Jeremy Hunt evidence to Leveson Inquiry

Primary evidence

Vol 2 of 3

Department for Culture, Media and Sport
Rt Hon Jeremy Hunt MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

Tel [redacted]
Fax

045

dcms
department for culture, media and sport

Your Ref:
Our Ref: [redacted]

Tom Watson MP
House of Commons
London SW1A 0AA

8 February 2011

Dear Tom

Thank you for your letter of 24 January about News Corporation's proposed acquisition of BSkyB.

You present arguments in favour of intervening on the basis of the public interest consideration specified at Section 58(2C)(c) of the Enterprise Act 2002 – this being concerned with the need for a genuine commitment to the broadcasting standards objectives set out in the Communications Act 2003.

As you know, a European Intervention Notice has already been issued in relation to this proposed merger. Had the Secretary of State for Business, Innovation and Skills believed this to be appropriate, he could have opted to identify in the intervention notice more than one of the considerations specified in section 58 of the Enterprise Act. In fact, the intervention notice was made only on the basis of the public interest consideration specified at Section 58(2C)(a) of the Act – this being concerned with need to ensure a sufficiency of plurality of persons with control of media enterprises.

Section 67(5) of the Enterprise Act 2002 provides that no more than one European Intervention Notice may be given in relation to the same relevant merger situation. Accordingly, it is not possible to make a further intervention in respect of this case on the basis of a different specified public interest consideration.

With best wishes

[redacted]

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport

SLAUGHTER AND MAY

One Bunhill Row
London EC1Y 8YY
T +44 (0)[redacted]
F +44 (0)[redacted]

046

9 February 2011

Your reference

Our reference
[redacted]

Rt Hon Jeremy Hunt MP
Secretary of State
Department of Culture, Media & Sport
2-4 Cockspur Street
London
SW1Y 5DH

Dear Mr Hunt

News Corporation / BSkyB (the "Takeover")

I write on behalf of BT, Guardian Media Group, Associated Newspapers Ltd, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (the "Concerned Parties").

I refer to your news release of 25th January and to my subsequent correspondence with DCMS, OFT and Ofcom.

We understand that the process you envisage would require Ofcom (working with OFT) to assess undertakings in lieu of reference to the Competition Commission (the "CC") without the involvement of interested third parties. Third parties would instead only be consulted after Ofcom/OFT have reported to you and after you have concluded that you are minded to accept such undertakings.

It is our view that this process would be unfair and would fail to meet the normal procedural standards of merger control and public law more generally.

Those standards envisage that in the absence of a clear-cut remedy, a case raising potential concerns (as is clearly the case here) should be reviewed by the CC. As you will be aware, the CC process is transparent and provides for the full involvement of interested third parties.

At the very least, the Concerned Parties should be consulted upfront on the broad structure of any proposed remedy (consistent we understand with previous Ofcom practice).

SLAUGHTER AND MAY

The Takeover raises substantive issues warranting a CC reference

Ofcom's advice to you was clear:

"[W]e believe there is a need for a fuller second stage review of these [plurality] *issues by the Competition Commission to assess the extent to which the concentration in media ownership may act against the public interest, and we advise the Secretary of State accordingly."*[1]

It is apparent from your news release that you agree with that advice.

No clear-cut remedy has been proposed

A "clear-cut" remedy is one where the *"effectiveness or proportionality of the proposed undertakings in lieu may [not] be questioned"*.[2]

The Concerned Parties understand that no clear-cut remedy has been proposed. According to press speculation, the remedies being explored involve instead the divestment of Sky News or more likely, some form of behavioural commitment from News Corporation.

I have previously written to you outlining the concerns around a divestment of Sky News. A copy of my earlier letter is attached at Annex 1. I note that Ofcom also concluded that such a divestment would risk *"a potentially perverse outcome for plurality"*[3] in the absence of a credible purchaser. It is clear that such a remedy cannot be "clear-cut".

The OFT's policy on behavioural remedies generally is clearly stated (and consistent with established procedure in other jurisdictions). The OFT considers it "unlikely" that such remedies would be acceptable absent a CC reference.[4] Ofcom also reported that there *"was significant scepticism as to the effectiveness of behavioural remedies as a mean of guaranteeing the editorial independence of Sky News from News Corp"*.[5] I attach at Annex 2 a paper which outlines the concerns with such a remedy in this case. Such concerns mean that a behavioural remedy

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[1] Paragraph 7.2 Ofcom report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation (the "Ofcom Report").

[2] Paragraph 8.4 OFT Guidance: Mergers – substantive assessment guidance

[3] Paragraph 7.6 Ofcom Report.

[4] Paragraph 8.10 OFT Guidance: Mergers – substantive assessment guidance

[5] Paragraph 7.4 Ofcom Report.

cannot be "clear-cut" and is therefore inappropriate in the absence of a full investigation by the CC.

Accepted merger procedure requires a reference to the CC

Under the accepted merger procedure there is a reference to the CC whenever the initial investigation identifies potential concerns which are not subject to a <u>clear-cut</u> remedy. In respect of competition cases, the OFT's guidance notes that:

"Undertakings in lieu of reference are...appropriate only where the...concerns raised by the merger and the remedies proposed to address them are clear-cut, and those remedies are capable of ready implementation."[6]

Where no clear-cut remedy is available, the standard approach is to refer the case to the CC.

The current procedure fails to reflect these considerations

It appears that you envisage a process which would depart from the accepted practice of the competition authorities and which would as a consequence be unfair to third parties in several respects. In particular:

- The advice which Ofcom and OFT is to provide to you would not be able to take into account the views of third parties. It is not clear whether Ofcom/OFT would be required to review and revise their advice following the public consultation. Nor is it clear whether such advice will be published.

- You, as the decision maker, will therefore be reaching a provisional ("minded to accept") conclusion based solely on discussions with the merging parties. Third parties opposing any proposal will be fundamentally and unfairly disadvantaged by being denied the opportunity to make informed submissions in advance of such a decision.

- The proposed process only envisages a 15 day consultation period. We understand that the merging parties have been in discussions over remedies for several weeks already. As a result, third parties would have substantially less time/opportunity than the merging parties to consider the proposed remedies and to influence the OFT, Ofcom and the Secretary of State.

If your decision is to meet public law requirements of fairness, it is essential that interested third parties are properly consulted <u>before</u> Ofcom/OFT report to you and <u>before</u> you propose to accept undertakings.

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[6] Paragraph 8.5 OFT Mergers Jurisdictional and Procedural Guidance.

The procedure should therefore be changed to give interested third parties a meaningful opportunity to comment.

We are not suggesting that interested third parties should necessarily have access to the detailed drafting of any undertaking. Our position is only that it is essential that they should be aware of the key features of any remedy proposal so that they are able to comment in an informed and timely manner.

In order to remedy the defects in the current proposal, the Concerned Parties therefore request that:

- You provide an outline of the key features of any remedy proposals that are made by News Corporation; and
- The Concerned Parties are given the opportunity to discuss the remedy proposals with Ofcom and the OFT prior them advising you.

In the absence of the above safeguards, the review will be procedurally unsound.

Yours sincerely

[redacted]

Copy to:

[redacted]

To: **Jeremy Hunt**

From: [redacted]
Team:Media
Tel: [redacted]
Date: **10/02/2011**

NEWS CORP/BSKYB MERGER: NEXT STEPS

Issue

Next steps in the News Corp/BSkyB merger.

Recommendation

That you note the timelines set out below and confirm that you are happy with what is proposed.

Timing

Immediate.

Background

See your statement attached at Annex A.

Advice

We have asked OFT and Ofcom for their reports by 3pm on Friday. We do not know what is in the reports but there are three broad outcomes:

Scenario 1: The reports conclude that the UILs are inadequate and or unenforceable. In this situation, you are likely to want to refer the matter to the Competition Commission immediately and make a written statement announcing your decision, probably on Tuesday or Wednesday (the last day possible before the recess). You would also need to write to News Corp and Sky explaining your decision. This could issue after the markets close on the night before the announcement.

Scenario 2: The reports conclude that the undertakings are satisfactory. If you agree, you will probably want to make an oral statement to both Houses on Tuesday. At that point we would also publish your letters to the OFT and Ofcom, their reports and the UILs for consultation. We suggest the minimum 15 day consultation period, though you will want to consider any strong representations for a longer period. Having announced 15 days, it would be possible to subsequently extend it if you felt the circumstances merited it. There are also likely to be requests for meetings which will need to be considered on a case by case basis.

Scenario 3: more time is required by Ofcom and/or OFT. It is possible that the OFT will say that the UILs are along the right lines but they need to do more work on them. This might be because they need to strengthen them in some way, or it may just be that more work is needed to get them into a consultable form. Either way, we think you would probably want to agree on an extension and would not make any announcement until the further work is completed (and we are back into scenario 1 or 2 territory).

Under scenarios 1 and 2, we think there are advantages both presentationally and in substance in meeting Ofcom and OFT on Monday to discuss their reports and ensure that you fully understand their conclusions.

cc
Jonathan Stephens
Jon Zeff
Patrick Kilgarriff
Carola Geist-Divver
Keith Smith

CONFIDENTIAL

Ofcom

048

11 February 2011

Jeremy Hunt
Secretary of State
DCMS
2-4 Cockspur Street
London
SW1Y 5DH

Colette Bowe
Chairman

Ed Richards
Chief Executive

Dear Jeremy,

News Corporation/BSkyB proposed merger: advice on proposed undertakings in lieu

We are writing today as requested to advise you in relation to News Corporation's proposed undertakings in lieu ("the proposed UILs"). We are aware that the OFT is also writing to you today with their advice on whether the proposed UILs would be practically and financially viable and effective in the short to medium and long term, in relation to which we have, as requested, assisted in light of our sectoral expertise.

You asked Ofcom to advise you, in accordance with section 106B of the Enterprise Act 2002, on the extent to which we think the proposed UILs address the potential impact on media plurality identified in Ofcom's report on the proposed merger between News Corporation and BSkyB dated 31 December 2010.

We focused on Sky news and current affairs services ("Sky News"), which we saw as essential to plurality. Our concern, in sum, was that the proposed transaction would result in Sky ceasing to be a distinct media enterprise from News Corporation, which would result in an increase in News Corporation's ability to influence public opinion (through Sky News), as measured by share of news and current affairs consumption by a UK-wide cross media audience. Taken in combination, this indicated a change in the concentration of media ownership which would be likely to affect sufficient plurality.[1]

[1] Paragraphs 5.46 and 5.52 of the report.

Riverside House
2a Southwark Bridge Road
London SE1 9HA

Telephone +44 (0)20 7981 3000
Facsimile +44 (0)20 7981 3333
www.ofcom.org.uk

The proposed UILs[2]

1. The proposed UILs, in essence, provide for Sky News to be spun off into a new company ("Newco") owned 39.14% by the News Corporation/Sky merged entity. The other shareholdings in Newco and its governance arrangements would reflect those of Sky today. Assets used only by Sky News would be transferred to Newco, while arrangements would be made to allow Newco the continued use of other shared assets, in particular the Sky brand. The News Corporation/Sky merged entity would enter into a carriage agreement with Newco for the continued supply of the Sky News channel over News Corporation/Sky's capacity for 10 years and thereby provide Newco with a revenue stream.

2. This would essentially replicate the current shareholding and governance arrangements of Sky. But the nature of Newco and its relationship with News Corporation would not be the same as that between Sky and News Corporation today and is indeed fundamentally different.

3. We have had two weeks in which to report to the Secretary of State. In the time available, we have put in writing to News Corporation our views on their proposed UILs, we have met with them to discuss these and have received today in writing from News Corporation amendments that it is willing to offer to its proposed UILs. The following assessment sets out our views of News Corporation's proposed UILs taking account of its further proposals to us.

Assessment

4. We have seen a draft of the OFT's report to you in relation to the financial and practical viability of the proposed UILs. In relation to the matters addressed by the OFT on financial and practical viability, we have no concerns over and above those set out by it. We note that the issues raised by the OFT are relevant to our plurality concerns and would need to be satisfactorily addressed in any final UILs.

5. We see the proposed UILs as a significant step by News Corporation towards addressing the potential impact on plurality we identified in our report. We take this view mainly because the combination of the carriage agreement and the brand licensing agreement make explicit the value that News Corporation and Sky place on Sky News and represent a significant commitment to the continuation of the Sky News operations for a period of 10 years. In addition, the Newco business plan appears to provide reasonable certainty over the viability of the spun-off entity against future market risks.

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[2] See attachment to letter from Jeremy Hunt to Ofcom dated 27 January 2011.

6. However, whilst the proposed undertakings reproduce the shareholding and governance structure of Sky, the context is unavoidably very different. Newco would not be like Sky. Today, Sky is a large, financially independent company with a range of products and services offered direct to consumers and Sky News is a relatively small part of its business. By comparison, Newco would be a relatively small company, with (at least to begin with) a small range of products – Sky News would be its sole product. Most importantly, it would be commercially dependent on its relationship with the merged News Corporation/Sky entity for about 85% of its revenues and 25% of its costs. This fundamental commercial dependency is inherently created by the spin-off process, and therefore inevitable in this context.

7. Therefore, in our view, to address our concerns about the impact on plurality, the following cumulative package of governance matters are needed. In outline:

   - The Board of Newco should consist of a majority of independent directors, "independent directors" being directors who have no other News Corporation or News Corporation associated interest;
   - The Board of Newco, including the independent non executive directors, should have a combination of both senior editorial and business experience/expertise;
   - The Chairman of Newco should be an independent non executive;
   - There should be a sub-committee of the Board of Newco to oversee editorial independence and integrity of Newco's services ("the Board Editorial Committee").

Independent non-executive directors

8. The proposed UILs provide that the Board of Newco would comprise a majority of independent non-executive directors (not including the Chairman), complying with the UK Corporate Governance Code (the Code)[3]. We believe this is a positive commitment to support the independence of Newco.

9. However, we consider that it is essential that these directors are truly independent from any potential News Corporation conflict of interest. Under the UK Corporate Governance Code, a board identifies each non-executive director it considers to be independent in character and judgment and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgment. Under the Code, a board may determine that a director is independent (stating its reasons) notwithstanding the existence of relationships or circumstances which may appear relevant to its determination, including if the director:

[3] UK Corporate Governance Code, B.1.1

- has been an employee of the company or group within the last five years;
- has, or has had within the last three years, a material business relationship with the company either directly, or as a partner, shareholder, director or senior employee of a body that has such a relationship with the company;
- has received or receives additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance-related pay scheme, or is a member of the company's pension scheme;
- has close family ties with any of the company's advisers, directors or senior employees;
- holds cross-directorships or has significant links with other directors
- through involvement in other companies or bodies; represents a significant shareholder; or
- has served on the board for more than nine years from the date of their first election.

10. In our view, in order to address our plurality concerns, a director should not be considered independent if there are any such relationships or circumstances in existence.

11. By letter on 11 February 2011, News Corporation informed us that it is willing to amend its proposed UILs also to undertake that a definition of "independent director" would be enshrined in Newco's constitutional documents, and that definition would exclude the circumstances and relationships set out above.

12. There would be a need to embed this in the constitutional documents, and for News Corporation to undertake to vote against any proposed changes to them.

Expertise

13. The proposed UILs gave a general undertaking to adhere to the obligation imposed by the Listing Rules as regards compliance with the principles set out in Section 1 of the UK Corporate Governance Code.

14. In our view, to address our concerns about the impact on plurality, the Board of Newco, including the independent non executive directors, should be required to have a combination of both senior editorial and business experience/expertise.

15. By letter on 11 February 2011, News Corporation informed us that it is willing to amend the proposed UILs also to undertake:

    - That the requirement in provision B.1 of the Code (that "the Board and its committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively") be enshrined in Newco's constitutional documents; and

- That at least one independent member would have editorial and/or journalistic experience.

16. There would be a need to embed this in the constitutional documents, and for News Corporation to undertake to vote against any proposed changes.

Independent Chairman

17. In our view, to address our concerns about the impact on plurality, in addition to a majority of independent non-executives, we believe the Board of Newco would need to be independently chaired, as clearly recommended by the Corporate Governance Code[4]. Such independence should be determined on the same basis as for other non-executives outlined above.

18. By letter on 11 February 2011, News Corporation has informed us that it is not willing to undertake that the Chairman would be independent. We do not understand the basis for this refusal, particularly since the clear recommendation of the Corporate Governance Code is that the chairman should, on appointment, meet the independence criteria set out in the Code, which News Corporation has agreed to on the stricter basis set out above, to ensure the independence of non-executive directors.

19. Without such an undertaking, it would be open to the Newco Board to appoint a Chairman who is affiliated with News Corporation. Given the nature of Newco and its relationship with News Corporation as set out above, we consider this would undermine the effectiveness of the proposed UILs in meeting our plurality concerns and the credibility of the undertakings.

Editorial committee of the Board

20. In order to meet our concerns on plurality, we believe that there should be a transparent mechanism in place to ensure editorial integrity and independence of Sky News is at the heart of the Newco Board's interests. We proposed to News Corporation that an editorial committee of the Board be established as follows:

    - Members of the Board Editorial Committee to contain a majority of independent non executive board members, one of whom is the Chairman of the Board Editorial Committee. We would expect the Chairman to have senior editorial experience and expertise.

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[4] UK Corporate Governance Code A.3.1 - The chairman should on appointment meet the independence criteria set out in B.1.1

- We would expect the terms of reference for the Board Editorial Committee to include:
    - the editorial independence and integrity of Sky News
    - the hiring, firing or replacement of the Sky News Editor and all key editorial appointments (including any material changes in terms and conditions which could give rise to constructive dismissal)
    - any changes to the authority, reporting relationship and consultation rights of the Sky News Editor.

21. News Corporation was not willing to agree to this. However, by letter on 11 February 2011, News Corporation informed us that it is willing to amend the proposed UILs to undertake that:

- Newco's constitutional documents explicitly provide that Sky News TV service will abide by the principle of editorial independence and integrity in news reporting and that it will comply with the Broadcasting Code;

- The hiring and firing of the head of Sky News (i.e. the most senior editorial position of Sky News) would have to be approved by Newco's Board, (which would comprise a majority of independent directors);

- Newco would establish a Corporate Governance and Nominations Committee. This would operate under terms substantially similar to those of Sky's current Corporate Governance and Nominations Committee. It would comprise a majority of independent members, including the independent member with editorial and/or journalistic experience. It would be chaired by an independent board member. It would be specifically entrusted with oversight of compliance with both Newco's corporate governance provisions (as provided for under the UIL) and Newco's constitutional provisions relating to the principle of editorial independence and integrity in news reporting, and compliance with the Broadcasting Code.

22. We believe it is critical to the effectiveness of the undertakings in addressing our plurality concerns, that editorial issues are put at the heart of the Board's function, but note this could be achieved in a number of ways. The terms now proposed by News Corporation are a promising basis from which to work. There would be a need to embed provisions relating to the constitutional documents, and for News Corporation to undertake to vote against any proposed changes to them. However, we note that the terms of reference of Sky's current Corporate Governance and Nominations Committee require the committee's recommendations to the Board to be made in consultation with the Chairman [of the Board], which means that, absent an independent Chairman, we would continue to have concerns.

Duration

23. We note that the OFT's assessment of the practical and financial viability of the proposed UILs is that they are likely to be effective over the short to medium term (no longer than 10 years) and are unlikely to be effective over the long term.

24. We agree that the proposed UILs are not a permanent solution and that their effectiveness may start to diminish in the run up to the end of the 10 year period. As advised to the OFT, we consider that a carriage agreement of a 10-year term in the context of industry dynamics in this sector is long term. This is because we consider there is likely to be significant evolution of the market and consumers' use of news and current affairs over the next decade. As a result, the situation with regard to plurality may be significantly different in 10 years time.

Advice

25. In the circumstances, we advise that the proposed UILs as currently drafted do not address the potential impact on media plurality identified in Ofcom's report.

26. However, were it possible to resolve the question of the independence of the Chairman, then together with the amendments accepted by News Corporation, the proposed UILs may represent a way forward in principle.

27. Depending on your decision, we consider (as, we note, does the OFT), that further negotiation with News Corporation may be necessary on the precise terms of the UILs offered by them. It is important to note that the financial and practical viability of the proposed UILs and their effectiveness in addressing our plurality concerns, will depend on the detail of the arrangements, including on specific contract terms and conditions between Newco and Sky/News Corporation.

28. In addition, in the time available, Ofcom has had discussions with News Corporation and received from News Corporation in writing amendments which News Corporation is willing to make to the original text of the proposed UILs. Given the time available, News Corporation has not provided Ofcom with a revised version of the proposed UILs. We therefore think that if the Secretary of State is minded to accept revised UILs, it would be sensible that any final draft be approved by Ofcom and the OFT.

29. In the context of the short to medium term effectiveness of the proposed UILs, as you will recall from our report, we recommend that the Government consider undertaking a wider review of the statutory framework to ensure plurality in the public interest. Specifically, we said that there may be value in providing for intervention where plurality concerns arise in the absence of a corporate transaction involving media enterprises and which are not safeguarded by the current media ownership rules. If the Government followed this recommendation, such a review could consider and provide

for the longer term position as appropriate and this would provide additional assurance in relation to the position beyond the 10 year term of the proposed UILs

Yours sincerely

Colette Bowe

Ed Richards

cc. Clive Maxwell, Executive Director, OFT

OFFICE OF FAIR TRADING

049

A report to the Secretary of State for Culture, Olympics, Media and Sport in response to the undertakings in lieu offered by News Corporation pursuant to Schedule 2 paragraph 3 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 concerning the anticipated acquisition by News Corporation of British Sky Broadcasting Group plc

A report pursuant to Section 93 of the Enterprise Act 2002

11 February 2011

NON-CONFIDENTIAL VERSION

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The Secretary of State has excluded from this published version of the OFT's report information which he considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂].

1. Executive summary and conclusions

Introduction

1.1. On 25 January 2011, the Secretary of State for Culture, Olympics Media and Sport (the Secretary of State) announced that he was minded to refer the proposed acquisition by News Corporation (News) of shares in British Sky Broadcasting Group plc (Sky) (together, the parties) that it does not already own to the Competition Commission (CC) for a detailed investigation.

1.2. The Secretary of State indicated that he is willing to consider undertakings in lieu (UIL) offered by News which have the potential to prevent or otherwise mitigate the media plurality concerns identified in the report sent to the Secretary of State by Ofcom on 31 December 2010.

1.3. The OFT has been asked to consult with the parties with a view to discovering whether in its view those UIL are practically and financially viable; and to consider if there are any practical issues which could undermine the operation of the UIL and whether they would be effective over the medium and long term.

1.4. The OFT has had two weeks in which to report to the Secretary of State. In the limited time available, the OFT has held meetings with News, Sky and Ofcom (in its position as sectoral regulator), and has received responses from News to a number of requests for information. The OFT has not been requested to consult with third parties and notes that this would not have been feasible in the timeframe. However, the OFT notes that third parties will have the opportunity to be consulted as provided for by statute[1] if the Secretary of State is minded to accept the UIL.

1.5. Depending on the decision of the Secretary of State, the OFT considers that further negotiation with News (with assistance from Ofcom) may be necessary on the precise terms of the UIL offered by News; however some progress has been made with News in these two weeks in terms of improving the practical and financial

[1] Schedule 10 of the Enterprise Act 2002.

viability of those UIL from the text originally proposed to the Secretary of State by News.

The clear-cut standard for UIL

1.6. UIL are typically regarded as appropriate where the remedies proposed are **clear-cut** and are **capable of ready implementation.**[2] The applicable principles are set out in the OFT's guidance.[3]

1.7. The OFT has carried out its analysis of the proposed UIL in this case by reference to the clear-cut standard. The OFT is mindful, however, that:

- the Secretary of State may consider it appropriate to adopt a different standard because he is acting under public interest considerations and the OFT's guidance is designed to deal with competition-related matters; moreover, the clear-cut standard is a policy position adopted by the OFT and other competition agencies;
- even taking into account the clear-cut standard, the OFT's preference for structural divestment solutions[4] in relation to UIL does not preclude the consideration of remedies other than divestment in appropriate cases. Moreover, the UIL offered by News bear some resemblance to a 'carve-out' remedy, which the OFT would generally regard as structural in nature, provided the relevant business or assets are capable of being separated from the parent; and
- whilst behavioural undertakings (such as price caps) are not generally accepted at the first phase of a merger investigation in lieu of a reference to the CC in competition cases, this does not preclude behavioural undertakings being provided in <u>support</u> of a structural solution provided that the overall remedy meets the clear-cut standard.

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[2] OFT Mergers - Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122) (the Exceptions and UIL guidance), paragraph 5.7.
[3] Exceptions and UIL guidance, paragraph 5.39.
[4] [✂], a sale of the business may be disproportionate if the proposed UIL meets the concerns raised in Ofcom's report and satisfies the clear-cut standard.

1.8. Any UIL must be assessed on a case by case basis. The basic principles for assessment are that:

- there must not be material doubts about the overall effectiveness of the remedy in solving the problem identified; and
- in practical terms, the remedy should not be of such magnitude and/or complexity that its implementation would require unworkable resources at first phase.[5]

1.9. In undertaking its assessment of the practical and financial viability of the UIL, the OFT focuses in this report on whether the UIL offered is capable of ready implementation and also, as instructed by the Secretary of State, whether the UIL would be effective over the medium and long term from the standpoint of practical and financial viability only. Ofcom will separately advise on the effectiveness of the UIL to meet media plurality concerns.

Overall assessment of the proposed UIL

1.10. The proposed UIL involve the establishment of Newco as a distinct owner of Sky News. The financial viability of Newco – and therefore the continued operation of Sky News – relies on the existence of a proposed carriage agreement between News and Newco, without which Newco would be significantly loss-making. News proposes that the term of the carriage agreement between News and Newco shall be 10 years. There is no provision for renewal of the carriage agreement at the end of the term.

1.11. In terms of the clear-cut standard, News argued that the spin-off of Sky News into Newco is a structural remedy that will lead to the creation of a stable, well-resourced, viable entity over the long term. It considers that its/Sky's ongoing incentive to carry the Sky News channel and thus to purchase it from Newco is an important feature that had informed the design of the UIL and should enable the Secretary of State to have confidence in the success of the UIL. Indeed, News noted that Sky had chosen to start a 24 hour news channel and had invested in that service since Sky News was launched in 1989. In essence, unlike in a normal divestiture

[5] Exceptions and UIL guidance, paragraph 5.8.

remedy, where the merging parties may have an interest in the (competitor) divested business failing, News submits that News/Sky would have an interest in the success of Newco going forward.

1.12. The OFT accepts that the UIL involve certain structural elements supported by behavioural commitments, and considers that, in practice, the proposed spin-off of Sky News is capable of ready implementation, albeit with further detailed issues to be resolved, including those set out below.

1.13. The OFT has identified certain risks which may undermine the practical and financial viability of the UIL. These include the following:

- the successful operation of Newco relies to some extent on the incentives of News/Sky to continue to carry and fund a 24 hour news channel. There is a strong likelihood that the commercial incentives lie with the continued operation of Newco, but it remains plausible that such incentives may change over time;
- uncertainty about the prospects for renewal of the carriage agreement on equivalent terms may begin to affect Newco some years before its term date, [✂]; and
- Newco's prospects post-termination of the carriage agreement are not clear.

1.14. The OFT advises that set against these risks are:

- the commercial incentive for News/Sky to continue paying for the Sky News channel (reinforced by the contractual rights afforded to Newco under the carriage agreement and brand licensing agreement);
- the protection and transparency afforded by being [publicly traded] [✂];
- the fact that the brand licensing agreement lasts for up to 14 years, which may place pressure on News/Sky to renew the carriage agreement upon termination for a further four years; and

- the ability of Newco to diversify its product offering or to continue with a distinctive news channel that ensures that Sky is willing to re-commit to the carriage agreement at the end of 10 years (or earlier).

1.15. In assessing these risks, the OFT has been asked to advise the Secretary of State on whether there are practical issues which could undermine the effective operation of the UIL, and whether the UIL would be viable over the medium and long term. The OFT's assessment, based on the information provided to it by News, indicates that the key agreements (the carriage agreement and the brand licensing agreement) would appear to underpin the short-to-medium term (no longer than 10 years) viability of Newco and the UIL. The OFT, however, considers that the finite duration of the carriage agreement, in particular, entails a material risk to the long term viability of Newco and hence the UIL.

1.16. The OFT notes that each of News, Sky and Ofcom consider that a carriage agreement of this length and duration, in the context of the industry dynamics of the media sector, is "long-term". The OFT accepts that the carriage agreement may be longer than the industry norm. However, the OFT considers that, in the context of ensuring the 'long-term' viability of Newco and the UIL, it is important to consider whether Newco can continue as a stand-alone entity on a permanent or lasting basis. It is clear that, absent the revenue stream provided by the carriage agreement [✂], Newco is effectively loss-making. As a consequence, absent renewal on a similar basis, an alternative revenue stream, or being acquired, there is a real risk that Newco may not survive as envisaged by the UIL beyond the term of the carriage agreement. This risk may also, as discussed above, affect Newco's prospects before that point. The relevance of these risks ultimately depends on the time horizon which the Secretary of State considers relevant to ensure the effectiveness of the UIL.

1.17. The OFT has not been able to identify with News any improvements to the UIL that overcome the essential structural limitation of the UIL, namely, the finite duration of the carriage agreement.

1.18. The OFT advises the Secretary of State that:

- if News enter into certain additional undertakings (details of which are set out in paragraph 1.20 below), the UIL are likely to be effective in the short and medium term (that is, no more than 10 years); and
- even if, however, News enters into such additional undertakings, the UIL are unlikely to be effective over the long term; the finite duration of the carriage agreement is a practical and financial issue which poses a significant risk to the operation of the UIL beyond 10 years (and possibly earlier).

1.19. In seeking to assess this advice, the Secretary of State may want to consider whether the UIL, supplemented by the additional undertakings mentioned above, which the OFT considers likely to be effective in the short-to-medium term, are of sufficient duration to meet the media plurality concerns identified by Ofcom or are effective in relation to them.

1.20. The additional undertakings referred to in paragraph 1.18 above are as follows:

- **Interim protection** – interim protection for the business to be divested is a standard feature of divestment remedies in competition cases, and will normally be included in OFT UIL. News has agreed to the inclusion within the UIL in this case of commitments from News regarding the preservation and continued operation of Sky News pending its spin-off. These will provide an assurance that the Sky News business to be spun-off will not be materially different to the Sky News business today;
- **non reacquisition commitment** – a commitment not to reacquire the business to be divested without prior OFT approval is a standard feature in OFT UIL; News has proposed to provide the Secretary of State with a form of non-reacquisition commitment, subject to two carve-outs: (a) a sunset provision which means that the clause would no longer apply at the end of 10 years; and (b) a carve-out in the event that a third party bid is launched for Newco. In the particular circumstances of this case, and subject to the more general points about the finite nature of the carriage agreement, the related long-term risks and the extent to which the Secretary of State considers the

duration of the carriage agreement sufficiently 'long-term', the OFT believes the 10 year limitation (that is, point (a)) to be acceptable, but would recommend against the carve-out in (b) given that this would still risk the frustration of the purposes of the UIL;

- **prior review of key agreements** – the success of Newco depends significantly on at least two key agreements – the carriage agreement and the brand licensing agreement; News has agreed that the form of both agreements should be subject to approval by the Secretary of State before he accepts the UIL; the OFT considers that there may be other key contracts which should require prior approval by the Secretary of State should he be minded to accept the UIL; the OFT would envisage that both the OFT and Ofcom (potentially supported by an independent expert funded by News) would have a role in the approval process of these agreements;

- **inclusion of an arbitration/dispute resolution mechanism** – given the importance of the key agreements between News and Newco going forward, News has agreed to the insertion of an arbitration or dispute resolution mechanism to ensure that any contractual disputes in relation to these agreements are resolved promptly, efficiently and without undue cost; more precise details of how such an arrangement would function have not been determined in the time available;

- **restrictions on termination of the key agreements** – the success of Newco depends significantly on at least two key agreements – the carriage agreement and the brand licensing agreement; these agreements are terminable only in the event of 'material breach'; in order to protect Newco against the risk of an unjustified termination by News, (and in light of concerns expressed by the OFT about the potential inequality in the positions of News and Newco and their respective resources in the context of a possible contractual dispute) News has offered a commitment in the form of a undertaking not to terminate either agreement prior to a formal and final determination having been made under that dispute resolution mechanism applicable under the relevant agreement (that is, a finding that Newco has committed a material breach of the carriage agreement or brand license agreement); the OFT advises that it believes that this proposal is acceptable in order to reduce the risk of an unjustified termination of the key agreements by News that could jeopardise Newco; and

- **other obligations** - the OFT sets out in sections 7 to 12 of this report further detail on each of the points raised above, together with further undertakings and improvements to the UIL.

1.21. The OFT notes that further review, negotiation and consultation on the UIL may be necessary as part of this process. It also notes that News has, to date, signalled its unwillingness to agree to one of the above additional undertakings. Given the limited time available, News has not provided the OFT with a revised version of the UIL. As a matter of prudence, the OFT considers that any finalised draft of the UIL for acceptance by the Secretary of State should be submitted by News to the OFT and Ofcom for further advice.

1.22. On the basis that the Secretary of State were minded to accept the UIL in an amended form, the OFT advises that it would be appropriate for the Secretary of State to test further the viability and robustness of the commitments offered during the statutory public consultation process.

1.23. The OFT has given such advice as it considers appropriate, having regard to the limited time period in which to consider the UIL and consult with News.

2. Transaction

2.1. The proposed transaction involves the acquisition of sole control by News over Sky through an offer for the remaining 60.86 percent shareholding in Sky not already owned by News.

3. Jurisdiction

3.1. The Secretary of State for Business, Innovation and Skills issued a European Intervention Notice on 4 November 2010 (the Intervention Notice) as permitted under Article 21(4) of the EC

Merger Regulation[6] to protect the UK's legitimate interest in media plurality, and pursuant to section 67(2) of the Enterprise Act 2002 (the Act) and the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the Order).[7]

3.2. The Intervention Notice referred to the public interest consideration set out in section 58 of the Act to ensure the sufficiency of plurality of persons with control of media enterprises in the UK. In this regard, the Secretary of State for Business, Innovation and Skills requested that Ofcom provide its recommendation and advice on the specified public interest consideration in deciding whether to refer the case to the CC for detailed investigation.[8]

3.3. On 31 December 2010, Ofcom issued its report, as provided for under Article 4A of the Order, which concluded that in its reasonable belief, the proposed acquisition may be expected to operate against the public interest on the basis that there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences.

3.4. In deciding whether to refer the transaction to the CC under Article 5 of the Order, the Secretary of State has the discretion to accept undertakings in lieu of making such a reference (UIL) from the parties, as permitted under paragraph 3 of Schedule 2 of the Order.

3.5. In a statement issued on 25 January 2011, the Secretary of State said he was minded to refer the merger to the CC but would first consider, with the involvement and advice of the OFT and Ofcom, the UIL offered by News and whether they would have *'the potential to prevent or otherwise mitigate the potential threats to media plurality identified in the Ofcom report.'*[9]

[6] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the Merger Regulation).
[7] The transaction falls within the sole jurisdiction of the European Commission to assess the competitive effects of the merger in the European Economic Area or a substantial part of it. On 21 December 2010, the European Commission cleared unconditionally the proposed transaction.
[8] As also required by the Intervention Notice, the OFT provided advice to the Secretary of State, pursuant to Article 4 of the Order, confirming that, in its view, the Secretary of State has jurisdiction and is able to exercise the power to make a reference to the CC.
[9] Statement from Culture Secretary Jeremy Hunt of 25 January 2011.

4. Scope of OFT advice

4.1. The Secretary of State has asked the OFT, pursuant to section 93 of the Act, to give its view on whether he should accept the UIL offered by News.

4.2. By letter to the OFT of 27 January 2011, the Secretary of State requested that, within two weeks, the OFT determine whether the UIL would, in its view, be practically and financially viable, so as to be acceptable to the Secretary of State. In particular, the OFT has been asked to consider if there are any practical issues which would undermine the operation of the UIL and whether they would be effective over the medium and long term. The Secretary of State requested that Ofcom provide any assistance required by the OFT in considering the UIL.

4.3. The Secretary of State has not asked the OFT to consult third parties. In any event, if he were minded to accept the UIL, third parties would have this opportunity as provided by the consultation provision in Schedule 10 of the Act.

4.4. In this report, the OFT does not advise on the potential impact of the UIL on the concerns raised by Ofcom regarding media plurality. This is being specifically addressed by Ofcom as a separate piece of advice requested by the Secretary of State pursuant to section 106B of the Act.

4.5. The OFT has received submissions from News and has met with each of the parties. The OFT has also received assistance from Ofcom in its role as sectoral regulator.

5. OFT approach to UIL

5.1. The OFT has carried out its analysis of the proposed UIL in this report by reference to its clear-cut standard. However, the OFT acknowledges that the Secretary of State may consider it appropriate to adopt a different standard in light of his assessment of public interest considerations in this case, whereas the OFT's guidance is designed to deal with competition-related matters.

5.2. In order to accept UIL (or in this case to recommend acceptance by the Secretary of State of proposed UIL), the OFT must typically be confident that all the potential concerns that have been identified by it (in this case, all concerns identified by Ofcom relating to sufficient media plurality) would be resolved by means of the UIL without the need for further investigation.[10] This is necessary since, once the UIL are accepted, the Secretary of State has no further recourse to refer the case to the CC after this point.

5.3. The explanatory note to section 73 of the Act states:

> *'The purpose of accepting undertakings is to allow the OFT (where it is confident about the problem that needs to be addressed and the appropriate solution) to correct the competition problem the merger presents without recourse to a potentially time-consuming and costly investigation. This provision mirrors the existing power...for the Secretary of State to accept undertakings-in-lieu, but with responsibility transferred to the OFT.'*

5.4. UIL are accordingly only appropriate where the remedies proposed to address any concerns raised by the merger are clear-cut and are capable of ready implementation.[11] For these reasons, the OFT typically does not consider that behavioural undertakings will be sufficiently clear-cut to address identified concerns.[12]

5.5. The clear-cut requirement has two dimensions: (1) there must not be material doubts about the overall effectiveness of the remedy; and (2) in practical terms, the remedy should not be of such magnitude and/or complexity that its implementation would require unworkable resources at first phase of a merger investigation.[13] The European Commission adopts a similar approach to remedies accepted at Phase I.[14]

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[10] Exceptions and UIL guidance, paragraph 5.6.
[11] Exceptions and UIL guidance, paragraph 5.7.
[12] Exceptions and UIL guidance, paragraph 5.39.
[13] Exceptions and UIL guidance, paragraph 5.8.
[14] Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (ECO No 802/2004: 'Commitments in phase I can only be accepted where the competition problem is readily identifiable and can be easily remedied. The competition problem therefore needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out "serious doubts" within the meaning of Article 6(1)(c) of the Merger Regulation.', paragraph 81.

5.6. In the present case, the OFT is concerned with the second part of its clear-cut requirement, since Ofcom will address the effectiveness of the UIL in its separate report to the Secretary of State.

5.7. Whilst behavioural undertakings are not generally accepted at Phase I of a merger investigation in lieu of a reference to the CC in competition cases, this does not preclude such undertakings being offered in support of a structural solution, so long as the overall remedy meets the clear-cut standard. In any event, the UIL are assessed on a case-by-case basis.

5.8. The monitoring of compliance with undertakings in lieu accepted by the Secretary of State under paragraph (3)(2) of Schedule 2 of the Order is the responsibility of the OFT pursuant to section 92 of the Act.[15]

6. Outline of News' proposed UIL

Summary of the proposed UIL

6.1. News proposes to offer to the Secretary of State a commitment involving the following core elements:

- Sky News will be spun off as an independent UK public limited company (that is, Newco), with its shares publicly traded [✂], either at the Closing Date[16] or as soon as reasonably practicable following the Closing Date and, in any event, no later than nine months from the acquisition of control of Sky by News. Shares in Newco will be distributed to existing shareholders of Sky in the same proportions as their existing shareholdings, such that News will retain the same 39.1 percent shareholding in Newco as it currently has in Sky;

- all tangible assets currently used exclusively for the purpose of carrying on the Sky News business, as well as key Sky News editorial staff, and all relevant licences, agreements and other material contracts will be transferred by Sky to Newco;

[15] See Schedule 3, paragraph 1(5)(b) of the Order.
[16] 'Closing Date' means the date on which News acquires all or a majority of the share capital of Sky or, if the Transaction is effected by a scheme of arrangement, the date on which the scheme of arrangement becomes effective.

- Sky will enter into a 10 year carriage agreement with Newco under which Sky will pay a carriage fee to Newco for the provision of its news services to Sky for distribution to end users. Sky will also license the 'Sky News' brand to Newco subject to payment of a royalty, for an initial period of seven years, with automatic renewal for a further seven years, and with the possibility of an extension for three more years;
- if required by Newco, Sky will enter into arms' length agreements for facilities and support services (such as advertising sales representation, lease of premises, broadcast and technical services and other assets owned by Sky); and
- the corporate governance structure of Newco will be established to replicate substantially the effects of the existing corporate structure of Sky such that: (1) News/Sky will be subject to a voting limitation of 37.19 percent of the total votes of Newco; (2) a majority of the board of Newco will comprise non-executive Directors determined by the board to be independent; (3) material transactions between Newco and News/Sky will require approval of Newco's Audit Committee, which will consist exclusively of independent non-executive directors; and (4) Newco will adhere to the obligations imposed by the Listing Rules as regards compliance with the principles set out in Section 1 of the UK Corporate Governance Code.

[News]' view on the clear-cut nature of the UIL

6.2. [News] submitted that the proposed UIL provide a clear-cut, structural solution which will maintain the existing degree of independence of Sky News. In [its] view, Newco will be established as a separate publicly-traded legal entity with corporate governance arrangements reflecting those of Sky, which can be implemented unilaterally by News based on the UIL.

6.3. [News] differentiated the proposed UIL from those in a normal divestment remedy on the basis that News would be a customer of Newco going forward, rather than a competitor. [News] emphasised that Sky had chosen to start a 24 hour news channel and had invested in that service since Sky News was launched in 1989. Sky News has therefore been a key part of Sky's commercial proposition to customers, and there is no reason to believe that News/Sky would wish to change this in the future.

6.4. News argued that its/Sky's ongoing incentive to carry the Sky News channel and thus to purchase it from Newco is an important feature that had informed the design of the UIL and should enable the Secretary of State to have confidence in the success of the UIL. In essence, unlike in a normal divestiture remedy, where the merging parties may have an interest in the (competitor) divested business failing, News submit that News/Sky would have an interest in the success of Sky News going forward.

6.5. [News] likened the UIL to that of 'an upfront remedy which does not require that a competition authority subsequently approve a suitable purchaser' and noted that 'it is therefore more clear-cut than a number of other structural remedies that are commonly accepted by regulatory authorities.'[17] [News] argued that given their structural nature, the UIL do not require ongoing monitoring as Newco will continue to operate as a distinct, profit-maximising enterprise under the direction and supervision of its board.

[News]' arguments on practical and financial viability

6.6. [News] argued that Newco will be practically and financially viable post-spin off. [It] argued that the UIL have been structured so as to ensure the continuation of Sky News as a distinct enterprise with an independent news voice, thereby addressing the relevant public interest consideration. In [its] view, it is not necessary (as would be the case if competition concerns were at issue) to require that all the links between Sky and Newco be severed; rather, that the current degree of editorial independence is preserved and that Newco is financially viable.

6.7. To address these issues, [News] submitted that by substantially replicating the corporate governance structure currently applied under Sky, Newco will be free to pursue its core news business. In [its] view, the 10-year carriage agreement means that Newco will have a reliable revenue stream for a much longer period than is typical in the media sector. This will allow Newco to independently plan for future investment and expansion based on a quantifiable

[17] News Response to the OFT's questions of 1 February 2011.

and stable cash flow over the medium to long term. Similarly, [News] argued that the grant of a licence to use the 'Sky News' brand will allow Newco to generate significant revenue streams from third parties.

