

IN. B 01

[Redacted]

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**From:** [Redacted]  
**Sent:** 22 December 2010 15:25  
**To:** ZEFF JON; [Redacted]  
**Subject:** RE: NEWSCORPS/BSKYB  
**Attachments:** Newscorp BSKyB - Note for No10 - 22 December 2010.doc

Jon You might be interested in this note No10 requested

<<Newscorp BSKyB - Note for.No10 - 22 December 2010.doc>>

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[Redacted] Department for Business, Innovation & Skills | Tel: 7215  
 2197|

**From:** [Redacted]  
**Sent:** 22 December 2010 15:24  
**To:** [Redacted]  
**Cc:** 'Jon.zeff'; [Redacted]  
**Subject:** NEWSCORPS/BSKYB

[Redacted] Just to confirm that you will need to deliver the report to DCMS now on 31 December. Jon Zeff is leading on this from now on so you might want to speak to him or [Redacted] about handling arrangements (though we will also be helping DCMS so you haven't quite got rid of us).

Regards

[Redacted]

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[Redacted] Department for Business, Innovation &  
 Skills | [Redacted] [www.bis.gov.uk](http://www.bis.gov.uk)

The Department for Business, Innovation & Skills is building a dynamic and competitive UK economy by creating the conditions for business success; promoting innovation, enterprise and science; and giving everyone the skills and opportunities to succeed..

### NewsCorp/BskyB Case – Process and Handling Issues

On 4 November 2010, the BIS Secretary of State issued an intervention notice requiring Ofcom to undertake an initial investigation into the public interest concerns around plurality of persons controlling media enterprises arising from NewsCorp's proposed purchase of the remaining shares in BskyB. He did so having considered a range of submissions raising concerns about the merger, and advice from Counsel.

#### **Who will take the decision?**

- The DCMS Secretary of State will now take the decision. Legally, it is important he does so on the merits of the case, ie it is not a collective Cabinet decision, and it is important to avoid any appearance of his independence being compromised. Previously, the BERR SoS's decision to intervene in the Lloyds/ HBOS merger was judicially reviewed on the basis that his discretion had been fettered by comments by the Chancellor.

#### **What happens next?**

- On 31 December 2010, the DCMS SoS will receive a report on the public interest issues raised by the merger from Ofcom. This follows a public consultation. The report will examine the substantive issues including those put to the SoS prior to intervention.
- On receipt of Ofcom's report, the SoS must decide whether to make a reference to the Competition Commission (CC) for a full investigation, clear the merger, or accept undertakings in lieu of a reference. There is an administrative guideline for the decisions of 10 working days from receipt of the report, though it is acceptable to take longer if, for example, the parties were to offer undertakings.
- If the SoS decides the case should be referred to the CC for a full investigation, it is open to him instead to accept from the parties statutory undertakings if he believes these would effectively remedy the concerns about plurality which he considers are raised by the merger. In assessing the potential for accepting such undertakings, he will take into account their effectiveness in remedying the identified concerns as well as the ease of enforcement.
- If the SoS decides to refer the merger to the CC, they will provide a report within 24 weeks advising whether the merger is likely to operate against the public interest and on the appropriateness of any remedies. On receipt of the CC's report, the SoS must take the final decision on whether or not the transaction operates against the public interest. At this stage, his decisions clearly need to be supported by strong evidence if they are to be robust against legal challenge.

#### **What can the SoS do if the merger is against the public interest?**

- He may take action he considers reasonable and practicable to remedy any of the effects that are adverse to the public interest. These are wide ranging powers which include being able to block a proposed merger, or require the divestment of shares if the purchase has already taken place. He must do so in a proportionate way using remedies which are the least intrusive to achieve the objective.

#### **How do the public interest and competition processes interact?**

- The public interest intervention has been running at the same time as the European Commission have been conducting a competition assessment on the

merger. On 21 December, they announced their decision to clear the merger on competition grounds, making clear this was without prejudice to the separate review being undertaken by the UK on media plurality. In principle, the two processes are separate, and the SoS will need to assess any plurality concerns independently of decisions by the EC about any effects on competition.

