market.
- OFCOM, primarily established to deal with electronic communications, is not suitable for also dealing with print media as none of the agencies that will form OFCOM has any experience of the newspaper industry.
- There can be no greater threat to press freedom than a state regulator deciding on the accuracy of newspaper reporting.

If you require any further information, please do not hesitate to contact me on 020 7782 6019.

*Yours sincerely*



Alison Clark  
Director of Corporate Affairs

Cc Secretary of State for Trade & Industry  
Secretary of State for Culture, Media & Sport.

Enc News International's memorandum

Memorandum submitted by News International  
to the Joint Committee on the Draft Communications Bill and  
the DTI/DCMS Joint Communications Bill Team  
on the Government proposals to reform the newspaper merger regime

12 July 2002

1. This paper is submitted by News International as a contribution to the debate on the reform of the law relating to newspaper mergers. News International's view is that these mergers should not be subject to a special regime but should be brought fully within the proposed new competition regime set out in Chapter I of Part 3 of the Enterprise Bill (EB) currently in the House of Lords.
2. The Government's proposals are very complex and cannot achieve its aim of delivering a regime that is less regulatory and more efficient. Much greater simplicity and certainty could be obtained if newspaper mergers were dealt with solely under the new regime in Chapter 1 of the EB. Pursuant to this Chapter, every newspaper merger would be referred to the Commission if:
  - (a) the turnover of the target company is £45m or more or
  - (b) if the merger results in 25% of any identified market (in EB terms) being concentrated in the hands of one person,and in either case there is a substantial lessening of competition in any market.
3. A reference could only not be made if the market was not of sufficient importance to justify a reference or if the consumer benefits outweighed any adverse effects of the substantial lessening of competition.
4. We recognise that there are concerns relating to the issues of diversity and plurality. In arguing that the special newspaper regime should be scrapped, we are not ignoring these concerns. Any proposed merger that met the criteria for referral to the Competition Commission would be subjected to a competition analysis of the relevant market in question and this would necessarily deal with the issues of diversity and plurality. Protecting competition in media markets provides the best guarantee of diversity and plurality. These are not separate issues. If, in the absence of competition concerns, a change in ownership of a newspaper led to the newspaper serving its readership less effectively, then market forces fuelled by ease of entry would ensure that other titles came in to fill the gap.
5. On that basis the public interest would be protected and the system would be transparent and easily understood. There would be only one regulator determining whether to make a reference. This would seem to be far more acceptable as a reform of the system than proposals which seem to increase the complexity of the system exponentially and give Ministers more discretion than before.

1.

6. However if the government proposals set out in the memo to the Joint Committee are accepted as the basis for new legislation, then for the legislation to be accepted by and acceptable to all parties affected, both regulators and regulated, proprietors and readers, the evidence for the need for such changes should be clear. In addition any change to the regime should increase certainty of application rather than introduce ideas which may appear at first reading to be unclear.
7. The comments which follow will we hope lead to some clarification of the rationale behind, and the effect of, the Government's proposals. Our comments on the specific proposals should be understood in the light of our general comments made above.
8. The Government has stated that the regime should be deregulatory and better targeted. We strongly endorse this aim and welcome the proposed abolition of the pre-merger consent requirement and the criminal sanctions.
9. However we are puzzled by the suggestion that there should be four regulators involved in making references, investigating the merger and in determining what if any measures should be taken following any reference.
10. Such a plethora of regulators will itself impose burdens on those intending to take over a newspaper, and we are not sure how the involvement of all four can be justified. The Government proposes to preserve the power of the Secretary of State to make references where the plurality issues are of concern. But in determining whether that is the case, the Minister will have to take advice from the OFT and OFCOM. If a reference is made and the recommendation is that the merger cannot go ahead either at all or only subject to conditions, the Minister will have to take advice from the Competition Commission and from OFT and OFCOM again. This is hardly streamlined or timesaving but is most likely to increase the time taken to deal with the matter and to be needlessly bureaucratic and expensive.
11. It is noted that the Competition Commission is expected to ascertain customer opinion in deciding on substantive issues (paragraph 5.16 and Annex E). It is not at all clear what this means. First, is it limited to local opinion as suggested in Annex E? Secondly, how will such opinion be obtained? If it is to be taken seriously it will need to be polled on a cross-section of the public, which is unlikely to be a simple, quick or cheap exercise. If it is intended just to ask a dozen people without any checks, it is unlikely to be acceptable either to the regulators or to the parties to the merger.
12. In any event, if it is to take place, the parties to the merger will need to be informed fully of what questions are being asked and who the individuals are. There would need to be agreement as to the questions by all involved if any substantive issues are to be decided in the light of the answers to the questions. This seems likely to lead to delays and expense in dealing with the reference and the need for it has not been explained.