7. **Legal spin-off of Sky News**[18]

7.1. The outline of the arrangements as regards the spin-off of Sky News to Newco has been set out in section 6.1 above.

7.2. In general, the OFT sees no reason why the proposed corporate arrangements in relation to the creation of Newco should not be practical. Partial divestments of businesses are common, and News provided a number of examples of spin-offs of businesses in similar sectors by way of illustration of the regularity of such arrangements.[19]

7.3. The OFT is unable to advise, given the limited time available, on the prospects of success for [an admission to trading] [✂]. When asked whether [an admission to trading] would be likely to be successful, News provided an opinion [✂][20] confirming that [✂]. The OFT has no reason to doubt the contents of this opinion but notes [✂].

7.4. The aspects of the spin-off which required the OFT's particular consideration relate to timing, the absence of any interim protection (which relates to timing), the shareholder base of Newco and the absence of a non-reacquisition commitment by News. The corporate governance of Newco is also a key consideration, which is addressed in the following section.

Timing of spin-off

7.5. News committed to effecting the spin-off of Sky News within nine months from the acquisition of control of Sky by News. [✂].

7.6. [✂].

[18] Paragraphs 2.1, 2.2 of the UIL.
[19] News response to OFT questions of 1 February. The examples provided by News included: Time Warner's spin-off of AOL and Time Warner Cable, Liberty Media's spin-off of DirectTV, Cablevision Systems Corp's proposals to spin off Rainbow Media. News noted Cable and Wireless also split into two separate companies last year.
[20] Annex 4 of the News response to OFT questions of 1 February.

7.7. [✂].

7.8. The OFT queried why News believed that a nine month period was reasonable in order for Newco to be divested (as envisaged by paragraph 2.1 of the proposed UIL). In particular, the OFT queried whether a shorter time period would be possible.

7.9. News said it considered that there were a number of reasons why the nine month period was reasonable:[21]

- [✂];
- [✂]; and
- [✂].

7.10. News noted that the obligation on it was to effect the spin off 'as soon as reasonably practicable' but believed the nine month backstop was appropriate.

7.11. [✂]. When agreeing and accepting UIL in competition cases, the OFT will determine the appropriate divestment period within which the remedy must be implemented according to the specific circumstances of the case. The OFT would generally seek to ensure that a remedy is implemented within a time period that is significantly shorter than nine months from completion (typically closer to three months). This is generally to ensure that the business(es) being divested do not deteriorate in the meantime. The extent to which interim protection is required during the nine month period is considered in the sub-section below (see paragraphs 7.13ff below).

7.12. Overall, the OFT considers that, in the particular circumstances of this case, the proposed nine month period in paragraph 2.1 of the UIL is not unreasonable.

Absence of interim protection

7.13. The proposed UIL do not include any provision regulating the way in which News, including Sky, would deal with, and exert control over, Sky News following News' acquiring control over Sky and

[21] News response to OFT questions of 1 February.

pending completion of the spin-off arrangements as required by paragraph 2.1 of the UIL.

7.14. Such interim protection is a standard feature of divestment remedies in competition cases, and will normally be included in the UIL in competition cases before the OFT. Its purpose is to protect the position of the assets or business to be divested. In practical form, these obligations normally require the acquiring business to maintain the business to be divested as a going concern with sufficient resources; not make substantive changes to it; preserve its facilities and goodwill; continue the nature, description, range and standard of services supplied by it; maintain its name or brand; not dispose of its assets, other than in the ordinary course of business, not integrate it with the acquirer's competing business; take steps to ensure that key staff are encouraged to remain with the business; and ensure that confidential information relating to the business to be divested is not shared with the acquirer's business.

7.15. News argued that interim protection was not required given that '*ownership/control of Sky News for an interim period of less than a year, pending spin-off of that business, would not eliminate or weaken Sky News as a distinct broadcast voice contributing to media plurality in the UK.*'[22] News further noted that it would have no incentive to inflict damage on the Sky News business given that: (a) it would not be competing with it after the spin-off; and (b) it would be purchasing from it going forward.

7.16. However, in order to assuage the OFT's potential concerns in this respect, News agreed[23] to provide interim protection in relation to the preservation and continued operation of Sky News pending its spin-off in the form of an assurance that the Sky News business to be spun-off will not be materially different to the Sky News business today. Such an assurance would be in similar terms to those typically provided in UIL in competition cases (as described above). The OFT would expect that such protection would include an obligation on News to seek to ensure that at least the Key Sky

[22] News response to OFT questions of 1 February.
[23] News response to OFT questions of 9 February.

News Editorial Staff remained with the Sky News business in the interim period.

7.17. On the basis that News ensures compliance with the interim protection as set out above, the OFT considers that its concerns would be alleviated in this regard.

The shareholder base of Newco (Sky News)

7.18. The UIL provide for the shares in Newco to be spun-off to the current shareholders of Sky in the same proportions as their current shareholding in Sky. Thus News would hold 39.1 per cent of Sky News.

7.19. The OFT considered what would happen to the shareholding in Sky News on its proposed flotation [✂], given that Sky News would be a considerably smaller entity than Sky, [✂] and the business model of Newco would be considerably narrower than that of Sky. Specifically, the OFT considered whether there was any reason why any changes to the shareholder base of Newco (compared to that of Sky at present) could undermine the viability of Sky News going forward.

7.20. News acknowledged that the shareholder base in Sky News was likely to change after admission of Newco's shares to trading. It considered, for example, that UK index tracking funds are very likely to sell their positions as [✂]. This change, and the fact that a reasonably significant proportion of Newco shares would change hands once such shares are publicly traded, would not, News argued, affect Newco's ongoing viability.

7.21. The OFT sees no reason to doubt News' submission in this respect. To the extent that there could be any concern about the change in Sky News' shareholder base, this could, the OFT believes, only likely come about through the fact that Sky News would be a considerably smaller body than Sky is at present. Specifically, the OFT considered whether this could result in Sky News having difficulty raising finance for future capital investment.

7.22. The OFT notes the implication of the inability to raise finance could impair the ability of Newco to respond to technological advances in the way that news is collected (input) or disseminated (output) can involve significant investment. By way of example, Sky informed the OFT that the conversion of Sky News so as to be able to provide output in HD cost in total around £[✂].

7.23. News did not foresee any need for Newco to borrow to finance its activities, but noted that it should be able to do so against the revenue stream provided by the 10 year carriage agreement.

7.24. News also emphasised that, in its view, '*the key question to be addressed by the UIL is the maintenance of Sky News as a distinct and viable broadcast news voice contributing to media plurality, NOT its ability to develop and expand beyond its core news provision business.*'[24]

7.25. Sky informed the OFT that, following conversion to HD, Sky News was well positioned in terms of technological status in terms of its competitors [✂]. However, to the extent that it did wish to fund new development, it could do this either by way of borrowing and by seeking to renegotiate an enhanced carriage fee (for example, a higher carriage fee for 3D channels).

7.26. Having regard to the above, the OFT does not believe that the changed shareholder base of Newco, as compared to Sky at present, provides any reason to believe the viability of Newco would be materially undermined for the foreseeable future.[25]

7.27. The OFT also considered whether there was any risk to the ongoing viability of Newco if Newco were at any future point to cease to be [publicly traded] [✂]. In response to this, News noted[26] that [removal from the market] would not have an impact on [Newco's] commercial operations and that there were alternative methods of trading shares in Newco (for example, over the counter or via a listing in a different market). The OFT has no reason to doubt this explanation [✂]-.

[24] News response to OFT questions of 1 February 2011.
[25] The OFT notes that Newco would clearly no longer have access to the significant resources of Sky to draw on for future development or innovation. However, the OFT believes that this factor falls outside the remit of advice sought from the OFT by the Secretary of State under section 93 EA 02.
[26] News response to OFT questions of 7 February 2011.

Absence of a non-reacquisition commitment

7.28. The OFT would normally expect any UIL to contain a non-reacquisition commitment. This typically provides that the merging parties commit, except with the prior written consent of the OFT, not to re-acquire any interest in the divested business, any company controlling the divested business or any of the assets of the divested business.

7.29. The UIL proposed by News did not contain any form of non-reacquisition commitment. News submitted that such an obligation was not justified in this case for a number of reasons, including that this was not a competition case and given that any further acquisition of Newco shares by News would lead to a "relevant merger situation" with consequent statutory regulatory approvals under the Act.[27]

7.30. News emphasised[28] its view that the general practical considerations underlying a non-reacquisition restriction did not specifically relate to the practical viability of the UIL proposed by News in the present case. As such, it considered that the Secretary of State would want to decide whether this is a relevant consideration.

7.31. News also noted that any hypothetical reacquisition of Newco shares by News would not automatically trigger a substantive review on issues of media plurality – given that this would depend on the issuing of an intervention notice.

7.32. Nevertheless, in order to meet the OFT's concerns about the absence of a non-reacquisition commitment, News proposed, except with the prior written consent of the Secretary of State, to commit not to acquire shares in Newco that will result in News holding more than 39.14 per cent of the shares in Newco, subject to two carve-outs:

- the inclusion of a sunset provision which means that the clause would no longer apply at the end of 10 years; and

[27] News' response to OFT questions of 1 February.
[28] News' response to OFT questions of 9 February.

- a carve-out to this restriction in the event that an independent third party has made an offer or proposed a merger (including by way of scheme of arrangement) or has otherwise indicated an intention to acquire 50 per cent or more of Newco's voting shares (in which case, News would promptly inform both the OFT and the Secretary of State, on confidential basis, of any acquisition by it of shares in Newco).

7.33. The OFT's UIL normally require an indefinite prohibition on reacquisition of the divested assets/business. However, News correctly identified that the CC's remedy guidelines stipulate that the standard practice of both the Competition Commission[29] and the European Commission[30] is that any undertaking for a non-reacquisition should be limited to 10 years. The OFT considers that, in the specific circumstances of this case (and subject to the Secretary of State accepting the duration of the carriage agreement to be sufficiently 'long-term' to deal with concerns about media plurality), a 10 year limitation on the non-reacquisition obligation may be justified. The OFT also observes that the ban on reacquisition would end at the same time as the carriage agreement.

7.34. However, in relation to a carve-out in the event of an attempted third party bid for control of Sky News, the OFT considers that this is unlikely to be acceptable given that this might still result, in practical terms, in the frustration of the UIL. The OFT also notes in this context that even if a non-reacquisition clause was entered into by News in the UIL, the effect of this non-reacquisition clause could be frustrated, in part, by the operation of the change of Control provisions in the brand licensing agreement. These provide (as detailed in paragraph 10.17 below) that the brand licensing agreement (and the carriage agreement) will terminate if any third party acquires in excess of 40 per cent of Newco. Should the Secretary of State wish to consider the UIL further, it would be important to consider the various agreements in detail and the risks that certain of these provisions may pose to the overall viability of Newco and the UIL.

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[29] Competition Commission - Merger Remedies Guidelines (CC2), paragraph 3.8.
[30] European Commission's Model Divestiture Commitments, paragraph 3.

7.35. On the basis of the above, the OFT considers that the non-reacquisition commitment from News for a period of 10 years would be acceptable, but that this should not include a carve-out of an attempted third party bid.

8. Corporate governance of Sky News[31]

8.1. The UIL provide for the corporate governance of Newco to be designed with a view to substantially replicate the existing corporate governance structure applying to Sky. These provisions are set out in paragraph 3.1 of the proposed UIL, and concern: voting restrictions on News; board composition; approval of material transactions; and adherence to the principles of good governance.

8.2. News emphasised to the OFT that the proposed arrangements in relation to corporate governance would provide 'symmetry' between the current arrangements, that is, between the relationship News currently has with Sky, and the proposed continuing relationship between News and Newco.

8.3. The OFT notes, however, that several aspects of the proposed relationship between News/Sky and Newco are not symmetrical with those between News and Sky today. Notably, the extensive contractual arrangements that will exist between News/Sky and Newco are not as central to the relationship between News and Sky.

8.4. The OFT considered whether there were aspects of the board arrangements that could impact on the financial and practical viability of Newco over the medium to long term. It considered that the corporate governance of Newco essentially went to the question of the independence of Sky News from News, which was essentially a media plurality question for Ofcom. However, the OFT sets out below its position in relation to Newco's adherence to the corporate governance provisions in the UIL and the definition of 'material transactions' requiring approval from Newco's audit committee.

[31] Paragraph 3.1 of the UIL.

Adherence to the corporate governance provisions in the UIL

8.5. News proposed in the UIL a number of measures by which the corporate governance structure of Newco would be established to substantially replicate the effects of the existing corporate governance structure of Sky (paragraph 3.1 of the UIL).

8.6. The OFT queried what assurance there would be that this provision would remain in place in the Newco Articles of Association going forward, in particular given that Newco would not itself be a signatory to the proposed UIL and that News would not have a controlling interest in Newco. This issue goes to the practical viability of the UIL as drafted.

8.7. In response to this, News noted that these restrictions would be embedded in Newco's Articles of Association and agreed that it would be prepared to give an undertaking that it would vote against any change in Newco's Articles of Association which would remove the governance provisions provided for in sections 3.1 (ii) to (iv) of the UIL.[32]

Definition of 'material transactions'

8.8. The UIL provide that 'material transactions between Newco and News/Sky will require the approval of Newco's Audit Committee, which will consist exclusively of independent non-executive Directors. In addition Newco's constitutional documents will provide that such transactions may, depending on materiality, require an independent fairness opinion or Newco independent shareholder approval (by virtue of Newco applying controls that have equivalent effect to those imposed by Chapter 11 of the Listing Rules)' (paragraph 3.1(iii) of the UIL).

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[32] Response to OFT questions of 7 February 2011. This assurance was on the condition that it should endure for so long as no single shareholder group has more than 50 per cent and News has the right to vote more than 25 per cent of the shares in Newco. The OFT has not explored the first part of this caveat with News but notes that, in any event, this situation would have resulted in a change of control in Newco, which is a ground for termination of the brand license agreement.

8.9. No definition is provided in the UIL for what constitutes a 'material transaction'. News stated that in the case of Sky:

- the audit committee (which consists solely of independent directors) is required to approve any transaction between Sky or its subsidiaries and News or any of its subsidiaries: (i) which involve or could reasonably involve the payment or receipt by Sky or its subsidiaries of amounts of £10 million or more but not exceeding £25 million; or (ii) which involves amounts of £25 million or more; and

- any transactions between Sky or its subsidiaries and News or any of its subsidiaries involving amounts of £25 million or more, if approved by the audit committee, must also be approved by the board of Sky.

8.10. News suggested that the UIL provide that such thresholds be used to define 'material transactions' for the purposes of the UIL.

8.11. The OFT is concerned, however, that the transaction thresholds that were appropriate in the context of Sky are not necessarily appropriate in the context of Sky News, given that it is a considerably smaller and more focused company. The OFT is also concerned that the above definition might exclude the brand licensing agreement. The OFT would therefore recommend that a revised definition of 'material transaction' be explored with News, that at least include the carriage agreement and brand licensing agreement (to the extent that they needed to be revised or renegotiated).

9. Transfer of Sky News[33]

9.1. The proposed UIL involve the transfer into Newco of Sky News, which is currently part of Sky.

9.2. As noted above, News cited a number of examples of when businesses have been separated or hived-off from their existing corporate structures (see paragraph 7.2 above).

9.3. At present, Sky News forms part of the wider business of Sky and is not a distinct legal entity. Sky described Sky News as being a

[33] Paragraphs 4.1, 4.2 of the UIL.

'directorate' of Sky, in that it was not a financially distinct business, but did have a distinct management structure that reported to the Head of Sky News.

9.4. The OFT considered in relation to the transfer of Sky News into Newco a number of practical issues with respect to the assets to be transferred as well as the staff. The OFT also considered the extent to which contracts where Sky is currently a party and which relate to Sky News, would be able to be transferred to Newco in order that it has the benefit of those contracts going forward.

9.5. The issues considered in this section are set out in concise form in paragraphs 4.1 and 4.2 of the proposed UIL. In terms of practical importance, they relate to the key question of what a separated Sky News business will comprise and how it will operate.

Assets to be transferred

9.6. The proposed UIL state that the Sky News business to be transferred to Newco shall comprise '*all or substantially all tangible assets currently used exclusively for the purposes of carrying on Sky News' business*' (paragraph 4.1 of the UIL).

9.7. News clarified[34] that this definition was intended to capture – such that they would be transferred into Newco – all tangible assets located in the existing Sky News building and other facilities used by Sky News for newsgathering, with the exception of the land and buildings at Osterley currently used by Sky News and shared technical facilities such as data networks, transponder capacity, transmission and uplink and play out facilities.[35]

9.8. The UIL also provide that: '*Arrangements will also be made for Newco to have the use of assets which are not used exclusively in the Sky News business on normal market terms if so requested by Newco*' (paragraph 4.1(i) of the UIL).

9.9. News clarified[36] that (in addition to shared technical facilities to be covered by an ongoing broadcast and technical services agreement (see paragraph 11.4 below) this was a reference to other facilities

[34] News response to OFT questions of 1 February 2011.
[35] Access to these is discussed in paragraph 11.4.
[36] News response to OFT questions of 1 February 2011.

and services to which Newco might require access while continuing to use the Osterley site.

9.10. News stated that it would offer to Newco a site support services agreement under which it would provide, among other things: canteen/food services, computer/IT services, finance systems, phone services, heating, lighting, security and cleaning, if required by Newco.

9.11. News stated that, to the extent needed by Newco, News/Sky will also continue to make available additional services which are in any event available on the open market, including broadcast operations (technical staff, for example camera operators) and creative services (design specialists). Sky stated it [could] provide access to the relevant facilities under a service contract to the extent required by Newco.

9.12. Sky identified the two main areas where Sky News was currently dependent, in operational terms, on services that were shared with other parts of the Sky business. These were technical services and creative services. Otherwise, Sky stated that it regarded Sky News as operationally relatively self-sufficient from the remainder of Sky.

9.13. Based on the information available to it, the OFT sees no reason why the core tangible assets required for Sky News could not be separated off into Newco. However, the OFT recommends that, given that Sky News is not currently a physically distinct business within Sky, the proposed UIL should set out precisely what assets are to be included in Newco, what assets will not be transferred, and what assets will be made available by Sky to Sky News as part of the ongoing arrangements.

9.14. News stated[37] that it[38] would be prepared to set out in greater detail the assets to be transferred / not transferred to Newco in the form of a schedule.[39] The OFT believes this would be appropriate.

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[37] News response to OFT questions of 7 February 2011.

[38] News noted that such a schedule would have to be prepared in consultation with Sky. Given that such a document would likely take a number of days to draw up, News suggested that the best way forward would be for Sky to provide it to the OFT during the public consultation on the UIL (should the Secretary of State be minded to accept the UIL).

Sky News staff, including non-solicitation

9.15. The UIL provide that all '*Key Sky News Editorial Staff and all or substantially all staff currently engaged principally in the Sky News business, including news gathering staff, production, online and multimedia staff and Sky News international staff*' will be transferred to Newco (paragraph 4.1(ii) of the UIL). Key Sky News Editorial Staff are defined as the head of Sky News, the executive editor of Sky News and the head of newsgathering of Sky News.

9.16. News noted in this respect that 'TUPE will operate to transfer staff employed in the Sky News business to Newco'.[40]

9.17. As in relation to assets (see paragraphs 9.13 to 9.14 above), the OFT proposed and News agreed[41] to ask Sky to prepare separately a list of key personnel to be transferred to Newco.

9.18. Based on the information available to it, the OFT sees no reason why the UIL as drafted should not provide for the staff required to operate the Sky News business to transfer into Newco.

9.19. The UIL as drafted do not include a non-solicitation clause in respect of any of the Sky News staff transferred to Newco. News justified the absence of any such restriction on the basis that it was unnecessary given that neither Sky nor News will be a direct competitor of the spun-off Sky News business and given that Sky will continue to have a vested interest in the continued provision of quality output from Sky News.[42]

9.20. The OFT was unsure, however, what would prevent News launching a neighbouring channel, such as a current affairs channel, from which it might acquire staff from Newco.

9.21. Although News stated that it had no such plans, in response to this concern, News stated[43] that it would be prepared to give a standard non-solicitation commitment for a short period of time if

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[39] See the Schedule to the European Commission Model Texts for Divestiture Commitments, available at: http://ec.europa.eu/competition/mergers/legislation/legislation.html.
[40] News response to OFT questions of 1 February 2011.
[41] News response to OFT questions of 7 February 2011.
[42] News response to OFT questions of 1 February 2011.
[43] News response to OFT questions of 7 February 2011.

the OFT took the view that such a commitment was needed. The OFT believes that, particularly given the importance of staff to the success of a news channel, the inclusion of a non-solicitation obligation would be sensible.[44]

Transfer of contracts – third party consents

9.22. The UIL provide for the transfer to Newco of four specific classes of contracts to which Sky is a party but which would be required by Newco if Sky News were to continue operating in the way it does at present. These four categories of agreement are: (i) carriage agreements with third parties; (ii) DTT capacity agreement with Arqiva; (iii) Channel 5 and IRN wholesale contracts; and (iv) contracts for the supply of content to Sky News/fixed newsgathering.

9.23. Where a third party consent is a critical feature of a particular remedy, then the OFT may be willing to accept undertakings in lieu only once it is clear that such consent will be forthcoming.[45] The OFT notes that, in the time available, it has only been possible to consider whether any of the above agreements proposed to be transferred to Newco were of critical importance to the ongoing viability of Newco where third party consent was required.[46]

9.24. In relation to the carriage agreements with third parties, News provided a list of these contracts, including whether consent would be required in relation to the transfer of each of them.[47] Around a third of these would require consent to be assigned. News argued that it was only the contract [✂].

9.25. [✂]

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[44] In addition, the OFT considers that interim protection is needed in relation to key staff – see paragraph 7.14.

[45] For example, see Completed acquisition by Aggregate Industries UK Limited of Atlantic Aggregates Limited and of Stone Haul Limited, OFT decision 2 March 2009, paragraph 132.

[46] If further investigation showed that these (or any other) agreements were of critical importance to the ongoing viability of Newco, and that third party consents were required, it may be appropriate to consult with those third parties prior to acceptance of the UIL or to obtain confirmation that such consents would be forthcoming.

[47] News response to OFT questions of 1 February 2011. News acknowledged that the list was non-exhaustive at this stage.

9.26. [✂]. In the limited time available, and based on the evidence supplied by the merging parties, the OFT does not, at this stage, believe that any of the existing carriage agreements can individually be said to be of critical importance for the viability of Newco going forward.

9.27. In relation to Sky's current contract with [✂][48] relating to.[49]

9.28. [✂]. The OFT examined the projected revenues and costs of Sky News on two alternative bases, under each of which Sky News would be profitable, namely:[50]

- [✂]; or
- [✂].

9.29. Based on the information supplied by News, the projected cost and revenue implications under either scenario are not significant enough to undermine Newco's profitability.

9.30. [✂]

9.31. [✂]

9.32. [✂]. Given the nature of these contracts (where services are supplied to Sky), the OFT has no reason to believe that Newco would be unable to source supply from these providers on an independent basis.

10. Carriage agreement and brand agreement with Sky[51]

Significance of the carriage agreement to Newco

10.1. Under the carriage agreement Newco will provide 'Sky News' channels and services to Sky on a wholesale basis for distribution by Sky to viewers or subscribers in return for the payment of a carriage fee. News submits that the carriage agreement will provide Newco with 'a significant and long-term revenue stream'. The 10-

48 [✂].
49 News response to OFT questions of 1 February 2011.
50 See paragraphs 3.20 of the Annex.
51 Paragraphs 4.3, 4.4, 4.5, 4.6 of the UIL.

year term contrasts with carriage agreement durations of three to five years typical in the pay TV industry.

10.2. News submitted that the terms of the proposed Sky carriage agreement reflect the importance of Sky News as part of Sky's offering to its subscribers, and that this importance has provided the basis for Sky's previous investment in, and funding of the net costs of, Sky News.

10.3. The Newco business plan indicates that the Sky carriage agreement would initially account for [✂] per cent of Newco total revenues (in 2010/2011),[52] rising to [✂] per cent of forecast total revenue in 2015/2016, and [✂] per cent of total revenue in 2019/2020.

10.4. [✂]. The Annexe contains a detailed analysis of the revenue projections for Newco including, in particular, the significance of [✂] to the profitability of Newco.

10.5. It is clear that a Sky carriage agreement in place on sufficiently long and financially attractive terms is fundamental to Newco's ability to cover its costs from the outset, and hence to its viability.

Significance of the brand licensing agreement to Newco

10.6. The proposed UIL require that Sky enter into a brand licensing agreement with Newco, which would permit Newco to use the Sky News brand in connection with its news output. This would be subject to payment of a royalty, and associated terms and conditions. In enabling Newco to provide output which is branded as 'Sky News' – an underlying requirement of the proposed carriage agreement – the brand licensing agreement is also key to Newco's ability to generate its main revenue stream, and hence its ongoing viability.

10.7. The brand licensing agreement will also place certain restrictions on Newco's activities, and will be terminable in certain circumstances.

Other agreements of key significance to Newco's viability

10.8. The carriage agreement and the brand licensing agreement are of critical importance to Newco's prospective viability. The UIL

[52] Sky carriage fees of £[✂]; total revenues of £[✂].

provide for Newco and Sky also to enter into various operational agreements (paragraph 5 of the UIL).

10.9. It is possible that some of the operational agreements are similarly important to Newco's viability and possible also that they could not readily be obtained from third parties other than News/Sky for an identifiable market price. Given the time available, the OFT has not been able to reach a view on whether any such operational agreements fall into this category. However, to the extent that this is the case, the OFT considers that these should be subject to additional oversight as discussed below in relation to the carriage and brand licensing agreements, namely prior approval and restriction on termination.

Prior approval of key agreements

10.10. Whilst the term of the Sky carriage agreement is specified in the proposed UIL, the structure and level of the carriage fees (and hence the value of Sky's contribution to Newco revenue) are not specified. The proposed UIL require that the form of carriage agreement would be subject to approval by the Secretary of State prior to acceptance of the UIL (paragraph 4.3 of the UIL).

10.11. The OFT considers that given the importance of the brand licensing agreement it would be appropriate for it to be subject to a similar approval mechanism. News has indicated[53] it is willing to include this provision.

10.12. In considering approval of these key agreements, the Secretary of State may consider it appropriate to request advice from the OFT and Ofcom on whether the specific proposed terms of the carriage agreement and the brand licensing agreement are acceptable in terms of securing the practical and financial viability of the undertakings. The OFT and/or Ofcom may need to call on expert external advice in relation to assessing the terms of these key agreements.

10.13. To the extent that there are further agreements (other than the carriage agreement and brand licensing agreement) that can be described as of key significance to Newco (see paragraph 10.8

[53] News response to OFT questions of 7 February.

above), then the OFT would recommend that such agreements also be the subject of upfront review and approval by the Secretary of State (and/or the OFT) prior to approval of the UIL.

Termination of key agreements

10.14. The carriage agreement would be terminable by Sky in the event of material breach, or in the event that Newco ceases to produce output which is branded 'Sky News'.

10.15. News explained that 'material breach' would typically be linked to commitments relating to the nature and quality of the channel to be provided to Sky.

10.16. Any change of Control of Newco which led to termination of its Brand Licensing Agreement (which permits Newco to use the 'Sky News' brand) could consequently also result in termination of the carriage agreement.

10.17. The brand licensing agreement would be terminable by Sky in the event of a material breach, or in the event of a change of Control[54] of Newco. Hence if a third party acquired a greater than 40 per cent holding of Newco's shares, Newco would be at risk of termination of both the brand licensing agreement and the carriage agreement.

10.18. Given the importance of the key agreements to the viability of the UIL, any developments resulting in early termination would have major significance. The OFT discusses below whether this consideration should require specific further obligations on News.

Restrictions on termination of the key agreements

10.19. The OFT noted the importance of the key agreements to the viability of the UIL. Although, for the reasons explained elsewhere, the OFT has no reason at present to doubt that News' incentives

[54] Control is defined in the draft UILs in terms of holding 40 per cent of shares or voting rights. This provision means that Newco would be unlikely to be taken over by a third party, given the implications for the brand licensing agreement, and therefore the carriage agreement. The OFT does not consider that this limitation undermines the financial viability of Newco, but notes that in any event the terms of the brand licensing agreement and the carriage agreement are subject to upfront review by the Secretary of State.

are currently to ensure the successful operation of Sky News as a provider of TV news content to it, the OFT is concerned about the degree of reliance that the UIL place on the continued operation of the carriage agreement and brand licensing agreement. The OFT therefore considered carefully whether the contractual obligations owed by News to Newco in relation to performance of the key agreements should be reinforced in some way.

10.20. Specifically, the OFT considered whether it would be appropriate to seek from News a direct commitment in the UIL to the Secretary of State that News would not terminate the key agreements without first obtaining prior approval from the OFT (such approval to be given only in the event of a material breach by Newco). News argued that an ongoing obligation from it to the Secretary of State in relation to the agreements was unnecessary and considered that this would raise practical issues around how the OFT would determine whether a material breach by News had in fact occurred. News also emphasised its willingness to commit to a more specific dispute resolution mechanism if the OFT considered that an ad hoc mechanism is needed (see paragraph 10.35 below).

10.21. News proposed to undertake in the UIL that it should not be permitted to terminate the key agreements prior to a formal and final determination having been made under that dispute resolution mechanism applicable under the relevant agreement. In order to address any concerns about Newco bearing the costs of arbitration/dispute resolution,[55] News stated it would be prepared to commit in the relevant agreements that it would bear its and Newco's costs of any dispute resolution originating from News' proposed termination (irrespective of the outcome).[56]

10.22. News observed that its proposal had the benefit of avoiding the position where the OFT would itself have to make a determination on a contractual dispute between two independent parties before it is adjudicated under the applicable dispute resolution mechanism.

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[55] The OFT noted that, in comparison to News, Newco would be a small business with limited resource to engage in an extended dispute with News.
[56] News response to OFT questions of 9 February.

10.23. The OFT considers that the safeguard suggested by News as described in paragraph 10.21 above provides an acceptable means in order to reduce the risk of an unjustified termination of the key agreements by News that could jeopardise Newco, subject to the details of the safeguard being further developed.

Duration of key agreements

10.24. The proposed term of the carriage agreement is 10 years. News argues that Newco will therefore have a reliable revenue stream for a much longer period than is typical in this sector. Ofcom confirmed this.

10.25. The proposed UIL require that under the brand licensing agreement Newco would receive a licence of the Sky News brand for an initial seven year term, with an automatic renewal for a further seven years, and which may then be extended at the option of Newco for a further three years. [✂].

10.26. The finite duration of the carriage agreement contributes to some uncertainty about Newco's long-term viability as a stand-alone entity. As noted above, in the Newco business plan the carriage agreement accounts for an increasing proportion of Newco forecast total revenues as the term progresses. Newco's prospects at (and in the period leading up to) conclusion of the term may depend on:

- Sky's incentives to negotiate a further carriage agreement;
- the terms Sky may prepared to negotiate at that time; and
- the alternative revenue streams which Newco has been able to develop or may have access to at that point.

10.27. The question therefore arises of how Newco would expect to derive its principal revenue stream once the carriage agreement (at ten years duration) has ended.

10.28. On one view, uncertainty about the prospects for renewal of the carriage agreement on equivalent terms may begin to affect Newco some years before its term date, [✂].

10.29. News argued that if Newco continues to produce a high quality and distinctive news service over the next 10 years, it is likely that Sky will wish to ensure that it can continue to offer Sky News as part of its offering, and renew its funding commitment to Newco in a way that ensures Newco's continued independent economic viability over the foreseeable future. As such, it argued that a renewal by Sky of the Carriage Agreement is by far the most likely counter-factual against which the OFT should consider the viability of NewCo.[57] However, notwithstanding this argument, the OFT believes it is not possible to conclude with any degree of certainty that the carriage agreement will be renewed after the expiry of the ten year period such that Newco's principal revenue stream will continue.

10.30. The OFT has been asked to advise the Secretary of State on whether there are practical issues which could undermine the effective operation of the UIL, and whether the UIL would be effective in the medium and long term.

10.31. The OFT accepts that the substantial length of the key agreements would appear to underpin the short-to-medium term viability of Newco. The OFT notes however, that the finite duration of the carriage agreement may entail a significant risk in relation to long-term viability. The relevance of this risk ultimately depends on the time horizon which the Secretary of State considers as relevant for ensuring the effectiveness of the UIL.

Dispute resolution mechanism

10.32. The proposed UIL do not contain any provision indicating what would happen in the event of a dispute between Sky and Newco in relation to any of the agreements between them, including the carriage agreement and the brand agreement. Successful resolution of such a dispute would be important given the reliance that these proposed UIL would have on the various contractual agreements between the parties.

10.33. The OFT considered that the proposed UIL should be modified by the requirement that the key contracts between Sky and Newco (that is, at least the carriage agreement and brand

[57] News response to OFT questions of 9 February.

licensing agreement – and potentially other agreements: see paragraph 10.9 above) should include within them a dispute resolution mechanism which would be binding on both parties. Such a mechanism would aim to ensure that disputes were settled quickly and efficiently by an independent arbitrator.[58]

10.34. Such an arbitration mechanism in relation to the contracts would impose a positive burden in relation to the party charged with this function. Given the technical nature of the disputes that could arise, the OFT considers that it would not be well placed to fulfil this function, but that consideration be given to the appointment of an expert independent arbitrator, to be funded by News as required.

10.35. News has indicated[59] that it would be willing to include a more specific dispute resolution mechanism (such as arbitration) in the agreements entered into between News and Newco.

11. Operational agreements with Sky[60]

11.1. As set out above in paragraph 10.9, to the extent that any of the operational agreements are of critical importance to Newco's viability and could not readily be obtained from third parties other than News/Sky for an identifiable market price, the OFT considers that they should be subject to similar protections given to the carriage agreement and brand license agreement.

11.2. However, with regard to operational agreements falling short of this status (that is, on the basis that the services to which they relate could potentially be sourced from third parties), the practical viability of Newco, at least initially, requires it to have ongoing access to currently shared technical facilities, and initial agreements in place to enable it to function effectively from the outset. This section considers how these agreements, that are not the subject of the upfront protection discussed in section 10, are treated under the UIL.

[58] The OFT has not had time to consider with News the terms by which such arbitration or dispute resolution would proceed, but would envisage that these would have regard to the terms of the contract and the terms of the UIL themselves.
[59] News response to OFT questions of 7 February.
[60] Paragraph 5.1 of the UIL.

11.3. It is helpful to note at this point that the OFT's guidance recognises that, '*[i]n certain cases, contractual provisions such as purchase or supply arrangements between the seller and the purchaser may be necessary to support a structural divestment on an interim basis, although it will be relatively rare that this is the case given the requirement at the OFT stage for a divestment to act as a clear-cut remedy.*'[61]

11.4. The proposed UIL require that Sky will, if required by Newco, enter into various agreements under which Sky will provide facilities and support services to Newco, on arms' length terms. Specific agreements listed in the UIL are:

- an advertising sales agreement under which Sky will sell advertising and sponsorship on behalf of Newco for a term of up to three years (or such shorter time as required by Newco);
- a lease of existing Sky News land and buildings to Newco for a period of up to 15 years;
- a site support services agreement, covering services such as IT support services for a term comparable with the term of the lease; and
- a broadcast and technical services agreement, covering satellite capacity, playout and uplink, DTT transmission, online transmission and mobile distribution, for a term of up to 10 years.

11.5. News and Sky have each noted that Sky currently has agreements of this sort with various third party channel providers ([✂]).

11.6. The initial services agreements would be put in place before the spin-off of Newco. News has indicated that the pricing of the above services (other than the advertising sales agreement[62]) would be fixed at Sky's cost of provision plus a five per cent margin, with increases each year measured by CPI.[63] News further stated that it would be willing to commit to such a cost structure within the UIL if required. News stated that Newco would be free to source

[61] See OFT Exceptions and UIL guidance, paragraph 5.23.
[62] News stated that the terms of the advertising sales agreement would be [✂].
[63] News response to OFT questions of 7 February.

services from third parties once its initial service agreements with Sky have expired if it chose to do so, or subject to early termination provisions to be agreed in the relevant contracts, and that this will also give Newco the ability to market test the terms being offered by Sky.

11.7. The UIL do not contain any provisions for monitoring or approval of the pricing or terms of initial services agreements, nor dispute resolution in relation to ongoing operational relationships between Sky and Newco. The proposed UIL also do not make such agreements between Newco and News a mandatory part of the ongoing Newco business. Rather, the option for them is provided to Newco, with the duration of the potential agreement specified in the majority of cases (for example, that the lease of the land and buildings should be for a period of up to 15 years).

11.8. To the extent that these agreements could be provided by third parties in the event that Sky News and News were for some reason unable to agree terms following spin-off of Newco, the OFT does not believe that the UIL need to provide for the continuation of these agreement beyond the initial terms set out in paragraph 5.1 of the UIL.

11.9. The OFT nevertheless considers that the current position under the UIL, under which such agreements are merely potentially available, is confusing given that News/Sky will have set up Newco and that Newco will inevitably require such services at its inception in order to be able to commence operations and function as a news channel provider.

11.10. The OFT would therefore recommend that the proposed UIL be amended such that:

- News is required to put in place, or to procure the putting into place of such agreements at the time of the spin-off of Sky News for the terms provided for in paragraph 5.1 of the proposed UIL;
- the UIL include reference to the pricing structures for these agreements (as described in paragraph 11.6 above);

- the list of initial operational agreements and associated services required by Newco to operate its core business are set out in full;
- the UIL require that Newco be provided with termination rights in relation to each of these contracts, with a reasonably short notice period; News/Sky should not enjoy such termination rights; and
- to the extent that a monitoring or arbitration function is envisaged in relation to the key agreement aspects of the UIL, that this mechanism should extend also to resolution of any disputes in relation to these agreements.

12. Review of Sky News income and cost projections

12.1. The OFT summarises in this section the financial analysis set out in the Annexe. This analysis relies on information supplied, in the main, by News and limited discussions with Sky. The OFT notes that it has had limited time to review the income and cost projections supplied by News; the forecasts supplied by News are based on its review of Sky and Sky News' financial information and industry knowledge; and the OFT understands that the information supplied has not been subject to rigorous analysis by Sky or Sky News itself [✂].

12.2. The UIL propose that Sky News be formed into an independent public limited company, Newco, following Sky's development of Sky News over the last two decades. The financial analysis review conducted by the OFT has focussed on a review of assumptions and, where possible, some consideration of risks that could mean that projections are not achieved, such as income shortfall or cost overrun, which could threaten the viability of Newco.

12.3. [✂]. The UIL envisage contractual arrangements that provide a significant payment from Sky to Newco, for the news service and, on the basis of projections provided, would be expected to keep Newco profitable, for the duration of those arrangements. The use of the Sky name would continue, in return for a payment from Newco related to its revenue.

12.4. The two way income flow, with the bulk of the net income transfer from Sky to Newco for provision of the news service, is intended to ensure that incentives are aligned:

- Newco has the financial resources to continue providing a 24-hour news service. It continues to operate under the Sky News brand which has achieved a strong reputation;

- Sky has an incentive to utilise the news service for which a substantial payment is being made. While the carriage agreement remains in force, this may provide a significant disincentive to set up a competing news service, which would undermine Newco, diminishing the return from Sky's 39 per cent share in Newco; and

- similarly, while the brand licensing agreement is in force, use of the Sky brand ensures that Sky will want Sky News to maintain a good reputation for high quality output.

12.5. [✂]. Newco would be strengthened by the size of the payment under the carriage agreement, which provides a strong and relatively stable income stream and shows the high value that News appears to place on the news service. [✂].

12.6. The period over which the OFT has considered the financial viability of Newco extends to 2019/20 (FY20), for which financial projections have been provided and which approximates the period of the carriage agreement.

12.7. The OFT's analysis in the Annexe considers Newco's projected profitability, followed by a review of revenue and costs.

Overall assessment

12.8. Forecasting accurately over a 10 year period is difficult, particularly in an area where technological change can be rapid. A small error in assumptions can lead to an increasing cumulative effect at the end of the period, or a combination of adverse events could cause an otherwise profitable company to move into losses that could ultimately threaten its financial viability. However a reasonable test of financial viability would be that the proposed structure and projections are based on reasonable assumptions and there is some flexibility to handle any unforeseen problems that arise.

12.9. Sky News is currently a directorate within Sky, but is not accounted for on a standalone basis. [✂].

12.10. [✂].

12.11. This change is driven by a subscriber-related payment for the news service totalling £[✂] in FY12. Additional charges in FY12 of circa £[✂] relate to property and facilities (£[✂]); depreciation on equipment (£[✂]); new 'listed company costs' (£[✂]) and a new charge for use of the 'Sky News' brand (almost £[✂]).

12.12. After reviewing the financial projections, some risks to the achievement of the projections and ways in which confidence in Newco's continued viability could be increased are outlined in the Annexe, which also contains a more detailed review of the financial information provided. The key importance of the carriage agreement and brand licensing agreement is emphasised.

12.13. Although well-placed in terms of HD technology, the smaller size of Newco, compared with being a part of Sky, could create challenges if significant funds are required to finance investment in new technology. Success in raising funds would depend on the return expected from the investment and the period over which the return was expected to be made.

Operating Profit[64] 2011/12 – 2019/20

[✂]

12.14. While it is possible to imagine a combination of unfavourable events that could cause the financial viability of Newco to be threatened, this is not considered to be very likely. The assumptions made in the projections for Newco appear to be reasonable and there is some flexibility to handle unforeseen

[64] Operating Profit excludes the £[✂] per year revenues earned through joint ventures.

problems. The benefit of the assured income from the carriage agreement strengthens the financial position of Newco. While this agreement operates, based on the evidence seen, the OFT has no reason to expect that Newco would not be financially viable.

Clive Maxwell
Executive Director, Office of Fair Trading
11 February 2011

Annexe

Analysis of Revenue and Cost Projections

1 Overall profitability

1.1 This Annex sets out the OFT's analysis of Sky News income and cost projections.

1.2 The analysis relies on information supplied, in the main, by News and limited discussions with Sky. The OFT notes that it has had limited time to review the income and cost projections supplied by News; the forecasts supplied by News are based on its review of Sky and Sky News' financial information and industry knowledge; and the OFT understands that the information supplied has not been subject to rigorous analysis by Sky or Sky News itself or the subject of external assessment.

1.3 Sky News is currently a directorate within Sky, but is not accounted on a standalone basis. [✂].

1.4 Based on the projections provided, when Newco is formed additional income streams partly offset by new recharges of costs, will increase operating profit by £[✂] to show an operating profit of £[✂] in 2011-12 (FY12):

1.5 This change is driven by a subscriber-related payment for the news service totalling £[✂] in FY12. Additional charges in FY12 of £[✂] relate to property and facilities (£[✂]); depreciation on equipment (£[✂]); new "listed company costs" (£[✂]) and a new charge for use of the 'Sky News' brand (almost £[✂]).

1.6 [✂].

Operating Profit[65] 2011/12 – 2019/20

[✂]

Analysis of Revenue

[✂]

2 Revenue

2.1 **Total revenue** projected in FY12 amounts to £[✂], comprising:

2.2 **Sky subscription payment:** £[✂] payment from Sky based on a carriage agreement between Sky and Newco. Payment is based on the number of Sky subscribers, the number of Sky HD subscribers, and an exclusivity premium as long as Sky News HD is only distributed on Sky platforms.

2.3 Subscriptions are based on December 2010 reported subscribers and HD penetration. [✂].

2.4 [✂].

2.5 **Sensitivity:** HD penetration grows from [✂] per cent in FY11 to [✂] per cent in FY15. If the increase was a [✂] at [✂] per cent in FY15, with HD subscribers increasing from [✂] to [✂] (rather than [✂]), income would be almost £[✂] lower in FY15. This compares with projected operating profit of £[✂] in that year.

2.6 [✂].

2.7 **Other subscriptions:** £[✂] payment is received for supply to other subscriptions, [✂].

2.8 **Sensitivity:** Income would be £[✂] from FY15 [✂].

---

[65] Operating Profit excludes the £[✂] per year revenues earned through joint ventures.

2.9 If the market for news on tablets grew less rapidly or was less remunerative, income would be up to £[✂] lower. However it is quite possible that other technological opportunities, as yet unknown, could offset this, particularly if Newco had access to technological developments made within Sky.