#### **When to publish Ofcom's report**

- The SofS has discretion when to publish the Ofcom report provided this is no later than when he publishes his decision on whether to make a reference to the CC. Our recommendation is that the SoS should publish the report when he announces that decision. This is a market sensitive issue, it appears sensible to do what we can to reduce media comment and speculation about the outcome of the decision.
- There is bound to be speculation, but this may be greater if the report were made public prior to announcing a decision since there would be substantive evidence and information for the media to analyse and interpret. For that reason it would be reasonable for the SofS to maintain the position that Ofcom's report should be published only at the time he announces his decision.
- Ofcom, however, intends to send us a redacted version of the report, suitable for publication, in the first week of January. It would therefore be possible to publish the report at an earlier stage on the 6 or 7 January.

#### **Could the decision to intervene be successfully challenged?**

- The original decision to intervene could be challenged on the basis that it was allegedly prejudiced and not made with an open mind. BIS officials, however, believe that the original decision was well-founded. The Secretary of State considered a wide range of submissions, and Counsel's clear advice was that the weight of evidence was in favour of intervening.
- Moreover, our lawyers consider it likely that we could successfully argue that any alleged impropriety would in any event be cured by the subsequent stages of the decision process. The initial decision reflects only a view that media plurality may be a relevant consideration. It is for OFCOM to report further on media plurality;; and the decision will now be taken by a different Secretary of State.

#### **Handling Media / Parliamentary queries**

- In responding to queries, Ministers and officials should avoid commenting on the substance of the case or, importantly, appearing to pre-judge the outcome of investigations before considering all the evidence. Decisions fall to be taken on their merits by the SofS in accord with his statutory duties under the Enterprise Act.

#### **Anticipated Timeline**

- 31 December – DCMS receive Ofcom's report
- 6, 7 January – receive a further two redacted versions from Ofcom – one that can be published, and one that can be discussed with NewsCorp.
- 6-11 January SofS considers the report, discusses it with Ed Richards, Counsel and officials
- 11-14 January – NewsCorp given opportunity to make oral representations to BIS officials and a couple of days to make any further written representations.
- 17-21 January – DCMS SofS announces his decision

IN. B. 03

[Redacted]  
**From:** [Redacted]  
**Sent:** 23 December 2010 10:49  
**To:** ZEFF.JON  
**Subject:** NEWSCORP/BSKYB - CASE HANDLING ISSUES

Jon Just for the record, here's the text we discussed/agreed with the reference to BIS Legal added.

The DCMS Secretary of State is now the decision taker in the NewsCorp/BSkyB case. Accordingly, Ofcom will deliver their report to DCMS private office on 31 December. DCMS officials will have policy responsibility for the case and will take the lead in advising their Secretary of State on the substantive case for referring the merger to the Competition Commission, consulting Counsel, and handling discussions with NewsCorp and others. BIS officials/Legal will, however, be readily on hand to advise DCMS officials and Ministers on the process and applicable law, which will include being on hand to attend any case meetings. BIS officials will work with DCMS colleagues to provide the assistance needed so that the DCMS Secretary of State has access to all the advice he needs.

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[Redacted] Department for Business,  
Innovation & Skills | [Redacted] | [www.bis.gov.uk](http://www.bis.gov.uk)

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IN-B 04

[Redacted]

**From:** [Redacted]  
**Sent:** 23 December 2010 11:53  
**To:** ZEFF JON  
**Cc:** [Redacted]  
**Subject:** FW: News Corporation/ Sky: Ofcom  
**Attachments:** Letter to BIS - Ofcom Process.pdf

Jon could we have an urgent word about this pls

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**From:** [Redacted]  
**Sent:** 23 December 2010 11:39  
**To:** [Redacted]  
**Cc:** [Redacted]  
**Subject:** News Corporation/ Sky: Ofcom

Please final attached a letter for your attention.

Regards

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Hogan Lovells International LLP  
 Atlantic House  
 Holborn Viaduct  
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Hogan Lovells International LLP  
Atlantic House  
Holborn Viaduct

IN. B 05

23 December 2010

[Redacted]

Department for Business, Innovation and Skills  
1 Victoria Street  
London  
SW1H 0ET

[Redacted]

Our ref  
Matter ref

[Redacted]

Dear [Redacted]

**NEWS CORPORATION - BRITISH SKY BROADCASTING - OFCOM REPORT**

I refer to the European intervention notice of 4 November 2010 concerning the proposed acquisition by News Corporation ("News") of the remaining shares in British Sky Broadcasting Group plc that News does not already own ("Transaction").

As News has made clear in its public statements, it has been shocked and dismayed by the views of the Secretary of State for Business, Innovation and Skills, Dr Vince Cable, which came to light during the course of 21 December.