13. Paragraph 5.11 proposes that OFCOM should be involved not only in giving advice to the Secretary of State but also in consulting on plurality issues. It is not at all clear what this would entail but it must be pertinent to consider what expertise OFCOM will have or will acquire in these issues. After many years of dealing with newspaper mergers and plurality issues, all expertise in this area is with the Competition Commission and its specialist panel. OFCOM will be formed through the amalgamation of bodies that have no knowledge or experience of the newspaper industry.
14. Since the proposal to involve OFCOM will result in four regulators being involved in considering whether to refer the merger, and under which power, whether to take any action following a reference and if so what, it would seem to be incumbent on the Government to show some positive reason for its involvement. After all, the cross-media ownership provisions may well become less important as spectrum availability increases so that its involvement in those mergers may well lessen as time passes. It seems quite illogical to start now to give them a completely new role not based on relevant experience when even the Government anticipates their one related role may well wither away in the future.
15. Apart from the general doubts as to the desirability of introducing new regulators at this stage, there must be a cost element involved in employing staff for what is likely to be an infrequent exercise of specialised functions. Any increase in costs is likely to have to be borne by the regulated industry the views of which ought to be taken into account.
16. Paragraphs 3.1 and 3.2 state that the existing definition of "newspaper" is to be retained but 3.2 also states that there will be a power to alter this definition by statutory instrument. This seems an unusual power to take since it is the fundamental basis of the newspaper merger provisions. Surely if there is to be a change it should be by way of primary legislation so that the issues can be properly discussed and the legislature given an opportunity to amend any Government proposals in this area?
17. We note the requirement in the EB that the competition aspects of the reference are to be examined in the light of the market in the UK or any market in the UK including where appropriate a joint market in the UK and another territory (EB s 21[1][b] and [6]). Is it the intention that a competition newspaper reference might be made on the basis of circulation in the UK but that the Commission investigation would look at the effects in such a UK market as is defined in EB s 21(6)? If for example a paper based in Northern Ireland circulated there and in Eire was to merge with another paper based in Northern Ireland, would the Commission be expected to look at the Eire aspects of the merger? How could it look at matters outside its jurisdiction?
18. The proposals refer in a number of places to the reference being of the supply of newspapers or advertising in newspapers. It is not clear why advertising is mentioned here. It does not seem very relevant in a national context and it is not certain that figures for advertising revenue will be available to any of the regulators in any event, whereas independently audited paid-for circulation

and free distribution figures are made public every month. It would seem likely that the question of advertising will only be raised where market share, in circulation terms, is held by only two or three proprietors and there is a proposed merger between one or more of those proprietors. A circulation test in such circumstances would seem to be easier to apply and equally efficacious as an advertising revenue test.