2.10 **Net advertising and sponsorship:** Income of £[✂] largely stems from spot advertising revenue, with smaller contributions from sponsorship and other forms of advertising. [✂].

2.11 This revenue is dependent on a contract with Sky to sell advertising and sponsorship. Commission of [✂] per cent and a sales margin of [✂] per cent are deducted from revenue.

2.12 **Sensitivity:** Dependence on Sky to sell advertising: [✂].

2.13 **Syndication:** Income of £[✂]: All syndication contracts will be transferred from Sky to Newco. The Five News contract, with income of £[✂] in FY12, comprises over [✂] per cent of this income, with the supply contract coming up for renewal in [✂]. It is assumed that the contract is renegotiated in [✂] with [✂].

2.14 **Sensitivity:** If the Five News deal is not renewed, income would be £[✂] lower from [✂], with costs around £[✂] lower.

2.15 **Income from joint ventures** of £[✂] is assumed across the period.

2.16 Overall, revenue of £[✂] will derive from Sky in [✂], (or £[✂] if including advertising revenue sold by Sky for Sky News). This would amount to around [✂] per cent of the total revenue stream, excluding advertising. Due to the expected growth in the carriage agreement payment, this is projected to increase to £[✂] or [✂] per cent of income in [✂] (£[✂] or [✂] per cent of total including advertising revenue). [✂].

2.17 This underlines the key importance of the carriage agreement and the relationship between Sky and Newco. Beyond the term of the carriage agreement an independent Newco would be very unlikely to be financially viable, unless the agreement is renewed or equivalent favourable arrangements were agreed.

Analysis of Costs

[✂]

3 **Analysis of costs**

3.1 **Total costs [✂]:**

3.2 **Programming costs [✂].**

3.3 Newsgathering costs comprise activities to find, compile and package the news stories. Costs growth recognises cost swings due to the expense of major events in the year, for example the Olympic Games in 2012.

3.4 [✂].

3.5 Online and multimedia costs represent the incremental costs associated with producing online, tablet and mobile products.

3.6 [✂].

3.7 **Sensitivity:** If the Five News contract is not renewed after [✂], costs will be £[✂] lower, but margin will also be reduced by a further £[✂] (see Syndication revenue comment).

3.8 [✂]. If annual inflation was [✂]per cent p.a. higher from [✂], programming cost would be around [✂] per cent (£[✂]) higher by [✂].

3.9 **Administrative costs** of [✂].

3.10 Corporate costs include both existing staff who support Sky News and an estimate of additional costs (£[✂]) arising from the creation of a new company including staff (for example, company secretary), cost of board meetings and audit, and need for a new incentive plan.

3.11 Property and facilities costs include rent, rates, utilities and facilities plus IT support to shared corporate systems e.g. HR. This is based on a 15 year agreement to lease land and buildings at cost plus [✂] per cent margin, [✂].

3.12 [✂].

3.13 Details of the assets involved are not currently available, but would need to be reviewed by Newco to ensure the value was appropriate.

3.14 [✂].

3.15 **Sensitivity:** The cost projections are significantly affected by the assumed rate of price inflation. If inflation averaged three per cent higher from [✂], administrative costs would be [✂] per cent (£[✂]) higher by [✂].

3.16 The contract for premises and facilities is envisaged to run for 15 years, whereas the carriage agreement runs for 10 years (the period subject to review). Unless Newco had a break clause available after 10 years, it could be committed to the premises with associated costs for a longer period.

3.17 **Technical and** broadcast **operations** of £[✂]: These costs include technical services needed to provide the news service such as satellite capacity, uplink services, DTT transmission, online transmission and mobile distribution. Sky proposes to offer a 10 year, fixed price contract for these services, or shorter if preferred, based at cost (rising at CPI) plus five per cent margin.

3.18 Broadcast operations and creative services would be provided and charged on actual usage, at cost plus five per cent margin; however for these services, News indicated that Newco would be free to move to a different third party supplier at short notice.

3.19 While the DTT capacity providing access to the Freeview channel would be charged initially at £[✂], the contract for the capacity expires in [✂], and it is assumed that Newco would negotiate directly with the supplier, [✂]. As a small company, Newco would be in a less strong position than Sky to negotiate a favourable deal.

3.20 [✂].

3.21 **Sensitivity:** The largest unknown is the availability and cost of the DTT transmission when the contract is renegotiated by Newco which would have significantly less financial negotiating power than News. [✂]. If the contract was not renewed, Sky estimate that costs of around £[✂] would be saved, but advertising revenue of £[✂] would be lost, overall a net revenue reduction of £[✂].

3.22 **Brand licensing costs** of £[✂] relate to payments made to Sky for use of the 'Sky News' brand. [✂].

3.23 The licensing agreement would give Newco assurance that it would continue to have access to the 'Sky News' name, so it is important that the brand licensing agreement give Newco assurance that the cost would not significantly increase on renewal of the contract

3.24 **Marketing costs** of £[✂] are projected based on current spending plus an additional £[✂] for advertising as an independent channel, assuming that Newco would be responsible for its own marketing.

3.25 **Sensitivity:** This level of advertising may underestimate the cost of establishing Sky News as an independent operation. In particular, opportunities to be advertised across Sky channels would be less easily available and likely to be more expensive, as market rates are charged, rather than costs not being allocated.

3.26 Property and facilities (£[✂]) and technical services (c. £[✂]) are very likely to be provided by Sky and broadcast operations and creative services might be supplied (c. £[✂]), suggesting a total of around £[✂] provided by Sky, [✂] per cent of their [✂] cost base. [✂].

4 Ability to raise funds to finance technological change

4.1 The investment made in high definition technology means that Newco is currently well placed in terms of technology. However technology can change rapidly and the possibility that substantial further investment would be required cannot be ruled out over the

10 year period considered. Newco would not be in as strong a position as Sky to provide any finance that would be required.

4.2 If these technological opportunities require additional capital investment there are three options available to Newco:

- Using retained earnings. This will depend on future earnings steam and dividend decisions that have been taken;
- Raising debt: There is a possibility of borrowing, possibly against the value of its fixed assets or its future income stream; and
- Raising additional capital: Newco could raise the required capital through a further rights issue or external share issue.

4.3 The likelihood of success in raising funds would depend on the return expected from the investment, alternatives available and the remaining term for the carriage agreement and expectations over its likely renewal. The smaller size of Newco could be a constraint in financing a major investment.

5 Risks

5.1 **Exposure to inflation:** [✂].

5.2 [✂].

5.3 [✂].

5.4 **Carriage agreement:** The payments made under the carriage agreement are crucial to the financial viability of Newco. If the arrangement was ended, unless the financial gap was closed by other forms of revenue, Newco would lose its major income stream and move into substantial losses.

5.5 While the agreement operates, this risk is mitigated by the term of the agreement and Sky's incentive to protect its brand and its apparent ongoing need for a well respected news service.

5.6 **Brand licensing deal:** The Sky brand is an important and valuable element of the Sky News product. The existence of a seven-year licensing arrangement gives continuity of the use of the name, which would be expected to be extended for a further seven years.

5.7 The price at which the contract would be renewed is very important to Newco and any substantial increase in the licensing cost at Sky's instigation could seriously damage Newco's financial position. However, [News] has confirmed that there will not be an increase in the brand loyalty fee if the licensing agreement is extended beyond the initial seven years.

5.8 **Estimation of costs:** [✂].

5.9 **DTT transmission contract:** The current arrangement for DTT capacity was agreed between Sky and [✂] and is due to be renegotiated in [✂]. [✂].

5.10 **Advertising revenue:** [✂]. TV advertising may not increase in demand, given alternative media available, particularly online and mobile. Also, another economic recession is a possibility that could lead in a significant fall in advertising revenue.

6 News Assessment of Risks to Financial Projections

6.1 [✂].

6.2 [✂].

7 Assessment of Risks

7.1 In the case of greater difficulties, the ability of Newco to survive short term losses would depend on its financial resources, and the company set up is projected to have some strengths:

- currently Sky News is unique insofar as it is the only HD 24 hour news channel in Europe;
- the company is set up with share capital of £[✂] and an initial cash injection of £[✂], of which half is expected to finance receivables;
- [✂];

- there is no gearing, so there could be potential to borrow against future earnings;
- shareholders, [✂], might be willing to provide further capital injections if required, as long as it maintained a strong interest in the supply of Sky News; and
- [✂].

7.2 While it is possible to imagine a combination of unfavourable events that could cause the financial viability of Newco to be threatened, this is not considered to be very likely. The assumptions made in the projections for Newco appear to be reasonable and there is some flexibility to handle unforeseen problems. The benefit of the assured income from the carriage agreement strengthens the financial position of Newco and while this agreement operates, and based on the evidence seen, the OFT has no reason to anticipate that Newco is not likely to be financially viable.

7.3 There are some areas where improvement in the financial arrangements could further reduce the risks to Newco, making it stronger and more able to face uncertainties in the future, such as:

- [✂];
- [✂]; and
- [✂].

8 Additional Future Financial Risk

8.1 Looking 10 years ahead, uncertainty about the continuation of the carriage agreement that provides the main income stream for Newco could lead to share price weakness in the final years of the agreement. Unless the agreement was renewed on favourable terms, or unexpectedly large alternative revenue sources were identified by Newco, it is difficult to foresee how Newco would continue to be viable as an independent company. [✂].

ENDNOTES

1. The OFT has corrected references in square brackets in paragraphs 1.14, 7.3 and 7.27, which were originally to 'listed' and 'listing' in its confidential report.

2. The OFT has corrected references in square brackets in paragraphs 6.2, 6.3, 6.5, 6.6 and 6.7, which were originally to 'The parties', 'they' and 'their' in its confidential report.

3. The OFT has corrected 'could' in square brackets in paragraph 9.11 which was originally 'will' in its confidential report.

4. The OFT has corrected 'Newco' in square brackets in paragraph 7.27 which was originally 'News' in its confidential report.

5. The OFT has corrected 'News' in square brackets in Annex 5.7 which was originally 'Sky' in its confidential report.

TSol
LAW AT THE HEART OF GOVERNMENT

The Treasury Solicitor
Broadcasting

2-4 Cockspur Street Tel [redacted]
London SW1Y 5DH Fax [redacted]
www.culture.gov.uk

050

Slaughter and May
One Bunhill Row
London EC1Y 8YY

By email only

Your Ref [redacted]
Our Ref

11 February 2011

Dear [redacted]

News Corporation/BSkyB

Thank you for sending me a copy of your letter addressed to the Secretary of State and dated 9 February 2011. As I asked in my letter of 1 February, it would be very helpful if could you please address correspondence to me rather than to the Secretary of State himself.

As the Secretary of State set out in his statement to Parliament on 25 January, taking account of the Ofcom report he received, he was minded to refer the transaction to the Competition Commission. However, as he also indicated, he was willing to consider undertakings being offered in lieu of a reference. In considering whether any proposals from the merging parties might be such as to mean that the Secretary of State would propose to accept such undertakings in lieu of reference, he has called upon the assistance of Ofcom and OFT. Ofcom is the specialist regulator in the field with a good deal of knowledge of the media industry and the dynamics of it. The OFT has a great deal of experience in merger matters and, in particular, in dealing with the practicability of any proposed undertakings in lieu of reference put forward in the competition context.

If, after considering input from Ofcom and OFT, the Secretary of State were to reach a position where he would propose to accept undertakings in lieu of a reference, he will consult on those proposed undertakings. That process will ensure that your clients will have a full opportunity to comment upon and make any relevant representations in relation to the proposed undertakings. Of course, if the Secretary of State does not reach the view that he would propose to accept undertakings in lieu, there will be no need for such a consultation.

You suggest in your letter that the process which the Secretary of State is following is unfair and fails to meet normal procedural standards of merger control and public law. The Secretary of State does not agree. He has made absolutely clear that your clients will be able to comment upon any undertakings the Secretary of State might propose to accept. Any objections your clients might have to any such putative undertakings can be put forward. They will have a full and fair opportunity to comment. It is unclear what the benefit would be of introducing a prior stage of comment for your clients on proposals in relation to which the Secretary of State has not reached a view and which may be subject to modification in the course of consideration.

Proper and, as you put it, meaningful consultation does not require multiple iterations of comment throughout a decision making process such as this one. The important point is that you and your clients are given an opportunity properly to comment on any proposal to accept undertakings in lieu of a reference. You will have that opportunity.

Finally, I cannot but emphasise that if, and I stress if, the Secretary of State does reach a view that he proposes to accept undertakings in lieu of a reference, he will carefully consider any observations you and your clients may have about those proposed undertakings.

Yours sincerely,

[redacted] 051

From: [redacted]
Sent: 14 February 2011 17:19
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; SMITH KEITH; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted] MARTIN LINDA; BEEBY, Sue; SMITH, Adam
Subject: RE: news corp/sky merger - next steps

[redacted]

Many thanks for your note on next steps with the News/Sky merger. The SoS has noted the three broad options.

[redacted]

From: [redacted]
[redacted]nt: 10 February 2011 15:20
[redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; SMITH KEITH; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted] V[redacted] MARTIN LINDA; BEEBY, Sue; SMITH, Adam
Subject: news corp/sky merger - next steps

[redacted]

We spoke. Here is a copy of the submission amended in the light of comments.

[redacted]

DCMS
2-4 Cockspur Street
London SW1Y 5DH

N[redacted]

[redacted]

052

From: [redacted]
Sent: 14 February 2011 18:57
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted]
Subject: RE: NEWS CORP/BSKYB MERGER

[redacted]

Many thanks for your note which we have just discussed with the SoS. The SoS has agreed the following next steps:

1) To write to News Corp copying the Ofcom and OFT reports. The letter should:

- explain that given the reports identify some outstanding concerns the SoS is still minded to refer.
- acknowledge that both reports suggest the UILs would address plurality concerns if the outstanding conditions were met.
- set out the SoS is prepared to allow News Corp 24 hours to indicate they would accept all the conditions proposed by the regulators
- explain if News don't accept all of the remedies proposed in 24 hours SoS would refer directly to the Competition Commission

2) If News Corp are prepared to accept the remedies in full, SoS will write to Ofcom and OFT requesting them to continue discussions with a view to producing a final set of UILs for him to consider. These final UILs would form the basis of a public consultation.

Very grateful for a draft letter for SoS to consider and send tomorrow.

Many thanks

[redacted]

From: [redacted]
Sent: 14 February 2011 12:55
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted]
Subject: NEWS CORP/BSKYB MERGER

[redacted]

Note for this afternoon's discussion attached.

[redacted]

DCMS
2-4 Cockspur Street
London SW1Y 5DH

[redacted]

053

To: **Jeremy Hunt**

From:
Team:
Tel:
Date: 14/02/2011

NEWS CORP/BSKYB MERGER: NEXT STEPS

Issue

Next steps in the News Corp/BSkyB merger.

Timing

Immediate.

Recommendation and Advice

We now have the reports from Ofcom and OFT. Both are broadly satisfied with the undertakings in lieu but have a number of major reservations. Ofcom conclude that Sky News should have an independent non-executive director and an Editorial Committee to ensure editorial integrity and independence of Sky. OFT are concerned about a number of detailed points (which we can discuss with you) and have a particular concern that News Corp should be unable to increase its share holding in Sky.

In principle you could agree to the merger going ahead now on the basis of the undertaking in lieu in their current form. However, in view of the outstanding concerns of the regulator, we would not recommend this. If you agree, the decision for you now is whether to refer the merger to the Competition Commission or allow more time to see if the Undertakings in Lieu can be amended so as to address all the outstanding issues

We think that the undertakings in lieu are sufficiently close to addressing concerns about plurality that it would be right to allow more time for them to be amended.

In terms of handling, you could write to News Corp informing them that:

- you have considered the reports from Ofcom and OFT and agree with their conclusions;

- you will refer the merger unless News Corp assures you within 48 hours that they will accept the remedies proposed by the regulators [in their entirety];

- if they do, you will ask Ofcom and OFT to continue discussions with News Corp with a view to producing a final set of Undertakings in Lieu which you can consult on.

Alternatively, you could write to Ofcom and OFT asking them to continue their discussions with News Corp and we could convey the message to News Corp at official level. Assuming you share the concerns of the regulators, it will be important that News Corp recognise that, to be acceptable, the undertakings in lieu must fully meet the regulators' concerns as outlined in their reports.

We are finding out from OFT and Ofcom how much more time will be needed to get the undertakings in lieu agreed and in a form which we can consult on.

cc
Jonathan Stephens
Jon Zeff
Patrick Kilgarriff
Carola Geist-Divver

Department for Culture, Media and Sport
Rt Hon Jeremy Hunt MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH

Tel
Fax
www.culture.gov.uk

054

department for
**culture, media
and sport**

CONFIDENTIAL

CMS 166464/asg

James Murdoch
Chairman and Chief Executive
News Corporation
3 Thomas Square
London
E98 1EX

15 February 2011

Dear James

NEWS CORP/BSKYB MERGER

In a letter to me of 18 January from Allen & Overy, you sent me a set of proposed undertakings which News Corporation would be willing to give in lieu of my making a reference to the Competition Commission. I announced on 25 January that I would consider undertakings in lieu in respect of the above merger. I also indicated that I would ask OFT and Ofcom to consider the proposed undertakings in lieu with a view to advising me as to whether they considered that they would address concerns about plurality and be workable.

I have now received reports from both regulators which I enclose. It is clear from the reports that OFT and Ofcom have considered the proposals in some detail and worked with News Corp in relation to them. Progress has been made in discussion with Ofcom and the OFT in regard to concerns about plurality. There are nevertheless a number of substantive issues outstanding which mean that neither Ofcom nor the OFT have been able to give a definitive recommendation.

If the substantive issues are not resolved, I do not consider that it would be appropriate for me to accept such undertakings and as such I will refer the matter to the Competition Commission. If, on the other hand, the substantive issues identified by Ofcom and OFT have been dealt with, I believe that I would be in a position to give serious consideration to accepting them.

Department for Culture, Media and Sport

There are therefore four critical matters which need to be resolved if I am to consider accepting your undertakings:

- The Board of Newco would need to be independently chaired. I agree with Ofcom's assessment that, without such an undertaking, the Newco Board could appoint a Chairman who is affiliated with News Corporation which would undermine the spirit and potentially the practical effect of undertakings designed to address concerns about plurality.

- There needs to be a non-reacquisition commitment as set out by the OFT. Whilst I understand that it is proposed that this could lapse after 10 years, I quite understand the OFT's concern that there should not be a "carve-out" in the event of a third party bid for Newco.

- The key contracts would need to be approved by me. At a minimum this would cover the carriage agreement and the brand licensing agreement. I would anticipate asking Ofcom and the OFT to advise me on these contracts at the appropriate time.

- There needs to be more clarity around the definition of "material transactions" (as identified in para 8.11 of the OFT report) and the assets to be transferred (paragraph 9.7-9.14).

There are also a number of other important issues where there is agreement in principle, or a large measure of agreement, and these too would need to be agreed and incorporated into the undertakings in lieu.

If you are unwilling to agree to the necessary changes, I will refer the merger to the Competition Commission. If, on the other hand, you will accept that in principle these changes can be made, and confirm that to me within 24 hours, I will formally ask Ofcom and the OFT to continue their discussions with News Corp with a view to producing as soon as possible a set of finalised undertakings in lieu which I can consider. If I then propose to accept those finalised undertakings in lieu of a reference, they can then be published and consulted on as the legislation requires.

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport

[redacted]

0555

From: [redacted]
Sent: 15 February 2011 14:16
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted] BEEBY, Sue; SMITH, Adam
Subject: RE: NEWS CORP/BSKYB MERGER
Attachments: SB 11 02 14 - JH letter to NC db 2 cln.docx

[redacted]

Draft attached. This has been cleared with our lawyers and Counsel.

As have mentioned, Ed would apparently like to speak to Jeremy before the report is sent to News Corp.

[redacted]

From: [redacted]
Sent: 14 February 2011 18:57
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted]
Subject: RE: NEWS CORP/BSKYB MERGER

[redacted]

Many thanks for your note which we have just discussed with the SoS. The SoS has agreed the following next steps:

1) To write to News Corp copying the Ofcom and OFT reports. The letter should:

- explain that given the reports identify some outstanding concerns the SoS is still minded to refer.
- acknowledge that both reports suggest the UILs would address plurality concerns if the outstanding conditions were met.
- set out the SoS is prepared to allow News Corp 24 hours to indicate they would accept all the conditions proposed by the regulators
- explain if News don't accept all of the remedies proposed in 24 hours SoS would refer directly to the Competition Commission

2) If News Corp are prepared to accept the remedies in full, SoS will write to Ofcom and OFT requesting them to continue discussions with a view to producing a final set of UILs for him to consider. These final UILs would form the basis of a public consultation.

Very grateful for a draft letter for SoS to consider and send tomorrow.

Many thanks

[redacted]

From [redacted]
Sent: 14 February 2011 12:55
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted]
Subject: NEWS CORP/BSKYB MERGER

[redacted]

056

From: [redacted]
Sent: 15 February 2011 16:13
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted] BEEBY, Sue; SMITH, Adam
Subject: FW: NEWS CORP/BSKYB MERGER
Attachments: SB 11 02 14 - JH letter to NC db 2 cln.docx

[redacted]

Revised draft following a discussion with lawyers and SpAds.

Please note that lawyers would like to retain the sentence in square brackets in the third paragraph, as it gives the Secretary of State more scope for manoeuvre in the event that he decides not to accept the UILs, whereas SpAds would like it deleted to keep the letter more focussed and think that the reference to "serious consideration" later in the para makes it sufficient clear that he has not reached a final decision on the UILs.

I will bring down copies of the reports.

[redacted]

From: [redacted]
Sent: 15 February 2011 14:16
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted] BEEBY, Sue; SMITH, Adam
Subject: RE: NEWS CORP/BSKYB MERGER

[redacted]

Draft attached. This has been cleared with our lawyers and Counsel.

As have mentioned, Ed would apparently like to speak to Jeremy before the report is sent to News Corp.

[redacted]

From: [redacted]
Sent: 14 February 2011 18:57
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted]
Subject: RE: NEWS CORP/BSKYB MERGER

[redacted]

Many thanks for your note which we have just discussed with the SoS. The SoS has agreed the following next steps:

1) To write to News Corp copying the Ofcom and OFT reports. The letter should:

- explain that given the reports identify some outstanding concerns the SoS is still minded to refer.
- acknowledge that both reports suggest the UILs would address plurality concerns if the outstanding conditions were met.

- set out the SoS is prepared to allow News Corp 24 hours to indicate they would accept all the conditions proposed by the regulators
- explain if News don't accept all of the remedies proposed in 24 hours SoS would refer directly to the Competition Commission

2) If News Corp are prepared to accept the remedies in full, SoS will write to Ofcom and OFT requesting them to continue discussions with a view to producing a final set of UILs for him to consider. These final UILs would form the basis of a public consultation.

Very grateful for a draft letter for SoS to consider and send tomorrow.

Many thanks

[redacted]

From: [redacted]
Sent: 14 February 2011 12:55
To: [redacted]
Cc: STEPHENS JONATHAN; ZEFF JON; KILGARRIFF PATRICK; GEIST-DIVVER CAROLA; [redacted]
Subject: NEWS CORP/BSKYB MERGER

[redacted]

Note for this afternoon's discussion attached.

[redacted]

DCMS
2-4 Cockspur Street
London SW1Y 5DH

[redacted]

News Corporation

057

STRICTLY CONFIDENTIAL
CONTAINS BUSINESS SECRETS

Rt Hon Jeremy Hunt, MP
Secretary of State for Culture, Olympics, Media and Sport

Department for Culture Media and Sport
2-4 Cockspur Street
London SW1Y 5DH

16 February 2011

Dear Jeremy,

News Corp/BSkyB

DRAFT: 16 February 2011

PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9 PER CENT OF BRITISH SKY BROADCASTING GROUP PLC

UNDERTAKINGS GIVEN BY NEWS CORPORATION PURSUANT TO PARAGRAPH 3 OF SCHEDULE 2 OF ENTERPRISE ACT (PROTECTION OF LEGITIMATE INTERESTS) ORDER 2003

of doubt any renewal of or material amendment to the Carriage Agreement and the Brand Licensing Agreement would be deemed to be a material transaction for the purposes of this definition;

"Newco" means the public limited company (including, where relevant, any wholly-owned subsidiary of such public limited company) into which the business of Sky News will be transferred and which will continue to operate that business, as described in section 2.1 above;

"News" means News Corporation;

"OFT" means the Office of Fair Trading;

"the Order" means the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

"Secretary of State" means Secretary of State for Culture, Olympics, Media and Sport (except as context otherwise requires);

"Sky" means British Sky Broadcasting Group plc;

"Sky News" means the business of news gathering and production, and creating and offering (whether on a free to air or subscription basis) the broadcast news channels currently branded "Sky News" and "Sky News HD" and related services under the Sky News brand and/or news services provided to third parties, including the wholesale provision of news input to third party media enterprises. For the avoidance of doubt, "Sky Sports News" is a separate business which will remain under the sole control of Sky;

"Subsidiary" shall be construed in accordance with section 1159 of the Companies Act 2006 (as amended), unless otherwise stated; and

"Transaction" means the proposed acquisition by News of some or all of those shares in Sky that it does not already own.

Department for Culture, Media and Sport
Rt Hon Jeremy Hunt MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

Tel [redacted]
Fax

058

CMS 166685/mk

department for
**culture, media
and sport**

Clive Maxwell,
Executive Director
Office of Fair Trading

By e-mail: [redacted]

17 February 2011

Dear Clive

NEWS CORP/BSKYB MERGER

Thank you for your letter and enclosed report of 11 February. I am grateful to you for all the work you have put into this report in such a short period of time.

I note your conclusion that, if the undertakings already offered were amended, concerns in relation to plurality could be met. I have now received assurances from News Corporation that they are prepared to meet all the outstanding matters set out in your report, and in Ofcom's report, and an updated draft of the proposed undertakings is enclosed with this letter.

I should therefore be grateful if you could work with News Corporation and Sky to agree a set of undertakings, so that I can make a final decision, taking into account your further recommendations, whether or not to accept those undertakings.

My officials will be in touch to discuss the timeframe.

[redacted]

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport

Department for Culture, Media and Sport
Rt Hon Jeremy Hunt MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

Tel 020 7211 6299
Fax [redacted]

059

CMS 166685/mk

dcms
department for
**culture, media
and sport**

Ed Richards,
Collette Bowe,
By e-mail: [redacted]

17 February 2011

Dear Ed and Collette

NEWS CORP/BSKYB MERGER

Thank you both for your letter of 11 February. I am grateful to you for all the work you have put into this report in such a short period of time.

I note your conclusion that, if the undertakings already offered were amended, concerns in relation to plurality could be met. I have now received assurances from News Corporation that they are prepared to meet all the outstanding matters set out in your report, and in the OFT's report, and an updated draft of the proposed undertakings is enclosed with this letter.

I should therefore be grateful if you could work with News Corporation and Sky to agree a set of undertakings, so that I can make a final decision, taking into account your further recommendations, whether or not to accept those undertakings.

My officials will be in touch to discuss the timeframe.

[redacted]

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport

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BY EMAIL ONLY

STRICTLY CONFIDENTIAL

Allen & Overy LLP
One Bishops Square
London E1 6AD United Kingdom

Tel +44 (0)20 3088 0000
Fax +44 (0)20 3088 0088
Direct [redacted]

[redacted]
Department for Culture, Media and Sport
2-4 Cockspur Street
London SW1Y 5DH

Our ref [redacted]

17 February 2011

Dear [redacted]

News Corporation - British Sky Broadcasting Group Plc

I refer to the letter from the Secretary of State for Culture, Olympics, Media and Sport (the **Secretary of State**) of 15 February 2011 to James Murdoch and to Mr Murdoch's reply of 16 February 2011 enclosing a revised draft set of undertakings in lieu (**UIL**).

The Secretary of State notes that if News Corporation (**News**) accepts in principle the four changes set out in his letter, he will formally ask Ofcom and the OFT to continue their discussions with News with a view to producing as soon as possible a set of finalised UIL for consideration. The Secretary of State further notes that should he propose to accept those finalised UIL they can then be published and consulted on as the legislation requires.

News would be grateful if the Department for Culture, Media and Sport (**DCMS**) could clarify what procedural steps it envisages will be taken should the Secretary of State be minded to accept a finalised set of UIL (subject, of course, to the further consultation between News, Ofcom and the OFT envisaged in the [redacted]

[redacted]

Yours sincerely

[redacted]

Partner

cc: [redacted] and [redacted] News Corporation; [redacted]and [redacted] - Hogan Lovells International LLP; [redacted]nd [redacted] Allen & Overy LLP

Enc.

060A

[redacted]

From: OLDFIELD PAUL
Sent: 18 February 2011 15:36
To: [redacted]
Subject: RESTRICTED - News Corp

[redacted]

I met with JS this morning. He's keen to have a plan in place early next week for the handling of the News Corp outcome well in advance of any announcement. I said I'd wait for you to return on Monday before I did anything, in case you already had something in train.

Think he's keen to have a statement drafted well in advance and also a plan from [redacted] Sue on who to brief etc.

Cheers.

Paul.

Paul Oldfield
Principal Private Secretary to the Secretary of State
Department for Culture, Media and Sport

[redacted]

TSol
LAW AT THE HEART OF GOVERNMENT

The Treasury Solicitor
Broadcasting

2-4 Cockspur Street [redacted]
London SW1Y 5DH
www.culture.gov.uk [redacted]

061

Allen & Overy LLP
One Bishops Square

E1 6AD

Your Ref [redacted]

23 February 2011

Dear [redacted]

News Corporation – British Sky Broadcasting Group Plc

Thank you for your letter of 17 February; apologies for the delay in responding to you.

To confirm, if the Secretary of State proposes to accept UILs, he would intend to publish his decision to accept those UILs, the UILs in full, and reports received from the OFT and Ofcom. However, he is conscious that his decision and the reports might contain confidential information and that it may be necessary to publish non-confidential versions of those documents. However, it is clear that the UILs should be published in as full a form as possible in order to ensure that those wishing to respond to the consultation which would follow will be able to do so fully and effectively.

Insofar any decision of the Secretary of State is concerned, you will be given opportunity to make representations as to confidentiality in advance of such a decision being published, albeit that we will want to get that done quickly. So far as the reports from the OFT and Ofcom are concerned, the Secretary of State intends in any event to publish these reports in due course, and will ask those bodies to provide non-confidential versions for publication. I would ask you therefore to provide us with versions marked with those parts which you would wish to remain confidential as soon as you are able to. I would also ask you to ensure that only those figures, words or passages which are of real sensitivity are marked up.

I hope that this is clear, but do please let me know if you have further queries.

Yours sincerely

[redacted]

OFFICE OF FAIR TRADING

062

The Rt. Hon Jeremy Hunt, MP
Secretary of State for Culture, Olympics, Media and Sport
2-4 Cockspur Street
London
SW1Y 5DH

Your ref	CMS 164661/DC	Direct line	
Our ref	COMP/5932	Fax	
Date	1 March 2011	Email	

Dear Secretary of State

Advice from the Office of Fair Trading on undertakings in lieu offered by News Corporation relating to the anticipated acquisition by News Corporation of British Sky Broadcasting Group plc

1. I refer to your letter of 17 February 2011 following on from our report to you of 11 February 2011 (the Report).

2. In your letter, you asked us to work with News Corporation (News) and British Sky Broadcasting Group plc (Sky) to agree a set of undertakings in lieu of reference (UIL), so that you can make a final decision whether or not to accept those undertakings, taking into account the OFT's further recommendations on whether they are practically and financially viable.

3. Since receiving your letter of 17 February, the OFT has engaged with News with a view to amending the UIL offered to you in light of the comments and recommendations in the Report. The OFT has also consulted with Ofcom in its role as sectoral regulator. This process has led to a revised set of UIL submitted by News on 1 March (the Revised UIL), a copy of which is annexed to this letter.

4. The advice and recommendations that I set out in this letter are based on the remit to the OFT set out in your letter of 27 January 2011. The OFT has advised on whether the UIL are practically and financially viable and has considered if there are any practical issues which could undermine the

operation of the UIL and whether they would be effective over the medium and long term. I note that your assessment of the Revised UIL will be in the context of their ability to resolve media plurality concerns. The OFT has not considered the effectiveness of the UIL in terms of their impact in addressing the media plurality concerns raised by Ofcom in its report of 31 December 2010. This issue is being addressed by Ofcom. To the extent that the OFT has been concerned with 'effectiveness' of the Revised UIL, this relates to their mechanical and operational effectiveness.

5. Before providing advice and recommendations in relation to the Revised UIL, I set out details of the amendments that have been made in the Revised UIL as against those originally submitted to the Secretary of State and considered by the OFT for the purposes of the Report.

Details of key amendments in the Revised UIL

6. The OFT set out in the Report (at paragraph 1.20) a number of amendments that it considered were necessary. These, together with the changes made since, are:

- **interim protection** – this has been included in paragraph 8.1 of the Revised UIL;
- **non reacquisition commitment** – this has been included in paragraph 8.1 of the Revised UIL;
- **prior review / approval of key agreements** – this has been incorporated in relation to the brand licensing agreement in paragraph 4.6 of the Revised UIL; News has provided that the lease of the current Sky News premises and the arrangements between News/Sky and Newco in relation to satellite capacity, playout and uplinking should also be subject to approval by the Secretary of State under paragraph 5.1(ii) of the Revised UIL;[1]
- **inclusion of an arbitration / dispute resolution mechanism** – this has been incorporated in paragraphs 4.5(v), 4.7(v) and 5.3 of the Revised UIL;[2]

[1] Unlike the carriage agreement and brand licensing agreement, these would not need to be approved prior to the Effective Date (that is, acceptance of the UIL).
[2] News has provided details of the proposed arbitration mechanism to the OFT, but the OFT notes that the Secretary of State will have the ability to review and approve these in the carriage agreement and brand licensing agreement.

- **restrictions on termination of the key agreements** – this has been included in paragraph 4.8 of the Revised UIL; and

- **other obligations** – the OFT set out in sections 7 to 12 of the Report further detail on each of the points raised above, together with further undertakings and amendments to the UIL; further material amendments to the Revised UIL are considered below in paragraph 7.

7. In addition to the above, there have been a number of additional material amendments incorporated in the Revised UIL,[3] namely:

- **enumeration of transfer of assets** – as envisaged in paragraphs 9.13 and 9.14 of the Report – News has included in paragraph 4.1 of the Revised UIL an obligation to provide a schedule of assets to the Secretary of State prior to acceptance of the UIL;

- **non-solicitation of staff** – as envisaged in paragraph 9.21 of the Report – News has agreed to include a two year non-solicitation clause in paragraph 4.2 of the Revised UIL; and

- **operational agreements** – as envisaged in paragraph 11.10 of the Report – News has addressed in the Revised UIL the main points raised by the OFT in relation to the operational agreements (in particular, as well as prior review of key agreements (see above), termination rights by Newco in relation to all operational agreements).

Advice in relation to the Revised UIL

8. In light of the amendments proposed by News, and subject to prior approval of the key agreements, as described above, the OFT advises the Secretary of State that the Revised UIL are likely to be practically and financially viable in the short and medium term (that is, no more than 10 years).

9. The OFT also advises the Secretary of State that the amendments made to the Revised UIL do not address the essential structural limitation identified in the Report, that the UIL offered are unlikely to be practically and financially viable over the long term. The relevance of this limitation ultimately depends on the time horizon which the Secretary of State,

[3] In addition, there have been a number of drafting changes to the Revised Undertakings that are not set out here.

advised by Ofcom, considers relevant to ensure the effectiveness of the UIL in addressing any media plurality concerns. The OFT notes that Ofcom's advice of 11 February 2011 sets out its views on the dynamics of the industry.

Advice in relation to process going forward

10. To the extent that you are minded to accept the Revised UIL, you will be aware that Schedule 10 Enterprise Act 2002 provides for a consultation period on UIL to give third parties an opportunity to make representations on them for you to consider.

11. Paragraph 2(2) of Schedule 10 provides an explanation of the contents of the notice that should accompany the publication of any UIL. In practical terms, this notice is normally effected by means of the publication of an accompanying text issued by the OFT (or, in this case, the Secretary of State) explaining why it/he is minded to accept the UIL in question. In order to fulfil the requirements of paragraph 2(2) and provide an informative basis for the consultation, the notice should identify the media plurality concerns that the Revised UIL are seeking to deal with and explain the intended purpose and effect of the Revised UIL.

12. In particular, having regard to the limited time period in which to consider the UIL offered and to consult with News, the OFT advises that it would be appropriate for you to test further the viability and robustness of the commitments offered during the statutory public consultation process.

Yours sincerely,

Clive Maxwell
Executive Director, OFT

DRAFT: 1 March 2011

PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9 PER CENT OF BRITISH SKY BROADCASTING GROUP PLC

UNDERTAKINGS GIVEN BY NEWS CORPORATION PURSUANT TO PARAGRAPH 3 OF SCHEDULE 2 OF ENTERPRISE ACT (PROTECTION OF LEGITIMATE INTERESTS) ORDER 2003

WHEREAS:

(a) News Corporation proposes to acquire the shares in British Sky Broadcasting Group plc that it does not already own.

(b) On 4 November 2010 the Secretary of State for Business, Innovation and Skills issued a European Intervention Notice under section 67(2) of the Act and the Order in connection with the Transaction.

(c) On 31 December 2010, Ofcom provided its report to the Secretary of State on issues of media plurality (as provided for in Article 4A of the Order) and on 30 December 2010 the OFT provided its report to the Secretary of State on the creation of a European relevant merger situation pursuant to Article 4(4) of the Order.

(d) The Secretary of State considers that the conditions for referring the Transaction to the CC under Article 5 of the Order are met and, absent any offer of undertakings from News, he would be minded to refer the Transaction to the CC.

(e) The Secretary of State has a discretion to accept undertakings in lieu of reference from News under paragraph 3 of Schedule 2 of the Order:

> *"The Secretary of State may, instead of making such a reference and for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the European relevant merger situation concerned accept from such of the parties concerned as* [he] *considers appropriate undertakings to take such action as* [he] *considers appropriate."*

(f) The Secretary of State considers that the undertakings given below by News are appropriate to remedy, mitigate or prevent the effects adverse to the public interest which may be expected to result from the creation of the European relevant merger situation.

NOW THEREFORE News hereby gives to the Secretary of State the following undertakings for the purpose of remedying, mitigating or preventing the effects adverse to the public interest which may be expected to result from the Transaction.

1. EFFECTIVE DATE OF THE UNDERTAKINGS

1.1 These undertakings shall take effect from the date that, having been signed by News, they are accepted by the Secretary of State.

2. SPIN-OFF OF SKY NEWS BUSINESS

2.1 News shall effect the spin-off of the Sky News business into an independent English public limited company, Newco, the shares of which will be publicly traded, using its best endeavours and acting in good faith, at the Closing Date or as soon as reasonably practicable following the Closing Date and in any event within 9 months of the Closing Date, subject to any extension of time agreed with the consent of the Secretary of State. Shares in Newco shall be distributed to the shareholders of Sky in the same proportions as their shareholdings in Sky.

2.2 News shall take (or procure the taking of) the following steps to achieve the spin-off of Newco to the shareholders of Sky:

(i) the formation of Newco as a new public limited company incorporated under the laws of England and Wales as a Subsidiary of Sky;

(ii) the establishment of the corporate governance arrangements set out in section 3 below;

(iii) the transfer of the business of Sky News (as set out in section 4 below) into Newco in exchange for shares in Newco;

(iv) the entering into of the agreements between Sky and Newco set out in sections 4.4, 4.6 and section 5 below;

(v) the spin-off of shares in Newco to shareholders of Sky in the same proportions as their shareholdings in Sky under arrangements that cause the resulting News shareholding in Newco on completion of the spin-off to be 39.1%, equal to its current shareholding in Sky; and

(vi) the putting in place of arrangements for the public trading of Newco shares.

3. CORPORATE GOVERNANCE OF NEWCO

3.1 News shall ensure that the corporate governance structure of Newco shall be established to substantially replicate the effects of the existing corporate governance structure of Sky. In particular:

(i) News shall be subject to a voting limitation of 37.19% of the total votes of Newco on substantially the same terms as currently apply in relation to Sky pursuant to the voting agreement dated 21 September 2005 (as amended by a memorandum dated 19 October 2005);

(ii) The articles of association of Newco shall provide that Newco's Sky News TV, radio and any closely related services (irrespective of the platform on which such service is distributed) will abide by the principle of editorial independence and integrity in news reporting and where appropriate will comply with the Ofcom Broadcasting Code;

(iii) The articles of association of Newco shall provide that, so long as News in combination with any member of the same Group of Interconnected Bodies Corporate as News does not own more than 50% of Newco's voting shares, the majority of the board of Newco shall comprise Independent Directors and one of those Independent Directors shall be chairman of the board of Newco. The definition of Independent Director contained in these undertakings shall be included in the articles of association of Newco;

(iv) Material Transactions between Newco and News or Sky shall require the approval of Newco's audit committee, which shall consist exclusively of Independent Directors. Material Transactions between Newco and News or Sky involving amounts of £12.5 million or more shall also require the approval of the board of Newco. In addition Newco's articles of association shall also provide that transactions between Newco and News or Sky may, depending on materiality, require an independent fairness opinion or Newco independent shareholder approval (by virtue of Newco applying controls that have equivalent effect to those imposed by Chapter 11 of the Listing Rules);

(v) The articles of association of Newco shall provide that the board of Newco and its committees shall have the appropriate balance of skills, experience, independence and knowledge of Newco to enable them to discharge their respective duties and responsibilities effectively and that at least one Independent Director must have senior editorial and/or journalistic experience;

(vi) The articles of association of Newco shall provide that the appointment or removal (including any material changes in terms and conditions which could give rise to constructive dismissal) and any material changes to the authority or reporting relationship of the head of Sky News must be approved by the board of Newco;

(vii) The articles of association of Newco shall provide that Newco shall adhere to the obligations imposed by the Listing Rules as regards compliance with the principles set out in the UK Corporate Governance Code; and

(viii) The articles of association of Newco shall provide that, so long as News in combination with any member of the same Group of Interconnected Bodies Corporate as News does not own more than 50% of Newco's voting shares, Newco shall establish a corporate governance and editorial committee which will:

(A) comprise a majority of members who are Independent Directors (including an Independent Director with senior editorial and/or journalistic experience);

(B) be chaired by an Independent Director;

(C) be entrusted with oversight of Newco's compliance with the corporate governance provisions, the provisions relating to the principle of editorial independence and integrity in news reporting and compliance with the Ofcom Broadcasting Code as provided for under section 3.1(ii) above; and

(D) operate under terms of reference which will stipulate that the corporate governance and editorial committee will:

I. be adequately resourced and have powers to review and investigate all areas within the remit of the committee;

II. meet at least four times a year;

III. report on a regular basis to the board of Newco;

IV. cause a statement to be included in the Newco annual report on its activities including its oversight functions specified in section 3.1(viii)(C) above;

V. consider any representations made by the head of Sky News as to Newco's compliance with the provisions relating to editorial independence and integrity in news reporting and compliance with the Ofcom Broadcasting Code as provided for under section 3.1(ii) above and report any such representations to the board of Newco; and

VI. advise the Newco board on any issues within its remit including any approval specified at 3.1(vi) above.

3.2 For so long as News in combination with any member of the same Group of Interconnected Bodies Corporate as News does not own more than 50% of the voting shares in Newco, News shall vote against any proposed change to Newco's articles of association which would remove the corporate governance provisions provided for in sections 3.1 (ii) to 3.1 (viii) above.

4. SKY NEWS BUSINESS TO BE HELD WITHIN NEWCO

4.1 News shall cause the Sky News business to be transferred, as a going concern, to Newco. This will require the transferring or making available of those assets required to conduct the Sky News business, which will be set out in a Schedule of Assets which will be provided to the Secretary of State prior to the Effective Date and which will include:

(i) all or substantially all tangible assets currently used exclusively for the purposes of carrying on Sky News' business. Arrangements will also be made for Newco to have the use of assets which are not used exclusively in the Sky News business on normal market terms if so requested by Newco;

(ii) all Key Sky News Editorial Staff and all or substantially all staff currently engaged principally in the Sky News business, including news gathering staff (UK and international staff), production, online and multimedia staff; and

(iii) all or substantially all licences, permits, consents and authorisations issued by any governmental or regulatory organisation for the benefit or purpose of the Sky News business (and, to the extent that such licences, permits, consents or authorisations are not capable of transfer, News will endeavour to assist Newco in applying for new licences, permits, consents or authorisations).