We note the 21 December announcement by the Prime Minister that all responsibility for competition and policy issues relating to media, broadcasting, digital and telecoms sectors will be transferred immediately to the Secretary of State for Culture, Olympics, Media and Sport. We also note that this transfer of responsibility includes full responsibility for Ofcom's activities in these areas, including in relation to the Transaction.

While the removal of the Secretary of State for Business, Innovation and Skills and his department from a decision-making role in relation to the Transaction was clearly required, News still finds itself in the entirely unsatisfactory position that the original decision to issue an intervention notice under section 67 of the Enterprise Act 2002 was taken by a Secretary of State who was motivated by bias.

Ofcom is now in the process on preparing a report ("Report") by 31 December 2010 on "the media public interest consideration mentioned in the European intervention notice concerned", which in this case is:

*"the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience".*

News provided detailed submissions to Ofcom on 23 November and had meetings with Ofcom on 22 November and 2 December.

Ofcom sent its Issues Letter on 10 December. News met Ofcom on 15 December to provide its initial comments on the Issues Letter and to seek clarification of the issues identified by Ofcom

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23 December 2010

and the reasons, in the light of the relevant legal test, why Ofcom expressed these to be "concerns" relevant to the application of that test.

News formed the clear view from the meeting on 15 December that Ofcom has identified issues which are not relevant for the application of the relevant legal test, correctly understood. Ofcom's failure to relate its preliminary analysis to the overriding issue of the sufficiency of media plurality for a relevant audience in the UK effectively deprived News of any opportunity to understand and comment on Ofcom's analysis before Ofcom reports to the Secretary of State. In addition, News considers that in its Issues Letter Ofcom did not carry out a proper analysis of the range and variety of voices available to a UK audience. News submitted a further written submission on 17 December setting out the errors in Ofcom's approach and identifying what it believes to be the correct approach to the application of the relevant legal test.

News continues to believe that, focusing on the legal test rather than the plethora of unsubstantiated assertions that are made by complainants, the issues in this case are in fact quite well defined and straightforward and that the Transaction cannot be said to lead to any reduction in the sufficiency of plurality.

Notwithstanding the opportunity to make submissions to Ofcom, News remains deeply concerned that the approach adopted by Ofcom will result in a Report which will not provide a proper basis on which the Secretary of State (now the Secretary of State for Culture, Olympics, Media and Sport) can exercise his judgment as to whether the relevant legal test is or is not satisfied or, therefore, whether to refer or not to refer the Transaction to the Competition Commission. News will in parallel be issuing a Freedom of Information Act request aimed at establishing whether and how, and if so in what terms, the biased approach of the Secretary of State for Business Innovation and Skills may have been communicated to Ofcom in relation to its review.

In the light of these deep concerns, and in view of the transfer of responsibility of relevant functions, we would be grateful if you could please confirm the relevant contact(s) at the Department for Culture, Media and Sport with whom we should liaise in the first instance in relation to the ongoing public interest review of the Transaction. In particular, it is imperative that News receives a copy of the Report to afford it the adequate opportunity to make written and oral submissions to the Secretary of State for Culture, Olympics, Media and Sport before he exercises his judgment and makes a decision. In the absence of such an opportunity, News respectfully submits that its rights of defence and due process will have been infringed.

We therefore formally request you to confirm that the Department will ensure that:

- (a) a copy of the Report will be made available to News; and
- (b) News will be afforded the adequate opportunity to make written and oral submissions on it before the Secretary of State for Culture, Olympics, Media and Sport exercises his judgment and takes a decision.

Yours sincerely

[Redacted signature area]

cc

[Redacted] Allen & Overy LLP

[Redacted]

Hoan Lovells

MOD300007902



IN. B 06

**From:** [Redacted]

**Sent:** 23 December 2010 13:41

**To:** [Redacted]

**Cc:** [Redacted]

[Redacted] ZEFF JON [Redacted]

KILGARRIFF PATRICK

**Subject:** RE: News Corporation/ Sky: Ofcom

[Redacted] Thank you. On your question about future process, DCMS officials will now be handling this case and the relevant contacts are Jon Zeff, [Redacted] and Patrick Kilgarriff. I have forwarded your letter to them and they will reply shortly. In the meantime I can confirm receipt of your FOI request.

Andrew Rees

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**From:** [Redacted]

**Sent:** 23 December 2010 11:39

[Redacted]

**Subject:** News Corporation/ Sky: Ofcom

[Redacted]

Please find attached a letter for your attention.

Regards

[Redacted]

[Redacted]

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