19. Paragraph 3.18 makes it plain that the criteria for reference even on the plurality concerns may be based on advertising revenue, cost or value. It is suggested that this paragraph needs considerable enlargement before it should be agreed by the legislature. In addition to concerns over the practicality of advertising revenue being used as a basis for a reference, the meaning of "cost" and "value" in this context is quite opaque. We do understand that the Government considers the present test on the basis of circulation of 500,000 to be inflexible and outmoded and we tend to agree with that view. But a circulation test does at least have the advantage of being clear and relatively easy to apply, which is not the case with the criteria being suggested as replacements. We believe that the grounds on which a merger reference can be made should be clarified before drafting is completed.
20. Another aspect of the new basis on which a reference may be made is that the relevant market share is of the market in the UK taken as a whole or in a substantial part of the UK. There is considerable doubt as to what this will mean in the context of a local newspaper merger. Paragraph 3.18 states that the question whether the criteria for reference are satisfied will be determined on a case-by-case basis. This would seem to be unsatisfactory for local newspapers many of which circulate in areas that would not readily be considered as constituting a substantial part of the UK.
21. Will the authorities be looking at the market on a county basis or will smaller or greater areas be relevant? The South Yorkshire case cited at paragraph 3.13 at note 7 does not seem to make the matter any clearer. What is important very often is the fact that there may be only two local newspapers in an area and the merger will remove one of them. In such a case the market share may only be important in the local context, which is not the same as saying that it is a market in a substantial part of the UK. On the other hand the target paper may circulate in an area that is more substantial in the sense either of having a large population - as is the case with London - or of having a large physical area; e.g., Wales. But there are many cases falling between these where the parties to a proposed merger will be quite unsure whether it is referable or not. And given the vagueness of the dicta in the South Yorkshire case, it may be that the answer will only be given by the courts.
22. It is not desirable to legislate in such a way as to leave interested parties unsure whether the legislation applies to them or under the impression that the only way the basic validity of a merger reference involving the local press can be tested is by an application to the courts. Although the EB provisions apply on this basis for ordinary competition references, that would seem to be acceptable where the competition in the market place is the whole essence of

the merger reference. Where the competition aspects are limited to a small area, a reference is unlikely to be considered.

23. But, on the basis of the current proposals, where the reference is to be made to protect the plurality principles (so that competition and the market place are not integral to the reference), it would seem desirable to introduce more certainty to the law, even if necessary to keep the exclusion for cases where the target paper has a small circulation. It is not suggested, so far as we are aware, that the exemption for such cases has brought the wrong result in any case. And certainty in this regard would help to accentuate the plurality principles as being different from the protection of competition pure and simple. The more they are seen to be the same, the harder it becomes to justify the need for two distinct references.
24. Paragraph 3.19 states that there will be a change in the definition of a merger so that material influence will come into the equation as it does for ordinary references on competition grounds. If there is to be the possibility that a merger of two newspapers can be referred both on competition grounds and plurality grounds then no doubt the definitions need to be brought into line. We understand that this change is purely for that reason - and not to bring more cases into the potential reference net - but it would be helpful if that could be clarified.
25. Paragraph 3.20 states that the Government will not keep the pre-notification procedure but that like other parties to mergers in the UK the parties to a newspaper merger will have the choice to proceed to completion and take their chances of a report requiring divestment. Does this mean that the Government and the OFT will not use their powers under Sch 7 to the EB to make orders to stop mergers being completed before the report is made and decisions on implementation of recommendations have been made?
26. Paragraph 4.2 deals with the new public interest jurisdictional criteria and states that intervention under these new provisions will only take place where "real" plurality issues arise. It is not clear what this means: is there some other test not mentioned in the paper which will be applied by the Secretary of State to determine whether the concerns are "real" or not? Will intervention notices not be served at an early stage in proceedings in order to be able to preserve the existing situation before full consideration of the issues has taken place?
27. Paragraph 4.9 and 4.10 set out the new public interest criteria intended to form the basis of the non-competition references. These paragraphs refer to the "UK press". It is not clear whether it is proposed to use this expression in the forthcoming legislation but what is said in 4.10 does not wholly fit with what has been said earlier; e.g., paragraphs 3.13 and 3.18, which are understood to bring in the market in the UK or a substantial part as the basis for a market share reference. Some clarification of paragraph 4.10 would be helpful.
28. Paragraph 4.16 refers to EB s 57(3), which allows the Secretary of State to amend s 57 to include considerations not already mentioned in s 57(1) (national interest considerations for the purposes of the special public interest



references in EB s.41 et seq) or to delete any that are already mentioned. The intention is to allow the Secretary of State to amend, delete or add to any of the three plurality issues already identified over 30 years or more of newspaper merger references.