4.2 News shall agree (subject to customary limitations) not to solicit staff transferred to Newco for a period of 24 months after the date of spin-off.

4.3 Without prejudice to the generality of section 4.1 above, and subject to obtaining the necessary third party consents, News shall also use all reasonable endeavours to procure that there will be transferred or made available to Newco:

(i) the benefit and burden of any carriage agreements between Sky and third parties (including with Virgin Media and UPC) for the distribution of the Sky News TV channel. News will use all reasonable efforts to ensure that these agreements are transferred directly to Newco;

(ii) Arqiva capacity for one standard definition channel until the expiry of Sky's existing capacity agreement with Arqiva in respect of the broadcast of Sky News on DTT;

(iii) the benefit and burden of wholesale contracts entered into by Sky for the supply of news content to Channel 5 and IRN; and

(iv) the benefit and burden of all or substantially all contracts to which Sky News is party associated with fixed newsgathering.

4.4 In addition News shall ensure that Sky enters into a **Carriage Agreement** with Newco under which Sky News channels and services will be provided to Sky on a wholesale basis for distribution by Sky to viewers or subscribers in return for the payment of a carriage fee by Sky to Newco in a form to be approved by the Secretary of State prior to the Effective Date.

4.5 Any Carriage Agreement approved by the Secretary of State for the purpose of the obligation in paragraph 4.4 above shall:

(i) be for a term of 10 years;

(ii) not provide Sky (or News) with any ability to determine or influence the editorial content of Sky News output or the appointment or termination of editors or other staff of Newco;

(iii) subject to section 4.8 below be terminable by Sky only in the event of material breach that has not been cured or in the event that Newco ceases to provide output which is branded "Sky News";

(iv) (subject to EPG regulation including Ofcom's Code of Practice on EPGs, and Sky's published "Method for allocating listings in Sky's EPG") oblige News to use its best endeavours to ensure that Newco is provided with an EPG slot which is no worse than Sky News' current EPG slot; and

(v) contain a dispute resolution mechanism.

4.6 News shall ensure that Sky will enter into a royalty-bearing **Brand Licensing Agreement** with Newco, under which Newco will receive a licence of the Sky News brand for an initial 7 year term, with an automatic renewal for a further 7 years, and which may then be extended at the option of Newco for a further 3 years, in a form to be approved by the Secretary of State prior to the Effective Date.

4.7 Any Brand Licensing Agreement approved by the Secretary of State for the purpose of the obligation in paragraph 4.6 above shall:

(i) permit Newco to use the Sky News brand in connection with its news output;

(ii) not provide Sky or News with any ability to determine or influence the editorial content of Sky News output or the appointment or termination of editors or other staff of Newco;

(iii) subject to section 4.8 below be terminable by Sky only in the event of a material breach that has not been cured and/or in the event of a change in Control of Newco; and

(iv) contain a dispute resolution mechanism.

4.8 News shall also ensure that neither the Carriage Agreement nor the Brand Licensing Agreement can be terminated by Sky until any dispute between News and Sky as to the validity of that proposed termination has been finally resolved under the dispute resolution process specified in the relevant agreement. News will bear all reasonable costs (including Newco's reasonable costs) of any dispute resolution process originating from a proposed termination by Sky of the relevant agreement (irrespective of the outcome of that dispute resolution process).

5. OPERATIONAL AGREEMENTS BETWEEN SKY AND NEWCO

5.1 News shall ensure that Sky will, prior to or at spin-off, enter into the agreements listed below with Newco under which Sky will provide facilities and support services to Newco, on arms'-length terms:

(i) an advertising sales agreement between Newco and Sky under which Sky will sell advertising and sponsorship on behalf of Newco for a term of up to 3 years;

(ii) a lease of land and buildings under which Sky will agree to lease the existing Sky News land and buildings to Newco for a period of up to 15 years and which shall be in a form to be approved by the Secretary of State prior to spin-off;

(iii) a site support services agreement under which Sky will agree to provide certain support services to Newco while Newco leases premises from Sky including IT support services for a term comparable with the term of the lease;

(iv) one or more agreements in relation to broadcast and technical services under which Sky will offer to Newco:

(A) satellite capacity;

(B) playout;

(C) uplink;

(D) DTT transmission;

(E) online transmission; and

(F) mobile distribution,

in each case for a term of up to 10 years (or such shorter time as required by Newco) except for the service set out at (D) which will be provided until [✂] (when Sky's contract with Arqiva relating to the broadcast of Sky News on DTT expires and it is expected that Newco will enter into its own contract directly with Arqiva) and, in the case of the agreement(s) relating to the services set out at (A), (B) and (C) in a form to be approved by the Secretary of State prior to spin-off; and

(v) broadcast operations (including studio operations staff such as camera operators and sound technicians; edit suite services and staff; in-studio graphics specialists; and video library staff) and creative services (on- and off- screen design services) agreements.

5.2 Each of the agreements set out at 5.1 (i) to (v) above will be terminable by Newco on the provision of reasonable notice to Sky and, where appropriate, break fees to cover Sky's unavoidable costs of early exit. The required period of notice (and, where applicable, break fees) will be set out in each agreement.

5.3 News shall ensure that the agreements listed at sections 5.1(iii), 5.1(iv) and 5.1(v) above will provide that charges to Newco are set for the first year at a fixed price (for each relevant agreement) equivalent to the cost of Sky providing the relevant services (including internal cost allocations) plus a 5% margin. Thereafter the charge to Newco for each agreement will be based upon the fixed price increased by CPI for each following year for the remainder of the agreement, with the following adjustments:

(i) Sky will adjust pricing to reflect actual usage levels for services where Newco has variable demand (e.g. IT support services and broadcast operations and creative services); and

(ii) Sky will adjust pricing to pass on savings or cost increases of services which Sky obtains from a third party (for example, the cost of web hosting or mobile transmission).

5.4 News shall ensure that any agreements entered into under sections 5.1(i) to 5.1(v) above will contain a dispute resolution mechanism.

6. CONTINUED SEPARATION

6.1 News shall not, for a period of 10 years from the Effective Date, except with the prior written consent of the Secretary of State, acquire shares in Newco that will result in News in combination with any member of the same Group of Interconnected Bodies Corporate as News holding more than 39.14% of the shares in Newco.

7. COMPLIANCE

7.1 News shall comply promptly with such written directions as the Secretary of State may from time to time give:

(i) to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings; or

(ii) to do or refrain from doing anything so specified or described which it might be required by these undertakings to do or to refrain from doing.

7.2 News shall procure that any member of the same Group of Interconnected Bodies Corporate as News complies with these undertakings as if it had given them and actions and omissions of the members of the same Group of Interconnected Bodies Corporate as News shall be attributed to News for the purposes of these undertakings.

7.3 Where any Affiliate of News is not a member of the same Group of Interconnected Bodies Corporate as News, News shall use its best endeavours to procure that any such Affiliate will comply with these undertakings as if it had given them. Until the Closing Date, Sky shall not be treated as an Affiliate of News for the purposes of this paragraph.

8. INTERIM ACTION

8.1 Prior to the spin-off of the Sky News business, News shall ensure that, from the Closing Date (except with the prior written consent of the Secretary of State or for the purposes of preparing for the transfer of the Sky News business to Newco and/or effecting the spin-off):

(i) without News accepting any duty to provide any substantial capital expenditure to the Sky News business in addition to the capital expenditure plans in place at the time of the Transaction, the Sky News business is maintained as a going concern and sufficient resources are made available by News for the continuation of the Sky News business on the basis of its pre-merger business plan;

(ii) no material changes are made to the organisational structure of the Sky News business or the management responsibilities within the Sky News business, other than in the ordinary course of business;

(iii) the Sky News business is maintained and preserved and is run in the ordinary course;

(iv) the nature, description, range and standard of news gathering and production and broadcast news currently supplied by the Sky News business is maintained;

(v) the separate brand identity of the Sky News business is maintained;

(vi) no assets of the Sky News business are disposed of, and no Interest in such assets is created or disposed of, other than in the ordinary course of business;

(vii) there is no new integration of the information technology used by Sky with that used by the Sky News business and the software and hardware platforms of the Sky News business shall remain unchanged, except for changes and maintenance in the ordinary course of business; and

(viii) all reasonable steps are taken to encourage all Key Sky News Editorial Staff and all or substantially all staff currently engaged principally in the Sky News business (as set out in section 4.1 above) to remain with the Sky News business.

9. PROVISION OF INFORMATION

9.1 News shall furnish promptly to the Secretary of State or the OFT such information as the Secretary of State or the OFT considers necessary in relation to or in connection with the implementation and/or enforcement of and/or the compliance with these undertakings, including for the avoidance of doubt, any confidential information.

10. INTERPRETATION

10.1 The Interpretation Act 1978 shall apply to these undertakings as it does to Acts of Parliament.

10.2 References in these undertakings to any English law term for any legal status, interest, concept or thing shall in respect of any jurisdiction other than England and Wales be deemed to include what most nearly approximates in that jurisdiction to the English law term.

10.3 In these undertakings the word "including" shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word and the word "include" and its derivatives shall be construed accordingly.

10.4 For the purposes of these undertakings:

"**Act**" means the Enterprise Act 2002;

"**Affiliate**" of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on and any enterprise that the second person carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act;

"**Brand Licensing Agreement**" has the meaning set out in section 4.6 above;

"**business**" has the meaning given by section 129(1) and (3) of the Act;

"**Carriage Agreement**" has the meaning set out in section 4.4 above;

"**CC**" means the Competition Commission;

"**Closing Date**" means the date on which News acquires all or a majority of the share capital of Sky or, if the Transaction is effected by a scheme of arrangement, the date on which the scheme of arrangement becomes effective;

"**CPI**" means the consumer prices index, as published from time to time by the Office for National Statistics;

"**Control**" shall be construed in accordance with section 26 of the Act, and in the case of a body corporate, a person shall be deemed to Control it if he holds, or has an interest in, shares of that body corporate amounting to 40 per cent or more of its issued share capital or carrying an entitlement to vote at meetings of that body corporate of 40 per cent or more of the total number of votes which may be cast at such meetings;

"**Effective Date**" means the date that, having been signed by News, these undertakings are accepted by the Secretary of State, as described at 1.1 above;

"**EPG**" means Electronic Programme Guide;

"**Group of Interconnected Bodies Corporate**" has the meaning given in section 129(2) of the Act; references to a Group of Interconnected Bodies Corporate shall be to the Group of Interconnected Bodies Corporate as constituted from time to time;

"**Independent Director**" means a member of the Newco board of directors who:

- has not been an employee of Newco, News or any member of the same Group of Interconnected Bodies Corporate as News within the last five years;
- does not have, and has not had within the last three years of the date of their first election to the Newco board, a material business relationship with Newco or News either directly, or as a partner, shareholder, director or senior employee of a body that has such a relationship (Sky's independent directors shall not be excluded from this definition by virtue of having served on Sky's board);
- has not received and does not receive additional remuneration from Newco or News apart from a director's fee, does not participate in Newco's or News' share option or performance-related pay scheme, and is not a member of Newco's or News' pension scheme;
- does not have close family ties with any of Newco's or News' advisers, directors or senior employees;
- does not hold cross-directorships and does not have significant links with other directors through involvement in other companies or bodies;
- does not represent a significant Newco or News shareholder; and
- has not served on the board of Newco or News within nine years from the date of their first election;

"**Interest**" includes shares, an interest in shares and any other interest carrying an entitlement to vote at shareholders' meetings; and for this purpose "an interest in shares" includes an entitlement by a person other than the registered holder, to exercise any right conferred by the holding of these shares or an entitlement to Control the exercise of such right;

"**Key Sky News Editorial Staff**" means the head of Sky News, the executive editor of Sky News and the head of newsgathering of Sky News;

"**Material Transaction**" means any transaction that involves or could reasonably involve the payment or receipt by Newco or its subsidiaries of amounts of £5 million or more or such other limits agreed by Newco from time to time. For the avoidance of doubt any renewal of or material amendment to the Carriage Agreement and the Brand Licensing Agreement would be deemed to be a material transaction for the purposes of this definition;

"**Newco**" means the public limited company (including, where relevant, any wholly-owned subsidiary of such public limited company) into which the business of Sky News will be transferred and which will continue to operate that business, as described in section 2.1 above;

"**News**" means News Corporation;

"**OFT**" means the Office of Fair Trading;

"**Order**" means the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003;

"**Secretary of State**" means Secretary of State for Culture, Olympics, Media and Sport (except as context otherwise requires);

"**Sky**" means British Sky Broadcasting Group plc;

"**Sky News**" means the business of news gathering and production, and creating and offering (whether on a free to air or subscription basis) the broadcast news channels currently branded "Sky News" and "Sky News HD" and related services under the Sky News brand and/or news services provided to third parties, including the wholesale provision of news input to third party media enterprises. For the avoidance of doubt, "Sky Sports News" is a separate business which will remain under the sole control of Sky;

"**Subsidiary**" shall be construed in accordance with section 1159 of the Companies Act 2006 (as amended), unless otherwise stated; and

"**Transaction**" means the proposed acquisition by News of some or all of those shares in Sky that it does not already own.

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Ofcom

063

1 March 2011

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport
Department of Culture, Media and Sports
2-4 Cockspur Street
London
SW1Y 5DH

Colette Bowe
Chairman

Ed Richards
Chief Executive

Dear Jeremy

News Corporation / BSkyB proposed merger: further advice on revised UILs

We are writing as requested in your letter of 17 February 2011, to provide you with our advice on whether a revised set of proposed undertakings (UILs) provided by News Corporation on 28 February 2011 addresses the potential impact on media plurality of its proposed acquisition of the shares in British Sky Broadcasting Group plc (Sky) it does not already own, as identified in our report of 31 December 2010.

Background

In our previous report of 31 December 2010, we noted that the proposed transaction would result in Sky ceasing to be a distinct media enterprise from News Corporation. We considered both external and internal plurality and a range of measures to assess the effect of the proposed transaction, including:

- **Audience share and reach within individual platforms** - Following the transaction, News Corporation would be the only news and media provider present on all four media platforms at the wholesale level (TV, newspapers, online and radio). At the retail level, it would be one of three providers of UK-wide news and current affairs on three of four platforms (alongside the BBC on TV, radio and online and Northern & Shell on TV, newspapers and online).
- **Consumers' consumption of news** – We considered the parties' position in respect of their share of 'news minutes' consumed. This suggests that the proposed acquisition would see News Corporation consolidate its second place in terms of news consumption (rising from 14% to 24% including wholesale news provision). This compares to the BBC, which has news consumption of 44% of minutes and DMGT which is third with 9%.

- **Primary research on consumers' claimed use of different media** - The proposed transaction would be a combination of the second and fourth largest providers based on our research into share of all references for news providers. For example, News Corporation's potential ability to influence would increase with the addition of Sky News, increasing its share of references from 12% to 22%. News Corporation's reach as a percentage of regular news consumers would increase from 32% to 51%.

By considering these measures, we concluded that the proposed transaction would result in an increase in News Corporation's ability to influence public opinion (through Sky News). This indicated a change in the concentration of media ownership which would be likely to affect sufficient plurality.

Our advice, based on the evidence and reasons set out in our report, was that we reasonably believed that the proposed acquisition may be expected to operate against the public interest since there may not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide cross-media audiences.

We therefore recommended a fuller second stage review of these issues by the Competition Commission to assess the extent to which the concentration in media ownership may act against the public interest.

On 25 January you announced that, following meetings with Ofcom and News Corporation, you intended to refer the merger to the Competition Commission, considering that it may be the case that the merger may operate against the public interest in media plurality. However, before doing so, you said that it was right that you consider undertakings in lieu (UILs) offered by News Corporation.

You requested Ofcom to advise you on the extent to which the proposed UILs address the potential impact on media plurality identified in our 31 December report. You separately asked the OFT to advise you on whether the proposed UILs would be practically and financially viable and effective, in relation to which we have, as requested, assisted the OFT in light of our sectoral expertise.

We wrote to you on 11 February 2011 with our views on News Corporation's UILs, which propose to separate Sky News into a new company – 'Newco'. In that letter, we detailed the importance of suitable governance measures being put in place as a result of the UILs given the fundamental commercial dependency of Newco on a merged News Corporation/Sky entity.

In our view, these UILs did not provide sufficient assurances on such governance arrangements to address our previously expressed concerns on the impact on plurality from the proposed transaction. However, we noted that the proposed UILs may represent a way forward in principle, subject to resolution of some key outstanding points and on further negotiation relating to the detail of the arrangements.

Following advice from Ofcom and the OFT, you received assurances from News Corporation that it was willing to address the outstanding concerns. On 17 February you asked us and the OFT to work with News Corporation on a revised set of UILs.

Following further discussion, News Corporation offered revised proposed UILs that are attached in full to this letter.

Revised proposed UILs

In our letter of 11 February, we had indicated that in light of Newco's commercial dependence on News Corporation, the following outline set of governance measures would be needed in addition to the measures offered in the original proposed UILs.

- The Board of Newco should consist of a majority of independent directors, "independent directors" being directors who have no other News Corporation or News Corporation associated interest;
- The Board of Newco, including the independent non executive directors, should have a combination of both senior editorial and business experience/expertise;
- The Chairman of Newco should be an independent non executive;
- There should be a sub-committee of the Board of Newco to oversee editorial independence and integrity of Newco's services ("the Board Editorial Committee").

In addition, we noted that the OFT had a number of remaining concerns relating to the practical and financial viability of the initial UILs. These concerns were relevant to our plurality concerns, and in our view would also need to be satisfactorily addressed in any final UILs.

Taking each of these points in turn, the revised UILs, received in final form on 1 March 2011, now propose as follows:

- a majority of the Newco board of directors will be independent, being directors who have no other News Corporation or News Corporation associated interest (UILs 3.1(iii) and 10.4);
- the Chairman of the Newco board will be an independent director (UILs 3.1(iii));
- the articles of association of Newco will provide that the board of Newco and its committees shall have the appropriate balance of skills, experience, independence and knowledge of Newco to enable them to discharge their respective duties and responsibilities effectively and that at least one Independent Director must have senior editorial and/or journalistic experience (UILs 3.1(v));
- the articles of association of Newco will provide that Newco's Sky News TV, radio and any closely related services (irrespective of the platform on which such service is distributed) will abide by the principle of editorial independence and integrity in news

reporting and, where appropriate, will comply with the Ofcom Broadcasting Code (UILs 3.1(ii)). The reference to closely related services is to ensure that the provision of text content alongside audiovisual content does not provide a mechanism for editorial influence that could affect the editorial independence and integrity of Newco news services; and

- Newco shall have a Corporate Governance and Editorial Committee, key points of whose terms of reference are defined in the articles of association. This committee would oversee and report to the full board on compliance with the principles of editorial independence and integrity in news reporting and compliance with Ofcom's Broadcasting Code (UILs 3.1(viii)).

Under the revised proposed UILs, the provisions in the articles relating to independent directors and the editorial committee would no longer apply if News Corporation acquired more than 50% of the shares in Newco (even though News Corporation might not have the 75% control of voting required to amend the articles of association of Newco).

However, News Corporation's share in Newco would be limited to 39.14% and it would require your prior approval to acquire any more (UILs 6.1).

In offering our advice in relation to the revised proposed undertakings we assume that you or any successor would consult both publicly and with Ofcom and the OFT before agreeing to any change which proposed to permit News Corporation to increase its shareholding above 39.14%.

We understand that if you are minded to accept these revised proposed UILs you will consult on them (as would also be required by statute for any future changes to or termination of the UILs). If you decide, subject to the outcome of the public consultation, to accept the UILs, we consider that further negotiation with News Corporation may be necessary on the precise terms of contracts outlined within them which require your prior approval. It is important to note that the financial and practical viability of the revised proposed UILs and their effectiveness in addressing our plurality concerns will depend on the detail of the arrangements.

As you are aware, the revised proposed UILs effectively run for a 10 year period. As we set out in our letter of 11 February 2011, we have advised the OFT that we consider that a carriage agreement of a 10-year term in the context of market dynamics in this sector is long term. This is because we consider that there is likely to be significant evolution of the market and consumers' use of news and current affairs over the next decade. As a result, the situation with regard to plurality may be significantly different in 10 years time.

However, in this context, we would like to restate and emphasise our advice, set out in our report of 31 December 2010 and our letter of 11 February 2011, that the Government should consider undertaking a wider review of the statutory framework to ensure plurality in the public interest in the longer term. We believe that the current system is deficient in failing to provide for intervention to be considered where plurality concerns arise in the absence of a corporate transaction involving media enterprises.

Our advice

We have seen a draft of the OFT's further advice to you in relation to the financial and practical viability of the revised proposed UILs. We agree with the OFT's position.

In conclusion, and with reference to the points set out above, we consider that the revised proposed undertakings would address the plurality concerns identified in our report of 31 December 2010.

Yours ever,

Colette Bowe **Ed Richards**

Enc

cc. Clive Maxwell, Executive Director, OFT

SLAUGHTER AND MAY

One Bunhill Row
London EC1Y 8YY
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

064

1 March 2011

[redacted]
Department for Culture, Media & Sport
2-4 Cockspur Street
London SW1 5DH

Your reference

Our reference [redacted]

Direct line [redacted]

Dear [redacted]

News Corporation/BSkyB

I write further to our letters of 12 January, 20 January and 9 February. As before, we write on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group (together, the "Concerned Parties").

It was reported in the Financial Times on 24 February that News Corporation has offered to divest Sky News as part of a proposed undertaking in lieu of reference to the Competition Commission ("CC").

Our letter of 20 January outlined the key difficulties with any remedy which seeks to divest Sky News on a standalone basis (separated from BSkyB). In particular, our letter outlined the complexities involved in separating the loss-making Sky News from BSkyB and ensuring that the business divested would constitute a viable and independent source of news plurality.

The complex nature of the issues associated with standalone divestment of Sky News mean that such a remedy cannot be characterised as "clear-cut" and therefore could not be an appropriate remedy in the absence of a full investigation by the CC.

Furthermore, the complexity of these issues makes it all the more important that the Secretary of State, the OFT and OFCOM engage with interested third parties (many of whom have relevant sector experience) prior to taking a provisional decision that any proposed undertaking addresses the plurality concerns. Therefore, the Concerned Parties request that:

- The Secretary of State provides an outline of the key features of any remedy proposals that are made by News Corporation;

- The Concerned Parties are given the opportunity to discuss the remedy proposals with the OFT and OFCOM prior to them advising the Secretary of State; and

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SLAUGHTER AND MAY

- The Concerned Parties are given the opportunity to discuss the remedy proposals with the Secretary of State prior to any provisional decision or substantive announcement which he may make on this issue.

Finally, the Concerned Parties would be grateful if you could confirm that the Secretary of State, the OFT and OFCOM will consider the issues outlined in our letter of 20 January when considering whether any proposed undertaking constitutes an effective remedy to the plurality concerns.

Yours sincerely

[redacted]

[redacted]slaughterandmay.com

Copy to : [redacted]

065

DEPARTMENT FOR CULTURE, MEDIA AND SPORT

NOTICE OF CONSULTATION ON THE PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9% OF BRITISH SKY BROADCASTING GROUP PLC

UNDERTAKINGS GIVEN BY NEWS CORPORATION PURSUANT TO PARAGRAPH 3 OF SCHEDULE 2 OF THE ENTERPRISE ACT 2002 (PROTECTION OF LEGITIMATE INTERESTS) ORDER 2003

Views are sought by midday on 21st March 2011 as to whether the attached undertakings in lieu are sufficient to remedy, mitigate or prevent the public interest concerns in relation to media plurality raised by this merger. For reasons explained below, the Secretary of State is not consulting on any competition aspects of the proposed merger.

Background

On 3 November last year, News Corporation (News Corp) indicated that it intended to increase its shareholding in British Sky Broadcasting Group Plc (Sky) from 39.1% to 100%.

Given the nature of the merger and the way in which United Kingdom law works, any competition concerns arising in relation to the transaction fell to be considered by the European Commission.

On 21 December last year, the European Commission concluded that the increased shareholding would not significantly impede effective competition.

However, under UK law, an issue arose as to whether this transaction gave rise to concerns about plurality of persons controlling media enterprises. The Secretary of State for Business, Innovation and Skills issued a European intervention notice raising this public interest. He asked Ofcom to investigate and report to him by 31 December. That report was produced by Ofcom and provided to the Secretary of State for Culture, Olympics, Media and Sport, Jeremy Hunt (the Secretary of State).

On 25 January, the Secretary of State informed Parliament of his initial decision on the proposed News Corp/BSkyB merger. Having considered the Ofcom report and considering that concerns raised in it meant that the relevant statutory test was met, he made it clear that he intended to refer the merger to the Competition Commission. However, before doing so he also made it clear that he would consider undertakings in lieu offered by News Corp which, in his opinion, had the potential to remedy, mitigate or prevent the potential threats to media plurality identified in the Ofcom report, the conclusion of which he shared.

The Secretary of State's statement, along with the Ofcom report and other supporting documentation, is published on the DCMS website at http://www.culture.gov.uk/publications/7737.aspx.

Undertakings in lieu were set out in detail by News Corp in a letter to the Secretary of State of 18 January and in a revised form on 24 January, both of which are published with this notice.

In brief, the proposal was that Sky News be spun-off as an independent public limited company. The shares were to be distributed amongst the existing shareholders of Sky in line with their existing shareholdings. The effect of this would be that, after the proposed News Corp/Sky merger was completed, the shareholdings in Sky News would remain as if the merger transaction had not happened. The new company would have a majority of independent non-executive directors and, importantly, have long-term carriage and brand licensing agreements with the newly-merged News Corp/Sky company so as to ensure its financial viability.

News Corporation would not be able to increase its shareholding in the new company without the permission of the Secretary of State.

In the Secretary of State's view, these undertakings in lieu had the potential to remedy, mitigate or prevent the effect of the increase in News Corp's shareholding to 100% of Sky News. On the face of it, they addressed the main concerns outlined in Ofcom's initial report and, as such, deserved serious consideration.

Having informed Parliament of his decision on 25 January, the Secretary of State wrote to the OFT on 27 January requesting them, under section 93 of the Enterprise Act 2002, as an expert public body with experience in negotiating undertakings in lieu, to discuss the undertakings in lieu with News Corp. On the same day he also asked Ofcom, under section 106B of the Enterprise Act, for advice on whether the undertakings in lieu addressed the potential impact on media plurality identified in their report. Both letters are published with this notice.

OFT and Ofcom reported to the Secretary of State on 11 February. Those reports are published alongside this notice, redacted as necessary for confidentiality.

It was clear from both reports that, in the discussions with News Corp, significant progress had been made towards resolving the concerns about plurality which had been identified to the Secretary of State by Ofcom and about which he continued to be concerned. As such, certain important issues remained unresolved.

The Secretary of State therefore wrote to News Corp on 15 February making clear that, unless News Corp were prepared to amend the undertakings in lieu to deal with the specific matters which the regulators considered needed to be dealt with in the undertakings, he would refer the merger to the Competition Commission. He asked them to respond within 24 hours.

News Corp replied the following day agreeing to make the necessary changes and providing the Secretary of State with a revised version of the undertakings in lieu. Both letters are published with this notice.

On 17 February the Secretary of State wrote to both OFT and Ofcom asking for further advice on the revised undertakings in lieu before taking a decision on whether to propose to accept them.

Both regulators wrote to the Secretary of State on 1 March and set out their further advice. Ofcom advised that the undertakings address their concerns over the plurality of news provision and the OFT has advised that they are likely to be practically and financially viable for up to 10 years. It is in the light of this independent advice, and the two regulators' previous advice, that Secretary of State has reached his decision. The advice is published with this notice.

Basis of decision

In its initial report, Ofcom identified a range of concerns, including:

- News Corp would be the only news and media provider present on all four media platforms (TV, newspapers, on-line and radio) at the wholesale level;
- News Corp would be one of three providers of UK-wide news and current affairs on three of four platforms at the retail level;
- That, in terms of "news minutes" consumed, News Corp would consolidate its position as the second place as provider behind the BBC;
- Primary research indicated that, in terms of "share of references", News Corp would leapfrog ITV into second place behind the BBC. This was true both on a retail and a wholesale basis.

The Secretary of State agreed with Ofcom's conclusion that the proposed acquisition raised concerns about whether there would be a sufficient plurality of persons with control of media enterprises.

Having carefully considered the subsequent OFT and Ofcom advice, and the reasoning set out in that advice, the Secretary of State considers for the reasons given in that advice that the undertakings in lieu which are proposed by News Corp will prevent, remedy or significantly mitigate the potential threat to media plurality, which might be caused by Newcorp's increased shareholding from 39.1% to 100% of Sky News. The Secretary of State takes the view that the proposed undertakings would offer significant editorial, operational, financial and commercial independence for the new company, and he would therefore propose to accept them.

Details of undertakings in lieu

Key aspects of the undertakings in lieu include:

- The Board of the new company will have a majority of independent directors who have no other News Corp, or News Corp-associated, interest;
- The Board, including the independent non-executive directors, will have the appropriate balance of skills, experience, independence and knowledge, and at least one must have senior editorial and/or journalistic experience ;
- The Chairman will be an independent director;
- Sky News' services will abide by the principle of editorial independence and integrity in news reporting;
- The Board will have a Corporate Governance and Editorial Committee to ensure compliance with the principles of editorial independence and integrity in news reporting;
- A 10 year carriage contract;
- A 7 year brand licensing (with potential to extend for a further 7 years).

The principles of the arrangements are clear and set out in the proposed UILs. There are detailed provisions of the carriage and brand licensing agreements which will need to be finalised. The terms of the UILs ensure that these agreements will need to be approved by the Secretary of State. In deciding whether or not to approve the drafting, the Secretary of State will take the advice of Ofcom and OFT as appropriate. The merger cannot, of course, go ahead until the Secretary of State has been satisfied on all these matters.

The OFT has said that the undertakings are likely to be practically and financially viable in the short and medium term. They expressed concerns about whether the undertakings in lieu would be viable over the long term, but recognised that the appropriate time-frame in this market was for the Secretary of State to decide, with Ofcom's advice.

Ofcom have considered the impact of a 10 year carriage agreement in the context of this industry. Given the rapid pace of technological change, they have advised the Secretary of State that in this environment a carriage agreement of 10 years is a long-term measure. The Secretary of State agrees with this view and therefore concludes that the provision of a 10 year carriage agreement and a 7 year brand licensing agreement with the option to extend for a further 7 years are of sufficient length to remedy, or significantly mitigate the concerns in relation to media plurality. He will of course only reach final conclusions on this and other aspects of the undertakings in lieu after this consultation.

In the circumstances, the Secretary of State considers that if the concerns relating to plurality identified by Ofcom are now prevented, remedied or significantly mitigated by the undertakings then he would propose to accept those undertakings in lieu of a reference to the Competition Commission. He considers that the arrangements involve a carriage agreement and a brand licensing agreement (along with various operational agreements) which will ensure the financial and commercial independence of the new Sky News company over what is a very long period in terms of this sector. The agreements are coupled with governance provisions, a number of which are highlighted above, which he considers ensure editorial and operational independence.

Consequently the Secretary of State has concluded that a referral to the Competition Commission would <u>not</u> be merited at this stage, and instead proposes to consult on the undertakings in lieu, the final version of which are published with this document.

In line with the legislation, the Secretary of State, by this notice, is commencing a consultation period during which time all interested parties will be able to express their views on the undertakings in lieu. Once he has considered representations, he will reach a decision on whether he still considers that the undertakings of lieu should still be accepted in lieu of a reference to the Competition Commission.

If after consultation he remains of the view that the undertakings in lieu address the concerns about media plurality, he will accept them and not refer this merger to the Competition Commission. If any amendments are made to the undertakings in lieu following this consultation, there will be a further notice of consultation before he takes any decision to accept amended undertakings in lieu.

Representations should be sent to bskyb-newscorp.consultation@culture.gsi.gov.uk by **midday on 21st March 2011**.

Postal representations should be sent to:

BSkyB-News Corporation Consultation

Media Team

Department for Culture, Media and Sport

2-4 Cockspur Street

London

SW1Y 5DH

065A

Oral Statement: News Corporation's proposed acquisition of BSkyB

Thursday 3 March 2011

The Secretary of State for Culture, Olympics, Media and Sport (Mr Jeremy Hunt): With permission, Mr Speaker, I should like to make a statement about News Corporation's proposed acquisition of BSkyB. I start by thanking both the Office of Fair Trading and Ofcom for their detailed, thorough and independent analysis, which has been produced to a challenging time scale. My decision today relates to the plurality of news provision, not competition or market power issues, which were ruled on by the European Commission on 21 December 2010.

Earlier this morning, I announced that the independent media regulator, Ofcom, had advised me that undertakings in lieu offered by News Corporation would address the plurality concerns that Ofcom had identified in its report to me of 31 December 2010. I also announced that the OFT considered the undertakings to be practically and financially viable for up to 10 years. In the light of this independent advice, I propose to accept such undertakings instead of referring the matter to the Competition Commission.

As the Enterprise Act 2002 requires, I have today published these undertakings for public consultation. For the sake of transparency, I have also published all the advice that I have received from Ofcom and the OFT, together with correspondence between myself and News Corporation and a time line for the process I have followed, including details of all meetings I have held. I hope that hon. Members will have time to study these undertakings during the formal consultation that will start today. However, it may help if I outline the main points.

The undertakings would ensure that Sky News is spun off as an independent public limited company. The shares in that company would be distributed among the existing shareholders of BSkyB in line with their existing shareholdings. News Corp would therefore retain a 39.1% stake in the new company, although it will not be allowed to increase this shareholding for 10 years without the Secretary of State's permission. In other words, even if the proposed News Corp/Sky merger goes ahead, News Corp's shareholding in Sky News will remain the same as at present.

The new company would have a 10-year carriage agreement and a seven-year renewable brand licensing agreement with the newly merged News Corp/Sky so as to ensure its financial viability. Unlike the board to which Sky News currently reports, the chairman would be required to be an independent director. Unlike at present, the board would have a corporate governance and editorial committee to ensure compliance with the principles of editorial independence and integrity in news reporting. For the first time, the requirement for the company to adhere to Ofcom's broadcasting code would be enshrined in the new company's articles of association.

In short, the editorial independence of Sky News will be better protected not only than it would have been had Sky News formed part of the buy-out of Sky shares, but even than it is right now. The principles of the arrangements are clear and set out in the proposed undertakings. There are still some detailed provisions of carriage, brand licensing and certain operational agreements that need to be finalised, and the terms ensure that such agreements need to be approved by me. In deciding whether or not to approve them, I will again take the advice of Ofcom and the OFT as appropriate. The merger cannot, of course, go ahead until I have been satisfied on all these matters.

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I also want to draw the House's attention to the long-term sustainability of these undertakings. The OFT has said that the undertakings are likely to be practically and financially viable in the short and medium term, but expressed concerns about whether they would be viable over the longer term. It stated, however, that the appropriate time frame in this market was for me to decide, with Ofcom's advice.

Ofcom has considered the impact of a 10-year carriage agreement in the context of the media industry, and it has expressed the view that, in a rapidly changing media and technological environment, a carriage agreement of 10 years is a long-term measure. I agree with its independent view about the difficulties of predicting with any certainty how the plurality issues will develop over a longer time frame. However, I will of course reach a final conclusion on that and other aspects of the undertakings only after the consultation is complete.

Consequently, on the basis of the independent advice I have received, I have concluded that a referral to the Competition Commission would not be merited at this stage, and instead I propose to consult on the undertakings in lieu, the final version of which has also been placed in the Libraries of both Houses and on my Department's website.

In line with the legislation, I am opening a consultation period, during which time all interested parties will be able to express their views on the undertakings. Once I have considered representations, I will reach a decision on whether I still believe that the undertakings should be accepted in lieu of a referral. If, after consultation, I am still of the view that the undertakings address the concerns about media plurality, I will accept them and not refer the merger to the Competition Commission.

I should add that, quite separately to my consideration of the merger, I have carefully noted Ofcom's point that there is a potential weakness in the current public interest test with respect to media plurality-namely, that it can be applied only when there is a commercial transaction to consider. That wider question is one that I intend to consider in the context of the forthcoming review of communications regulation which I announced earlier this year.

Throughout the process, I have been very aware of the potential controversy surrounding the merger. Nothing is more precious to me than the free and independent press for which this country is famous the world over. In order to reassure the public about the way in which the decision has been taken, I have sought and published independent advice at every step of the way, even when not required to by law. After careful consideration, I have followed that independent advice. The result is that, if the deal goes ahead, Sky News will be able to continue its high-quality output with greater protections for its operational and editorial independence than those that exist today. For those people who have concerns about the plurality of news provision, I hope that that will be a welcome step forward. As such, I commend this statement to the House.

[Ends]

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News Corporation / BSkyB merger – 3 March 2011

020/11
3 March 2011

The Secretary of State for Culture, Olympics, Media and Sport, Jeremy Hunt, has today announced that, following advice from Ofcom and the Office of Fair Trading (OFT), he intends to accept undertakings from News Corporation on their proposed merger with BSkyB in lieu of a referral to the Competition Commission.

A notice of consultation on the undertakings has been launched today and expires on 21 March.

The Secretary of State is required to look at the specific issue of media plurality related to the merger (competition issues having already been dealt with at European level) and issues of plurality focus on the provision of news.

The undertakings that News Corporation has offered would involve Sky News being 'spun-off' as an independent public limited company. The shares in that company would be distributed amongst the existing shareholders of BSkyB in line with their shareholdings - News Corporation would therefore retain a 39.1 per cent stake in the new company. To ensure editorial independence and integrity in news reporting, the company would have a board made up of a majority of independent directors, including an independent chair, and a corporate governance and editorial committee made up of independent directors (who would have no other News Corporation interests). News Corporation would not be allowed to increase its shareholding in the new company without permission from the Secretary of State for 10 years.

The company would have a ten year carriage agreement and a seven year renewable brand licensing agreement to ensure its financial viability – measures considered by the regulators to be long term in the rapidly-changing media sector.

Jeremy Hunt said:

"I am consulting on proposed undertakings from News Corporation. Informed by advice from the regulators, I believe that these will address concerns about media plurality should the proposed News Corporation/BSkyB merger go ahead. The undertakings offered would ensure that shareholdings in Sky News would remain unchanged, and indeed offer it more independence from News Corporation than it currently has.

"Throughout this process I have been very aware of the potential controversy surrounding this merger. Nothing is more precious to me than the free and independent press for which this country is famous the world over. In order to reassure the public about the way this decision has been taken I have sought and published independent advice at every step of the way, even when not required to do so by law. And I have followed that independent advice."

Once the Secretary of State has considered responses to the consultation, he will reach a decision on whether he still believes that the undertakings in lieu should still be accepted. If, after consultation, he is still of the view that the undertakings in lieu which News Corporation has offered address the concerns about media plurality, he will accept them and not refer this merger to the Competition Commission.

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Notes to Editors

On 3 November 2010 News Corporation notified the European Commission of its intention to acquire the shares in BSkyB that it does not already own. On 4 November 2010 the Secretary of State for Business, Innovation and Skills issued a European intervention notice in relation to the proposed acquisition.

The Business Secretary asked Ofcom to investigate and provide advice and recommendations on the public interest consideration in section 58 of the Enterprise Act 2002. This public interest consideration concerns the sufficiency of plurality of persons with control of media enterprises.

On **25 January 2011** Jeremy Hunt announced that he intend to refer the merger to the Competition Commission as he considered that it may operate against the public interest in media plurality, but that he would first consider (and ask the OFT and Ofcom for advice on) undertakings in lieu offered by News Corporation.

This investigation, and the Secretary of State's decision, is solely and specifically on the issue of media plurality. The European Commission has already looked at competition issues, and on 21 December 2010 cleared the proposed merger. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area or any substantial part of it. The Commission made it clear that its decision did not prejudice the Secretary of State's jurisdiction in relation to the merger's impact on the separate question of sufficiency of plurality in the media.

DCMS has today published the undertakings proposed by News Corporation, all advice received from Ofcom and the OFT, correspondence between the Secretary of State and News Corporation, and a timeline of the process followed.

Supporting documents
Notice of Consultation on the proposed acquisition by News Corporation of up to 60.9% Of BSkyB Group PLC – March 2011
Oral Statement: News Corporation's proposed acquisition of BSkyB

Press Enquiries: 020 7211 2210
Out of hours telephone pager no: 07699 751153
Public Enquiries: 020 7211 6000

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[redacted]

From: [redacted]
Sent: 10 March 2011 17:22
To: [redacted]
Cc: [redacted] SMITH, Adam; BEEBY, Sue; KILGARRIFF PATRICK; ZEFF JON; STEPHENS JONATHAN
Subject: RE: Consultation correspondence
Attachments: SB 11 03 10 - consultation process.doc

[redacted]

Revised advice attached. This is a joint note from [redacted] and me.

[redacted]

From: [redacted]
Sent: 10 March 2011 14:22
To: [redacted]
Cc: [redacted] SMITH, Adam; BEEBY, Sue; KILGARRIFF PATRICK; ZEFF JON; STEPHENS JONATHAN
Subject: RE: Consultation correspondence

[redacted]

Advice (cleared with lawyers) on how to handle the consultation process. Some of this SoS is well aware, of some will be new.

Happy to discuss.

[redacted]

From: [redacted]
Sent: 04 March 2011 10:45
To: [redacted]
Subject: Re: Consultation correspondence

Hi [redacted]

Sos has just asked for some legal advice on the right way to handle what he is calling the '17 day' consultation.

I think it would be good to explain the process, what he can say at this stage to respondents and more generally how he should refer to the consultation when speaking about it publicly. We should also set out what happens once responses are in.

Would it be possible to have something for close Monday?

Thanks

[redacted]

Sent from my BlackBerry Wireless Device

From: [redacted]
To: [redacted]
Cc: [redacted]
Sent: Fri Mar 04 08:23:44 2011
Subject: RE: Consultation correspondence

It's also occurred to me this morning that we will need some strong lines about what the SoS can and cannot legally do. I think many of the responses focus on what are properly competition concerns, and concentration of media power concerns. Those are different from plurality, and we should, I think, work up some lines (also for a consultation response) to this effect.

[redacted]

Legal Advisers to the Department for Culture, Media and Sport
Email: [redacted] **Tel: 020**[redacted]

From: [redacted]
Sent: 04 March 2011 07:53
To: [redacted]
Cc: [redacted]
Subject: RE: Consultation correspondence

[redacted]

Thank you very much – I'll ask [redacted] to set the meeting up.

I am not in the office on Monday and Tuesday (although happy to join the meeting on the spider phone) – but my thoughts are:

We need to ensure we are considering this from the correspondents point of view: do they believe that in writing to Jeremy – at any of the varies emails used, that he will factor the points they have made into his decision making process – if yes, I think we should not respond to the letters but include them as consultation responses ([redacted] and I discussed the FOI implications – which can be resolved).

Having looked at some of the letters coming in – I don't think we can send a response - they have read/heard Jeremy's statement and are responding to it, pointing them in the direction of the consultation document seems bureaucratic and unhelpful.

Thought on handling of MP letters and PQs gratefully received.

[redacted]

From: [redacted]
Sent: 03 March 2011 18:51
To: [redacted]
Cc: [redacted]
Subject: RE: Consultation correspondence

Consultation: Risks and Process

During the consultation

It is important that you continue to stress that you are taking a quasi-judicial decision. As such, you must not take into account any irrelevant considerations (whether political, economic or whatever) but reach a decision on the merits of the case.

You can refer to the advice which you have received and followed from the regulators, though it is important not to give the impression that you have been directed by them. You must have carefully considered their advice in reaching your own decision.

Given that you may change your mind as a result of the consultation, it is best if you do not, or do not appear to be, too strongly defending the proposal while it is still out for consultation. Where specific criticisms are raised, it would be safest to say that they will be carefully considered before you reach your decision.

It is best to keep to the lines that you have used to date as far as possible. However many good arguments you use, one "bad" argument could be used as the basis of a challenge. The safest course legally is to let the decision speak for itself and direct those with views to participate in the consultation exercise.

That said, it is perfectly reasonable to give primarily factual answers to questions based on the substance of the UILs (as you have done already). It is also reasonable to give a description of the process you have followed and intend to follow.

Once the consultation is over and you have reached your decision, you will then be able to defend whatever decision you make in a much more pro-active fashion than you can during the course of the consultation.

Meetings

We recommend that you do not offer meetings where they have not been requested.

Where requested, you will need to consider each meeting request on its merits. We would recommend that you agree to requests from the main opponents and would be highly unlikely to recommend meetings with individuals. There will inevitably be some grey cases in the middle where a judgement needs to be made.

One-to-one meetings with MPs do not feel consistent with the transparent approach adopted to date, and we recommend that instead you write all MPs (draft to follow).

If you did want to see MPs, a workable approach may be to have open meetings for MPs. We can discuss this further if you wish.

At all meetings we recommend that you make it clear at the start of the meeting that your primary role is to listen carefully to the representations put to you, not to engage in debate or justification of the proposed UILs. You should also encourage the attendees to make representations in writing.

Period of consultation

You may well have late responses and requests for an extension to the timetable. These will have to be considered on their merits. It may not be reasonable to turn down requests for an extension where the respondent is likely to have substantive points to make. At the same time, it would not be reasonable to allow the process to drag out interminably, so a careful balance will have to be struck. There is no need, however, to say publically that an extension might be considered in some circumstances but equally you should not categorically rule it out.

Once the deadline for comments has passed

You will need to consider all representations, clearly spending more time on those which are more relevant. We will provide you with advice and a summary of all the main representations plus a numerical indication of total representations as soon as possible after the end of the period. It will no doubt take some time for us to read all the representations and produce summaries of ones which raise new or substantive points, and we have secured extra resources for this exercise.

No decision should be taken until you have all these representations before you.

Your final decision will have to be communicated by way of a decision letter. Legal advice is that this should be taken and issued only after all the representations have been read, summarised where necessary, and published on our website.

As indicated above, it is at this point that your decision can be promoted more actively.

[redacted] 067

From: [redacted]
Sent: 11 March 2011 22:52
To: BSKYB
Cc: [redacted]
Subject: News Corporation / BSkyB: Response to Notice Of Consultation
Attachments: Response To Consultation.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

CONFIDENTIAL EMAIL FROM SLAUGHTER AND MAY - THIS EMAIL AND ANY ATTACHMENT MAY BE PRIVILEGED

Dear Sir / Madam,

Please find attached on behalf of BT, Guardian Media Group, Associated Newspapers Limited, Trinity Mirror Plc, Northcliffe Media and Telegraph Media Group submissions made in response to the Department for Culture, Media and Sport's Notice of Consultation on the proposed acquisition by News Corporation of up to 60.9% of British Sky Broadcasting Group PLC.

Kind regards,

[redacted]

Slaughter and May
One Bunhill Row
London EC1Y 8YY
Tel: +44 [redacted]
Fax: +44 [redacted]

From: [redacted]
To:
CC:
Subject: RE: FW: BSkyB consultation

Sent Date: 18/05/2011 20:25
Received Date: 18/05/2011 20:26

CONFIDENTIAL EMAIL FROM SLAUGHTER AND MAY - THIS EMAIL AND ANY ATTACHMENT MAY BE PRIVILEGED

Dear Ms [redacted]

We confirm that we are happy for you to publish an unredacted version of the response.

Best regards

[redacted]

Slaughter and May
[redacted]

From [redacted] @Culture.gsi.gov.uk]
Sent: [redacted]
To [redacted]
Cc: [redacted]
Subject: BSkyB consultation

Thank you for your response to the consultation on the undertakings in lieu in respect of the proposed acquisition by News Corporation of up to 60.9% of BSkyB Group PLC.

Whilst we are analysing the responses received we are writing to you to see if you would be happy either:

1) for us to publish your response to the consultation you provided. We understand you provided it marked as strictly confidential.

2) if we published a redacted version of your response to the consultation, and if so, could you provide us with one that you are happy with.

3) if you would prefer that we did not refer to your response in our summary of responses.

I would be grateful if you could let us know what your preference would be within five working days. No final decisions have been taken on whether or when we will publish the responses.

Thank you

[redacted]

Department for Culture, Media and Sport

2-4 Cockspur Street

London

SW1Y 5DH

[redacted]

RESPONSE TO NOTICE OF CONSULTATION ON THE PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9% OF BRITISH SKY BROADCASTING GROUP PLC

2.3 The UIL proposed by News Corporation entirely fails to address the plurality concerns. To be effective, the remedy would need to ensure that Sky News remains independent of News Corporation. In reality, the UIL will make Sky News almost entirely dependent on News Corporation. For example, Sky News will be:

(i) Dependent upon a contract with News Corporation for 85% of its revenues (and 25% of its costs).

(ii) Dependent upon News Corporation to distribute its TV news output on the BSkyB network.

(iii) Dependent upon News Corporation for its future existence – since Sky News will be unviable were the carriage agreement not to be renewed.

2.4 In these circumstances it is fanciful to expect that Sky News will enjoy any meaningful independence allowing it to offer a separate contribution to news plurality. Instead, the editors and directors of Sky News will be acutely aware that the viability of the company (and therefore their own job security) depends entirely on maintaining the approval of News Corporation.

relevant conditions, News Corporation could easily pursue complaints on other grounds in an attempt to discourage editorial policy of which it disapproved.[11]

6.5 These issues are further compounded by the absence of any real clarity over defined terms used in the UIL. For example, BSkyB is entitled to terminate the carriage agreement upon a "material breach" by Sky News of its obligations under the agreement – the UIL does not elaborate, however, on the interpretation of this phrase.

6.6 The dependence of Sky News on News Corporation was confirmed by the OFT who stated that "*the successful operation of Newco relies to some extent on the incentives of News/Sky*".[12]

6.7 News Corporation appears to consider that this departure from normal UK merger control standards is justified on the basis that Sky News and News Corporation will not be competitors and, therefore, that News Corporation will have an interest in the ongoing success of Sky News.[13] It is important to note that were the OFT's normal standards to be applied, the merged entity's incentive in respect of the divestment business would be irrelevant – as remedies are supposed to create independent divestment businesses (viable regardless of the incentives of the merged entity). The fact that News Corporation had to resort to its own incentives to argue that Sky News will be viable is in fact confirmation that Sky News will not be independent.

6.8 Furthermore, even if it were factually correct that News Corporation has a commercial interest in the ongoing success of Sky News,[14] the argument entirely fails to address the plurality issues. Specifically, it is false to assume that an interest influencing the editorial content of Sky News would involve any commercial sacrifice on the part of News Corporation. First, given the unequal bargaining position of the two companies, even a threat by News Corporation to use its financial and commercial leverage could change Sky News policy without necessarily endangering the success or ongoing operation of Sky News. Secondly, it may simply be the case that the benefits of influencing editorial policy (e.g. increased exposure for News Corporation newspapers) outweigh any costs involved in disciplining Sky News. It is therefore wrong to assume that an interest in the success of Sky News acts as a safeguard against editorial influence.

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[11] Other examples of how News Corporation could discipline Sky News might include degrading the quality of services provided under Clause 5 of the UIL or degrading the scope or quality of distribution (see further below).

[12] Paragraph 1.13, OFT report dated 11 February 2011.

[13] Paragraph 6.4, id.

[14] It is not even clear that this factual assumption is well-founded. For example, there is no restriction on News Corporation setting up its own broadcast news business. Therefore, it may well be the case that News Corporation will have a commercial incentive to hinder the success of Sky News. The OFT noted that News Corporation may not always have an incentive to promote the success of Sky News (see paragraph 1.13, OFT report dated 11 February 2011).

8.4 In light of the above, therefore, instead of maintaining the *status quo* with regard to News Corporation's shareholding in Sky News (by reference to the present ownership structure of BSkyB), any remedy envisaged by the UIL should in fact reduce News Corporation's shareholding in Sky News post-Takeover in order to ensure the remedy is adequate and takes account of this increased influence that News Corporation will enjoy over Sky News through, *inter alia*, the Carriage Agreement.

9. No Lasting Remedy

9.1 Even if one sets aside all the concerns (as set out above) as to Sky News' dependence upon News Corporation during the 10-year term of the carriage agreement, the UIL suffers from another profound defect: it makes no provision to protect news plurality on an ongoing basis. Instead, the UIL simply leaves it to News Corporation to decide (by virtue of the carriage agreement renewal decision) whether Sky News should continue to exist after 10 years. Therefore, while over the "short and medium" term the remedy contained in the UIL is deeply flawed, over the long term it is simply non-existent. This is completely contrary to normal merger control standards which require a divestment remedy to effect a lasting change in the market structure.[23]

(A) OFT/OFCOM Advice

9.2 There is no doubt that the viability of Sky News will be in severe jeopardy if the carriage agreement is not renewed after 10 years. The OFT explained that:

> "*in the context of ensuring the 'long-term' viability of Newco and the UIL, it is important to consider whether Newco can continue as a standalone entity on a permanent or lasting basis. It is clear that, absent the revenue stream provided by the carriage agreement, Newco is effectively loss-making. As a consequence, absent renewal on a similar basis, an alternative revenue stream, or being acquired, there is a real risk that Newco may not survive as envisaged by the UIL beyond the term of the carriage agreement.*"[24]

9.3 The OFT states that this threat to the survival of Sky News threatens the efficacy of the UIL: "*the finite duration of the carriage agreement, in particular, entails a material risk to the long term viability of Newco and hence the UIL*".[25] The OFT went on to describe the finite duration of carriage agreement as an "*essential structural limitation of the UIL*"[26] and stated that it had been unable to identify any improvements to the UIL which would address this flaw.

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[23] See, for example, paragraph 22, Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

[24] Paragraph 1.16, OFT report dated 11 February 2011.

[25] Paragraph 1.15, id.

[26] Paragraph 1.17, id.

[redacted]

068

From: [redacted]
Sent: 13 March 2011 20:04
To: ZEFF JON; [redacted] KILGARRIFF PATRICK; SMITH, Adam
Cc: [redacted]
Subject: Urgent - action required newscorp/bskyb merger

Dear all

Sorry to email on a Sunday evening. Sos wants to meet on the newscorp consultation tomorrow morning. I will ask Will to arrange a slot in the diary. He is likely to want to meet the key opponents of the deal during the consultation to show that he has met and listened to both sides.

I have spoken to Jonathan Stephens tonight who would be very grateful if we could pull together a list of the organisations/people sos might see for 10.00am pls?

Presumably we could go for those people who wrote in to the original ofcom report? Could we group some of them together to avoid numerous meetings?

It's not impossible that sos will take the advice in the submission (ie only meet on request) but given what I've heard over the weekend I do think it will be unlikely, so we now need to get a back up plan in place.

Very happy to discuss

Many thanks

[redacted]

Sent from my BlackBerry Wireless Device

070

The Office of The Rt Hon Lord Prescott
House of Lords
London
SW1A 0PW

15 March 2011

Rt Hon Jeremy Hunt MP
Secretary of State
Department for Culture, Olympics, Media and Sport
1-4 Cockspur Street
London SW1Y 5DH

Dear Secretary of State

In your statement to the House of Lords on 3 March you indicated your provisional agreement to Murdoch's News Corp application to takeover BSkyB. However you said that there would be a 17 day consultation period.

During the statement, I called upon the Department to either delay or extend the consultation period until the reopened criminal investigations by the Metropolitan Police into Murdoch's News of the World had been completed. The Minister in her reply recognised the seriousness of the charges but failed to answer my question.

It has become more and more evident that the criminal activities by News International's News of the World have extended far beyond its original defence of a rogue reporter.

Moreover the new evidence later released by News International clearly shows a deliberate withholding of such evidence to the original enquiry led by Assistant Commissioner Yates. This has led to the reopening of the enquiry and investigation by various bodies and we now await their further response.

For example, the reopening of the criminal investigation by Assistant Commissioner Akers of the Metropolitan Police has revealed many, many more cases of phone hacking. This involves thousands of individuals, who were originally denied the opportunity of being informed during the Yates and Hayman investigations.

The Crown Prosecution Service is now complaining of being misled by the original evidence provided by the Yates investigation and is now conducting its own enquiry into events.

Indeed, yesterday in a letter to the Guardian the Director of Public Prosecutions, Keir Starmer complained publicly that Mr Yates had taken a sentence of evidence given to the Culture Media and Sport Committee out of context. This will no doubt be considered by the Parliamentary Committees in their own new enquiries.

The Press Complaints Commission (PCC) is also conducting its own enquiry into its failure to hold the journalists, managers and newspapers involved in this case to account. Your own Minister in an adjournment debate in the House of Commons on the 10 March recognized the 'undoubted lapse in the standards that we expect from the media'.

The numerous civil court cases are daily revealing evidence of possibly thousands of cases of illegal phone hacking. A number of reputable television documentary programmes, along with the on-going Guardian investigation by Nick Davies, have revealed more evidence of these criminal activities. They also highlighted the concern over the close relationship between the Metropolitan Police and News International at the highest levels.

Last night the Panorma television programme revealed a new process of criminal activity - email hacking commissioned by the previous News of the World executive, Alex Marunchak, once again revealing decision making at the very highest executive level on a Murdoch newspaper.

I am also aware, as I said in my statement to the House of Lords, that investigations are underway into phone hacking by people working for the Sunday Times.

The increasing public concern of the involvement of News International in criminal activities - clearly endorsed at the highest level - is reflected in an online petition with more than 360,000 people calling for Murdoch's bid to takeover BSkyB to be blocked.

I once again call on this Government to delay confirmation of this decision to grant approval until the enquiries into these criminal acts are completed. Did you consider these issues before making your initial decision?

These many reopened enquiries into criminal acts by News International raise important questions over integrity and whether Murdoch would pass any 'fit and proper person' test to take full control of a major part of the UK's television and newspaper media.

If you are not prepared to delay your final decision, will you consider using your review powers if further criminal acts are proven?

Please accept this letter as my contribution to the consultation period and I hope you will address yourself to the question when you make your next statement.

Sincerely

Rt Hon Lord Prescott

071

News Corp / BSkyB Undertakings In Lieu

BT Submission to DCMS dated 16 March 2011

Summary

News Corp's proposed undertakings in lieu (UILs) were published on 1 March for consultation. The UILs are meant to preserve media plurality by ensuring that Sky News (Newco) remains an independently viable force against other providers of news, in particular the BBC, ITN and News Corp itself. In BT's view, the UILs will not achieve this.

First, the UILs are too easily circumvented and unlikely to achieve sufficient ***independence*** for Sky News.

- News Corp and Sky News remain ***structurally*** connected through shareholdings, directorships and a web of significant contracts. It will be easy for News Corp to deploy its votes, people and contractual rights to make operations difficult for Sky News;
- Sky News's ***financial*** viability is assured only through revenues achieved from its 10 year carriage agreement with BSkyB;
- the ***checks*** meant to rein in News Corp's influence (independent directors, editorial board and audit committee) are ***too weak***, given News Corp's track record of undermining such checks;
- there is a long 9 month ***interim period*** during which News Corp is allowed full control of Sky News, a crucial window in which to influence Sky News' future agenda.

Secondly, the likelihood is that the UILs will only ***delay*** News Corp's full control of Sky News by 10 years, ***not prevent*** it:

- After 10 years, News Corp may proceed to acquiring full control ***without further regulatory review***. The acquisition of an entity as small as Sky News will not necessarily fall within UK merger control thresholds.
- The carriage agreement between Sky News and BSkyB, without which Sky News is signficantly loss-making, comes to an end in 10 years' time. This both increases Sky News' dependency on News Corp and makes Sky News less attractive to a competing bidder because of the uncertainty as to whether or not the contract will be renewed.

We consider that the UILs have not been sufficiently tested in the time available and that their deficiencies can only be adequately addressed if the proposed acquisition is

referred to the Competition Commission. The issues are too complex to be resolved in further market testing[1].

Not independently viable

With full ownership of BSkyB, News Corp will have complete control of Sky News' main trading partner. It is not sufficient to limit News Corp's influence, in particular over editorial policy. Plurality in news media can only be achieved if Sky News becomes an ***independently viable*** company.

The UILs do not ensure that Newco is independently viable – in terms of voting rights, directorships, the web of contracts between News Corp/BSkyB and Sky News, and the insufficiency of independent contracts for Sky News.

How voting rights may be used by News Corp to undermine the UILs

News Corp, through BSkyB, is likely to have a majority of voting rights at general meetings of Newco. This enables BSkyB to block important resolutions. For example, a share issue may be blocked by BSkyB. This gives News Corp control over an important source of funding for Newco, which cannot be secured by the board alone but must be approved in general meeting by a majority of shareholders.

Funding could be secured by debt, but only as long as Newco's Articles of Association empower Newco to borrow. As there is no restriction on BSkyB voting to remove the power to borrow in Newco's articles, News Corp will be in a position to block all borrowing.

In that scenario, which regulators would be unable to prevent under the UILs as currently drafted, Newco would have no independent, conventional way of raising money, and all of Newco's revenue streams will have to come from third party contracts.

Third party contracts are a very fragile basis for funding, particularly when the principal contract Newco relies on is the carriage agreement with BSkyB. The OFT report comments on Newco's financial dependence on BSkyB, describing the carriage agreement as Newco's *"principal revenue stream"*, stating it *"accounts for an increasing proportion of Newco foreast total revenues as the term progresses"*[2]. It is clear that Newco will not be able to rely on independent revenue streams from other contracts.

In sum, Newco will have no ability to independently fund itself. The implications are noted by the OFT:

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[1] The undertakings would have to be finalised by 21 April (24 weeks from the date of the European Intervention Notice): paragraph 3(5) Schedule 2 Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003.

[2] Paragraph 10.26, 11 February OFT report. Although this pre-dates the 1 March draft UILs, the OFT's commentary remains relevant.

"... the implication of the inability to raise finance could impair the ability of Newco to respond to technological advances in the way that news is collected (input) or disseminated (output)"[3]

UILs should ensure that Newco's borrowing powers are enshrined in the Articles.

The independence of the board is not guaranteed

The UILs require the majority of the Newco board to be independent, and only one independent director to have senior editorial/ journalistic experience. This may effectively result in a majority of industry experts on Sky News' board being BSkyB appointees. Independent non-experts, however well intentioned, may not have the experience required to probe some of the more complex board proposals.

The single expert independent director will be the lynch-pin for guaranteeing the board's independence, and there is not enough in the UILs to support him or her – no fellow independent expert board members, no requirement that he/she should be present at meetings, no provision to cover for any long-term absence.

Contracts can be used to frustrate the undertakings

All of Newco's significant contracts (the Carriage Agreement, Brand Agreement and Operational Agreements) will be with BSkyB. This will give News Corp multiple opportunities to use BSkyB's contractual rights to frustrate the UILs. The following are just some examples of how this might happen.

Carriage Agreement

After 10 years, the carriage agreement between BSkyB and Sky News will come to an end. The Carriage Agrement may not be renewed after it elapses. In its report[4] the OFT said:

> *"...it is not possible to conclude with any degree of certainty that the carriage agreement will be renewed after the expiry of the ten year period such that Newco's principal revenue stream will continue."*

Ofcom assesses that 10 years is justified since it is a much longer period than is typical in this sector[5]. Typical contract length in the sector is not the point. The Carriage Agreement has to be long enough to ensure continued independence and viability. As stated by the OFT:[6]

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[3] Paragraph 7.22 11 February OFT report.

[4] Paragraph 10.29, 11 February OFT report.

[5] Ofcom's 1 March advice, page 4.

[6] Paragraph 10.24, 11 February OFT report.

"However, the OFT considers that, in the context of ensuring the 'long-term' viability of Newco and the UIL, it is important to consider whether Newco can continue as a stand-alone entity on a permanent lasting basis."

The OFT considers that without the carriage agreement, "*Newco would be significantly loss-making*".[7] The carriage agreement "*would appear to underpin the short-to-medium term (no longer than 10 years) viablity of Newco and the UIL*". *The OFT* "*considers that* ***the finite duration of the carriage agreement, in particular, entails a material risk to the long term viability of Newco and hence the UIL.***"[8] [emphasis added]. The OFT adds:"*there is a real risk that Newco may not survive as envisaged by the UIL beyond the term of the carriage agreement. The relevance of these risks ultimately depends on the time horizon which the Secretary of State considers relevant to ensure the effectiveness of the UILs.*"

The Carriage Agreement is clearly not long enough to secure Newco's independence.

Brand Licensing Agreement

The Brand Licensing Agreement may be used as a control mechanism by News Corp. For example, an obligation not to denigrate the brand could be used to control Newco's activities and in extremis even to constrain Sky News' coverage of News Corp-related matters.

It is not clear whether the Brand Licensing Agreement will be terminable in the event of a change of control (a third party acquiring more than 40% of Newco shares). If so, the Brand Licensing Agreement can be used to "*result in termination of the carriage agreement*".[9] This is because the Carriage Agreement is terminable "*in the event that Newco ceases to provide output which is branded "Sky News*"[10].

It is not satisfactory that the Carriage Agreement should end once Newco ceases the Brand Licensing Agreement. This prevents Newco from ending the Brand Licensing Agreement after the initial 7 year term, in readiness for the Carriage Agreement elapsing.

Premises and facilities sharing

BSkyB and Newco are required to share premises and facilities for 15 years. Physical proximity is all to BSkyB's advantage as it will bring huge scope for cross-

[7] Paragraph 1.10, 11 February OFT report.

[8] Paragraph 1.15, 11 February OFT report.

[9] Paragraph 10.16, 11 February OFT report.

[10] Paragraph 4.5(iii) UILs.

fertilisation and influence. Newco does not appear to have the benefit of break clauses.

The UILs, instead of enshrining long-term premises and facility sharing, should ensure that News Corp provides Newco with the financial means to be physically separate. By analogy, BT's undertakings required Openreach to be operationally separate and Ofcom saw to it that Openreach was located in a different building not shared by other parts of BT.

Operational Agreements

The advertising sales agreement under which BSkyB will sell advertising and sponsorship on behalf of Newco will give BSkyB control over all Sky News advertising. Again this agreement may operate more to News Corp's than to Sky News' advantage. Instead of securing the most attractive financial deal for Sky News, BSkyB may try to secure terms that advantage News Corp or BSkyB instead.

[CONFIDENTIAL]

As seen above, Newco's inability to raise finance could impair its ability to trade. Advertising revenues are a potentially very important source of independent finance. The UILs could be frustrated by giving BSkyB unfettered control over Newco's advertising revenue.

The UILs should require advertising to be handled by a third party, albeit funded by BSkyB. In addition, to safeguard against BSkyB interference, advertising should be placed on terms that do not favour News Corp or BSkyB or deny access to any legitimate advertising buyer.

The UILs fail to ensure a sufficiency of independent contracts

As seen above, Newco will need to secure independent sources of revenue. This may include revenue from contracts with third parties that compete with News Corp or BSkyB. There is nothing in the UILs that encourages Newco to pursue such revenue opportunities, regardless of its impact on News Corp.

The UILs should ensure that Newco positively pursues independent revenue streams, without discriminating against competitors of News Corp or BSkyB.

The proposed checks in the UILs are insufficient to secure independence

Given News Corp's ability to use its voting rights, directors and contractual rights to influence Sky News, the proposed checks in the UILs on News Corp and BSkyB are insufficient.

Audit committee

The Audit committee[11] should ensure fairness in transactions between News Corp/ BSkyB and Sky News, but only protects material transactions. Materiality is insufficiently defined and appears to refer only to financials thresholds. An agreement may be essential but have a low monetary value[12]. The Audit committee's powers are too vague to be effective[13]. A fairness opinion obtained by the Audit committee need not be followed.

Editorial committee

The corporate governance and editorial committee's powers are central to the UILs[14]. They are insufficiently defined. By contrast, the BT undertakings detail in 37 paragraphs the remit and powers of the independent Equality of Access Board that oversees equality of access for third parties to BT's network. The Board is given teeth by virtue of the requirement on BT to inform the Board of breaches and on the Board to inform Ofcom of non-trivial breaches. The UILs should set out Newco's obligations in greater detail, including a requirement for breaches to be reported to the Editorial committee, and from there reported to the OFT or Ofcom, who should be given formal responsibility for supervision of the operation of the undertakings. The prospect of breaches being reported acts as an important deterrent.

The UILs should require the head of Sky News, not just empower him, to make representations to the Editorial committee on compliance with the principle of editorial independence, and require him to report breaches to the Editorial committee.

Dispute resolution process

The protection in the dispute resolution process, preventing termination by BSkyB until disputes are resolved, only applies to the Carriage and Brand Licensing Agreement[15]. This protection does not extend to Operational Agreements[16]. In its

[11] Paragraph 3.1(iv) UILs.

[12] A contract may become operationally essential and therefore fall outside the list of Operational Agreement to be reviewed by the OFT.

[13] The UILs appear to rely on Chapter 11 of the Listing Rules, a code for listed companies in case of transactions with related parties. This does not help as the safeguards provided in Chapter 11 consists in obtaining the approval of Newco shareholders. Such approval is likely to be forthcoming by virtue of BSkyB's ability to exercise a majority of votes.

[14] Paragraph 3.1(viii) UILs.

[15] Paragraph 4.8 UILs.

[16] Paragraph 5.4 UILs does not require paragraph 4.8 protections to apply in the case of Operational Agreements.

report, the OFT recommends similar protection for Operational Agreement through the dispute resolution process:

> *"[operational agrements] should be subject to similar protections given to the carriage agreement and brand license agreement."*

No fairness requirement

There is no general requirement in the UILs for News Corp or BSkyB to deal with Sky News on a fair, non-discriminatory basis. News Corp could frustrate the UILs by imposing onerous requirements in Newco contracts, which Newco does not have the negotiating power to resist. These could even act as a poison pill against future take-over bids for Newco.

There should be a requirement in the UILs for News Corp and BSkyB not to discriminate against Newco in their commercial deals, and to grant Newco no less favourable terms than to a third party.

- ***Controls fall away***

If News Corp acquires more than 50% of Newco voting shares, the corporate governance provisions in the UILs will fall away. It is likely that in order to acquire more than 50% of the voting rights, News Corp would seek regulatory clearance. However that is not necessarily the case. The Secretary of State may not intervene under media plurality rules. News Corp itself acknowledges that:

> *"any hypothetical reacquisition of Newco shares ... would not automatically trigger a substantive review on issues of media plurality – given that this would depend on the issuing of a merger notice".*[17]

It is worth noting that the corporate governance provisions rules may be voted out of the Articles by a majority of shareholders that are not related to News Corp.

- **Inadequate safeguards in the 9 month interim period**

There is a 9 month interim period during which News Corp is allowed full control of Sky News. This is a very long period compared to the three months that are normally considered acceptable to implement a remedy[18]. It is a crucial window which can be used by News Corp to influence Sky News' future agenda.

The UILs will not prevent News Corp interfering in Sky News for the first 9 months of its operation. Nor will the UILs prevent the sharing of confidential information between News

[17] Paragraph 7.31, 11 February OFT report.

[18] Paragraph 7.11, 11 Feburary OFT report.

Corp and Sky News in the interim period, despite the OFT stating this to be one of the normal requirement in UILs[19], that should be adopted in this case[20].

News Corp can reacquire Newco after 10 years

The UILs require continued separation between News Corp and Sky News for a 10 year period.[21] The OFT has stated that it would not usually place a time limit on separation[22]. The risk is is imposing a 10 year limit is that this will leave the way open for News Corp to acquire Sky News after 10 years. It is not certain that a take over bid for Newco would trigger the merger control provisions of the Enterprise Act since:

- Newco's gross assets may be below the £70 million threshold and the merger may not increase a share of supply of 25% or more (no referrable merger);
- it is unlikely that a quarter of broadcasting will be supplied by the merging parties (no special merger situation);
- even if the merger gives rise to a referrable merger or special merger situation, the Secretary of State is not obliged to intervene[23].

It cannot be assumed therefore that after 10 years, an acquisition of further shares by News Corp would trigger a merger control review.

News Corp would be well placed to bid for Newco after 10 years. The impending expiry of the carriage agreement between BSkyB and Sky News that underpins the viablity of Newco, will make Newco less attractive to competing bidders, leaving the field open for News Corp.

The UILs are not viable after 10 years

The OFT considers that: [24]

> *"there is a real risk that Newco may not survive as envisaged by the UIL beyond the term of the carriage agreement. The relevance of these risks ultimately depends on the time horizon which the Secretary of State considers relevant to ensure the effectiveness of the UILs."*

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[19] Paragraph 7.14, 11 February OFT report: *"ensure that confidential information relating ot the business to be divested is not shared with the acquirer's business"*.

[20] Paragraph 7.17, 11 February OFT report.

[21] Paragraph 6 UILs.

[22] Paragraph 7.33, 11 February OFT report.

[23] For example the Secretary of State did not issue an intervention notice for media plurality issues to be considered in the merger between the Daily Express and 5.

[24] Paragraph 1.15, 11 February OFT report.

Ofcom appears to fall back on a hypothetical review of the statutory framework to ensure plurality in the public interest in the long term. There is no indication that such a review may be initiated.

The UILs therefore fail to ensure that Newco is independently viable in the long term.

Conclusion

In our view the UILs merely pave the way for News Corp to make a full bid for Sky News in 10 years' time. Only a referral to the Competition Commission can unpick the complexities of the UIL and ensure that the future of media plurality is safeguarded.

BT Group plc
16 March 2011

073

To: Jeremy Hunt

From: [redacted]
Team: Media
Tel: [redacted]
Date: 17/03/2011

NEWS CORP/BSKYB MERGER

Issue

- Advice from OFT and Ofcom on representations on the UILs.
- Meeting with main opponents of the merger.

Timing

Immediate.

Recommendation and Advice

We recommend that you continue to get appropriate advice from Ofcom and OFT on the substantive responses to the consultation on the UILs to see whether they raise any points which might lead you to reject or amend the UILs.

Draft letters for your signature are attached.

We have now had the response from Slaughter & May, BECTU and BT (attached) which should be enclosed with the letters.

The main group of opponents who Slaughter & May act for (BT, Guardian Media Group, Associated Newspapers, Trinity Mirror, Northcliffe Media and Telegraph Media Group) have also asked for a meeting with you to explain their points. They would like Ofcom, and OFT to be present which we agree would be very sensible as they too will want to hear the points explained and, if necessary, seek clarification.

I suggest your office get in touch with them to agree a suitable date. The contact is [redacted]

As of this afternoon, we have received over 10,000 responses, all but 500 of which are part of an organised e-mail campaign. Of the remaining 500, the vast majority are also from members of the public who are opposed to the merger. We will give you an update when the consultation formally closes on Monday at midday.

cc
Jonathan Stephens
Jon Zeff
Keith Smith
Patrick Kilgarriff
Carola Geist-Divver

RESTRICTED

Adam Smith
Sue Beeby

[redacted]

074

From: [redacted]
Sent: 17 March 2011 15:09
To: BSKYB
Subject: submission
Attachments: Submission to the Secretary of State final.docx; The Ofcom report on the NewsCorpKGrevised.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Please find attached my submission to the Secretary of State, along with a document analysing the Ofcom report on the transaction, to which the submission cross-refers.

David Elstein

Submission to the Secretary of State in relation to the NewsCorp/BSkyB proposed transaction

It has been evident, ever since the European Commission cleared the proposed transaction in terms of competition issues, that the only basis for it being blocked within the UK would be on plurality grounds, based on the specific provisions within the 2002 Enterprise Act. This has not stopped opponents of the deal from continuing to cite competition issues, as in point 6 of the latest missive from the self-styled "media alliance" (now – apparently – the "dead wood society", as it no longer includes the BBC and Channel 4). However, their primary argument addresses the effectiveness of the UILs in relation to Sky News that have been secured by Ofcom and the OFT from News Corp in order to gain their approval for the transaction.

What the "media alliance" argument does not address is the underlying reality. Once Sky News became the focal point of the process, several courses of action were open to News Corp and BSkyB. One was simply to close down Sky News. Understandably, given the massive long-term investment in Sky News, its considerable brand value and its widely acknowledged success as a news channel, the parties were no doubt reluctant to do this. Another option was to close Sky News temporarily, and at some future date re-launch it, perhaps under another name. Again, this may have been deemed over-engineered in the face of other possible solutions.

A third option was to spin off Sky News ahead of any transaction process, with a shareholding balance reflecting the current BSkyB one of 60.9% non-News Corp and 39.1% News Corp. This would require the creation of a coherent operating structure along with a medium-term financial plan, such that the non-News Corp shareholders would face no on-going financial calls, and might also be able to sell their shares.

The current proposal is a mirror image of that approach, with Sky News "left behind" after all the rest of BSkyB has been merged into News Corp. The structural and financial issues that will inevitably face a loss-making business currently fully-integrated into BSkyB are not to be under-estimated. However, attempts to find solutions to those problems – especially if they are combined with structures designed to ring-fence Sky News editorially – need to acknowledge an over-riding fact: there is no current obligation for the shareholders of BSkyB – let alone the biggest shareholder – to commit to funding Sky News this year, next year or for any measurable future period. Any attempt to impose such an obligation runs the clear risk of the parties simply deciding to close Sky News, such that no impediment to the transaction remains for regulators or politicians to address.

It is to the credit of the shareholders that they have invested so heavily in an award-winning service, even after the launch of the BBC News Channel made the sustaining of the quality of Sky News permanently unprofitable. It is also to their credit that, although the best means of retaining the strength of Sky News – keeping it as an integral part of BSkyB – has been ruled out by a combination of political pressure and regulatory muddle, they are still willing to contemplate an imperfect structure and long-term subsidy (longer term than the BBC enjoys) rather than resort to closure.

However, the Secretary of State should not be misled by the flawed Ofcom report on the transaction into believing that there really is a plurality issue, even if – for the sake of moving the transaction forward – the parties are responding constructively to the invitation to offer UILs. The Secretary of State should be aware that neither the Competition Commission nor a judicial review of the Ofcom report could conceivably sustain its methodology, such that its recommendations would inevitably be rendered void. Of course, the Competition Commission could substitute its own reasons for not clearing the merger on plurality grounds, but its ability to do so may have been compromised by some aspects of the Ofcom report.

The attached note, prepared by me last month, details a series of errors and questionable judgments in the Ofcom report, whose combined effect is to enlarge the seeming significance of the proposed transaction in its potential effect on media plurality. Two key indicators – reach and share – are seen by Ofcom as of such importance that the alleged scores from combining the businesses – 51% and 24% respectively – are cited by Ofcom in its March 1st letter to you signing off the UIL process.

Both these figures are clearly wrong, and the attached note explains in some detail why a share of news consumption of between 9% and 14% is more plausible than the 24% offered. As far as reach is concerned, the Ofcom methodology is so misguided that no reliance on it is possible at all.

Radio reach for Sky News is defined by Ofcom as anyone who has listened to at least five consecutive minutes of commercial radio in any week. Given that news on commercial radio is confined to 2-3 minute bulletins broadcast at the head of most hours, the chances of just 5 minutes including the whole of a news bulletin are low. Analysis of RAJAR data for the last quarter of 2010 shows that at least 2 million of the alleged 33.4m included in the Ofcom definition of weekly reach for Sky News have never heard even one second of a bulletin.

Given that average listening time to commercial radio for adults is 13 hours a week, defining reach by 0.6% of that listening (5 minutes) is a trivially low threshold. In any case, non-consecutive listening is more likely to offer a meaningful reach figure for radio news, given its rigid transmission pattern. Before reach can be considered meaningful, surely at least one bulletin a day should be the minimum threshold (2 minutes a day is the level used by NRS to define newspaper reach). On that basis, commercial radio news reach would be between 12.4m and 19.4m adults per week, not the 33.4m reported by Ofcom: if we took a mid-point within that frame, less than 50% of Ofcom's figure.

Similarly, television news reach (which can be measured precisely by BARB) needs a far more stringent definition than 3 consecutive minutes of viewing (or 0.2% of average weekly viewing). Such a low threshold serves only to exaggerate the reported reach of minor providers. For instance, simply increasing the threshold to even the inadequate 5 consecutive minutes applied to radio reduces Five's reach by 60% (and so would almost certainly reduce Ofcom's estimated combined Sky News/Five reach by at least 50%).

Ofcom does not explain how its consultant, Kantar, has calculated a 14.5m weekly reach for News Corp newspapers collectively. Given the published reach figures for each of the four titles, a reach of 10-11m seems far more likely. It can be stated with some confidence that the 51% weekly reach projected for Sky/News Corp (the basis of which has never been explained by Ofcom) is wrong by a large margin, and that no reliance can be placed on it.

Likewise, the figures provided for news consumption do not stand up to even the most cursory examination. Despite repeatedly canvassing the option of weighting different measures of media news consumption, Ofcom decided – inexplicably – not to weight anything, up or down, whilst conceding that this might be in error. The report explicitly treats a minute reading a newspaper as the equivalent – in consumption terms – of a minute watching a news programme: this despite overwhelming evidence that less than half the content of newspapers is actually news. No reasonable person could adopt such an irrational approach. In doing so – and thereby doubling the apparent consumption of news output attributable to News Corp from under 7% to nearly 14% – Ofcom undermines faith not just in its methodology but in its bona fides.

A similar – more embarrassing – error is found in Ofcom's treatment of commercial radio news consumption. Ofcom appears to have missed the 2009 press release issued by IRN and Sky News to announce that the volume of news supplied to IRN by Sky News would be two minutes per hour, not three. It is true that many major stations maintain a 3-minute bulletin, but they supplement the national and international stories supplied by Sky News with local stories sourced elsewhere. Moreover, news bulletins are not universally broadcast through the night. As a result, the three minutes an hour of news attributed to Sky News by Ofcom, amounting to 72 minutes a day, should in reality be counted as 28 minutes a day. Consequently, the 6.7% of all daily news consumption attributed by Ofcom to Sky News radio should really be less than 3%: a lamentable error by the body that regulates commercial radio.

With television, Ofcom again consistently ignores its own multi-year research on stated audience reliance on news sources – confirmed by a special survey in November – and fails to up-weight the time spent watching TV news output. It also treats all Five's news output as if it were wholly controlled by Sky News.

As the attached note explains, there are arguments for attributing commercial radio news consumption, and Five News output, at least in part to those legally responsible for it – the commercial radio licence holders and Five – rather than to Sky News. However, even if this course is not followed, any accurate assessment of the real amount of Sky News radio output, and proportionate weightings of time spent with TV news and newspapers, would leave the combined share of News Corp and Sky at between 9% and 14% of news consumption.

This happens to be, at the highest point, barely more than Ofcom calculates as News Corp's pre-transaction level: a level that the Ofcom report nowhere suggests is unacceptable. Moreover, in order to make its case of possible public detriment from a reduction in news plurality as a result of the transaction, Ofcom perforce has to treat News Corp's current controlling 39.1% stake in BSkyB as non-controlling in key respects: even if the most important one cited – hiring and firing of the editor of Sky News – is undoubtedly within News Corp's power now. Even if this error is ignored, the logic of Ofcom's position inexorably leads to the situation in which the Secretary of State finds himself.

This is that 39.1% of a spun-off Sky News does not bestow control on News Corp: an assumption that frustrates many opponents of the UILs, even though the contrary assumption would render the need for UILs null. The additional items agreed by News Corp in relation to funding, brand licensing, chairmanship of the Sky News board and the creation of an editorial board do not assuage the hostility of those who simply want to delay the transaction by triggering a reference to the Competition Commission. As I know from having shared public platforms with leading executives from the Telegraph Group and the Guardian Media Group, their objective – if they cannot prevent the entire transaction – is delay, which is more attractive to them than any amount of UILs, irrespective of the potential impact of delay on the survival of Sky News. Better, they think, that Sky News closes than that it be allowed to exist under the control of News Corp, now or in the future.

However, by discounting the significance of the 39.1% News Corp holding – for instance, by not apportioning that part of Sky News' supposed share of news consumption to News Corp, which would reduce the impact of the transaction – Ofcom has made any reference to the Competition Commission moot: all the parties ever had to do was spin off Sky News, with unchanged shareholdings. Indeed, Ofcom's call for UILs supposedly protecting the independence of Sky News begs the question as to why Sky News was deemed currently to be 100% independent for the purposes of calculating news consumption shares.

Ofcom's call for greater powers to intervene in the media market is puzzling. The biggest single change in news consumption in recent years has been the 10% rise in the BBC's already dominant share of TV news consumption – the source overwhelmingly relied upon by regular news users, according to Ofcom's multiple sources of evidence. By comparison, the shift in supply contracts for Five and IRN from ITN to Sky News is secondary. Neither of these developments has attracted any comment from Ofcom in the eight years of its existence and – indeed – neither is mentioned as an issue in the current report. Yet the change most lamented by the "media alliance" – the 3% rise in News Corp's share of a rapidly declining national newspaper market in the last 10 years – barely affects the overall news consumption picture. The question therefore must be: what non-transaction changes does Ofcom think might require special powers for it to exercise?

Ofcom gives no clue as to what such powers might involve. Forced divestment of businesses? Excluded categories of buyers? Restrictions placed on print runs of newspapers that have become too popular? It is notable that normal competition rules – not special media plurality rules – were what forced BSkyB to divest most of its shares in ITV. Competition rules can also prevent unfair trading practices. The 20/20/20 rule enshrined in the 2003 Communications Act is now redundant: News Corp would not be allowed by the Competition Commission to own ITV as well as BSkyB, even if it published no newspapers. Can it really be a matter of legislative concern if ITV chooses a news supplier that happens to sell newspapers to 8% of consumers? Only 40% of adults read national newspapers, yet the 2003 Act precludes anyone with 20% of that market supplying ITV with TV news. This government is easing local cross-media ownership rules. To introduce new powers begs the questions: what would they be, why would they be needed and how would they be exercised?

Scepticism on this front is underlined by Ofcom's sub-standard performance on the relatively simple question it has just been trying to analyze. If the regulator seemingly does not know how to define reach in comparable terms as between different media, does not understand the significance or even the quantum of supposed consumption of news across different media, and chooses to ignore the detailed research about consumer behaviour it has commissioned, it is hard to have much confidence in its ability even to define the circumstances for non-transaction intervention.

The government will have ample time to consider the wisdom of the Ofcom bid for extra powers in the run-up to a new Communications Act in 2015. Meanwhile, Ofcom having excluded the optimum circumstances for Sky News to flourish (that is, fully owned by BSkyB within News Corp), the best that can be hoped for is that the UILs offered by News Corp, and accepted by Ofcom and the OFT (however reluctantly) will do as little damage as possible. For the Secretary of State now to refer the transaction to the Competition Commission would inexcusably put at risk an excellent news service, whose viewers trust it much more than viewers of its terrestrial rivals trust those services.

David Elstein 16/3/2011

The Ofcom report on the NewsCorp/BSkyB transaction

Ofcom's report, on whether the News Corp offer to buy the 60.9% of BSkyB it does not already own should be referred to the Competition Commission, said at the outset that the threshold was low: if the transaction involved a reduction in media plurality that might be contrary to the public interest, the Commission should be called in.

The test was whether there would be a sufficient supply of people with control of media enterprises. Unfortunately, the Enterprise Act 2002 which created the special powers of intervention for the Secretary of State in media mergers defined neither "sufficient" nor "control"; and even the definition of "media enterprises" – as newspaper publishers or broadcasters – has its tricky points.

An immediate problem for Ofcom was deciding whether there was currently a "sufficient" supply of people with control of media enterprises. On the face of it, Ofcom's failure to intervene in the earlier merger of Northern and Shell and Channel 5 strongly suggests that a reduction of one in "supply" is not in itself grounds for intervention; and that if the reduction as a result of that deal was not material, the status quo was presumably satisfactory. Why, then, would News Corp increasing its ownership of BSkyB to 100% from the 39.1% which already allowed it operational control make enough difference to cross the "low threshold" required for intervention?

The three criteria

Ofcom said (in paragraphs 1.21 and 3.17 of its report) that its conclusions would depend upon three criteria: reach; consumption of news; and the importance attached by consumers to different sources of news. Unfortunately, Ofcom's attempts to apply these criteria are seriously flawed, thanks to a combination of errors of fact and of judgment.