29. This does seem to show a lack of confidence in the Department's ability to distil the essence of the Commission's reports over the years. Such a power should not be necessary but if any changes are shown in the future to be required, the Government of the day should have to come back to Parliament to achieve that end. After all there is no guarantee that future Governments will agree with the philosophy of the present Government and in such a case it would not be right to allow substantial changes to be made to fundamental provisions of the legislation without the consent of the legislature.
30. We have read section 5 of the paper with some concern, as the procedure seems to be complicated. In view of the short time we have had to digest the paper we may have not taken all aspects of the policy into consideration but for the present we would like to point out that there appears to be a proposal that four regulators acting separately will, where a reference is made both on public interest and competition grounds, all have to form a view on whether or not the merger may be expected to operate against the public interest. There is no guidance in the EB so far as we have been able to discover as to what "public interest" means in this context.
31. This proposal does seem to be a recipe for confusion both between the regulators themselves and between the regulators and the parties to the merger. It would be helpful if the Government could clarify how these different judgments will be brought together or will the parties be asked to respond to different judgments from the various regulators?
32. Paragraph 5.21 briefly discusses the possibility of a newspaper merger involving other non-newspaper assets and presumably businesses. This follows on it seems from paragraph 3.3 which says that the definition of newspaper proprietor will be unnecessary as the provisions will follow the EB line of looking at cases where enterprises cease to be distinct. This seems to mean therefore that, where two newspapers are to come under common ownership, the reference will be of a merger where each enterprise is the owner of a newspaper whether or not other assets or businesses are also in the ownership of that enterprise.
33. This leads to consideration of what precisely the reference will be looking at. Suppose for example a holding company A has a 100% subsidiary that is a newspaper proprietor (in terms of the existing law). And that subsidiary buys 100% of another company that is also a newspaper proprietor. And the Secretary of State decides to refer the merger to the Commission on the public interest grounds. Will the Commission be expected to look at the other businesses owned by the holding company A?

34. Alternatively if the target company is the holding company of other companies that carry on other businesses, is the Commission intended to look at those other businesses?
35. Clarification of this aspect would be most helpful.
36. Paragraph 7.1 states that OFCOM will be asked to keep the new newspaper merger provisions under review. There is a proposal in the draft Communications Bill that OFCOM should have a review function there but this is a different situation. The OFT will have the function of keeping the newspaper market under review and from that we expect OFT to be the lead regulator for the newspaper industry. It is difficult to see how OFCOM could usefully review the legislation where its involvement is peripheral to the performance of the main and continuing functions under the EB. If there is to be a review of these new provisions it would seem much more appropriate to ask the OFT to carry out the review.
37. The paper does not say exactly how the new legislation will fit in with the EB but we would ask that it be included in that Bill rather than the Communications Bill. Or if that is not possible given the time-table for that Bill, that the Communications Bill amends the Enterprise Bill to give effect to the Government proposals. It seems clear that the proposals will be enacted by reference to the provisions in the EB: it is inconceivable that a new system will be self-contained in the Communications Bill. It will be exceedingly difficult for all those involved in newspaper mergers, whether as parties, civil servants or OFT or OFCOM staff and the Competition Commission itself, to know what the law and procedure is if it is split between the two Bills. And there seems to be no reason for putting these new provisions in the Communications Bill rather than the EB.
38. In sum we would like to welcome the intention to legislate afresh in this field and to loosen up what is by any standards a tight regime. But we would like the new provisions to be clear and not lead to more delay and expense than is absolutely necessary.