From the outset, Ofcom said it wanted to assess cross-media provision of news and current affairs: but in only one of the four media examined is the category of current affairs actually measured – TV – and Ofcom chose to ignore that metric. It so happens that including current affairs viewing would have reduced the reported consumption of Sky News output, and enlarged that of the BBC, but we are not given a reason for the omission.

The only genre for which data from BARB (the industry research unit) was used by Ofcom was that dealing with international and national news: viewership of news bulletins, news programmes and 24-hour news channels.

Reach

The Ofcom exercise tried to align "reach" across various media, set out in Figure 1 on page 8 of its report (also Figure 15 on page 33). However, it managed to confuse itself thoroughly: first with TV.

The definition of reach of each channel's or broadcaster's news output depends upon three variables: the qualifying length of continuous viewing time (number of minutes), the period within which qualification counts (a week, a month, etc) and the number of different such viewings in the period (one, two, three, etc).

Ofcom chose to focus more on suppliers of news than on broadcasters. In legal terms, as Ofcom recognizes in paragraph 2.20, suppliers may well fall outside the 2002 Act, if they are not also broadcasters (ITN, for example, is not a broadcaster) and therefore do not qualify as media enterprises. Ofcom conceded that if Sky News were only a supplier (to Channel 5 and to commercial radio through its contract with Independent Radio News), and did not operate a broadcast service, there would be no basis for a public interest intervention, as only one of the merger parties would qualify as a "media enterprise". Nonetheless, given that there was a broadcast operation called Sky News, Ofcom felt justified in including its third party supply as being under its "control". I will return to this point later.

Ofcom describes Sky News as one of "three main (sic) providers of TV news": a description somewhat undercut by the qualification that their respective shares of provision are 70% (BBC), 22% (ITN) and 8% (Sky News). Indeed, if broadcast channel had been the definition, Sky News would be found in a remote seventh position. Yet the combination of "one of three main providers" of TV news with News Corp's leading position in newspaper provision is Ofcom's reason for referring the transaction to the CC.

The report's analysis of TV news reach, using one viewing period of three consecutive minutes in a week as the criterion, puts the BBC well ahead, at

33.5 million adults. ITN's reach (across ITV and Channel 4) is 21.9 million, and that of Sky News (in its own right and as a supplier to Channel 5) is 11.7 million.

Actually, the reach of the Sky News channel by this measure is just 4.8 million (less than 10% of adults). In Figure 8 on page 31, all the channels broadcasting news are identified individually, showing Sky News reach trailing that of news on BBC One, ITV1, BBC News Channel, Channel 5, Channel 4 and BBC Two. Sky News reach is less than one-sixth of that for news on BBC One. Even news content on BBC Two has a 30% larger reach than the Sky News channel.

The significance of BBC news being available from three BBC channels would be more apparent if the third element of measurement – "at least one" qualifying viewing session – were increased to two, three, or four, with multiple viewing options allowing "BBC TV" to draw much further clear.

Likewise, increasing the threshold from three consecutive minutes to five consecutive minutes would reduce Channel 5's reach by 60% (and with it the reach of "Sky News" as a supplier), as compared with a reduction of around 10% for other channels. Ofcom chose not to cite these – or any other – alternative ways of measuring reach.

Yet five minutes of consecutive listening is precisely the measure used by Ofcom to define radio reach. RAJAR, the radio equivalent of BARB, has no sub-genre entitled news, let alone news and current affairs, so Ofcom simply regarded <u>any</u> one instance of five consecutive minutes of listening to radio in a week to be equivalent to reach for radio news: a substitution for which it is impossible to find a justification.

News Corp says that Ofcom compounds this error with two further mistaken assumptions: that commercial radio transmits three minutes of news every hour, and that Sky News supplies it all. News Corp's response to the Ofcom report pointed out that, in peak time (when most listening takes place), most major commercial radio groups supplement Sky News content (which only covers national and international news) with other news content (primarily local news); and news bulletins typically run two minutes, not three.

It is puzzling how Ofcom (which licenses and regulates all broadcast commercial radio in the UK) would not know this if News Corp is right. What is even harder to understand is how it can convert reach for any commercial radio listening into reach for news listening (which constitutes 3.3% of output), let alone listening to Sky News, if Sky News does not supply all of commercial radio's news content.

Eventually, in paragraph 4.36, Ofcom acknowledges that the figure for Sky News radio reach is *"potential"* reach; moreover, "it is likely that estimating reach on the basis of all radio listening overstates the level of reach achieved in respect of national news listening". It probably overstates it by a factor of at least 2, and maybe much more.

To add to the confusion, Ofcom places newspaper reach in the same graphic (Figure 1 on page 8, reproduced as Figure 15 on page 37). The numbers it shows, supplied by Kantar, base the definition of reach on readership, as researched by the National Readership Survey. However, the published NRS figures are for individual newspapers, not for newspaper groups, and Ofcom does not reveal how the group figures were derived.

For instance, the Daily Mail has an average readership of 4.7 million according to NRS, while the Mail on Sunday has a readership of 4.9 million. According to Ofcom, the Mail's group readership is 7.3 million, implying that at least half of the Sunday readers do not read the weekday edition, and vice versa. Likewise, the Daily Telegraph has a readership of 1.7 million, and the Sunday Telegraph 1.5 million, but group readership, according to Ofcom, is 2.4 million: again implying that about half of the weekday readers do not read the Sunday edition, and vice versa.

News Corp's News International is more complicated, as it owns four newspapers. The Sun and the News of the World have readerships of 7.7 million and 7.6 million respectively, with The Sunday Times on 3 million and The Times on 1.6 million. But Ofcom reports group readership at 14.5 million, or 29.4% of all adults, which can only be true if at least half of The Sun's readers do not read the News of the World, and vice versa. Given that half of all adults – according to NRS – do not read a newspaper at all, the Ofcom calculation implies that 60% of all people who read a newspaper read a News Corp title.

The 1 million readership attributed to the Lebedev Foundation is even more puzzling, as The Independent has a readership of 550,000, and the Independent on Sunday a readership of 590,000: it would appear that almost nobody reads both papers.

Ofcom excluded the Evening Standard from its Lebedev numbers, so that cannot be the answer. In the absence of any other explanation, it is hard to understand these and many other Kantar figures, unless – perhaps – the published NRS reach statistics have been inflated by extending the period (24 hours after publication, according to NRS) qualifying as "readership".

The likelihood, of course, is that such an extension would only apply to non-news elements in the newspapers: for as Ofcom notes in paragraph 3.5, "newspapers are not solely devoted to the reporting of news". What else is there? According to Ofcom, there is "content based on in-depth discussions and opinionated commentary".

In reality, there is much more: the puzzles, fashion, cookery, travel, investment advice, TV listings, reviews, agony aunts, features, gardening, property pages, readers' letters, and so on that constitute the bundled product we call "newspapers".

Last week, The Sunday Times (according to NRS, the newspaper on which readers spent by far the most time) contained the equivalent of 504 A4-size pages. 30 were devoted to national and international news. A further 52 pages came in the shape of sport and business sections, which NRS tells us are read by less than 60% of "readers" of The Sunday Times. Even allowing these sections full "news" value (and note that Ofcom excludes "sports news programmes" from its definition of news for TV reach), and discounting advertising pages by 90%, actual news content accounted for less than 23% of all pages.

In recent weeks, the "news" proportion of The Sunday Telegraph has been as low as 15% and never above 30%. The same applies to the Saturday editions of both the Daily Telegraph and The Times (which are read for longer than the Monday to Friday editions): this week, "news" comprised 15% of content, or less than 90 pages out of nearly 600. Clearly, the reach of newspaper groups reported in the Ofcom table – even if it were fully explained – cannot be reasonably presented as equivalent to the reach of their news pages. Research from North America has shown that as many as a third of newspaper readers never look at the news pages.

Ken Goldstein, president of Communications Management Inc of Winnipeg, argues that the same criticism can be applied to the data for online reach and consumption, taken from Nielsen by Ofcom. The prominence in the top 50 websites of news providers does not equate to site visits being news consumption. The Daily Mail and the BBC, which are easily the leading two sites included in the sample, both offer a large proportion of feature material (though the BBC is in the process of reducing the entertainment element in its website). As it happens, the role of the internet in the Ofcom analysis is too small to make it worthwhile to attempt a systemic adjustment: but the point made is almost certainly correct.

The simple fact is that "newspaper" reach for certain, and online reach in all probability, is not the equivalent of "TV news" reach: presenting it as such is just as erroneous as the comparison between "Sky News radio" reach and "TV news" reach. It follows that the 51% reach for Sky News and News Corp combined, calculated by Ofcom, is unlikely to be correct. Figure 1 is not what a regulator which styles itself "evidence-based" should be including in a report.

Consumption

Fortunately, actual news consumption is an easier currency to measure across media. BARB provides details of the minutes of TV news consumption per head per day; it is possible roughly to estimate the proportion of daily radio listening measured by RAJAR that is attributable to news; NRS measures both readership and minutes spent on newspapers; and Nielsen has estimates of online consumption.

However, Ofcom's attempt (Figure 26 of page 59) to assemble the four elements in a single diagram – the most crucial in the whole report – falls into a number of traps. Ofcom does not provide the raw figures it used: but the percentages it has calculated give us a clue as to its methodology – which turns out to be not even the biggest problem presented by Figure 26.

On TV news consumption, as with reach, Ofcom chooses to attribute the Sky News production, News on Five, to Sky News, rather than to Channel 5, which is responsible for it in legal, contractual and regulatory terms – something Ofcom is fully aware of, as the licensor of Channel 5. If there were any problem with Channel 5's news output, Ofcom would be straight on to Channel 5, and would not even pick up the phone to Sky News.

The legal issue is: who has control? Having commissioned News on Five (originally from ITN) when I launched the channel, I had no doubt that my Head of News was always in editorial control, and accountable to me (through the Director of Programmes) as Chief Executive. In due course, the ITN employee who was the editor of News on Five moved to Five as an employee, and his successor accounted to him on a daily basis. Inevitably, newsgathering was undertaken by the supplier, but the news agenda, together with the content and running order of the news bulletins, was a joint decision.

It was absolutely not my experience that – in Ofcom's words – "there was little scope for editorial adjustment by the retailer". The implication that, currently, the Sky News editor responsible for delivering News on Five checks with News Corp what to include in each bulletin, while the broadcaster stands helplessly by, is wrong. Given Ofcom's concession that the Competition Commission, in assessing the concept of wholesale news supply, concluded that there was "some degree of shared editorial influence", it is hard to understand Ofcom's decision to attribute the output of Five News 100% to the Sky News column.

There is a further legal puzzle. The 2002 Enterprise Act is clear as to what constitutes a media enterprise: either a broadcaster or a newspaper publisher. The Ofcom report makes clear that if Sky News were not itself a media enterprise – in other words, a broadcaster in its own right – then its wholesale supply of news would not be relevant to the public interest inquiry.

It follows that if Sky News were to hand back its Ofcom broadcast licence, and operate in the UK solely as an online service, it could retain its non-UK broadcast services, and its wholesale supply contracts, without there being any basis for a public interest intervention by the Secretary of State. Yet because Sky News *is* a broadcast service, Ofcom feels able to attribute 100% of Channel 5's news output (along with commercial radio news, irrespective of the use of other sources and the active compilation of bulletins by radio stations themselves) to Sky News.

An illustration of the difficulty presented by the Ofcom approach is that if ITN – which is a wholesale supplier that does not qualify as a broadcaster – were to be taken over by the Daily Mail, currently a 20% shareholder, and then won back the supply contracts to Channel 5 and commercial radio currently held by Sky News, the merged enterprise would – according to Ofcom's methodology – suddenly jump from a 9% control of consumed news to 22%. Yet such a transaction would fall entirely outside the framework of the legislation, suggesting that either the Act is badly drafted, or that Ofcom's methodology is faulty, or that there would be nothing to worry about (or possibly all three).

If we move to the newspaper side of the consumption diagram, we find that Ofcom has – as in the reach section – counted the full weight of minutes reading newspapers as if these were spent consuming news, on the basis that "one minute of TV national news consumption is equivalent to one minute of reading a newspaper" (note 124): an unsustainable position, in the light of actual newspaper content.

Could Ofcom – without saying so – be working on the assumption that newspapers are read with real concentration, whereas many people do other things whilst watching TV? Unfortunately, Ofcom itself had disposed of this argument in a massive research exercise last year, which included the finding that 83% of all TV viewing is "solus" (that is, not accompanied by any other media activity), whereas only 71% of reading print is "solus".

The question is: what level of discount should be applied to the newspaper consumption figures to make them comparable to the TV news consumption minutes? It seems that a figure of 50% would be conservative: a minimum reflection of the very different experiences being measured as between "viewing TV news" and "reading newspapers", and a discount level used by the German regulator, KEK in a similar situation recently.

It should be noted that Ofcom's focus on "national" newspapers (which happens to catch all News Corp titles) excludes great swathes of newspaper publication covering national and international news, but not nationally distributed. That the Yorkshire Post, The Scotsman and the Evening Standard also cover issues at a more local level does not invalidate their national and international content. Metro's readership is not far below that of the Daily Mirror/Record, and the Evening Standard's is not far short of that for The Times. 3.5 million people read a regional evening paper every weekday; 7.5 million a regional morning paper; 10 million a paid-for local weekly; 17 million a free local weekly: their combined readership is as large as that for the so-called national titles, but is excluded from Ofcom's analysis.

Audience reliance on news sources

The significance of these omissions is underlined when we move on to the third element in the Ofcom guidance: audience reliance on different news media. Here the report provides startling – and seemingly decisive – evidence.

In 2009, as in previous years, Ofcom asked a very large sample of regular news consumers which source they relied upon most. 73% plumped for TV; 8% for newspapers (including, to some extent, the categories of newspaper just described that Ofcom excluded); 7% for radio; and 7% for online. These proportions have changed little over the years. Likewise (see paragraph 4.32), 29% reported that their only source of news was TV, compared with 6% for newspapers, 3% for radio and 5% online. Some of this differential may be on account of perceptions of bias: 56% think newspapers are biased, but only 22% say that of TV.

Ofcom also cites another piece of recent research, on cross-media behaviour, which asked similar questions, but in a different order and with different emphases. The results were 63:14:10:10 – slightly less stark than the 73:8:7:7, but surely of high significance. These findings strongly suggest up-weighting the reported minutes watching TV news, or re-allocating all consumption according to these "reliance" ratios (it would then no longer be necessary to discount minutes reading non-news in newspapers, as the actual level of news in newspapers would have been factored in).

Mr Goldstein of CMI takes the view that, if Ofcom is conducting an inquiry based on the potential detrimental effects of a merger's undue influence on consumers of news, and the views of those consumers in terms of reliance on sources are established and robust, it must make sense to take those views fully into account – rather than discard them whilst claiming to act on behalf of these very consumers. He has compiled the following table:

Media	Audience shares within the medium based on Figure 26, page 59 of Ofcom report	Media "weights" based on Figure 6 on page 29 of Ofcom report: % saying medium is "main source of news"	Media "weights" based on Figure 6 on page 29 of Ofcom report: Audience shares weighted by "source of news" %	Media "weights" based on footnote 54 on page 28 of Ofcom report: % saying medium is "main source of news"	Media "weights" based on footnote 54 on page 28 of Ofcom report: Audience shares weighted by "source of news" %
NEWSPAPERS		8%		14%	
News Corp.	34.2%		2.74%		4.79%
DMGT	22.8%		1.82%		3.19%
Trinity Mirror	11.9%		0.95%		1.67%
Telegraph	10.4%		0.83%		1.46%
Northern and Shell	10.2%		0.82%		1.43%
Guardian	6.5%		0.52%		0.91%
Lebedev	2.5%		0.20%		0.35%
Pearson	1.5%		0.12%		0.21%
RADIO		7%		10%	
BBC	73.2%		5.12%		7.32%
Sky (as news supplier)	26.8%		1.88%		2.68%
ONLINE		7%		10%	
BBC	37.5%		2.62%		3.75%
News Corp.	12.5%		0.88%		1.25%
DMGT	25.0%		1.75%		2.50%
Trinity Mirror	0.0%		0.00%		0.00%
Northern & Shell	0.0%		0.00%		0.00%
Telegraph	12.5%		0.88%		1.25%
Guardian	12.5%		0.88%		1.25%
Lebedev	0.0%		0.00%		0.00%
Pearson	0.0%		0.00%		0.00%
Sky	0.0%		0.00%		0.00%
TELEVISION		73%		63%	
BBC	73.5%		53.66%		46.30%
ITN	17.4%		12.70%		10.96%
Sky	9.1%		6.64%		5.73%
(of which Five 22.6%)	(2.1%)		(1.50%)		(1.29%)
ALL OTHER		5%		3%	
TOTALS		100%	100.00%	100%	100.00%
BBC			61.40%		57.37%
ITN			12.70%		10.96%
News Corp			3.62%		6.04%
Sky			8.52%		8.41%
Sky + News Corp.			12.14%		14.45%
Sky/NC minus wholesale			8.76%		10.48%

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As a cross-check, I re-worked Ofcom Figure 26 on page 59, adjusting in three ways: down-weighting newspapers by 50%; separating wholesale news supply; and up-weighting TV by 50%:

Ofcom 1 (before changes)

News consumption: percentage of minutes per head per day

Company	**Papers**	**Radio**	**TV**	**Online**	**Total**
Sky		6.7	2.4		9.1
Channel 5			0.7		0.7
News Corp	13.8			0.1	13.9
[News Corp/Sky	*13.8*	*6.7*	*3.1*	*0.1*	*23.7]*
BBC		18.3	24.9	0.3	43.5
ITV			4.8		4.8
Channel 4			1.1		1.1
DMGT	9.2			0.2	9.4
T Mirror	4.8				4.8
Telegraph	4.2			0.1	4.3
N and Shell	4.1				4.1
Guardian	2.6			0.1	2.7
Indy	1.0				1.0
Pearson	0.6				0.6
Total	**40.3**	**25.0**	**33.9**	**0.8**	**100%**

Ofcom 2 (after changes)

Company	Papers	Radio	TV	Online	Total
Sky			4.51		4.51
News Corp	5.45			0.07	5.52
[News Corp/Sky	*5.45*		*4.51*	*0.07*	*10.03]*
BBC		14.46	46.77	0.25	61.48
ITV			9.02		9.02
Channel 4			2.08		2.08
IRN		5.29			5.29
DMGT	3.63			0.17	3.8
T Mirror	1.89				1.89
Telegraph	1.66			0.07	1.73
N and Shell	1.62				1.62
Channel 5			1.32		1.32
Guardian	1.03			0.07	1.1
Indy	0.4				0.4
Pearson	0.24				0.24
Total	**15.92**	**19.75**	**63.7**	**0.63**	**100%**

As can be seen, both in the Goldstein table and my "Ofcom 2", the share of news consumption attributable to News Corp is substantially lower than in Ofcom 1, and the combined share of News Corp and Sky, excluding wholesale supply, is around 10% - as compared with the 24% in the Ofcom report.

There is a further problem. News Corp already owns 39.1% of BSkyB (and therefore of Sky News). Ofcom says it has "taken into account" that fact, but nonetheless fails to attribute any part of the Sky News audience to News Corp pre-transaction (which would reduce yet further the supposed impact of the merger). Ofcom's justification is that owning 100% of BSkyB would allow News Corp to run the business entirely to its own commercial agenda. This legal argument (in marked contrast to Ofcom's preference for "reality" as opposed to legality where wholesale news supply is concerned) misses the key point: News Corp has now – and has always possessed – operational control of BSkyB, including every aspect of Sky News.

When Ofcom asserts (as it does in paragraph 5.7) that 100% control of BSkyB would give News Corp greater power to dismiss the editor of Sky News, it is wrong. Every editor of Sky News is appointed by the chief executive of BSkyB. Every chief executive of BSkyB has been nominated by News Corp, and rubber-stamped by the BSkyB board. News Corp could remove the current editor of Sky News today, and secure the appointment of his successor, even without the proposed transaction.

Some opponents of the merger have argued that only the presence of the independent directors of BSkyB has prevented News Corp having its evil way with Sky News. They cite Rupert Murdoch musing that he wished Sky News were more like Fox News. In fact, there is nothing preventing Murdoch from transforming Sky News, other than sound commercial sense. A version of Fox News might or might not work in the UK – the US version, available on the Sky platform, has virtually no viewers – but Sky News is very successful journalistically (winning the Royal Television Society award for best news channel again this February) and arguably Murdoch's most admired UK journalistic product.

As for the independent directors, there is no evidence that they have ever raised at board level any issue to do with Sky News. Indeed, in their submission to Ofcom in support of the merger, they effectively offered to close Sky News if that were the only barrier to clearance.

Paradoxically, it is News Corp – which launched Sky News and funded it for two years before Sky was merged with British Satellite Broadcasting in 1990 – which has shown the most interest in keeping alive the loss-making service.

There is a further problem with treating the 39.1% as if it had no significance. It would follow that, if News Corp sold down its stake in News International (which publishes all its UK newspapers), reducing to 39.1% but retaining editorial control (as with BSkyB), and then used the proceeds to buy 39.1% – plus editorial control – of the Telegraph Group, the Daily Mail group, Trinity Mirror and Northern and Shell, it would have secured editorial control of 89% of UK national newspaper consumption. However, according to Ofcom, there would be five separate owners of that 89%, and none of them would be News Corp. There would be no reduction in media plurality, and no grounds for any intervention under the 2002 Act. Indeed, the current merger proposal would also not be subject to a public interest intervention.

Summary

I would expect the key table in the report (Figure 26 on page 59, which is equivalent to Ofcom 1 above) to come under severe pressure if it were subjected to detailed scrutiny at any independent review. Contrary to the report's claim that its conclusions represent "a reasonable belief, on the basis of the evidence available", it is clear that Ofcom ignored a great deal of evidence: not only that which was readily available, but also that which Ofcom itself provided.

It failed to present any alternative ways of measuring TV news reach, including one variation which reduces Channel 5 reach by 60%. It offered a radio news reach figure for Sky News which cannot be correct. Instead of presenting the published figures for individual newspaper reach, it offering a bulked up estimate for "group reach", unsupported by any explanation and in seeming conflict with the individual reach figures.

On consumption, it treated newspaper readership as if it were news readership: an approach which substantially over-states the significance of newspapers. Despite saying that current affairs as well as news consumption would be measured, no attempt was made to include the easily measurable TV current affairs genre.

On audience reliance on sources, it presented strong evidence of the paramount significance of TV, and then chose to ignore it.

It also chose to attribute 100% of its estimate of commercial radio news reach and consumption to Sky News, despite News Corp's claim that most major station groups treat Sky News content as an ingredient within, rather than the whole of, the peak-time bulletins they compile. The News Corp claim also challenged Ofcom's estimate of the volume of commercial radio news output, whether or not it was all attributable to Sky News.

On wholesale news supply, Ofcom ignored the Competition Commission judgment that it involved shared editorial responsibility, and instead attributed all of Channel 5's news output to Sky News.

It wrongly stated that the transaction would allow News Corp to dismiss the editor of Sky News (a power it has always possessed). Finally, in consistently discounting the significance of News Corp's current stake in BSkyB, it exaggerated the true effects of the transaction on media plurality. An extension of that logic would see Ofcom allowing even a massive shift in control of UK newspapers without recognizing any case for intervention.

The biggest danger for Ofcom is not that it may have made a series of errors and questionable judgments. It is that all of these errors and judgments pointed in one direction: to enlarge the significance of the proposed merger, and reduce the reported level of BBC dominance. The chances of this having happened by accident are low. If any independent review of the Ofcom report found support for a charge of bias, it would surely spell the beginning of the end for Ofcom, whose future status is by no means guaranteed under media legislation planned for 2015.

Cross-media ownership rules

As part of its report, Ofcom suggested that any new legislation should create additional regulatory powers to intervene in the media market, even in the absence of a transaction, if there were concerns about plurality. Whatever the faults of the current legislation, the weakness of this report will give politicians pause before they assign any new authority to Ofcom – or its successor.

My original concern in this whole affair was that a misguided regulatory intervention into the News Corp/BSkyB transaction might have the effect of discrediting our regulatory processes, rather than dislodging the merger. That concern remains.

It is sometimes claimed that our regulatory structure is too weak to counter-act the influence of News Corp. Yet regulators forced Rupert Murdoch's exit from London Weekend Television, rejected his consortium's application for the British satellite project, rejected his consortium's bid for Channel 5, excluded BSkyB from what became ITV Digital, forced BSkyB to divest most of its shares in ITV, and have imposed restrictions on BSkyB in relation to platform management, electronic programme guides, conditional access charges and wholesale pricing of sports channels. The main cross-media ownership rule – the 20/20/20 clause – is aimed at News Corp and BSkyB.

Yet Ofcom's new intervention proposal reflects a degree of unease with our cross-media ownership rules, the current version of which have been in place in 2003. We seem primarily concerned with national newspapers: yet Ofcom accepts that diversity of ownership is not equivalent to diversity of opinion. Moreover, the long-term decline in circulation seems likely to continue, such that a 20% threshold in 2003 represents a much higher circulation then than it does now. Is it circulation or share which concerns us? Is circulation anyway the right test? The Daily Mail/ITN example I offered would not be possible if readership rather than circulation was the test: no newspaper with over 20% of national newspaper circulation can control the ITV news provider. The Mail falls below that threshold in circulation, but not in readership.

Finally, what – if anything – should we do about the BBC? The BBC's share of TV news consumption has grown from 60% to 70% since 2002. The BBC now controls 71% of the news sources on which consumers place 87% of their reliance: TV, radio and online. Many, including Ofcom, are relaxed about this situation, in that the BBC seeks to influence neither votes nor views. But if we are not concerned about that 71%, why worry about possible combinations of small fractions of that share in the commercial sector? And if we are concerned about the 71%, what should be done?

David Elstein 27.2.11

[redacted]

075

From: James Firth [redacted]
Sent: 17 March 2011 17:00
To: BSKYB
Subject: Formal Submission from James Firth

What follows is a formal submission to the consultation process from James Firth, a digital rights commentator, data management consultant and internet expert. This submission is made with the presumption that the contents of the submission and identity of the submitter may become public knowledge. A copy of this submission is also published online here : http://ejf.me/dC

James Firth has a 14 year career in IT. He has worked on military and civilian communications projects and is credited as the sole inventor of patent GB2388282 (EP1359778), a system for managing encryption keys in secure communications systems, whilst working for Motorola. James created his first website in 1994 and has closely followed the development of the internet. He has worked for He now writes the blog www.slightlyrightofcentre.com as well as working as a consultant on data management issues. He has been [illegible]blished in national media and is a committee member of Digital Surrey, a knowledge-sharing community for [illegible]usinesses that use the internet.

The viewpoint expressed is that of James Firth, and the official position of his company, Dalton Firth Limited. James is not speaking for Digital Surrey, or any other organisation mentioned above.

I'm concerned that the proposed buy-out will impact competition and plurality in the online news market, and this aspect may not have been fully assessed. I therefore urge the Secretary of State to refer this deal for Competition Review.

My concerns stem from the estimated 2.5 million broadband subscribers using BSkyB's internet service Sky Broadband. The proposed deal could put News Corporation in a position to give discounted, bundled or preferential access for Sky Broadband subscribers to its online news titles; in particular its non-free services such as The Times, News of The World and The Daily (iPad newspaper).

[illegible]'s dominant position could adversely effect other publishers in the online news sector if News Corporation chose [illegible] promote News Corporation's online titles to Sky Broadband customers (so-called "cross-promotion" deals). It i[illegible] also give News Corporation a dominant position in the sale of advertising slots should the company decide to offer cross-media deals providing TV, online and printed newspaper advertising; and this may have an adverse impact on competition in the market for advertising.

The deal might restrict the plurality of news sources accessed by a bulk of Sky Broadband subscribers if, for example, News Corporation decided to promote its own online news content on its portal services, such as launch pages provided by default to subscribers of an ISP.

This deal could potentially lead to a closed market of news - TV and online - for BSkyB customers, and provide serious challenges for other online newspapers looking for new ways to make online journalism pay.

James Firth

[redacted] 076

From: [redacted]
Sent: 17 March 2011 15:14
To: BSKYB
Subject: BSkyB - News Corp Consultation
Attachments: consultation on BSkyB merger 10.3.11.doc

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Sir/Madam

On behalf of BECTU I attach our response to this consultation.

Yours sincerely

[redacted]

BECTU

CONSULTATION ON UNDERTAKINGS FOR PROPOSED NEWS CORP – BSKYB MERGER: BECTU SUBMISSION

1 BECTU is the trade union for creative, technical and administrative workers in the audiovisual and live entertainment sectors. With thousands of members working in the broadcast and independent production sectors, we have a close interest in this issue and made a previous submission to the consultation on the public interest test in relation to this proposed merger.

2 We note that, following reports from Ofcom and OFT, the Secretary of State indicated he was minded to refer the merger to the Competition Commission, subject to further discussions with News Corp on undertakings in lieu of such a referral. We note that following such discussions the Secretary of State has now indicated he intends to accept such undertakings in lieu of a referral.

3 We further note that underlying the whole process have been concerns about competition, media pluralism and the public interest 'in relation to every different audience in the United Kingdom for there to be a sufficient plurality of persons with control of the media enterprises serving that audience'. Specific issues emerging in the public interest consultation included:

- the power of the media not just to reflect but to form opinions
- the sheer size of News Corp in relation to competitors
- the editorially-interventionist approach of Rupert Murdoch
- the need for impartiality in news coverage but also in the selection of issues to cover and the setting of the news agenda
- the clearly-attested editorial preferences of Murdoch and News Corp
- the opportunities for cross-subsidy and cross-promotion

<u>THE PROPOSED UNDERTAKINGS</u>

4 We note that the undertakings cover the following points:

- Sky News to be spun-off as an 'independent' public limited company with shares distributed among existing Sky shareholders in line with their shareholdings and News Corp thereby retaining a 39% holding (needing the Secretary of State's permission to increase this)
- the new company to have a 10 year carriage agreement and 7 years brand licensing agreement with News Corp/BSkyB.

- measures aimed at achieving editorial independence: an independent chair; a majority of independent directors with appropriate skills and experience; an editorial committee of the board.

COMPETITION

5 In commenting on the undertakings, we firstly do not accept that competition issues have been satisfactorily dealt with and that we are dealing solely with issues of media pluralism and editorial independence. The sheer size and reach of the proposed merged company gives rise to clear concerns that it would be anti-competitive:

- the merged company would be the largest private media company ever seen in the UK
- an enlarged News Corp, with an expected turnover of £9b within a few years, would have almost double the revenue of the BBC. Its size and scale would predominate over every other media organisation in the UK.
- the new combine would reach across all significant media platforms: television, radio, newspapers, online and ISP – including a customer- base of 10m television subscribers and a 40% share of the newspaper market.

6 It would clearly have opportunities on a scale unavailable to any competitor:

- to cross promote News Corp news titles and channels
- to bundle news products with other media services
- to develop integrated news products for convergent devices and media
- to win wholesale news contracts
- to distort the advertising market with cross platform deals
- to take a dominant position in competing for rights.

7 If none of this gives legitimate grounds for competition concerns: whatever would?

DEPENDENCE

8 We do not accept that the proposed new company operating Sky News would be, in any meaningful sense, 'independent' :

- the new company would be relatively small, with Sky News as its sole product
- it would be commercially dependent on News Corp/BSkyB for 85% of its revenue and 25% of its costs
- News Corp would be its largest shareholder as well as the sole funder of Sky News
- there is no guaranteed mechanism for the new company to escape this position of dependence in the future.

9 We note the OFT's view that: 'It's clear that, absent the revenue stream provided by the carriage agreement, Newco is effectively loss-making. As a consequence, absent renewal on a similar basis, an alternative revenue stream, or being acquired, there is a real risk that Newco may not survive as envisaged by the [undertakings] beyond the term of the carriage agreement'.

10 The proposed spin-off company would have only a formal independence while in reality remaining deeply dependent on News Corp. Surely the purely formal appearance of independence should not be enough to negate the need for a referral to the Competition Commission?

EDITORIAL ISSUES

11 In the light of the above factors, the measures proposed to provide 'editorial independence' appear to us to be completely inadequate. This is especially the case given News Corp's previous record of promises of editorial independence and integrity at the time of earlier takeover deals: notably in relation to The Times and Sunday Times in 1981 and the Wall Street Journal in 2007. Post-takeover, none of these publications are considered in any way editorially-independent of the interests of News Corp.

12 This concern is especially pointed at a time when News Corp companies are subject to numerous civil actions and to a renewed police investigation concerning illegal phone-hacking. This context should give pause for thought on the wisdom of accepting the proposed undertakings without a full process of regulatory scrutiny up to and including the Competition Commission.

13 As a test of the genuineness of News Corp's commitment to editorial independence, we note that as late as February this year its position was that it was not willing to undertake that the chair should be independent. Its subsequent reluctant acceptance of this point gives us no comfort whatsoever – and nor should it be of any comfort to the Secretary of State.

THE PROCEDURE

14 We have severe reservations about the procedure followed by the Secretary of State in reaching his decision. Given the earlier reports from Ofcom and OFT and given that, on the basis of these, the Secretary of State was at that point minded to refer the issue to the Competition Commission, why was News Corp then allowed the privilege of a series of private discussions with regulators, without any public scrutiny, leading to the reluctant and unconvincing undertakings we are now presented with? Why, on an issue concerning media pluralism – and thereby our democratic process – was the initial decision in favour of a referral to the Competition Commission not complied with?

15 The Secretary of State has given the appearance:

- of being primarily concerned to achieve protection from legal challenge for a controversial decision he may have been predisposed to make in the first place
- of reducing a decision of major public interest to private horse-trading with a very significant supporter of his Government and his Party
- of seeming to be exceptionally keen and accommodating in order to find a means of allowing the merger without further regulatory scrutiny.

16 We therefore believe that in the broader democratic interest of seeking a diverse and pluralistic media landscape in the UK, the proposed merger should be referred to the Competition Commission.

WIDER CONCERNS ON MEDIA REGULATION

17 We note and agree with Ofcom's view that 'the current statutory framework may no longer be equipped to achieve Parliament's policy objective of ensuring sufficient plurality of media ownership'.

- the current framework will only trigger a process of public interest scrutiny if there is a specific corporate transaction (eg a merger)
- plurality concerns may well arise not from such a transaction but from the evolution of the media market eg increasing dominance by a media operator simply by means of growth in audience and market share.

18 We therefore join Ofcom in urging the Government to undertake a review of the statutory framework to ensure media pluralism – with particular attention to plurality concerns which may arise in the absence of a specific corporate transaction.

CONCLUSION

19 We call on the Secretary of State to refer the proposed merger to the Competition Commission rather than abjectly accepting this inadequate settlement.

20 We further call on the Government to institute a broader review of the statutory framework governing the public interest in media pluralism.

Andy Egan/slv/10 March 2011

Department for Culture, Media and Sport
Rt Hon Jeremy Hunt MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

077

department for
culture, media
and sport

CMS 170083/DC

Ed Richards
Chief Executive
Riverside House
2a Southwark Bridge Road
LONDON
SE1 9HA

18 March 2011

Dear Ed,

NEWS CORP/BSKYB MERGER: UILS

I am forwarding to you copies of the representations made by Slaughter and May (who represent an alliance of media groups), BT and BECTU in response to the on-going consultation on the proposed undertakings in lieu offered by News Corporation on 1 March 2011 (the UILs). I would be grateful if you would review the advice you have already given me on the potential impact on media plurality of the proposed UILs in light of these representations. Please also let me know whether, having considered these representations, it would be appropriate in your view for the UILs to be amended in any respect.

I envisage that my officials will also in due course send you copies of any other submissions that make material representations with regard to the practical and financial viability of the proposed UIL, together with a summary of all of the consultation responses. I would be grateful if you would, in the same way, review your previous advice and advise whether any amendments to the proposed UIL would be appropriate in light of such submissions and the summary of responses.

I said in my statement to Parliament that I would be asking Ofcom and OFT to advise me on the detailed provisions on carriage, brand licensing and certain operation agreements which are set out in undertakings in lieu. I understand that News Corp is working on these documents, and I would be grateful for your advice in connection with these contracts in accordance with my previous request for your advice.

Department for Culture, Media and Sport

I said in my statement to Parliament that I would be asking Ofcom and OFT to advise me on the detailed provisions of the carriage and brand licensing agreements as well as certain operational agreements which are referred to in the proposed UILs. I understand that, subject to any amendments that may be necessary in light of the responses to the consultation, News Corporation anticipates that it will be in a position to provide Ofcom and the OFT with copies of drafts of these key documents for your respective consideration shortly. I would ask you to engage with News Corporation as necessary and advise me whether in your view these agreements, once finalised, are consistent with the proposed UILs (as amended, if applicable, to take account of the responses to the consultation) and Ofcom's previous advice with regard to media plurality.

I am writing to OFT in similar terms and I would ask that both organisations continue to work closely together on these questions.

Yours ever

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport

Department for Culture, Media and Sport
Rt Hon Jeremy Hunt MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

Tel
Fax

78

dcms
department for **culture, media and sport**

CMS 170083/DC

Colette Bowe
Chairman
Riverside House
2a Southwark Bridge Road
LONDON
SE1 9HA

18 March 2011

Dear Colette,

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I am writing to OFT in similar terms and I would ask that both organisations continue to work closely together on these questions.

Yours ever

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport

Department for Culture, Media and Sport
Rt Hon Jeremy Hunt MP
Secretary of State

2-4 Cockspur Street
London SW1Y 5DH
www.culture.gov.uk

Tel
Fax

079

department for
culture, media
and sport

CMS 170083/DC

Clive Maxwell
Executive Director
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
LONDON EC4Y 8JX

18 March 2011

Dear Clive,

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Department for Culture, Media and Sport

I am writing to Ofcom in similar terms and I would ask that both organisations continue to work closely together on these questions.

Yours ever

Rt Hon Jeremy Hunt MP
Secretary of State for Culture, Olympics, Media and Sport

[redacted]

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From: [redacted]
Sent: 18 March 2011 16:47
To: BSKYB
Subject: BSkyB-News Corporation Consultation - submission attached
Attachments: Scan001.PDF

Attached please find a detailed 16 page legal submission written by law firm DLA Piper on behalf of Avaaz.

Please acknowledge receipt of this submission.

[redacted]

[redacted]

AVAAZ <http://Avaaz.org> - the world in action
Te[redacted]

DLA PIPER

3 Noble Street
London
EC2V 7EE
United Kingdom
DX 33866 Finsbury Square
T +44 (0)[redacted]
F +44 (0)[redacted]
W www.dlapiper.com

BSkyB News Corporation Consultation Media Team
Department for Culture, Media and Sport
2-4 Coxspur Street
London
SW1Y 5DH

Your reference

Our reference [redacted]

18 March 2011

By Email :
bskyb-newscorp.consultation@culture.gsi.gov.uk

Dear Sirs

SUBMISSION ON THE DRAFT UNDERTAKINGS IN THE NEWSCORP - BSKYB MERGER

On behalf of Avaaz, we would like to submit the following comments in relation to the Secretary of State's consultation on the proposed acquisition by News Corporation (**"NewsCorp"**) of the remaining 60.90% of British Sky Broadcasting Group Plc (**"Sky"**).

Avaaz is a global citizens network with over 7 million members worldwide and over 500,000 members in the UK. Avaaz has a particular interest in safeguarding democracy and is keen to ensure media plurality is not compromised in the UK.

1. Executive Summary

1.1 As concluded by Ofcom and accepted by the Secretary of State, the proposed acquisition raises significant public interests concerns. Section 58(2C) Enterprise Act 2002 (as amended) requires the Secretary of State to consider in particular "*the need, in relation to every different audience in the UK, or in a particular area or locality in the UK, for there to be a sufficient plurality of persons with control of media enterprises serving that audience.*"

1.2 This public media consideration is "*concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality.*[1] This needs to take into account the effect not only in terms of number of enterprises but also of the range of diverse views. For News Corporation to be in a position to add 100% ownership of BSkyB to its holding of 37% of the UK newspaper market while retaining any degree of control over Sky News gives one enterprise, and one individual, Mr Rupert Murdoch, too

[1] DTI- Guidance on the Operation of the Public Interest Merger Provisions relating to newspaper and other media mergers, May 2004, section 7.7

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much control of the media because of his ability to influence opinions and control the agenda. These very serious concerns warrant an in-depth investigation by the Competition Commission. (See below Section 2)

1.3 The proposed Undertakings in Lieu ("**UIL**") are not sufficiently robust or permanent to prevent NewsCorp from exercising a significant degree of control over Sky News, and require further in-depth consideration by an expert body such as the Competition Commission, and further opportunities for third parties to comment on their scope and effect.

1.4 Should nevertheless the Secretary of State decide to exercise his discretion and accept undertakings in lieu of referring the transaction to the Competition Commission, then the current UIL are significantly deficient and do not provide a comprehensive remedy to the public interest concerns identified by Ofcom and accepted by the Secretary. Set out below are various as to ways in which they must be strengthened. In particular the UIL must:

1.4.1 protect media plurality on a permanent basis, not merely for 10 years (see section 3a);

1.4.2 protect media plurality from day one by preventing NewsCorp from having any degree of control, even on a temporary basis, by delaying completion of the acquisition of Sky until Sky News has been spun off (see section 3b);

1.4.3 include the appointment of a Monitoring Trustee to supervise the negotiations on the numerous commercial contracts and the spin off of Sky News (see section 3c);

1.4.4 Regardless of its economic rights in the spun off Newco, impose upon NewsCorp limited voting rights to avoid it having de facto control over Sky News (see section 3d) ;

1.4.5 ensure that Sky News can become financially independent of NewsCorp. The terms of all the commercial agreements should therefore be improved, including (i) subject to a fair and reasonable terms and (ii) terminable by Sky News (see section 3e);

1.4.6 provide for more active monitoring by strengthening the obligations regarding compliance and reporting on adherence to the UIL, and set out upfront fixed financial penalties for breach of the letter and spirit of these UIL to ensure that NewsCorp does not seek to undermine or circumvent them (see section 3f) ; and

1.4.7 impose a non-compete obligation on NewsCorp so that it cannot circumvent the UIL and undermine the business of Sky News (see section 3g).

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2. The Proposed Acquisition Should be Referred to the Competition Commission

2.1 We endorse Ofcom's *Initial Report on the Public Interest Test* dated 31 December 2010 in which Ofcom had particular regard for the significance attached by Parliament to media plurality for the functioning of a healthy and informed democracy (paragraph 1.5). Avaaz is very concerned about the effect the proposed acquisition will have to reduce media plurality in the UK. Whether directly or indirectly NewsCorp should not be in a position to exercise control over Sky News, nor be able in anyway to determine its commercial strategy or editorial policy.

2(a) The increase from 39% to 100% ownership does affect the level of control and hence plurality of the media.

2.2 NewsCorp contends that Ofcom does not take account of Sky's existing links with [NewsCorp]"[2] referring to the fact that "in Sky/ITV, [NewsCorp] was already assumed to have control/material influence over Sky and no concern about plurality was identified"[3].

2.3 Regardless of whether NewsCorp's existing 39% shareholding already gave it a level of control over the Sky Group, it is evident that if the proposed acquisition was allowed to proceed giving NewsCorp 100% ownership of shares in Sky (including Sky News), this would significantly change the way the Sky business, and in particular Sky News, would operate. Full control would allow NewsCorp to take decisions involving Sky News which are in the *exclusive* commercial interests of NewsCorp and this would result in a reduction in the number of persons with control over media enterprises in the UK, with Sky ceasing to be a distinct media enterprise. There are numerous examples, both under the EC Merger Regulation 2004 and the UK Enterprise Act 2002 which makes it quite clear that there is a distinction to be made in the degree of control between an entity that may be subject to joint control or material influence from one party, and an entity which becomes a wholly owned subsidiary.[4] (See further section 3(d) below as to the level of control NewsCorp will have over Sky News even with the proposed UIL safeguards). Such a change in the degree of control is recognised as capable of having an effect on competition, and therefore also capable of affecting media plurality. As the EC Commission noted in ICI/Tioxide - "*Decisive influence exercised singly is substantially different to the decisive influence exercised jointly, since the latter has to take into account the potentially different interests of the other party or parties concerned*"[5].

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[2] Section 5 (a) of News Corporation's Submission to the Secretary of State for Culture, Olympics, Media and Sport, dated 14 January 2011.

[3] ibid, section 8.7(iv)

[4] Para 3.2.15 - 3.2.16 of the Merger Assessment Guidelines, OFT 1254 of September 2010 and paras 63 and 64 of the OFT's *Report in Acquisition by British Sky Broadcasting Group plc* of a 17.9% in ITV plc of 27 April 2007.

[5] Commission Decision of 28.11.1990, Case No IV/M/023 - ICI/Tioxide, para 2.

2.4 Whereas currently as a matter of company law all the directors of Sky have a duty to promote the success of the company, for the benefit of the shareholders as a whole[6], once it is a wholly owned subsidiary the interests of NewsCorp would be affecting the strategy.

2.5 Furthermore, as a listed company, Sky is currently under an obligation to treat all shareholders equally and to ensure that certain transactions with NewsCorp are carried out on terms that are fair and reasonable to shareholders as a whole, and in the case of larger transactions, seek the prior approval of minority shareholders for such transactions.[7]

2.6 With sole control, NewsCorp would be in a position to take decisions without any regard for other shareholders regarding, for example, a decision to offer new types of services (e.g. branching out into other types of media) or to shut down part of its operations or make journalists or other important staff redundant and replacing them with individuals with a particular view or agenda.

2.7 As a matter of fact, NewsCorp existing minority shareholding means that it only has limited influence over the appointment of Sky's management. As at the end of the last financial year, there were 5 out of total of 14 of Sky's Directors that were reported as being employees or former employees of News Corporation.[8] However if NewsCorp were to have 100% control and ownership then NewsCorp could unilaterally dismiss and appoint all of the management of Sky and/or Sky News.

2.8 Therefore NewsCorp's arguments that the proposed transaction does not change the *status quo* regarding plurality in the media are irrelevant and has been, we would submit, correctly disregarded by Ofcom and the OFT.

2(b) Substantial Effect of the Proposed Acquisition on Media Plurality

2.9 As is abundantly clear from the results of Ofcom's review of the industry, the proposed transaction would put NewsCorp as the sole media enterprise with *significant market shares across all four platforms* (television, radio, press and online).[9] Post transaction, at a wholesale level, NewsCorp would be the largest (of eight) newspaper provider, the third largest (of three) TV news provider, the second (of two) largest provider of radio news content, and one of the top five online news providers.[10]

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[6] UK Companies Act 2066, section 172

[7] UK Listing Rules

[8] Sky's Annual Review 2010, page 38.

[9] The BBC is active across only 3 platforms - it does not have the significant share of newspapers that NewsCorp has. Furthermore the BBC is not a commercial enterprise - see further section 2(c) below)

[10] Ofcom Report on public interest test on the proposed acquisition of British Sky Broadcasting Group Plc by News Corporation , 31 December 20010, (hereafter the "**Ofcom Report**") para. 5.22 and footnote 121.

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2.10 Furthermore, as determined by Ofcom, the proposed acquisition would see NewsCorp consolidated its second place in terms of *news consumption* (rising from 14% to 24% including wholesale news provisions). Although the BBC will remain the market leader (with a 44% share news consumption), the next largest *commercial* media enterprise is DMGT with 9%.[11] The news consumption analysis is useful in that it provides an overview of cross-media usage from a consumer's perspective, however it does not take into account the varying ability of different media to influence opinion, and we would argue that the role and scope of the BBC is very different from that of commercial enterprises (see further below at section 2(c)).

2.11 Furthermore, in terms of providers of news and current affairs across media platforms, while the BBC may have the largest share, representing 37% of total references, ITN, NewsCorp and Sky News currently constitute the second largest group of providers, with Sky News having a particular strength, since building its presence in retail and wholesale news provision.

2.12 As noted in the Ofcom Report, the effect of the proposed acquisition is to bring together one of the three main providers of TV news with the largest provider of newspapers in the UK. It is this cross-media ownership which is the critical issue in this proposed transaction and gives rise to the concerns about its effect on the provision of news at the wholesale level - and therefore ultimately on the reduction in the diversity of news stories and opinions. The effect on the relevant share of references and reach would be significant. Furthermore, in the provision of wholesale news:

2.12.1 the proposed acquisition would result in Sky ceasing to be a distinct media enterprise, reducing the number of main group news providers from three to two (ITN and NewsCorp/Sky News) in both share and reach terms. This would be particularly marked in wholesale news provision.

2.12.2 the proposed acquisition would result in the combination of the second and fourth largest providers based on Ofcom's research into *"share of all references for all news providers"*. This would give NewsCorp a 10% rise in the ability to influence news content. Furthermore, NewsCorp's reach as a percentage of regular news consumers would also increase from 32% to 51%[12], i.e. a majority of the UK consumer market.

2.13 As concluded by Ofcom, and accepted by the Secretary of State if NewsCorp were to acquire sole control over Sky and Sky news, the resulting presence across all four platforms; its share of news references and reach would be significant and raises public interest concerns as to the remaining plurality of media. This concern is not lessened simply because the BBC remains a strong player in the UK market.

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[11] Ofcom Report. para 1.25

[12] Ofcom Report. para 1.32

2(c) BBC v. NewsCorp

2.14 One particular feature of the UK market is that the BBC remains the main provider of news. However, what is clear is that the proposed acquisition would propel the combined group (NewsCorp and Sky) into second place, and *the market leader in the commercial sphere.* As noted in the Ofcom Report,[13] the BBC is a public entity with entirely different set of objectives and legal framework within which it must operate.

2.15 What the proposed transaction does is to increase the control one 'controlling proprietor' has over the collection, analysis and dissemination of news in the UK, which will not necessarily be effectively challenged by the BBC. In terms of commercial objectives, or content and scope of services offered a private commercial enterprise is much more flexible. Similarly the ability to respond to market developments and the time taken to implement a new strategy is much quicker for a commercial enterprise compared to a public undertaking like the BBC. The proposed acquisition will have a substantial effect on the competitive dynamics between the remaining commercial enterprises, and the demise of Sky News in the independent segment of the market will have severe consequences for media plurality.

2(d) The proposed transaction raises sufficiently serious concerns to warrant an in-depth analysis by the Competition Commission

2.16 In view of the unique cross-media position, with a significant presence in all media platforms, the proposed acquisition will have an effect on news content in the UK, and media plurality. Given the degree of control exercised by Rupert Murdoch as "controlling proprietor" over NewsCorp, if this control is allowed to extended to Sky News, this would mean that the largest commercial news provider in the UK would be ultimately controlled by one individual, and therefore UK news will be unduly influenced by the political motivations and economic concerns of one individual. It is therefore clear that the proposed acquisition changes the media landscape and raises significant issues regarding media plurality which require an in-depth analysis by the Competition Commission.

2.17 A month of negotiations behind closed doors between NewsCorp and the Secretary of State and the OFT, with then just 17 days for public consultation on complex and novel UIL is insufficient time to take into account the very significant public concerns expresses both by the 58,700 individuals who have made submissions to Ofcom.[14]

2.18 We would therefore urge the Secretary of State to reconsider his acceptance of the draft undertakings and refer the proposed transaction to the Competition Commission for an in-depth investigation both of the plurality of media issues and the viability of the proposed remedies.

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[13] Ofcom Report, para 1.35.

[14] Paragraph 1.6 of the Ofcom Report.

2.19 If nevertheless the Secretary of State decides *not* to refer the proposed acquisition to the Competition Commission, *substantial* amendments are required in order to properly ensure media plurality is safeguarded with robust UIL that provide a viable solution for the long term, and not just for the short term.

3. Comments on the Proposed Draft Undertakings

3.1 Our comments are based on the proposed undertakings in lieu published on 3 March 2011 (the "**UIL**") unless otherwise indicated.

3(a) The concerns raised require a long term solution

3.2 The acquisition of sole control over Sky will result in permanent change to structure of the media industry. As is the case when the OFT accept undertakings in lieu of a reference under the Enterprise Act to address *competition* concerns in a merger, regard must be had to achieve as comprehensive a solution as is reasonable and practicable to address the concern identified[15]. In view of the concerns raised about the transaction's effect on media plurality, the UIL need to be easy to implemented and provide a clean cut remedy to the concerns identified by the Secretary of State, Ofcom and the OFT on a permanent basis.

3.3 As drafted the UIL do not even attempt to address the effect of the permanent change to the market. The undertakings are, as stated by the OFT "*unlikely to be practically and financially viable over the long term*".[16] The UIL fail to oblige a continued separation between NewsCorp and Sky News.

3.4 At paragraph 6.1, the UIL provide that NewsCorp shall not, for a period of 10 years, acquire additional shares in Newco, except with the prior written consent of the Secretary of State.

3.5 Firstly, we see no reason why (even with consent) it should be open to NewsCorp to be allowed to acquire additional shares in Sky News during the first 10 years. It is unlikely that the industry will change so significantly during this period to assuage concerns about market plurality. Sky News needs to be given time to develop independently, and this will be significantly hampered if there is a threat it could still be acquired by NewsCorp at some future date.

3.6 Secondly, there is no logical reason why this obligation should be limited to 10 years. This obligation can easily be changed into one of unlimited duration, such that any further acquisition by NewsCorp will always be reported and checked against its potential effect on media plurality. .

15 Enterprise Act 2002, section 73.

16 OFT's letter to The Rt Hon. Jeremy Hunt, MP dated 1 March 2011 setting out their advice on the undertakings in lieu.

3.7 There are plenty of examples of undertakings entered into by the OFT or the Competition Commission requiring companies not to acquire or reacquire shares in other companies without prior written consent.[17] By imposing this obligation for an unlimited duration, it would at least ensure that NewsCorp does not acquire Sky News the day after the 10 years have expired, but rather oblige NewsCorp to justify any increase in its shareholding on the basis that market circumstances have changed sufficiently for such an acquisition to no longer give rise to any public interest concerns.

3.8 Should the market have changed sufficiently at some point in the future, or an acquisition of additional shares clearly no longer be against public interest, then NewsCorp would always have the option to apply to the OFT to have these undertakings amended or withdrawn. However, such amendment or withdrawal would only be possible following a review of the market and should explicitly include a review of the potential effect on plurality of the media.

3.9 Furthermore, the UIL propose that the Carriage Agreement between Sky and Newco will be entered into for 10 years. This will have significant effect on the financial viability of Sky News and its expiry would effectively terminate its ability to continue competing in the market. Further consideration should be given as to whether this duration is appropriate. Given the complexity and likely impact of this agreement on Sky News we submit this is something far more appropriate for the Competition Commission to consider in more detail.

3(b) Media Plurality must be protected from day one, even while Sky news is being prepared for the Spin off

3.10 NewsCorp is proposing to spin off the Sky News business into an independent English public limited company, Newco, the shares of which will be publicly traded. It has agreed to an obligation "*to do so as soon as reasonably practicable following the Closing Date and in event within nine months, subject to any agreed time extension*". The shares in Newco are to be distributed to the shareholders of Sky in the same proportions as their shareholding in Sky, resulting in NewsCorp retaining a 39.1% share in the spun off Sky News.

3.11 How the spin off is managed and how long it takes to occur will have an impact on media plurality, not only in the short term - but could also have a detrimental effect on Sky News on the longer term if certain standard steps (often imposed by competition regulators) are not taken to protect it.

3.12 We note that NewsCorp has been given a significant amount of time to spin off the Sky News business. If media plurality is to be protected effectively from the beginning Sky News should be spun off *before* NewsCorp

[17] The standard text in Divestment undertakings by the Competition Commission is "*These undertakings shall be in force until such time as they are varied, released or superseded under the [Enterprise] Act*" See, for example, *Notice of acceptance of final undertakings pursuant to Section 82 and Schedule 10 to the Enterprise Act 2002 in Completed acquisition by Maqcuarie UK Broadcast Ventures Ltd of National Grid Wireless Group.* March 2008.

completes on the proposed acquisition of Sky and gains control of the entire Sky business including Sky News.

3.13 Given that Sky News is currently an integrated subsidiary within the Sky Group, this would have the added benefit that NewsCorp would apply the same diligence and timeliness in trying to ensure the Spin off occurs as on the acquisition of Sky, and it would not be distracted by the completion of its own acquisition of the Sky Group.

3.14 This would also avoid Sky News ever coming under the total control of NewsCorp, during which time it could still be affected both financially and commercially in a way that could affect its business even after the spin off.

3.15 It also means that if, for whatever reason, NewsCorp is unable to fulfil this obligation, regardless of whether it is as a result of its own actions or actions it has failed to take, or as a result of *force majeure* events in the market place, media plurality will be protected and the businesses (NewsCorp and Sky) will not have been integrated.

3.16 We would also suggest that if and when Sky accepts the offer from NewsCorp it should be prepared to sign up to these draft undertakings as well.

3.17 Finally, in order to increase the certainty that the spin off will actually take place, we would submit that the majority of the existing Sky shareholders should provide the Secretary of State with a "commitment in principle to purchase the Newco shares". It is standard practice for the OFT to require an "upfront buyer" for a business to be divested in accordance with undertakings in lieu where there is any uncertainty as to whether such divestment would occur. A similar certainty is required in this instance.

3.18 The UIL provide some guidance as to what NewsCorp can and cannot be doing in the interim period before the Spin off occurs. These provisions need to be strengthened further.

3.19 A new paragraph 8.1(ii) should be inserted ensuring that -

> *"NewsCorp does not take any action which might prejudice or impede the spin off of Sky News."*

3.20 The current paragraph 8.1(iii) should be amended as follows:

> *"The Sky News Business is maintained and preserved [insert: including facilities and goodwill] and is run in the ordinary course;]"*

3.21 Paragraph 8.1(viii) should be expanded to include a non-solicitation provision which covers the period between Closing Date and spin off. Currently paragraph 4.2 UIL which includes a non-solicitation provision only applies once spin off has occurred. However, clearly it is equally important that neither NewsCorp nor Sky seek to solicit key employees of Sky News during

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the interim period as the Sky News business is being transferred into Newco and listed.

3(c) Appointment of a Monitoring Trustee

3.22 The Spin off requires separation of Sky News from the current Sky Group and includes numerous intra group arrangements which will need to remain in place on a workable basis. The UIL provide that a Schedule of Assets is to be provided to the Secretary of State prior to the Effective Date. In view of this fact, it is essential to ensure that Sky News has all the necessary assets, personnel and commercial agreements in place to operate as a news provider. It is naïve and unreasonable to assume that the Secretary of State will be in a position to verify whether this is the case.

3.23 Furthermore, there is a commercial incentive for NewsCorp and Sky to transfer as little as possible of the Sky News assets to Newco.

3.24 Therefore there should be an overriding obligation that if, within the first year of the spin off, Sky News realises that certain of the assets that it should have transferred to it were not, it can still require those assets to be transferred.

3.25 Normally in similar situations the EC Commission and the OFT will insist on the appointment of a Monitoring Trustee to supervise the divestment is made on a timely basis and properly carried out. We are therefore very surprised that the spin off is not subject to a Monitoring Trustee as would typically occur in a merger situation which gives rise to competition concerns.[18] There is sufficient expertise and experience within the OFT for provisions relating to a Monitoring Trustee to be included in these undertakings. Such a Monitoring Trustee would then be in a position to monitor much more closely on a day-to-day basis that the proper steps are promptly taken to spin off Newco.

3.26 The Monitoring Trustee should be required to report on a regular basis to the Secretary of State and/or the OFT, so that steps might be taken if the spin off is being unduly delayed, particularly if this is due to NewsCorp's action.

3.27 We note that some effort has been made to include details of a number of the key commercial agreements between Sky News and third parties and between Sky and Newco. Putting in place a Monitoring Trustee is standard practice and would help ensure that Sky News executives have an independent third party to assist them should there be any difficulties in negotiating the terms and conditions of obtaining the relevant assets.

3.28 While we note that in many instances the agreements are subject to the approval of the Secretary of State prior to the Effective Date, we would argue that the Secretary of State and his department would have little or no prior experience on similar issues, and that therefore it would be much more

[18] See, for example, *The Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation*, May 2003.

prudent and effective to oblige NewsCorp to appoint and pay for a Monitoring Trustee, such Monitoring Trustee being an individual or organisation which has extensive prior experience of equivalent situations.

3(d) Corporate Governance- effectively limiting NewsCorp's control over Sky News

3.29 We note that NewsCorp will be subject to a voting limitation of 37.19% of the total votes of Newco on substantially the same terms as currently apply in relation to Sky pursuant to the voting agreement dated 21 September 2005 (as amended by a Memorandum dated 19 October 2005). As far as we have been able to establish, these two Sky documents are not available in the public domain and therefore the public consultation is inadequate as interested third parties are not able to verify to what extent there is any genuine voting limitation on NewsCorp.

3.30 Furthermore, irrespective of the economic interest that NewsCorp will have in Newco which amounts to 39.1%, *there are grave concerns regarding the voting limitation of only 37.19%.* UK law provides that "control" is not limited to the acquisition of outright voting control, but includes situations falling short of outright control - distinguishing three levels of control (in ascending order):

3.30.1 Company A, the acquirer, [here NewsCorp] may acquire the ability materially to influence the policy of Company B, the target [here Sky News] (known as "material influence")

3.30.2 Company A may acquire the ability to control the policy of Company B (known as de facto control); and

3.30.3 Company A may acquire a controlling interest in Company B (known as "de jure" or "legal" control).[19] This generally means a shareholding of more than 50% of the voting rights in a company.

3.31 In considering whether a transaction raises competition concerns, the Authorities have been given the discretion to treat material influence and de facto control as equivalent to legal control.[20] We would argue the same applies to the public interest concerns such as media plurality.

3.32 Under the UILs it is proposed that NewsCorp will have voting rights of 37.19% in Sky News. This gives it de facto control over Sky News. Just because NewsCorp currently has some degree of material influence/control over Sky does not mean it should be allowed to retain the same level of shareholding post Spin off, as the degree of control that shareholding gives it will change as a result of the proposed transaction.

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[19] Section 26 of the Enterprise Act 2002

[20] See Competition Appeal Tribunal (CAT) Judgement in *BSkyB v. the CC and the Secretary of State and Virgin Media v. CC and the Secretary of State* (September 2008), para. 104

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3.33 De facto control is *"likely to include situations were the acquirer has over more than half the votes actually cast at a shareholders meeting. It might also involve situations where an investor's industry expertise leads to its advice being followed to a greater extent than its shareholding would seem to warrant"*.[21] As previously determined by the OFT and the EC Commission, control in listed companies can be achieved with considerably smaller shareholding, indeed as was found in the *Sky/Manchester United* case, material influence can already occur with 10% of the voting rights in a listed company.[22]

3.34 Once Sky News is spun off as Newco, it will be an entirely different and much smaller media enterprise than the Sky Group. It is therefore likely that it will attract different shareholders than it might have to date as part of a wider group. There is no guarantee that the new Sky News shareholders will be sufficiently strong or interested to vote against NewsCorp if the need arose. There is therefore a significant risk that just be keeping the same level of shareholding NewsCorp's control in Newco will de facto still be more than it currently has over Sky.

3.35 With the potential for weak remaining shareholders and such a significant level of voting rights, NewsCorp could still set the commercial strategy in the listed Newco. The proposed corporate governance structure in the UILs will provide some protection from de facto control by NewsCorp, but it is still inadequate as it still leaves a significant amount of the commercial strategy on which NewsCorp can vote. With its large block of voting rights, it will be able to ensure its desired commercial strategy is adopted.

3.36 We would therefore strongly urge the Secretary of State to consider *amending the voting agreement* prior to listing to ensure that NewsCorp's own voting rights are limited to at least below 25% of Ordinary Shares and that any veto rights it has are limited purely to those required to protect a minority investment, as opposed to allowing it to have voting rights which give it the ability to exercise material influence or control over Newco. In other words, we believe that NewsCorp could retain the equivalent of the economic rights it currently has in Sky News (i.e. 39.1%), but that its voting rights should be limited to below 25% of Ordinary Shares (so that it cannot veto ordinary resolutions) and only have veto rights as are normally accepted to protect a minority shareholder's investment, but not such that NewsCorp can veto the commercial strategy, budget or appointment of senior management of Sky News.

3.37 The principle of editorial independence and integrity in news reporting which is to be enshrined in the Articles of Association of Newco should not only relate to Sky News, TV and radio but *all* related services, including specifically online services. Moreover given the essential importance of

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[21] OFT and CC merger Assessment Guidelines, September 2010, OFT 1254, section 3.2.13

[22] DTI Press release of 9 April 1999 whereby the Secretary of State for Trade & Industry announced his decision to block the BSkyB/Manchester United merger following the MMC's recommendations, and BSkyB was required to sell its shareholding down to 9.99% and no directors to avoid having material influence. P/99/309.

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adherence to OFCOM's broadcasting code (the "**Code**"), and in particular those sections dealing with due impartiality, accuracy and the giving of undue prominence to particular views and opinions (Section Five of the Code) we would point out that simply including a requirement for adherence to the Code in Newco's articles of association offers no additional assurance of compliance whatever. Instead we would suggest a measure to try to reinforce the importance of adherence to the Code. Options to achieve this might include an agreement that in addition to any other consequences which would ordinarily follow, NewsCorp will itself pay a financial penalty of a material amount (perhaps determined by OFCOM) each time OFCOM makes a finding that Newco has breached the Code. This should have the effect of reinforcing in the minds of all the directors of Newco (especially the ones appointed by NewsCorp) the importance of strict adherence to the Code.

3.38 We agree with the UIL proposal that the majority of the board of Newco should be comprised of Independent Directors. However, given NewsCorp's proposed 37.19% voting rights in Newco, provisions need to be included preventing NewsCorp from being involved in their selection and approval.

3.39 We agree with the need for Newco to establish a corporate governance and editorial committee and the proposal set out at paragraph 3.1(viii) UIL, and the need for a statement to be included in Newco's Annual Report on its activities. However, we also strongly believe that there should be an obligation for an annual report to be submitted to the OFT or the Secretary of State for Media, Culture and Sport in order to ensure that the government actively monitors compliance with the undertakings, given that they raise such fundamental public interest concerns.

3(e) Sky News to become financially independent of NewsCorp - the terms of commercial agreements need to be improved

3.40 If the UIls are to amount to a workable remedy, they need to place Sky News in the position to be a viable business in the long term that can continue to operate as a news provider. Therefore the terms of all commercial agreements need to be scrutinised carefully.

3.41 We have already suggested that a Monitoring Trustee should be appointed to assist in the negotiations regarding all agreements. This is a simple and well precedented remedy and easy to implement.

(i) The carriage agreement

3.42 In relation to the Carriage Agreement which is to be entered into between Sky and Newco under which the Sky News channels and services will be provided to Sky on a wholesale basis for distribution by Sky to viewers or subscribers, we note that the proposed term is limited to 10 years. Further consideration needs to be given as to whether this is the correct duration for Sky.

3.43 While we agree in principle that the Carriage Agreement should have a fixed term duration, we would submit that Newco should retain the right to

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terminate the Carriage Agreement given an agreed notice (for example, one year). This would be to enable Sky News to consider alternative long term strategies and potentially enter into carriage agreements, whether on an exclusive or non-exclusive basis with competitors of Sky and NewsCorp.

3.44 We note that the undertakings do not explicitly state that such Carriage Agreement will not be exclusive; if Sky News is to be in a position to develop independently of NewsCorp it must be non-exclusive.

3.45 Similarly, there should be an obligation imposed on Sky to ensure that Newco's terms are no less favourable than those for third parties.

(ii) The Royalty License

3.46 We note that Newco will be entering into a Royalty Bearing Brand Licensing Agreement under which Newco will receive a licence of the Sky News brand for an initial 7 year term, with an automatic renewal for a further 7 years and an option to extent for a further 3 years. We believe that the Brand Licensing Agreement royalty provisions must be subject to a FRAND obligation so that NewsCorp does not charge Sky News an uneconomical or unfair royalty, which would significantly affect its viability.

3.47 Furthermore, while Newco should be *permitted to use* the Sky News brand, there should be no obligation on it to do so. Sky News ought to also be explicitly permitted to develop an alternative brand for its news output. This would help to ensure that ultimately Sky News is able to develop independently of NewsCorp.

(iii) The Advertising sales Agreement

3.48 In terms of the proposed Advertising Sales Agreement between Sky and Newco for a term of up to three years, there should be an additional obligation that it should be on terms no less favourable than those for existing customers of Sky.

(iv) the Other Agreements

3.49 We note that the various broadcast and technical services agreements are all to be for a term of up to 10 years and that it is proposed that many will be specifically subject to approval by the Secretary of State prior to the Spin off. We would add that both negotiations and the terms under which these agreements are entered into should also be subject to the supervision by the Monitoring Trustee we have suggested above.

3.50 In relation to the provisions of paragraph 5.3 UIL which relate to the pricing of the numerous operational agreements, we believe that a new 5.3(iii) obligation should be included which provides a right for Sky News to appoint an independent auditor to review the pricing which Sky provides for various services to Newco, including full access to verify that Sky is in compliance with its obligations under the proposed undertakings. If any discrepancies are found, the cost of such an audit should be payable by Sky/NewsCorp.

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3(f) Compliance Provisions need to be strengthened to ensure the letter and spirit of these UILs are complied with

3.51 The provisions in section 7 of the UIL seek to ensure that NewsCorp is to comply promptly with any written directions of the Secretary of State. Given the grave concerns raised by the proposed acquisition we submit that the obligation to comply with provisions in the UIL need to be strengthened, both by giving the Government greater monitoring powers and greater scope to penalise any attempt to breach the letter and sprit of the UIL.

3.52 Under the Enterprise Act 2002 there is a duty to comply with undertakings, and this duty is owed to anyone who may be affected by a breach of that duty[23]. Any breach is actionable if such a person sustains loss or damage[24], unless the subject of the undertaking took all reasonable steps and exercised all due diligence to avoid a breach of the undertaking.[25] Compliance can also be enforced by civil proceedings brought by the OFT for an injunction.[26]

3.53 In view of the inherent difficulties in quantifying damages for breach which may affect the public interest which these UIL are seeking to protect, we suggest a fixed penalty clause is incorporated into the undertakings, in addition to making it clear that the Secretary of State, as well as the OFT, would have the power to injunct NewsCorp from taking, or failing to take, any action which is in breach of the undertakings.

3.54 A new section 9.2 should be added to include provisions relating to the monitoring of compliance. Typically, when the OFT enters into "hold separate undertakings" as an interim solution while it investigates a merger transaction, it requires the prospective purchaser to report every 10 working days to the OFT[27] and provide such information as the OFT may require from time to time for the purposes of monitoring compliance by the parties and their subsidiaries to the "hold separate undertakings". Given, as indicated above, that the interim period before Sky News is spun off could take as long as nine months if not longer, it is imperative that compliance not only with the undertakings themselves, but also specifically with the interim provisions, is imposed and actively monitored.

3.55 We suggested above that a Monitoring Trustee be appointed; as part of the duties of the Monitoring Trustee it should equally be its responsibility to ensure that NewsCorp and Sky are adhering to the *principle and spirit of these undertakings*.

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23 Enterprise Act 2002, section 167(2)-(3)

24 Ibid, section 167(4)

25 Ibid, section 167(5)

26 Ibid, section 167(6)

27 See the OFT's template for initial hold separate undertakings, section 4.

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3(i) Non-Compete on NewsCorp

3.56 Finally if the Spin off is to ensure Sky News operates as a viable media enterprise, it is imperative that NewsCorp and Sky have a non-compete obligation imposed on them, for as long as they continue to hold shares exceeding 10% (i.e. have material influence[28]) over Sky News.

3.57 Without a non-compete obligation there would be a significant risk that NewsCorp/Sky could use their knowledge and information regarding the Sky News business to set up a rival news service which would operate to detriment of Sky News, and ultimately could cause its demise, thereby allowing NewsCorp to circumvent the intended safeguards to media plurality of the UIL.

Yours faithfully

DLA Piper

DLA PIPER UK LLP

cc Avaaz

28 See comments on material influence above in section 3(d).

[redacted] 081

From: Steven Barnett <[redacted]
Sent: 20 March 2011 13:04
To: BSKYB
Subject: response to consultation
Attachments: Response to DCMS consultation Mar2011.doc

Follow Up Flag: Follow up
Flag Status: Flagged

Please find attached my response to the Secretary of State's consultation on this matter.

I would be grateful of an acknowledgement that it has arrived and will be considered.

Prof Steven Barnett
Professor of Communications
School of Media, Art and Design
University of Westminster
Watford Road, Harrow
Middlesex HA1 3TP
[redacted]

Proposed acquisition by News Corporation of up to 60.9% of British Sky Broadcasting group plc: response to the DCMS consultation paper

Prof Steven Barnett, University of Westminster

DCMS is consulting on whether the proposed Undertakings in Lieu (UiL) are "sufficient to remedy, mitigate or prevent the public interest concerns in relation to media plurality raised by this merger".

I believe they are inadequate for three reason, which taken together should be sufficient reason for the Secretary of State to refer the matter to the Competition Commission, as originally recommended by Ofcom. There is a fourth issue relating to transparency and good democratic practice on which I elaborate at the end.

1. An independent Board of Directors will not insulate Sky News from potential editorial influence from News Corporation.

The new company will be almost entirely financially dependent on News Corporation, who will presumably be responsible for paying the bulk of the salaries of the independent directors. On the two previous occasions when similar boards have been established to safeguard editorial "independence" within News Corporation – at Times Newspapers and the Wall Street Journal – the structure has manifestly failed. Within both organisations, there is substantial evidence of Rupert Murdoch exercising influence over the appointment of key editorial figures and over the general editorial agenda (at the Times newspapers, for example, over its approach to Europe).

Two further points arise from this objection. First, it is sometimes assumed that the nature of editorial influence is direct, immediate and easily measurable. For some proprietors and some media products, this is demonstrably true (e.g. Robert Maxwell on the Mirror newspapers and Murdoch himself – by his own admission – on his tabloid newspapers). On a news channel, however, as with broadsheet newspapers, the process is more subtle and inchoate: influence is exerted through the appointment of senior editorial figures, through informal conversations with editorial staff, over a longer period of time, and in ways that are not easily discernible. One recent example is the remarkable absence in the Times newspapers of coverage of phone hacking allegations made against News Corp's *News of the World*. These are not issues on which an editorial board can intervene, however "independent" it may be.

Second, there is nothing intrinsically wrong with a media owners exercising influence over their media products. Given the often substantial losses that such ownership often entails, it would indeed be perverse to assume any different. Moreover, history tells us that, however benign or non-interventionist an owner purports to be, every media organisation adopts a corporate and journalistic ethos commensurate with the owner's world view. The issue is not whether such influence is intrinsically "bad", but the importance of securing a sufficient plurality of media owners to guarantee a diversity of influences and voices.

By allowing this acquisition without further scrutiny, the Secretary of State will be unilaterally reducing the number of media voices and entrenching the already overweening power of one corporation ultimately owned by a single individual. This power will not be mitigated by an apparatus which has been tested and failed on two previous occasions.

2. Ofcom's advice in relation to the UiL appears to be qualified and contingent on the detail of further negotiations with News Corporation.

Despite public statements by the Secretary of State that the industry regulators are satisfied with the undertakings, Ofcom's position appears to be more ambivalent. They have made it clear in their letter of 1 March to the Secretary of State that "further negotiation" with News Corporation may be necessary on the precise detail of contractual terms, and that their effectiveness in addressing Ofcom's plurality concerns "will depend on the detail of the arrangements". Despite the importance which Ofcom places on this detail, a decision appears to have been made which pre-empts the negotiations and thus will allow News Corp a significantly stronger bargaining position than had the matter been referred for proper scrutiny.

It is difficult to understand how an acquisition with such profound repercussions for media diversity in Britain can be acceptable, when the main communications regulator has not yet been satisfied about the precise terms of undertakings which are then to be determined behind closed doors.

3. Any undertakings will apply for ten years only, after which News Corp will be able to take full control of Sky News.

It is equally difficult to understand why a time limit has been imposed given the uncertainty over how media plurality and consumption will unfold. Ofcom states that "there is likely to be significant evolution of the market and consumers' use of news and current affairs over the next decade" and that therefore "the situation with regard to plurality may be significantly different" in ten years. There appears to be an assumption, both by Ofcom and government, that the direction of travel is towards greater plurality. This is manifestly untrue and contrary to empirical evidence.

We can be certain of two trends over that time period: first, that the pressure towards greater consolidation within the private sector will continue as media enterprises struggle to compensate for the migration of advertising revenue to online and strive to develop new business models. Second, investment in the public sector – essentially the BBC – will decline more rapidly than at any time in the last 50 years. We can state with virtual certainty that the BBC's share of voice will therefore diminish, with a proportionate increase moving towards a consolidated private sector.

At the same time, the widespread notion that a plethora of new online sources of news and information will compensate for this consolidation has been hugely overstated. As the Goldsmiths Leverhulme project has demonstrated, most online sources are recycled or aggregated material from existing news providers. It is entirely possible – indeed likely – that in ten years time there will be an even greater concentration of media ownership. And yet, that is the very point at which News Corporation will be allowed to take complete control of a TV news operation which may well – by then – be the *only* commercial broadcast news operation remaining in the UK. It must surely be contrary to the public interest to permit the potential for such untrammelled power to be exercised by a single organisation without proper scrutiny and consultation.

There is, finally, an important issue about transparency and accountability. Both Coalition parties are committed to better democratic practices which allow important decisions to be properly and publicly interrogated. And yet this transaction is apparently to be permitted after nothing more than an exchange of letters between government, regulators and News Corp, constrained by an extremely tight timetable, with further negotiations to be held in private, and with no proper scrutiny by the appropriate regulatory authorities in a public forum. In its letter to the Secretary of State, the OFT refer to this "limited time period" and advises that the SoS further tests "the viability and robustness of the commitments offered" during consultation.

A reference to the Competition Commission would allow for proper, detailed, transparent and public scrutiny of a decision which is ultimately about the proper functioning of a healthy and informed democracy. This is a matter of enormous public interest, on which the government appears determined to ignore the legitimate concerns of many individuals and organisations and to bypass constitutional mechanisms of regulatory accountability. Both the decision itself and the indecent haste in which the Secretary of State is seeking to impose it are an affront to the principles of democratic accountability and transparency.

I do not agree that the concerns relating to plurality have been prevented, remedied or significantly mitigated by the proposed undertakings. They will not guarantee editorial or operational independence. We do not have sufficient knowledge of the detailed arrangements to know whether they are sustainable. And there is no evidence whatsoever that the media environment will be sufficiently benign after the proposed ten year period to accommodate a full editorial takeover of Sky News by News Corp. Moreover, I believe that the manner in which this decision is being taken is fundamentally undemocratic and contrary to the public interest. In light of the manifest inadequacy of the undertakings, I would ask the Secretary of State to follow his original stated intention and refer the proposed acquisition to the Competition Commission.

20 March 2011

Prof Steven Barnett
Professor of Communications
Communications and Media Research Institute (CAMRI)
University of Westminster
Watford Road, Harrow
Middlesex HA1 3TP

email:

[redacted] 082

From: Patricia Holland <[redacted]
Sent: 20 March 2011 15:56
To: BSKYB
Subject: Response to Consultation on BSkyB
Attachments: DCMS consultation on BSkyB.doc

Follow Up Flag: Follow up
Flag Status: Flagged

A response to the above consultation is attached

Patricia Holland,
Senior Lecturer
Bournemouth Media School
urnemouth University

Response to the DCMS consultation paper on:
Proposed acquisition by News Corporation of up to 60.9% of British Sky Broadcasting group plc

From Patricia Holland
Senior Lecturer
Bournemouth Media School
Bournemouth University

1. There are a number of substantial reasons why the 'Undertakings in Lieu' given by News Corporation are not "sufficient to remedy, mitigate or prevent the public interest concerns in relation to media plurality raised by this merger".

I am aware that these have been spelt out in a number of responses to this consultation, and would refer you in particular to the responses from Professor Steven Barnett of the University of Westminster, from the Goldsmiths Leverhulme Media Research Centre and from the Campaign for Press and Broadcasting Freedom.

These document the current situation:

- the dominance of News Corporation in national newspaper circulation
- the track record of Rupert Murdoch in building media power and using the media he controls to exert influence over UK politics, in particular to provide a favourable environment for his own business interests.
- the track record of Rupert Murdoch in closely controlling the media he owns, both through personal intervention and in the choice of editors and others in positions of influence.
- the commercial power of Sky television as an enterprise, including Sky News.

and the likely outcomes if the acquisition of BSkyB goes ahead, even with the 'Undertakings"

- the limited nature of the 'Undertakings' in relation to Sky News, in which the proposed new company will still be partially controlled by News Corporation, hence will not have guaranteed editorial or operational independence.
- the fact that the 'Undertakings' leave open the possibility that Sky News may become fully owned by News Corp in ten years time.

I support the conclusion drawn by the media experts I have quoted that the proposed acquisition should be referred to the Competition Commission, as the Secretary of State originally intended.

2. I would like to add one other important point on media plurality and the public interest.

The debate has centred on the provision of news. For this reason 'Undertakings' have been offered by News Corp in relation to Sky News.

However, it is important to note that the problem of market dominance and plurality of provision extends *across* the broadcasting genres. The public interest is wider than just the provision of news.

The strength and international reputation of UK broadcasting has been built on an ecology which balances provision from the publicly funded BBC with that from a range of different commercially funded companies. Pluralism in provision has meant vigorous competition for quality and audiences between the differently funded organisations, and between the different commercial companies. This has resulted in a breadth and diversity which benefits all parts of the viewing and listening audience.

As the media analyst Claire Enders pointed out in her Report of September 2010, Sky is already bigger than the BBC in broadcasting revenues. She predicted that it could grow to 'control 50% of the newspaper and television markets respectively'. The consequences of this are cultural as well as financial. They affect the broad range of programming, especially domestically produced programming, as well as news.

The dominance of a powerful, internationally based commercial company has cultural consequences which are outside the terms of reference of the Competition Commission. This is a problem which needs to be addressed.

In their Report on the proposed News Corporation acquisition, the communications regulator Ofcom stated that there is a need for ' a wider review of the statutory framework [of the media] to ensure sufficient plurality in the public interest'.

I support that statement. The Secretary of State should refer thi proposal to the Competition Commission, but *also* take into account those aspects which are not within the Competition Commission's remit.

Patricia Holland
March 2011

083

[redacted]

From: [redacted]
Sent: 21 March 2011 11:19
To: BSKYB
Subject: DMOL RESPONSE TO CONSULTATION
Attachments: DMOL RESPONSE.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Please find attached the response from DMOL on the consultation on the proposed acquisition by News Corporation of up to 60.9% of British Sky Broadcasting Group PLC

Kind regards

[redacted] | DMOL | www.dmol.co.uk
No1, Nine Elms Lane | Vauxhall | London | SW8 5NQ
Tel: [redacted] | Fax: [redacted] | Mbl: [redacted]

DTT Multiplex Operators Limited
1 Nine Elms Lane
Vauxhall
London
SW8 5NQ
t: 020 7501 4380
f:020 7501 4399
www.dmol.co.uk

bskyb-newscorp.consultation@culture.gsi.gov.uk

BY EMAIL

Dear Sir / Madam

DEPARTMENT FOR CULTURE, MEDIA AND SPORT
Consultation on the proposed acquisition by News Corporation of up to 60.9% of British Sky Broadcasting Group PLC
Undertakings given by News Corporation pursuant to Paragraph 3 of Schedule 2 of the Enterprise Act 2002 (Protection of legitimate interests) order 2003

DMOL, DTT Multiplex Operators Limited, is a company owned by the operators of the six digital terrestrial television (DTT) multiplexes. It is a business to business organisation and its purpose is to provide technical platform management for the DTT platform.

DMOL sets and administers policy for the DTT platform including the management of the central service information collator and the allocation the Logical Channel Numbers used by the channel providers on the platform.

Further to the above consultation, DMOL notes that News Corporation has undertaken to:

> "use all reasonable endeavours to procure that there will be transferred or made available to Newco capacity for one standard definition channel until the expiry of Sky's existing capacity agreement in respect of the broadcast of Sky News on DTT" under clause 4.3 (ii)

and (subject to EPG regulation including Ofcom's Code of Practice on EPGs, and Sky's published "Method for allocating listings in Sky's EPG")

> "use its best endeavours to ensure that Newco is provided with an EPG slot which is no worse than Sky News' current EPG slot [on the Sky Platform] " under clause 4.5 (iv).

As part of the allocation of Logical Channel Numbers, DMOL requires channel providers to enter into an LCN agreement with DMOL in order to be both allocated an appropriate LCN and to be provided with the Service Information for their channel which is cross carried across all of the multiplexes. This formal agreement sets out the services to be provided by DMOL and ensures protection for both DMOL and the channel providers. Whilst the majority of channel providers have signed LCN agreements, and as Ofcom had been made aware, Sky has refused to enter into such LCN Agreements or even entertain meaningful discussions with DMOL regarding them.

dmol
DTT Multiplex Operators Limited
1 Nine Elms Lane
Vauxhall
London
SW8 5NQ
t: 020 7501 4380
f:020 7501 4399
www.dmol.co.uk

As a result of Sky's ongoing refusal to sign a DMOL LCN Agreement, DMOL is extremely concerned that News Corporation's endeavours regarding the Newco EPG slot are limited to the Sky Platform alone and that no consideration has been given to the provision of the Newco EPG slot on DTT. Furthermore, whilst Sky may wish to continue to decline to sign the agreement in respect of its own services we do not believe that such refusal should be extended to Newco which, we believe, will have a more favourable view and long term commitment to the DTT platform.

To remedy this situation DMOL suggests that it is made a requirement by the Secretary of State that an LCN agreement with DMOL for Sky News is signed by Sky in advance of the proposed acquisition by News Corporation of up to 60.9% of British Sky Broadcasting Group PLC and the agreement is novated to Newco to allow the resultant "spin-off" of Sky News to avail itself of the DMOL LCN Policy.

Should Newco not sign a DMOL LCN Agreement, or receive the benefit of such an agreement via Sky, it risks losing any security over its current LCN and the continued engineering support from DMOL for service information related changes until such time as a valid agreement is in place.

General Manager

[redacted]

084

From: Mik Moore <[redacted]
Sent: 21 March 2011 00:23
To: BSKYB
Cc: Abby Bellows
Subject: submission from Jewish Funds for Justice
Attachments: JFSJ Jeremy Hunt submission March 2011.docx

Follow Up Flag: Follow up
Flag Status: Flagged

To the Office of the Secretary of State for Culture, Olympics, Media, and Sport -
Attached is our submission regarding the consultation on the proposed acquisition by News Corporation of up to 60.9% OF BSKYB Group PLC. Please confirm receipt.

Thank you.

Regards,

[redacted]
Jewish Funds for Justice

EWISH FUNDS
OR JUSTICE

Submission to the Consultation *on the proposed* acquisition by News Corporation of up to 60.9% Of BSkyB Group PLC

To: Jeremy Hunt, Secretary of State for Culture, Olympics, Media and Sport
From: Jewish Funds for Justice
Date: March 18, 2011

Jewish Funds for Justice (JFSJ) is a non-profit Jewish community organization in the United States that invests in low-income communities and grassroots organizations for social change. We are writing because we believe the undertakings in lieu for News Corporation's BSkyB acquisition do not sufficiently "remedy, mitigate or prevent" the public interest concerns in relation to media plurality raised by this proposed merger.

Our concerns are two-fold:

1. We believe that the 'Newco' which would be created will not be adequately independent to protect media plurality.
2. The unacceptable content of some of News Corporation's television broadcasts here in the US do not give us reason to believe that News Corporation will act in a way that protects the greater public interest in the UK.

With regard to the first point, 'Newco' will be dependent on News Corporation for a majority of its revenues. As a result, News Corporation will be able to exert influence over 'Newco' through financial control.

We feel that there has been insufficient time to allow parties to fully investigate the undertakings, which we believe leave a number of questions remaining. For instance, are the checks and enforcement clauses adequate to ensure that Murdoch will not exert editorial influence over 'Newco'? What will prevent Murdoch from increasing the profile of Fox News in the UK? Are the timescales adequate to protect the long-term media plurality?

A referral to the Competition Commission would be a means of investigating these concerns to a greater extent.

Our second concern relates to the wider question of public interest protection, and we would like to reiterate some of the issues that we raised in our original submission to Ofcom during their consultation on the public interest concerns surrounding the acquisition. This submission is included as an attachment. Our concerns centered on Rupert Murdoch's tolerance of comments by Glenn Beck that we believe to be anti-Semitic in nature. We do not believe that these issues

New York
330 7th Avenue, 19th Floor
New York, NY 10001
phone: (212) 213 2113
fax: (212) 213 2233

website: jewishjustice.org **blog:** jspot.org

can be separated from the acquisition by News Corporation that is currently under consideration.

We were heartened to see that Ofcom took these issues seriously in its report. We were also delighted to see that Ofcom recommended a referral to the Competition Commission.

However, the concerns highlighted in our original complaint remain unabated by the partial independence granted to Sky News. NewsCorp's acquisition threatens media plurality as well as the prospect of fair and balanced reporting, given the company's track record of tolerating, if not promoting, the extreme opinions expressed by Glenn Beck on Fox News.

Over the past few months, public outcry against Glenn Beck's rhetoric has intensified as he makes claims that many find increasingly disturbing. This week, Beck suggested that the devastating tsunami in Japan stemmed from a failure to follow the Ten Commandments. Previously, he asserted that the United Nations and unions are conspiring with the Muslim Brotherhood for a "New World Order." Beck even issued a rare apology recently after comparing the largest branch of American Judaism to "radicalized Islam."

In response to Beck's extremism, right-wing commentators like Jennifer Rubin in *The Washington Post* have declared that he does not represent "mainstream conservatives." Yet he still proudly represents Fox News and NewsCorp.

Glenn Beck's vitriolic rhetoric has been cited as playing a role in several acts of violence. After Beck accused sociology professor Frances Fox Piven of authoring a 1966 plan to "intentionally collapse our economic system," she received hundreds of death threats. After Beck's repeated attacks on the American Civil Liberties Union and the Tides Foundation, Byron Williams attempted to assassinate staff of the organizations. Williams himself said of Beck: "it was the things he exposed that blew my mind."

While Charlie Sheen and Dior's John Galliano have both been severely disciplined for their public anti-Semitic rants, Rupert Murdoch has not given Glenn Beck so much as a slap on the wrist for comments that we believe to be anti-Semitic and inflammatory. Murdoch's failure to oppose Beck's rhetoric reflects his characteristic refusal to take responsibility for the impact of his broadcasting.

We urge you to reconsider your decision to advance Murdoch's bid for BSkyB. We believe it is counter to the "public interest," both on the grounds of protecting media plurality and preventing dangerous rhetoric from receiving greater prominence on UK television.

If you have any questions, please contact [redacted] Jewish Funds for Justice, at [redacted]

At the very least, we encourage you to refer the acquisition to the Competition Commission for the full investigation it deserves. It is clear to us that the undertakings in lieu fall far short of protecting the UK public. We have learned this the hard way with NewsCorp in the United States.

Thank you for your consideration.

If you have any questions, please contact [redacted] Jewish Funds for Justice, at [redacted]

085

From: [redacted]
Sent: 21 March 2011 00:29
To: BSKYB
Subject: Media Matters submission re proposed acquisition by News Corp of BSkyB
Attachments: Submission on proposed acquistion of BSkyb by News Corp.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Please see attached or below for the submission regarding the proposed acquisition from Media Matters for America.

Submission to secretary of state Jeremy Hunt on the proposed acquisition by News Corporation of up to 60.9% Of BSkyB Group PLC

To: Jeremy Hunt, Secretary of State for Culture, Olympics, Media and Sport
From: Media Matters for America
Date: March 21, 2011

Media Matters for America is a Web-based, not-for-profit progressive research and information center dedicated to comprehensively monitoring, analyzing, and correcting conservative misinformation in the U.S. media. Launched in May 2004, Media Matters for America put in place, for the first time, the means to systematically monitor a cross section of print, broadcast, cable, radio, and Internet media outlets for conservative misinformation, defined as news or commentary that is not accurate, reliable, or credible and that forwards the conservative agenda, every day, in real time.

Using the website www.mediamatters.org as the principal vehicle for disseminating research and information, Media Matters posts rapid-response items as well as longer research and analytic reports documenting conservative misinformation throughout the media. Additionally, Media Matters works daily to notify activists, journalists, pundits, and the general public about instances of misinformation, providing them with the resources to rebut false claims and to take direct action against offending media institutions.

Our daily monitoring of Fox News gives us a unique perspective from which to understand the potential damage of a completely News Corp–owned broadcasting company. We believe that the undertakings in lieu regarding this merger with BSkyB do not sufficiently "remedy, mitigate or prevent the public interest concerns in relation to media plurality", as raised in Ofcom's report on the matter – leading them to the regulator's recommendation that the matter be referred to the Competition Commission. Our concerns fall into two broad categories:

1. Although there is an undertaking that Sky News will become independent of BSkyB, Sky News will still be 39% owned by News Corp and subsidized by News Corp. There are not sufficient checks to ensure that the undertakings are strictly adhered to and, furthermore, the undertakings are valid for just ten years.
2. Even if Sky News remained an independent entity, nothing in the proposal offered by News Corporation prevents it, once it acquires the rest of BSkyB, from creating a news station totally under the aegis of BSkyB (and hence News Corporation's editorial control). Another Murdoch-owned news channel, whether Sky News or a new station, as is demonstrated below, would be antithetical to the public interest and would not enhance plurality of media in the UK.

Precedent clearly indicates News Corp's history of promising editorial independence and then quickly wresting back control when a deal has gone through. In 1981, Rupert Murdoch purchased *The Times* with the promise of editorial independence. From the perspective of reporters and editors who left in the wake of the takeover, this promise was not kept; by hiring his cronies, Murdoch assured that *The Times* would meet his editorial aspirations. A quarter of a century later, when discussions between Murdoch and the Bancroft family became public, opponents of the deal referenced Murdoch's quick capture of editorial control with *The Times*. Because of its fiduciary responsibility to its shareholders, the Bancrofts were all but legally obligated to sell the money-losing Dow Jones Company and, in 2007, the sale went through, once again with a promise of editorial independence that would shortly be broken. These are not examples of obscure entities that Murdoch purchased and then spun his own way: they are instances of major newspapers tacking far to the right because of their owner. To believe that Sky News will retain real independence under News Corp's proposal is a simple infraction of the maxim that those who forget history are doomed to repeat it.

Allowing the deal to go ahead also assumes that there will be sufficient processes in place to monitor News Corp's adherence to the undertakings. It also assumes that the independence can be measured. The reality is that editorial influence can be exerted in a number of immeasurable ways, i.e. independently through conversations, and our concerns are not eased by the knowledge that 'written directions' given by the Secretary of State 'from time to time' are the proposed methods of securing compliance.

Furthermore, there is currently nothing in the undertakings that would suggest a continuation in the status quo at BSkyB. Within months of full ownership of BSkyB, it would be easy to create a new station devoted to news, with which Murdoch would have carte blanche. The undertakings do not prevent Murdoch or News Corp from building the profile of Fox News in the UK. Murdoch has professed a desire in the past to "make Sky News more like Fox News,"[i][1] and we are concerned that the undertakings do not go far enough to prevent the "Foxification" of the UK's news agenda.

As we have seen in the American media, the damaging, irresponsible journalism that can be viewed on News Corp's Fox News channel is dangerous. Fox's audience cuts across age, gender, race, education, and income level, contrary to the common understanding in the UK that only neo-conservatives and tea party members watch Fox. More Fox viewers (in contrast to viewers of any other news station) are misinformed about the health care reform law enacted in the US; the veracity of climate change; and the direction of the economy.[ii][2] Misinformation on these and other issues of benefit to the extreme right is propagated by Fox hosts who are experts not in facts but in how to repeat falsehoods over and over again until an audience receives them as facts. Fox has a wider viewership than any other news station, and is perceived to be more credible than C-SPAN, a network that literally employs a camera to publicize activity in the US government.

Unless misinformation is in the public interest, this deal should not proceed as is.

Media Matters believes that there must be either:

- A full investigation by the Competition Commission to allow for proper scrutiny and public protection; or
- At the very least, new undertakings for consideration by the UK public that address the above issues and truly protect the public interest concerns raised in Ofcom's report.

Thank you for your time and consideration.

Sincerely yours,

Matthew Butler
CEO, Media Matters for America

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i[1] Reported November of 2007: http://www.guardian.co.uk/media/2007/nov/24/bskyb.television

ii[2] From an academic study undertaken at the Program on International Policy Attitudes at the University of Maryland: http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/671.php?nid=&id=&pnt=671&lb=

MEDIAMATTERS
FOR AMERICA

Submission to secretary of state Jeremy Hunt on the proposed acquisition by News Corporation of up to 60.9% Of BSkyB Group PLC

To: Jeremy Hunt, Secretary of State for Culture, Olympics, Media and Sport
From: Media Matters for America
Date: March 21, 2011

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[2] From an academic study undertaken at the Program on International Policy Attitudes at the University of Maryland: http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/671.php?nid=&id=&pnt=671&lb=

- At the very least, new undertakings for consideration by the UK public that address the above issues and truly protect the public interest concerns raised in Ofcom's report.

Thank you for your time and consideration.

Sincerely yours,

CEO, Media Matters for America

[redacted]

086

From: [redacted]
Sent: 21 March 2011 13:08
To: BSKYB
Subject: Attention Jeremy Hunt
Attachments: SubmissiontoBSkyBConsultation.doc

Follow Up Flag: Follow up
Flag Status: Completed

Dear Jeremy Hunt
Please find attached a letter from the UK Coalition for Cultural Diversity regarding the consultation. We are a membership organisation made up of creative and cultural organisations and linked through an international Federation to forty two national coalitions worldwide. We have acted as a consultative partner for government with particular regard to the promotion and protection of diversity of cultural expressions, as detailed in UNESCO's Convention, 2005.
We are concerned that neither the rule of law nor the public interest will be served if News Corporation is allowed to take over BSkyB.

Best wishes
[redacted]KCCD
[redacted]KCCD

UK Coalition for Cultural Diversity

For the Attention of Jeremy Hunt, Secretary of State
Department of Culture, Media and Sport

March 21st 2011

Dear Secretary of State

Ref: News Corporation bid for BSkyB

We are concerned that the terms of reference which are being used to adjudicate on News Corporation's takeover bid for BSkyB do not take account of the need to uphold the rule of law regarding our commitments to the European Audiovisual Media Services Directive. In addition any measures taken or concessions made should take account of the objectives of the UNESCO Convention on the Promotion and the Protection of Diversity of Cultural Expressions, 2005.

The Audiovisual Media Services Directive, 2007, requires all television channels shall carry, wherever practicable, a majority of national/European content, excluding sport, current affairs, news and game shows. In many Member States, like Spain, this has enabled the government to ask cable and satellite channels to progressively increase their investment in local film, drama and documentary.

Furthermore, Article 13 of the directive states that Member States shall ensure that new television like services, meaning video on demand, promote and invest in national and European audiovisual content.

Concessions drawn from News Corporation may address issues of pluralism affecting news, but we would ask for evidence that the following are also taken into account.

Protection of diversity of programming

BSkyB has already used its superior purchasing power to cherry pick popular American programmes and to use them to ween audiences away from national broadcasters who cannot compete. For example, the rights to broadcast *Mad Men* were recently bought at a cost of £225,000 per programme, against the existing payment by the BBC of £65,000. By securing top ratings material in the same way as it has taken key sports events from the national broadcasters,

Registered Office: 59 Oakfield Road, London N4 4LD, Email: [redacted]

BSkyB not only affects the diversity of content available to viewers, but unfairly benefits from its dominant position to further expand its subscriber base. The total inclusion of BSkyB within News Corporations multinational empire can only increase this type of fiscal intimidation for market space to the detraction of diversity of expression in programming.

Investment in local and European content
The Secretary of State has not asked for assurances that News Corporation will comply with the Audio Visual Media Services Directive by making proper, proportionate investment in local programming, particularly feature film, documentary and drama, to fulfil its obligations to UK citizens' right of access to diversity of programming.
Ofcom's recent report analyzing contribution to local programme content revealed that we are relying on 90% of original, local content being provided by our 5 terrestial broadcasters. BSkyB's investment in local content is negligible and no clear statistics have been provided. Instead it recently supported the more profitable option of launching Sky Atlantic, thus aggravating a totally skewed playing field, where American film and drama already account for 80% or more of all feature film across our screens.

The UKCCD is concerned that The Secretary of State demonstrates how these issues are being taken into account in the negotiations with News Corporation. Whilst the promise of a longer debate with media organizations and experts prior to a Green Paper may allow some issues of public interest to be protected, there is no indication that compliance with the AVMS Directive or diversity of expression is included in these agendas.
We urge the Secretary of State to address these issues and look forward to making further contributions to the future debate.

Best wishes

[redacted] JKCCD
UKCCD

Registered Office: 59 Oakfield Road, London N4 4LD, Email: [redacted]

W 087

[redacted]

From: [redacted]
Sent: 21 March 2011 09:46
To: BSKYB
Subject: News Corporation and BSkyB
Attachments: Final BSkyB CPBF response 21 March.doc

Follow Up Flag: Follow up
Flag Status: Flagged

I attach our submission to the Department's consultation on the proposed merger.

We have no objection to this being published in full on your web site.

[redacted]
paign for Press and Broadcasting Freedom
rford Road
Walthamstow
London E17 9NL.
[redacted]

21 March 2011.

RESPONSE BY THE CAMPAIGN FOR PRESS AND BROADCASTING FREEDOM (CPBF) TO THE DCMS CONSULTATION ON THE PROPOSED NEWS CORPORATION TAKEOVER OF BSKYB.

1.0 THE CAMPAIGN FOR PRESS AND BROADCASTING FREEDOM

The Campaign for Press and Broadcasting Freedom (CPBF) is an independent organisation funded by its membership which links people working inside and outside the media. It works to improve diversity and accountability in the media and has campaigned since 1979 on a range of issues including ownership and control, censorship, public service broadcasting and media standards. For further details: www.cpbf.org.uk

1.1 The CPBF responded to the original Ofcom enquiry which reported on 31 December 2010. We argued in our evidence to Ofcom that the News Corporation/ BSkyB takeover would 'represent a transformative shift in UK media ownership'. We had serious concerns about the impact of the proposed takeover on media plurality, but also more broadly on the competitive position of other UK media groups faced with the massive global resources (financial, marketing, programming) a merged News Corporation/BSkyB would be able to deploy. We also stressed the basic point, which goes right to the heart of media pluralism, that a merged company would be a powerful boost to the well-documented existing political and commercial power and influence which Rupert Murdoch, the chairman and CEO of News Corporation, already exerts within the UK.

1.2 We think this power and influence has been confirmed yet again. In particular we are puzzled and concerned by the decision taken by the Culture Secretary to substitute Ofcom's original advice, which he was initially minded to accept, that the merger would give rise to serious media plurality concerns and therefore be referred to the Competition Commission, with a process that involved direct negotiations with News Corporation.

1.3 The CPBF does not consider that the undertakings given by News Corporation in any way address the concerns we expressed in our original Ofcom submission. Indeed, events since News Corporation announced its intention to acquire the remaining 60.9% of BSkyB shares it does not own have highlighted more broadly the inadequacy of UK media ownership law and regulation.

1.4 Our particular concerns about the agreements with News Corporation contained in the consultation are detailed below. We conclude that the case should still be referred to the Competition Commission. Ofcom's report, delivered on 31 Dec 2010, and its subsequent further advice on 1 March 2011, both underlined the need for a wider review of the statutory framework to ensure plurality in the public interest in the longer term. We also strongly support such a review and state the reasons why below.

2.0 SCOPE OF THE CONSULTATION

2.1 The consultation document explicitly excludes 'any competition aspects of the proposed merger' (p1) and instead focuses on the details of undertakings given by News Corporation with regards to the spin-off of Sky News to Newco. We believe this makes the consultation fundamentally flawed because it narrows discussion down to the viability or otherwise of the undertakings regarding Newco and rejects any discussion of the far wider implications of the proposed merger. Put simply, we think the issue of Sky News, though important in terms of plurality of news, is marginal in terms of the overall impact the merger would have on UK media. From News Corporation's perspective the obligation to fund Sky News is a minor concession to gain full control of the profits BSkyB will generate in future years.

2.2 The consultation document also mentions that the European Commission, when it cleared News Corporation's proposed acquisition, 'concluded that the increased shareholding would not significantly impede effective competition'. (p1) That decision, however, applies to the impact of the merged company 'as it may affect trade between Member States' (Article 102, *TFES*) and does not directly address its impact on the domestic UK media market. Indeed, as the Commission point out in clearing the proposed acquisition (IP/10/1767, 21 December 2010) Article 21 of the EU Merger Regulation recognises that 'Member States may take appropriate measures, including prohibiting proposed transactions to protect legitimate interests, such as the plurality of the media.' In the evidence we presented to Ofcom we demonstrated that the proposed merger raised both competition **and** media plurality issues – the two aspects are inextricably linked. The undertakings made by News Corporation with regard to Sky News will only have a minimal impact in this regard and do not therefore in any way alleviate our concerns.

What is clear is that News Corporation wants BSkyB for two reasons. Firstly, the heavy investments in infrastructure, broadband and HD TV by the company are complete and profits are rising rapidly. Numis Securities forecasts operating profits of £1.2bn in 2012, compared with £780m in 2009. Secondly, the merged organisation will be a multi-media emporium able to bundle and cross-promote its products. It would completely dominate UK media, creating the media equivalent of a black hole whose sheer power can damage or destroy other media. In the CPBF's view the development of such a dominant media group would directly threaten media plurality. Yet none of these concerns, widely expressed in an unparalleled display of public disquiet over the past three months, have in our view, been addressed.

2.3 The failure to conduct a full Competition Commission review, and the narrow scope of the consultation, also means that there will be no consideration of the **future impact** of the merged company on other UK media companies. The *Daily Mail* Comment (4 March 2011), summarising the sheer scale of the merged company concluded, 'No other media company will have such leverage.' Yet any analysis of the future implications for media plurality, if that leverage is deployed against other media groups, has been marginalised when it should be a central concern.

3.0 NEWCO, SKY NEWS and NEWS CORPORATION

3.1 Newco, which will run Sky News under the proposals, will not be a viable independent news business. It will rely on News Corporation for over 85% of its revenue and gain access to viewers through the BSkyB platform. Newco's economic dependency will make it vulnerable if News Corporation exerts influence. The views of a regulator quoted in the *Financial Times* (Ben Fenton, 'Nebulous concept of plurality left off the contract', 4 March 2011) reinforce this point – Newco will be 'entirely dependent on a stipend from Rupert Murdoch'. Andrew Neil, former editor of *The Sunday Times*, gave a brutally frank assessment of the proposed arrangements when interviewed on television – money determines power and influence.

3.2 The Culture Secretary in his announcement of 3 March said under the proposed arrangements, 'In short, the editorial independence of Sky News would be better protected than it would have been not only if Sky News had formed part of the buyout of Sky shares, but even than it is right now.' We do not agree. In the *Financial Times* report quoted in 3.1 one expert view described the 10-page undertaking document as 'unbelievably sketchy'. Both the definition of independence and the safeguards for editorial independence in the undertakings are weak. Also the main board of Newco will continue to have News Corporation executives on it that will be able to exert influence over Sky News. Finally, the safeguards for editorial staff would place them in a difficult position in disagreements over editorial policy because they would have to take the risky step of putting themselves in dispute with their employer.

3.3 The fate of undertakings made by Rupert Murdoch to acquire media assets in the past are now well documented (see Note). However the undertakings in this case raise particular concerns. Apart from the fact that the CPBF thinks they lack robustness, monitoring compliance with them lies with the Culture Secretary rather than independent regulators. The point is well made in a letter sent to members of both houses by the Media Alliance: 'There are at least seven different ways in which the Culture Secretary can be required to approve or agree to behaviours governed by the undertakings, which make them incredibly susceptible to more or less implicit political interference in the future. In any event, all the undertakings to protect independence would be extinguished should News Corporation acquire over 50% of Newco.'

3.4 Great emphasis has been placed by the Culture Secretary on the fact that, as part of the consultation, he has published the documents involved in negotiations with News Corporation, but some of the key elements of the arrangements have not been made public. In addition the OFT advised that the Culture Secretary should 'test further the viability and robustness' of the commitments made by News Corporation during the consultation process. We question how such a process could be undertaken with any rigour in the eighteen days allowed for the consultation.

3.5 For the above reasons we believe that the proposed undertakings should not be accepted, the consultation process stopped and the case handed over to the Competition Commission to conduct a full investigation.

4.0 MEDIA PLURALITY

4.1 There is a case to be made that the Culture Secretary did the best that he could within the existing framework of UK media law (the *Financial Times* makes it in its editorial, 'Why Hunt could not stop Murdoch', 4 March 2011). He inherited the Communications Act (2003) from the previous government, and the 'public interest' test, to assess whether media mergers would impact on plurality, was only inserted at a late stage, as a result of criticisms from the joint committee chaired by Lord Puttnam.

The News Corporation bid for BSkyB has highlighted that Britain's media ownership laws are unfit for purpose. As the *FT* editorial points out, 'A proper definition of media plurality is needed. It is illogical to regulate it only when there is a change of control. Factors such as organic growth and technological change do lead to big shifts in media consumption – and hence plurality.'

4.2 Ofcom has also urged a wider review of the current laws on media plurality on the grounds they do not work well. Its chief executive, Ed Richards, has argued for a more dynamic system in which a plurality review could be triggered because of a change in audience levels or viewing share. The CPBF strongly supports such a review, but also believes there are lessons to be learnt from the widespread public concern and opposition to the News Corporation takeover of BSkyB. People clearly care about a diverse and plural media, and that is why we strongly support the case for the establishment of a Media Commission which can gather evidence, develop policy proposals and feed these into debates on the framework of a new Communications Act which has the protection and promotion of media plurality at its core.

NOTE

What Price Undertakings? Rupert Murdoch and the London *Times*

In 1981, owner of the *News of the World* and *The Sun* since 1969, Rupert Murdoch acquired *The Times* and *Sunday Times*. Guarantees were given to John Biffen, Secretary of State for Industry, as part of his consent for Murdoch to acquire the papers. To assuage concerns about editorial independence and integrity Murdoch agreed to give extra powers to independent directors on the paper's board. The six independent members were charged with protecting the editors of the two papers from interference by the owner, having approval over the hiring and firing of editors, and preventing the owner interfering in reports which might conflict with his opinions or interests as the proprietor. Editors would have also have control over staffing decisions.

Frank Giles, editor *Sunday Times* 1981-83, commented that the board 'had very little power or will to protect the independence of the papers they were appointed to safeguard.' In his autobiography, *Sundry Times*, he describes how Murdoch ordered him in January 1982 to replace the paper's magazine editor with an editor from the *News of the World*.

In March 1982 Murdoch called Fred Emery, a former *Times* assistant editor, into his office and said he was considering firing *Times* editor, Harold Evans. Emery reminded Murdoch of his guarantee that editors couldn't be fired without the approval of the independent directors. Murdoch's response was, 'God, you don't take all that seriously, do you. Why wouldn't I give instructions to the *Times* when I give instructions to editors all around the world?'

Harold Evans, when editor of *The Times* asked Edward Pickering, 'What protection can I expect from you as a national director against improper pressures?' 'You have to remember, said the fifth independent national director, 'that I worked for Beaverbrook...that's the way things are.' (Harold Evans, *Good Times, Bad Times*, p404) Evans resigned after incessant pressure on 15 March 1982.

[redacted]

088

From:	[redacted]TUC.ORG.UK>
Sent:	21 March 2011 09:46
To:	BSKYB
Subject:	TUC response to Consultation on Proposed acquisiation by News Corporation of up to 60.9 per cent of BSkyB group
Attachments:	BSkyB.docx
Follow Up Flag:	Follow up
Flag Status:	Flagged

Attached is the TUC 's response to this consultation.

[redacted]
TUC Congress House,
Great Russell Street,
LONDON WC1B 3LS
[redacted]

TUC home page. News, papers, and email alerts
http://www.TUC.org.uk

TUC RESPONSE TO CONSULTATION ON THE PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9 PER CENT OF BRITISH SKY BROADCASTING GROUP PLC.

1) The TUC is responding to the consultation on whether the undertakings given by News Corporation are sufficient to remedy, mitigate or prevent the public interest concerns in relation to media plurality raised by this merger. In our view the undertakings are inadequate.

2) The TUC has a strong interest in these issues as we respresent 6.1million workers in 55 unions. Our members work in all sectors of the economy, including the media and broadcasting industries. As a high profile organisation speaking on behalf of people at work we also have a close interest in the plurality of the media and especially the commitments of the broadcast media to report impartially on matters of public interest including industrial affairs. Our members also tell us that they value both the plurality of media sources, especially in news coverage.

3) We believe the undertakings given are inadequate for the following reasons:

   a) Newco, which will run Sky News under the proposals will not be a viable independent news business. It will rely on News Corporation for over 85 per cent of its revenue and gain access to viewers through the BSkyB platform. Newco's economic dependency will therefore make it vulnerable if News Corporation exerts its influence. The close relationship between editorial independence and financial independence have been widely recognised in many instances, perhaps most relevantly, by parliament in ensuring separation of the BBC licence fee from general taxation as a guarantee of BBC independence from political influence.

   b) The guarantees of editorial independence appear to us to be inadequate as under these arrangements News Corporation executives will be able to exert influence over Sky News.

   c) Previous guarantees over editorial independence given to the Government in 1981 when Rupert Murdoch acquired *The Times* and *Sunday Times* were shown to be poorly regarded as subsequent remarks by those directly involved have demonstrated.

   d) The undertakings place a great onus on the Culture Secretary. There are at least seven ways in which the Culture Secretary can be required to approve or agree to behaviours governed by the undertakings. This has to be seen in the context where News Corporation is a major player in British political life. News Corporation publications have supported the winning party in British general elections from 1979 onwards, with *The Sun's* switch from Conservative to Labour in 1997 and from Labour to Conservative in 2009 both being seen as highly significant by politicians. News Corporation publications and especially *The Sun* have also been outspoken about particular ministers. It is therefore conceivable that any politician would think twice before acting in a way that could offend News Corporation and thus potentially damage their party and their own career prospects.

[redacted]

089

From: [redacted]
Sent: 21 March 2011 12:08
To: BSKYB
Attachments: PG Letter DCMS BSkyB Consultation 18th March 2011.doc

Importance: High

Follow Up Flag: Follow up
Flag Status: Completed

NUJ NATIONAL UNION OF JOURNALISTS

PARLIAMENTARY GROUP

Chair: Austin Mitchell,
Secretary: John McDonnell
Vice Chairs: Don Foster, Mike Hancock, Angus Robertson, Robert Walter

Please find attached the NUJ Parliamentary Group submission to the DCMS consultation into BSkyB and News Corporation.

Regards,

pp. [redacted]
[redacted] NUJ Parliamentary Group
[redacted]

NUJ
NATIONAL UNION OF JOURNALISTS

PARLIAMENTARY GROUP

Chair: Austin Mitchell,
Secretary: John McDonnell
Vice Chairs: Don Foster, Mike Hancock, Angus Robertson, Robert Walter

BSkyB-News Corporation Consultation
Media
Department for Culture, Media and Sport
2-4 Cockspur Street
London
SW1Y 5DH

18th March 2011

NUJ Parliamentary Group Submission to Consultation on the Proposed Acquisition by News Corp of BSkyB

This is the submission from the National Union of Journalists (NUJ) Parliamentary Group to the Department for Culture, Media and Sport (DCMS) consultation on the proposed acquisition by News Corp of BSkyB shares.

The NUJ Parliamentary Group was established on a cross party basis, and consists of over 30 MPs and Peers. We meet regularly, along with the union, to discuss areas of interest within the media industry and have held regular Ministerial meetings, as well as meeting with key external organisations such as the BBC, ITV, Ofcom and the Press Complaints Commission. As you may well be aware the NUJ represents 38,000 members working in all sectors of the media and has in its membership staff and freelancers – writers, reporters, editors, sub-editors, illustrators and photographers.

The Group is concerned that previous guarantees and assurances given by Rupert Murdoch have been disregarded. We understand that guarantees were given by Rupert Murdoch to John Biffen MP, Secretary of State for Industry in 1981 when he acquired *The Times* and the *Sunday Times*. These guarantees were designed to address concerns about editorial independence and integrity. Rupert Murdoch agreed to give extra powers to independent directors on the paper's board; the six independent members were charged with protecting the two papers' editors from interference by the owner, having approval over the hiring and firing of editors; and preventing the owner interfering in reports which might conflict with his opinions or interests as the proprietor. However, we believe that these guarantees were either disregarded or ignored.

Frank Giles, the editor of the *Sunday Times* between 1981-83, stated that the papers' board '*had very little power or will to protect the independence of the papers they were appointed to safeguard*'. We understand that in Mr Giles' autobiography *Sundry Times* he details that Rupert Murdoch ordered him in January 1982 to replace the paper's magazine editor with an editor from the *News of the World*. Furthermore, we are also led to believe that Fred Emery, home editor of *The Times* in 1982 reported Murdoch as saying '*I give instructions to my editors all round the world, why shouldn't I in London?*' Emery tells how Murdoch had given an assurance to the British government that he would not interfere editorially in return for being allowed to buy *The Times* and *Sunday Times* without reference to the Monopolies and Mergers Commission, but when Emery reminded of these assurances Murdoch is attributed as saying '*They're not worth the paper they're printed on*'.

[redacted]
[redacted] **NUJ Parliamentary Group**
G10 Norman Shaw South, House of Commons, LONDON SW1A 2JF
Tel: [redacted]

NUJ
NATIONAL UNION OF JOURNALISTS

PARLIAMENTARY GROUP

Chair: Austin Mitchell,
Secretary: John McDonnell
Vice Chairs: Don Foster, Mike Hancock, Angus Robertson, Robert Walter

We have been made aware of further examples regarding Rupert Murdoch's News Corporation and past guarantees. News Corporation acquired Dow Jones & Company, publisher of the *Wall Street Journal* in December 2007. We understand that under an agreement between News Corporation and the Bancroft family, who owned a controlling interest in Dow Jones, sole power over the newsroom was to rest with the managing editor, Marcus Brauchli. As part of the agreement Rupert Murdoch could not remove him without the consent of a committee of independent overseers.

However, we are led to believe that after Murdoch took control of the paper he took an active role in the newspaper's daily operations. Despite editorial guidelines introduced when Rupert Murdoch bought the newspaper, the editor was sacked and replaced by Robert Thompson from *The Times*.

The Group has also been made aware of the case of Bruce Guthrie. Mr Guthrie was editor of the Rupert Murdoch's biggest selling daily newspaper, Melbourne's *Herald Sun*. Mr Guthrie was dismissed in October 2008; days after Rupert Murdoch had apparently told him that he was doing an excellent job of editing the newspaper. Mr Guthrie wrote in the *Guardian* dated 28th January 2011 that '*not for the first time I found myself reflecting that what Murdoch says and what he does are two different things*'. Mr Guthrie went on to write that '*I'm not the first person to be lulled into a false sense of security by Murdoch and his assurance, and I won't be the last ... it seems likely that Murdoch will offer up some sort of editorial guarantee or independent board in order to be allowed to complete his bid for 100% of BSkyB. Such assurances should be taken with a pitch of salt. Actually a whole shaker of the stuff*'.[1]

The Group believes that in light of these examples News Corporation guarantees of editorial independence for Sky News needs to be re-examined thoroughly. The Group believes that the most appropriate way to proceed is for the Secretary of State for DCMS to refer the News Corporation bid for BSkyB to the Competition Commission.

Please address any correspondence in this matter to Simeon Andrews, who coordinates the Parliamentary Group (details below).

[redacted]

John McDonnell MP
Secretary
NUJ Parliamentary Group

[1] 'My battles with Rupert' Bruce Guthrie *The Guardian* 28th January 2011

[redacted]
[redacted] **NUJ Parliamentary Group**
G10 Norman Shaw South, House of Commons, LONDON SW1A 2JF
Tel: [redacted]/[redacted]

[redacted]

090

From: [redacted]
Sent: 21 March 2011 11:23
To: BSKYB
Subject: NUJ submission to BSkyB consultation
Attachments: NUJ submission to DCMS consultation on BSkyB.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Please find attached the NUJ submission in response to the DCMS consultation on the proposed acquisition by News Corporation of up to 60.9% of BSkyB Group PLC.

Please confirm receipt of this document.

Thanks

[redacted]

e[redacted]nuj.org.uk

NATIONAL UNION OF JOURNALISTS

NUJ submission in response to the DCMS Consultation on the proposed acquisition by News Corporation of up to 60.9% of BSkyB Group PLC

The NUJ remains deeply concerned about how the proposed News Corporation/ BSkyB acquisition would affect media plurality. We are also conscious that the massive power of the planned News Corporation/BSkyB operation through financial and other resources which the merger would make available is inimical to the public interest.

BskyB's heavy investments in infrastructure, broadband and HD TV are now complete, so the payoff in profits is rising. Operating profits are forecast to reach £1.2bn next year, a rise of £420m on 2009.

This financial power, combined with huge influence in terms of merged marketing and programming strength, can only damage the sustainability of the other media groups which are an important factor in media plurality, as well as strengthening any political or other causes which News Corporation/ BskyB or its proprietor chooses to support.

The power of Rupert Murdoch is already disturbingly evident in the decision by the Culture Secretary to negotiate with him about the News Corporation/ BskyB acquisition rather than follow Ofcom's recommendation that it be referred to the Competition Commission. Ofcom's report and advice stressed the importance of a full review of the statutory framework to ensure plurality in the public interest in the longer term.

The case for referring the proposed News Corporation/ BSkyB takeover to the Competition Commission remains the best guarantee of protecting the public interest, as shown by the degree of expressed public disquiet at the News Corporation/ BSkyB takeover plans. The latest poll conducted by YouGov commissioned by Avaaz shows that almost 60% of the British public believe that Rupert Murdoch has too much influence on politics and 64% believe that if News Corporation is allowed to acquire total ownership of BSkyB it will grant Murdoch and his company too much power.

We believe that this public unease is compounded by consideration of 'competition aspects of the proposed merger', something expressly excluded from the remit of the current consultation. This means that the overall effect of the News Corporation/ BSkyB takeover on media and media plurality in the UK is ignored.

In addition to News Corporation's interest in harvesting profits from BskyB, the merger would also open up huge opportunities for cross-promotion, with consequent serious risks for the future of other UK media.

Without a full Competition Commission examination, the damage which the proposed takeover will do to other UK media is being ignored. We have no confidence that the current consultation, for the reasons already identified, will put this right.

When confronted with the threat to media plurality posed by the News Corporation/ BSkyB takeover, supporters of Mr Murdoch's plans argue, like the Culture Secretary, that through the transfer of Sky News to Newco 'the editorial independence of Sky News would be better protected than it would have been not only if Sky News had formed part of the buyout of Sky shares, but even than it is right now'.

It is not possible to sustain this view when one examines the threadbare undertakings offered as a result of the negotiations between Rupert Murdoch and Jeremy Hunt. Safeguards for editorial independence, and the very definition of independence itself, are of little value.

News Corporation executives will sit on Newco's main board, holding powerful influence over Sky News, and disagreements over editorial policy would place staff in the dangerous position of being in dispute with their employer.

Newco will not be a viable independent news business, since it will be relying on News Corporation for more than four fifths of its revenue and using the BSkyB platform to access viewers. Newco's economic dependency will make it vulnerable if News Corporation exerts influence. Former *Sunday Times* editor Andrew Neil's experienced analysis of what the arrangements mean for Murdoch was clear: money determines power and influence.

And we must make no apology for pointing out that when it comes to honouring undertakings concerning media acquisition, Rupert Murdoch has form. After he succeeded in 1981 in taking over *The Times*, he let it be known the following year that he was considering firing the editor, Harold Evans. When reminded that he had guaranteed that editors couldn't be fired without the approval of the independent directors created through his 1981 'undertakings', his response was illuminating: 'God, you don't take all that seriously, do you. Why wouldn't I give instructions to *The Times* when I give instructions to editors all around the world?'

So, the value of the commitments made by News Corporation in its negotiations with the Culture Secretary must be subject to exacting scrutiny. The OFT has advised that the Culture Secretary should 'test further the viability and robustness' of the commitments. Even the timetable for the consultation hardly allows of any robustness in that test.

In the interests of media plurality and in the general public interest, we are convinced that the proposed News Corporation/ BSkyB takeover must be passed to the Competition Commission for full investigation.

091

To: Jeremy Hunt

From: [redacted]
Team: Media
Tel: [redacted]
Date: 21/03/2011

NEWS CORP/BSKYB MERGER: CONSULTATION ON UILS

Issue

Update on the consultation process.

Timing

Immediate.

Recommendation and Advice

The consultation on the undertakings in lieu ended at midday today. By that point, we had received 38,687 responses. Following an initial look at the responses this afternoon, it is clear that a very large number of these have been received as part of a campaign organised by Avazz (about 37,700). We have also received letters from around 140 MPs.

The following companies have provided responses:

[redacted]

[redacted]

We will continue to pass substantive submissions of OFT and Ofcom for their consideration and will make sure as we go through all the responses to pick up all the relevant points.

You may also be interested to know that, according to the Media Guardian, there has been a YouGov poll commissioned by Avaaz. It recorded that almost 60% of British people believe that Rupert Murdoch has too much influence on the country's politics. 64% believe that if Murdoch's News Corporation is allowed to acquire total ownership of BSkyB, it will grant Murdoch and his company too much power over the media. 7% of respondents believe that you made the right decision not to refer the media giant to the competition regulator. 41% stated that they oppose the proposed deal, with 5% expressing support. More than 20% said that they believe this decision may affect how they vote at the next general election.

Avaaz is also running a global online petition called UK: Stop Rupert Murdoch, which, at the time of writing, has attracted 362,308 signatories from all over the world.

cc
Jonathan Stephens
Jon Zeff
Rita Patel
Keith Smith
Carola Geist-Divver

Adam Smith
Sue Beeby

092

[redacted]

[redacted]

[redacted]

[redacted]

CONTAINS BU[redacted]

RESPONSE TO THE NOTICE OF CONSULTATION ON THE PROPOSED ACQUISITION BY NEWS CORPORATION OF UP TO 60.9% OF BRITISH SKY BROADCASTING GROUP PLC

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

arqiva 094

BSkyB-News Corporation Consultation
Media Team
Department for Culture, Media and Sport
2-4 Cockspur Street
London
SW1Y 5DH

18 March 2011 **(redacted version 25 April 2012)**

Dear Sirs

Consultation on proposed undertakings concerning the proposed acquisition by News Corporation ("News Corp") of shares it does not already own in BSkyB Group plc ("Sky"): Submission by Arqiva Services Limited ("Arqiva")

This submission is provided by Arqiva in response to the Secretary of State's consultation on the undertakings offered by News Corp in lieu of a reference to the Competition Commission of its proposed acquisition of the 60.9 per cent of Sky that it does not already own, as published on 3 March 2011.

Arqiva is the licence holder and operator of two of the UK's three commercial Digital Terrestrial Television (DTT) multiplexes and is a founding member of Freeview. This includes Multiplex C, in relation to which Sky currently has a carriage agreement to carry up to three television channels. One of the channels that currently utilises that capacity is Sky News, the subject of the proposed undertakings in lieu.

Arqiva has a serious concern about the proposal that Sky News be spun off as a separate public limited company, which does not appear to be addressed by the proposed undertakings. This is the practical arrangements for the continued carriage of Sky News on the DTT platform beyond the expiry of Sky's existing carriage agreement in November 2014. This issue requires detailed consideration to ensure that the necessary commercial support from New Corp is in place.

On the face of the documents made available in the consultation, this concern has not been contemplated by Ofcom or the OFT. **Arqiva submits this concern must be addressed in the undertakings in lieu.**

Signed on behalf of Arqiva Services Limited

Michael T. Finchen
Director - Digital Platforms

Arqiva, Wireless House, Warwick Technology Park, Heathcote Lane, Warwick, Warwickshire, CV34 6DD
Tel 01926 416000 Fax 01926 416600 www.arqiva.com

[redacted] 069

From: [redacted]
Sent: 14 March 2011 12:02
To: KILGARRIFF PATRICK; [redacted] ZEFF JON; [redacted] SMITH, Adam; STEPHENS JONATHAN
Cc: OLDFIELD PAUL
Subject: RE: Urgent - action required newscorp/bskyb merger

Jon/Patrick

Many thanks for briefing SoS this morning on the Newscopr/BSkyB merger.

On the consultation and the process of analysing the responses, SoS was clear that we should take the necessary time to examine the substantive points raised about the UILs. His priority was to ensure that the final UILs are robust and viable in the long term. We must take care to avoid possible loop holes.

meetings, SoS wanted to be, and be seen to be, even handed with both proponents and opponents of the merger. To that end SoS agreed he would consider requests for meetings once written evidence had been submitted. In particular, SoS wanted the alliance of bodies working through Slaughter and May to be aware of this position and his willingness to meet, given the representations they have made throughout this process.

Many thanks

[redacted]

-----Original Message-----
From: KILGARRIFF PATRICK
Sent: 14 March 2011 09:15
To: [redacted] ZEFF JON; [redacted] SMITH, Adam
Subject: RE: Urgent - action required newscorp/bskyb merger

[redacted]

Yes I am here.

I think the issue is one of what the diplomats would call "demandeur"

In essence if opposed parties seek a meeting/meetings - we determine the who, when and how. If we seek meetings we invite the invitees to determine the terms with the likelihood of lengthening the process.

The meetings can only be the opportunity for those opposed to emphasise and reinforce points we would want them to make in the written consultation and for the SoS to clarify his understanding of the points made. So better when the consultation has closed.

More pragmatically the obvious meeting is with the loose coalition of opposed media interests and on behalf of whom we have had a regular stream of letters from Slaughter + May - Solicitors.

Any meeting would need to see the SoS in listening mode - the meeting is not and should not a opportunity for the SoS to attempt to persuade those attending that its provisional decision is the right decision.

Patrick

-----Original Message-----
From: [redacted]
Sent: 14 March 2011 08:46
To: [redacted] ZEFF JON; [redacted] KILGARRIFF PATRICK; SMITH, Adam
Subject: RE: Urgent - action required newscorp/bskyb merger

With apologies for the short notice, SoS would like to meet to discuss the legal advice at 9.30am.

Jon/Patrick - are you both able to attend?

Thanks

[redacted]

-----Original Message-----
From: [redacted]
Sent: 14 March 2011 08:02
To: [redacted] ZEFF JON; [redacted] KILGARRIFF PATRICK; SMITH, Adam
Cc: [redacted]
Subject: RE: Urgent - action required newscorp/bskyb merger

All,

Just to let you know, I'll be out of the office from 8.30 until approximately 10 at a medical appointment.

Having discussed with Patrick over the last week, our view is both that grouping people together would be sensible. However, it may prove difficult (within a relatively short consultation window) to see everyone. If the SoS wishes to be proactive in meeting people, then it will be difficult to offer meetings, and then not be able to arrange them before the close of the consultation, so this might have the effect of lengthening the consultation period.

Just some initial thoughts...

[redacted]

Legal Advisers to the Department for Culture, Media and Sport
Email: [redacted] |Tel: [redacted]

-----Original Message-----
From: [redacted]
Sent: 13 March 2011 20:04
To: ZEFF JON; [redacted] KILGARRIFF PATRICK; SMITH, Adam
Cc: [redacted]
Subject: Urgent - action required newscorp/bskyb merger

Dear all

Sorry to email on a Sunday evening. Sos wants to meet on the newscorp consultation tomorrow morning. I will ask Will to arrange a slot in the diary. He is likely to want to meet the key opponents of the deal during the consultation to show that he has met and listened to both sides.

I have spoken to Jonathan Stephens tonight who would be very grateful if we could pull together a list of the organisations/people sos might see for 10.00am pls?

Presumably we could go for those people who wrote in to the original ofcom report? Could we group some of them together to avoid numerous meetings?

It's not impossible that sos will take the advice in the submission (ie only meet on request) but given what I've heard over the weekend I do think it will be unlikely, so we now need to get a back up plan in place.

Very happy to discuss

Many thanks

Sent from my BlackBerry Wireless Device